Conscientious Objection and Compulsory Military Service In New Zealand

by

P. M. KHOURI, B.A.

CONSCIENTIOUS OBJECTION AND COMPULSORY MILITARY SERVICE

Compulsory military service is both widespread and time-honoured; wherever and whenever there has been forced service there has been objection, and, certainly since the time of Christ, conscientious objection. The early church was pacifist, and records of particular objectors date from at least 295 A.D. Recognition and consideration of such objectors by the law has been slow, depending initially on the intransigence of the members of the "peace churches", namely Quakers, Jehovah's Witnesses and Christadelphians, but once the principle has been accepted, then generally the scope of the objections granted thereby has increased substantially.

The acceptance of conscientious objectors means that it is recognised that the final judgment on participation in any war should be made not by the State but by the individual. This acceptance of the right of the individual, to live according to his convictions within the most totalitarian form which a State can assume, the State mobilised for war, has immense implications if the struggle of the conscientious objector is viewed as only a part of a wider struggle to retain the liberties of the individual from the encroachment of the State.

HISTORICAL BACKGROUND OF CONSCIENTIOUS OBJECTION IN NEW ZEALAND

World War I

Under the *Defence Act 1909,* all male inhabitants of New Zealand became liable to undergo military training. However, s. 92 said:

> (1) Nothing in this Act shall require any person to bear arms or perform or undergo military service or training if the doctrines of his religion forbid him to do so, but every such person shall be liable to perform

> as an equivalent to such service and training such non-combatant duties as are prescribed by the Governor in Council.
>
> (2) The burden of proving exemption under this section shall rest on the person claiming exemption.

Under the *Defence Amendment Act 1912,* s. 65, s. 92 of the principal Act was repealed, and exemption from military service would be granted if a Magistrate to whom an application had been made, was

> satisfied that the applicant objects in good faith to such training and service on the ground that it is contrary to his religious belief: s. 65 (2).

If exempted, the holder of a certificate of exemption would be liable

> to perform in lieu thereof such non-military services as the Governor-General in Council may from time to time prescribe as equivalent thereto: s. 65 (3).

Failure to perform any service so prescribed rendered the conscientious objector liable to a fine, failure to pay such a fine rendering him liable

> "in certain cases" to be "committed to military custody": s. 65 (4).

Furthermore, on any such conviction, the certificate of exemption granted to the offender became null and void, and he became disqualified from receiving any further such certificate: s. 65 (5). Thus those men whose appeals had been rejected, and who still refused military duties, could be forcibly impressed into the Expeditionary Force, subjected to field punishments, and actually sent into the front line.[1]

Exemption was thus refused to all who could not undertake any service in the army (except clergymen who were exempted from service on the certificate of the Minister of Munitions), and even those willing to perform non-combatant duties were refused exemption from combatant service unless they were members of a religious sect, the tenets and doctrines of which declared the bearing of arms to be contrary to divine revelation. Furthermore, no allowance was made for the non-pacifist political conscientious objector.

Something like 400 men were sentenced to imprisonment for refusal of service. In December 1918 all military defaulters (except religious objectors who were members of churches which declared service to be contrary to divine revelation) were deprived of their civil rights (the right to work for the State and the right to vote) for ten years.[2]

[1] Baxter, A., *"We Will Not Cease"*. An account of his experiences as a conscientious objector during World War I.
[2] Efford, L., *"Penalties on Conscience"*, (1945).

World War II

Regulation 21(1)(e) of the *National Service Emergency Regulations 1940* (Serial Number 1940/117) established as a ground for a right of appeal that a man called up for service conscientiously objected to serving with the Armed Forces.

Before an appeal could be allowed on this ground, under Reg. 21(2) the Appeal Board had to be satisfied that the appellant had a genuine belief that it was wrong to engage in warfare in any circumstances. In general, the Appeal Board had a discretion to accept active and genuine membership of a pacifist religious body as evidence of the appellant's convictions; and, in particular, had a discretion to allow an appeal on proof:

(a) The appellant has for a substantial period preceding the outbreak of the present war with Germany been a member of the Society of Friends or of the Christadelphian Sect,

and

(b) that he has during that time been continuously and actively associated with the body of which he is a member.

Regulation 21(2) was revoked in 1941 to avoid the suggestion that such membership was essential to sustain an appeal; and it was expressly provided that an Appeal Board could accept an appellant's own account of himself even if there was no corroborating evidence. Accordingly, proof of pre-war pacifist belief was not required. A genuine belief, at the time of the appeal, was substituted.

By virtue of Regulation 28A of the National Service Emergency Regulations 1940, Amendment No. 4 (Serial No. 1941/73), Appeal Boards could dispose of appeals on the ground of conscientious objection in one of three ways:[3]

(1) If the Appeal Board was satisfied that the appellant held "a genuine belief that it is wrong to engage in warfare in any circumstances", it was obliged to allow the appeal. In this event, two conditions automatically applied, viz.—

(a) That the appellant remain in, or take up such employment "of a civil nature and under civil control as the public interest requires" as directed by the special Tribunal:
(b) That, in order that his financial position should be no better than it would have been if he were serving as a member of the Armed Forces, the appellant pay to the Social Security Fund any remuneration in excess of what he would have obtained as a member of the Armed Forces.

This determination was made in 606 or 19.7 percent of the cases heard.

[3] *Report of National Service Dept:* Appendix to the Journals of the House of Representatives (1946) H-11A p. 24, Paragraph 121.

(2) In any other case where the Appeal Board was satisfied that the appellant held a genuine belief that it was wrong to perform combatant duties in the Armed Forces, it had to dismiss the appeal subject to the condition that the appellant be employed only in non-combatant duties in the Armed Forces. In such event the appellant was subjected to mobilization but was usually drafted to ambulance and other units. This decision affected 1,226 or 39.8 percent of the cases heard.

(3) In any other case, the Appeal Board had to dismiss the appeal unconditionally. This outright dismissal was followed by call-up for service with the Forces. This affected the largest number of cases; 1,245 or 40.5 percent of the total. In such event the appellant either accepted service, whereupon he was posted to a non-combatant unit where requested; or he refused service; whereupon he was charged in the Magistrate's Court with failing to report; he was then sentenced to imprisonment for a period up to three months, after which he was committed to a defaulter's detention camp, where discipline was strict, work hard, and food and accommodation less attractive than that prevailing in military camps.[4]

In 1945, the serious lack of uniformity in the decisions of Appeal Boards and the absence of any further appeal rights such as were afforded in both Britain and Australia, forced the belief that a number of genuine objectors might have been harshly treated. Consequently, Revision Authorities were established to ascertain whether, among those committed to Defaulter's Detention Camps, there were those who could now establish a

> conscientious belief that would prevent his participation in war.

If so, the man would be released from detention on parole under man-power direction and subject to forfeiture of any remuneration in excess of that which it was deemed he would have received had he served in the Armed Forces.[5]

Four hundred and sixty-seven men, representing 76 percent of the total number in detention, submitted their cases for revision, and, after hearing, 283 gained their release on parole.[6]

The State thus made provision for those who, on religious or humanitarian grounds, thought it wrong to kill or to resist force by force; i.e., who believed that to engage in warfare was in any circum-

[4] *Report of National Service Dept:* (1945) H-11A p. 25.
[5] Regulation 44 c(3), (4), (5) of National Military Service Emergency Regulations.
[6] *Supra* n. 4, paragraph 126.

stances wrong; or who believed that it was wrong to perform combatant duties in the Armed Forces.

However, as in the First World War, non-pacifist political conscientious objection was not recognised in New Zealand. Genuine and strongly held opinions based, for instance, on opposition to the existing war or on disapproval of the existing organisation of society (considered as not being worthy of defence, though the appellant would fight in defence of a State organised in the way he approved), did not, in the view of the Appeal Boards, amount to conscientious objection within the meaning of the regulations.[7]

In Britain, however, the Appellate Tribunals accepted non-pacifist political objections as conscientious objections. The test made by these Tribunals was not the *ground* of the objection but the *depth* of the objection:

> If the applicant convinced them that he held his convictions so rootedly that they represented to him an issue of right or wrong in his own conduct, they exempted him, despite the fact that in another war he might take up arms.[8]

This approach, which involves a much greater respect for the conscience of the individual and for his right to live according to his own convictions, was adopted by the New Zealand Government in the *Military Training Act 1949* and has been followed in all subsequent legislation involving compulsory military training. The *Military Training Act 1949* provides that—

> If any person subject to registration claims that he conscientiously objects—
>
> (a) to serving with the Armed Forces; or
>
> (b) to performing combatant duties—he may, instead of applying for registration for service in the Armed Forces, apply to be registered as a conscientious objector: s. 28(1).

Any person so registered

> shall not, so long as he is so registered, be liable for any service under this Part of this Act, or be required without his consent to submit himself to medical examination. s. 34(1).

The effect of this is to recognise that there need not be a necessary connection between a conscientious belief and religion, that it is proper for a belief grounded on a broad humanitarianism, or on moral principles not derived from religion, to lead to an exemption.

[7] *"Conscientious Objectors"*, [1941] N.Z.L.J. 1, 113.
[8] Fenner Brockway in his foreword to Hayes, D. *"Challenge of Conscience"* (1949), XIII.

NATIONAL MILITARY SERVICE ACT 1961

At present the various exemptions from military service that are offered to people holding particular classes of belief are set out in, and governed by, the provisions of the *National Military Service Act 1961* (Serial No. 1961/116).

Section 29 (1) of the Act provides that:

> If any person subject to registration claims that he conscientiously objects—
> (a) to serving with the Armed Forces; or
> (b) to performing combatant duties—he may, instead of applying for registration for service in the Army, apply to be registered as a conscientious objector.

Every application must be made to the Department of Labour in a form approved by the Minister (Lab.—M.T.3) and may, if the applicant thinks fit, be accompanied by any documentary evidence or statement of facts in support of the application: s. 28(2).

A person who makes such an application is not required to apply for registration for service in the Army: s. 28(4). Furthermore, even if he has already applied for registration for service in the Army, and is already registered in the military service register, he may apply "at any time" to be registered as a conscientious objector: s. 28(5). Provision is thus made in the Act for the in-service objector whose objections have been formed only after the commencement of service:—his application involves only those matters which might be considered in any other application.

Where an application is made under s. 28 of the Act for registration as a conscientious objector the Secretary of Labour shall ensure—

> (a) That the applicant is provisionally registered in a register of conscientious objectors . . . ; and
> (b) That, upon the applicant being so registered, a certificate of provisional registration is issued to him . . . ; and
> (c) That the application for registration is referred to the conscientious objection committee for determination: as provided in the Act: s. 29 (1) (a), (b), (c).

The application is heard before the Conscientious Objection Committee which

> shall consist of three persons to be appointed by the Minister and to hold office during his pleasure: s. 30 (2).

One of the members of the Committee is usually a clergyman, and the other (unofficially at any rate) represents the views of the Returned Services Association.[9]

[9] *"A Christian Attitude Towards Military Service"*, a pamphlet issued by the Anglican Pacifist Fellowship (New Zealand Branch), from whom further information or assistance may be obtained. Secretary, Mr C. Barfoot, 13 Peacock St., Glendowie, Auckland 5.

The procedure of the Objection Committee is

> such as the Committee thinks fit,

and it may

> admit and accept such evidence as it thinks fit, whether admissible in a Court of law or not: s. 39(1), (2).

The applicant may be represented by a barrister or solicitor or, with the leave of the Committee, by any other person: s. 40(1). The Crown may be represented by any person appointed by the Minister and the Crown representative has a right to be heard in opposition to the application or in support of it, to produce documents and call witnesses, and to cross-examine witnesses: s. 40(2), (3). All applications must be heard in public,

> unless the Committee in any particular case, due regard being had to the public interest, considers that the hearing or any part thereof should take place in private: s. 40 (4).

After the hearing, the Objection Committee may either determine an application on its merits or, as the case may require, dismiss it for want of jurisdiction or for want of prosecution, or permit it to be withdrawn: s. 32(2).

The Committee, if it is not satisfied that the ground upon which the application is made is established, shall dismiss the application: s. 32(3). An unsuccessful applicant is then registered for military service: s. 33. If he refuses to attend, he is liable to imprisonment for not more than three months or a fine of not more than $400: s. 56(2).

The Committee, if it is so satisfied, shall by order direct—

> (a) That the applicant shall be unconditionally registered in the register of conscientious objectors: s. 32(3)(a).

So long as he is so registered, he shall not be liable for any service under the Act, or be required without his consent to submit himself to medical examination: s. 34 (1). The objector's wage or salary in excess of a private's pay for a period of 158 days must be paid into the Public Account to the credit of the Social Security Fund: s. 36, or

> (b) That he shall be registered in that register as a person liable to be called up for service but to be employed only in non-combatant duties: s. 32(3)(b).

In this case the Army Board shall make arrangements for securing that the objector, during the period for which he serves, shall be employed only in non-combatant duties: s. 34(2).

The determination of the Objection Committee on any application is final and conclusive, except where there is reason to suppose that the determination may have been procured by fraud, or that new

and material evidence is available. If this is the case, the Objection Committee may rehear the application, and cancel, vary, or confirm the previous determination, and make such order as it thinks fit: s. 42 (3).

Proceedings before the Objection Committee

> shall not be held bad for want of form: s. 45(1);

nor may they be appealed against; and,

> except on the ground of lack of jurisdiction; no proceedings, order, direction, requirement, or decision . . . shall be liable to be challenged, reviewed, quashed, or called in question in any Court: s. 45(2).

The Hearing

The task, therefore, of ascertaining whether or not the applicant has a particular type of conscientious objection is entrusted to the Objection Committee. The Act does not define "conscientiously objects"; however, after some consideration of past legislation and of analogous provisions in the *Australian National Service Act 1951-1968* and *National Service Regulations* it can be said that a conscientious belief is a conscientious belief whether the ground of the belief is or is not of a religious character and whether the belief is or is not part of the doctrines of a religion.

It is thus recognised that there need not be a necessary connection between a conscientious objection and religion, and that it is proper for a belief grounded on a broad humanitarianism, or on moral principles not derived from religion, to lead to an exemption. This may be compared with the United States provisions which endeavour (specifically) to exclude non-religious beliefs.[10]

A significant proportion of applications rely on this provision. However, an application based on humanitarian grounds does involve

[10] *"Public Law"*, No. 90-40 (30 June 1967). Legislation adopted in 1964 by the U.S. Congress exempts only those whose opposition to war is based on religious training and belief. The statute defines this as "belief in a relation to a supreme being involving duties superior to those arising from any human relation". However, in a decision reported in the *New Zealand Herald* (16 June 1970) the Supreme Court said that a man denying the existence of God could be a conscientious objector:

"The five-three ruling in the case of *Elliott Welsh* strengthened a 1965 ruling by the High Court which said in effect that one can be religious even in professing to be a non-believer.

"Justice Hugo Black, writing for the majority, said that moral or ethical beliefs imposing a duty of conscience on the individual could occupy a place parallel to that filled by God.

"Mr Welsh had described his beliefs as having been formed by reading about history and sociology.

"Justice John Harlan agreed with the Court ruling, but commented that it completely obliterated the intent congress had in granting conscientious objector stakes to those professing belief in conventional religions with an organised and formal structure."

the applicant in some difficulties. Although an objector's beliefs need only concern military service, the usual ground for a non-religious application is complete opposition to all violence. This means that the applicant may be subjected to intensive cross-examination on matters such as self-defence (or defence of his mother or sister), the road toll, and so on.[11] If, in the face of this, he has difficulty in presenting a logically consistent statement, he may fail to convince the Committee.

The Committee is meant to be concerned with sincerity, not logic or consistency; it is meant to be determining the holding of a belief, not the correctness of it. The nature of the inquiry to be undertaken has been stated in a number of Australian cases.[12]

In *King* v. *Minister of State for Labour and National Service* [1953] S.A.S.R. 199, at p. 206, Ross J. said:

> . . . the question whether his beliefs are right or wrong is not for me to determine, and it is only relevant in these proceedings to the extent that it touches on the genuineness of such beliefs. In this connection I agree with the following passage from the judgement of Sir John Morris C.J., in *In Re J. D. A. T. Walker* (unreported—Supreme Court, Tasmania, 29/5/42). His Honour said: "The only question I have to determine is whether the appellant does in fact conscientiously object to service in the naval, military, or air forces, in a combatant or non-combatant capacity. And if I find that he does, then my own view of the cogency or otherwise of the reasons upon which he holds the objection becomes immaterial, since it is of the essence of freedom of conscience that a man may hold to his conscientious conviction irrespective of whether a judge or any other person thinks he ought.

In Grondal v. *Minister of State for Labour and National Service* (unreported, Supreme Ct. of Western Australia, 11/9/1953—quoted in *Reg.* v. *District Court: Ex parte White* (1966-1967) 40 A.L.J.R. 337, at p. 343), Dwyer C.J. said:

> . . . a conscientious belief is an individual's inward conviction of what is morally right or morally wrong, and it is a conviction that is genuinely reached and held after some process of thinking about the subject. It represents a conclusion that is uninfluenced by any consideration of personal advantage or disadvantage either to oneself or others, and perhaps when put to the test should be ordinarily combined with a willingness to act according to the particular conviction reached although this may involve personal discomfort or suffering or material loss.

The beliefs upon which the conscientious objection is based are in this context

> wide enough to include those views rational and irrational to which the mind has so persuaded itself either as a matter of reasoned conclusion or emotional conviction . . . that to act contrary to their principle would

[11] The validity of the analogy between personal self-defence and war (accidental v. premeditated) is doubtful and is rarely resorted to in practice as a test of an applicant's sincerity.

[12] Material on the New Zealand C.O. Committee is difficult to obtain as applications and reports are confidential. However, see appendix.

> be felt as a violation of morality. But they must spring from or dwell in conscience or moral sense and not the shock to the intellect that is the touchstone.

—*In re Taylor* (Supreme Court of Tasmania, unreported judgment, No. 100/1067) per Crisp J.

It is obvious that the task of the Objection Committee is not easy. On the one hand its members must not allow their opinions concerning the contents of the beliefs to influence their finding as to sincerity; on the other, the content of the beliefs may throw some light on the sincerity with which they are held.

> The division is a fine one, yet if the protection, and right, of conscience granted by the Act is to be given effective operation, it is a division which must be made.[13]

The Matters to be Considered

How can the Committee judge whether the content of the belief, or any of the circumstances relating to it, indicate a lack of sincerity on the part of the applicant?

The Act says that it

> may admit and accept such evidence as it thinks fit, whether admissible in a Court of law or not: s. 39 (2).

The Committee is thus entitled to look to any matter it feels will throw light on the questions to be determined. The matter most commonly referred to is behaviour inconsistent with the beliefs alleged to be held, and the length of time over which such beliefs have been held. However, strict regard to these two factors may result in harsh consequences, especially in the case of the young man, who, for various reasons, gives no consideration to questions that might involve his conscience, until the matter is suddenly thrust upon him by an impending call-up ballot or registration. Both these factors are simply matters to be considered, not conclusive indications of the lack of the necessary state of mind.

On the other hand, a long period of belief coupled with manifestly consistent behaviour usually leads to certain exemption.

One disadvantage of the tribunal system is the difficulty which an inarticulate applicant may have in presenting his beliefs to the satisfaction of the Commitee. He ought never to be placed in the situation where he feels his own efforts will fail to convince for lack of intellectual content. It was noted in England during the last war that if the applicant could not express his inner convictions easily, or if his attitude was one of "defence" or obstinacy or self-

[13] Reaburn, S. N., *"Conscientious Objection and the Particular War"*, [1969] 43 A.L.J. 319.

assertiveness, an entirely wrong impression was given to the Tribunal,[14] with unjust and often harsh results.

The applicant, however, must never allow the presentation of his beliefs to be prepared by someone else. This is bad tactics, because expression of beliefs in a form which does not come naturally from the applicant is bound to lead to considerable damage to his position during cross-examination.

The Committees are wary of cases where they feel that an applicant's beliefs are the result of urging or coaching by others: they must be genuinely entertained by him as distinct from something so urged.

It is submitted that the correct approach to this point is for the Objection Committee to regard with suspicion a situation where a belief has been urged upon the applicant. Where, however, a belief has been developed or clarified by means of advice and discussion, or assistance has been sought in the presentation of the belief, it is submitted that the Committee is not entitled to regard this as evidence of insincerity.[15]

The Standard of Proof

The language of s. 32(3) of the Act ("if it is not satisfied that the ground upon which the application is made is established") indicates that the burden of proving the claim lies on the applicant. There is, however, no indication of the standard for that burden. It would seem that the proper standard is that of balance of probabilities, a test stressed in the following quotation in the Australian case of *Collett* v. *Minister for Labour and National Service* (1965) 60 Q.J.P.R. 8 per Andrews D.C.J.:

> The onus of proof upon the appellant . . . requires that he satisfy the court on the balance of probabilities.

He went on to say that there was little doubt that exemption from service was not to be granted lightly. The question cannot be disposed of simply by allowing an applicant to go into the witness box and swear to the issue. He must be thoroughly examined because, as the belief is a matter particularly within his own knowledge and might be difficult to disprove, the court must have a proper opportunity to form an opinion as to the genuineness of the beliefs.

[14] *Supra* n. 9, XIII.
[15] *Supra* n. 12, 320.

COMBATANT AND NON-COMBATANT

The Act provides in s. 28 for recognition of two types of conscientious belief; one, prohibiting service with the Armed Forces, leading to complete exemption from liability to render service; the other, allowing non-combatant duties only, leading to exemption from engagement in duties of a combatant nature.

It is common for applicants to claim exemption from non-combatant duties on the ground that any involvement in a "military machine", even that part of it devoted to the saving of life, is inimical to their beliefs. Some have taken this argument further, and argued that in a modern warfare there can be no such thing as a non-combatant member of the armed forces.

Section 34(2) of the Act provides that a person registered as liable to perform only non-combatant duties shall not be required to engage in duties of a combatant nature. The responsibility for seeing that this does in fact occur is on the Army Board. Any military order for the performance of combatant duties (for instance, in an emergency) would be contrary to the direct provisions of the section, and therefore unlawful. The wording of the section is mandatory, but it is doubtful what sanction there could be against any member of the armed forces who made or enforced any such order. As compliance with the order could so easily be regarded as evidence of a change in beliefs, such a question might only arise as a defence in the court-martial of an objector who refused to obey the order.[16]

What are non-combatant duties? On 8th February 1966 the Australian Department of the Army released the following statement on non-combatant duties:

> National servicemen who are conscientious objectors, but who do not object to non-combatant duties [will] be excused all duties and training connected with weapons except training necessary to learn how to render weapons safe. . . . These duties will include service with the medical or dental corps, or as clerks, storemen, stewards, or in any duty not involving the bearing of arms.

There is a tendency seen in some Australian cases to equate non-combatant duties with service in a medical unit. This attitude sometimes operates to cloud the Committee's appreciation of an objector's position. If the applicant would assist the victim of a road accident, how can he say he would not assist a wounded soldier?

But this attitude overlooks the difference between a medical orderly and a storeman issuing rifles and ammunition, and should not be allowed to impede the committee's consideration of particular applications regarding non-combatant duties.

[16] *Supra* n. 12, 321.

SUCCESSIVE APPLICATIONS

Is an applicant for conscientious objection exemption precluded by the finding of the Objection Committee, that he was not to be so exempted, from making a successive application seeking the granting of such exemption?

The *National Military Service Act 1961,* s. 42 states that every determination of the Objection Committee "Shall . . . be final and conclusive," provided that

> On the application of the Secretary . . . the Objection Committee . . . may, if it has reason to suppose that . . . new and material evidence is available, rehear the application, and cancel, vary, or confirm the previous determination, and make such order as it thinks fit.

The nature of an application is a request for the Objection Committee to find as a matter of fact certain presently held beliefs, and any finding by the Committee can only be as at that time. There is, therefore, no logical reason why there should not be a successive application; for a successive application presents the Committee with a question not previously decided.

The Act, by implication, provides for such successive applications. Upon dismissal of any person's application, the Secretary shall cause the applicant to be registered in the military service register: s. 33. Once he is so registered, he may apply at any time under s. 28(5) to be registered as a conscientious objector, in which case his registration in the military service register will be cancelled, and his appliaction for registration as a conscientious objector will be referred under s. 29(1)(c) to the Objection Committee to be determined.

Naturally, if the evidence shows no change of belief, the application will be quickly rejected. But what kind of change of belief would be sufficient to ground a new application? A clear statement on this point came from Windeyer J. in the Australian case of *Collett* v. *Loane* (1966-1967) 40 A.L.J.R. 345, at p. 351:

> No doubt the [National Service] Act proceeds on the assumption that beliefs are ordinarily firm and constant and are likely to remain unchanged in the time between registration and call-up. Sudden conversions—if conversions ever occur without some kind of premeditation—are no doubt unlikely to occur. Nevertheless it seems that months may elapse between a decision rejecting an application for exemption and a call-up notice. And in that time it is possible for a man's conscientious beliefs genuinely to change and develop, to clarify and intensify and become for him more dominating and compelling. If that happens, he may, I think, apply again, notwithstanding that his earlier application had been rejected. If the magistrate hearing his second application thought that he was doing no more than repeating in substance what he had earlier said, that he held no new views and exhibited no greater sincerity or conviction of belief, one should expect his new application to be promptly rejected. Nevertheless, as I see it, the task for the magistrate would be not to inquire whether the beliefs which the applicant professed were philosophically different from those he had earlier professed. . . . The

> essential question for the magistrate would be, was the applicant at the time of the hearing before him exempt on the ground of his having conscientious beliefs as described in the Act?

Thus, provided there is some indication of development in the applicant's position, the question is the principal one faced by the tribunal in every case.

APPEAL

Under the *National Military Service Act 1961,* proceedings before the Objection Committee shall not be held bad for want of form: s. 45 (1); nor may they be appealed against: s. 45(2). Also

> except on the ground of lack of jurisdiction, no proceedings, order, direction, requirement, or decision . . . shall be liable to be challenged, reviewed, quashed, or called in question in any Court: s. 45(2).

There is thus no provision made in the law against the possibility of a wrong decision by the Objection Committee. An applicant aggrieved by the decision of the Committee has no further right of appeal.

This is unlike the position in Australia where the legal machinery provided makes improbable a wrong decision in the case of the genuine objector. There, an appeal against the decision of a magistrate is provided for in s. 29c of the *National Service Act* and s. 38A of the *National Service Regulations.* Either the applicant or the Minister may appeal to a court of review which shall hear and determine the appeal, and may affirm, vary or reverse the decision of the court below. Section 29c(6) provides that

> unless a court of review . . . otherwise orders, the appeal shall be by way of rehearing.

The appeal is a hearing *de novo,* and there are no special restrictions on the evidence that may be presented.

The *National Service Act Amendments Act 1968* provides that the applicant or the Registrar may appeal from the decision of the court of review on a question of law, or, with leave, on any other ground. This appeal is to three judges of the Supreme Court of a State. A further appeal may be taken from that decision, by special leave, to the High Court. The possibility of an unfair decision is thus guarded against.

That injustice can occur where no appellate authority exists was recognised by the New Zealand Government in the Second World War: The report of the National Service Department for 1945 said:

> concern has been caused by the serious lack of uniformity in the decisions of Appeal Boards . . . and by the absence of any further appeal rights; . . . a number of genuine objectors might have been harshly treated.

It is apparent that if such injustice is to be prevented, then an institution similar to that in Australia must be established whereby the decision of the Objection Committee would be liable to review by a higher tribunal.

The principal argument in favour of an appellate tribunal is based upon the nature of the inquiry itself. The Objection Committee is given the very difficult, and fundamentally impossible, task of judging the beliefs of conscientious objector applicants. Conscience is, by its very nature, a matter of individual judgment, and no tribunal can be sure of estimating correctly the beliefs of those who claim to act by reason of it. To suggest that a tribunal can make an infallible judgment as to the beliefs a man conscientiously holds is to deny the validity of conscience as the final authority in human conduct.

When faced with this difficulty, it can not be expected that the Objection Committee will make no wrong judgments as to the sincerity of the men coming before it. It is therefore essential, so that the intention of the legislature may be carried out, that the proceedings of the Objection Committee be liable to be questioned for want of form, or appealed against.

Conscientious Objection and the Particular War

Section 28(1) of the Act refers to persons who conscientiously object

> to serving with the Armed Forces.

Because of the lack of nationwide agreement to the validity and properness of New Zealand's participation in the Vietnam War, the question whether this phrase allows exemption for opposition to a particular war has assumed crucial importance in many cases.

In the Australian case of *Ex parte Thompson* (1968) 42 A.L.J.R. 173 the majority held that only an objection to all military service at any time would satisfy the provisions of their Act, and the United States Supreme Court has refused to hear the merits of cases involving objection to a particular war.[17]

[17] This conclusion is based upon my own analysis of a successful application by a student, Mr J. Jobbins: His application for registration as a conscientious objector was based upon:
the war in Vietnam.
(1) "My investigations into the moral, political and legal issues raised by Tribunal at Nuremberg.
(2) The implications of this war with respect to international law; in particular Article 6 of the Charter of the International Military Tribunal at Nuremberg.
(3) Subsequent necessary considerations regarding military service."

In New Zealand, however, non-pacifist political objections have been accepted as conscientious objection.[18] If the applicant can satisfy the Objection Committee that he has a conscientious belief that New Zealand should not be involved in the war in Vietnam (by presenting expert and documentary evidence of his special study of the war, and the conclusions he had drawn), and, while holding that view, he could not in conscience perform any kind of military service, for to do so would assist New Zealand's part in that war, then the Committee will direct that he be unconditionally registered as a conscientious objector.

An additional argument in support of this form of objection is based on the nature of the responsibilities attaching to the individual soldier which might flow from participation in an unjust war, or the possible commission of acts later judged as war crimes. The anti-Vietnam War protesters point with considerable force to the precedents of the Nuremberg trials after World War II, claiming that, as International Law places ultimate responsibility on the head of the individual, the right to conscientious objection should be wide enough to allow an individual to conscientiously refuse the imposition of such possible responsibility.

The position in New Zealand is now the same as that in England in World War II. The test is not the ground of the objection but the depth of the objection. If an applicant can convince the Committee that he holds his convictions so rootedly that they represent to him an issue of right or wrong in his own conduct they will exempt him, despite the fact that in another war he may take up arms.

[18] In a case reported in the *Auckland Star*, 9 March 1971, the United States Supreme Court ruled that a conscientious objector cannot object only to certain wars, such as that in Vietnam. It said that there could be no such thing as a "selective conscientious objector". The Court's decision was given in two cases in which young men asserted the right to refuse to fight in Vietnam, although both indicated that under other circumstances they would be willing to carry arms for the United States. One of the appellants, Guy Porter Gillette characterised the Vietnam War as "unjust" but said that he would be willing to fight in a war of national defence or one sponsored by the United Nations as a peacekeeping measure.

The only dissenter in the nine-man Court was Justice William O. Douglas who was quoted as having said: "I had assumed that the welfare of the single human soul was the ultimate test of the vitality of the first amendment (to the Constitution)."

The majority, whose decision was written by Justice Thurgood Marshall, said if young men were allowed to choose their own war there would be too great a burden on draft authorities to decide whose claims were just:

"We conclude that it is supportable for Congress to have decided that the objector to all war—to all killing in war—has a claim that is distinct enough and intense enough to justify special stakes, while the objector to a particular war does not".

APPENDIX

This is a survey of the activities of the New Zealand Conscientious Objection Committee since the reintroduction of compulsory military training by the National Military Service Act 1961. The following statistics are taken from the appendices to the Journals of the House of Representatives for the period March 1962 until 31 March 1970.

In 1962, the applications for registration for service under the Act totalled 17,389 and the comment was made that although the Committee had not yet commenced operations, it appeared that there would be "not more than fifteen cases for consideration by the Committee".[19]

In the reports for 1963 and 1964 no mention was made of conscientious objectors. In 1965, however, the report for the period 1 July 1964 until 31 March 1965, noted that although 12,698 persons registered for military service, the number of applications for registration as conscientious objectors totalled only 58. These were dealt with as follows:[20]

Registered unconditionally	34
Registered for non-combatant service	18
Struck out—no appearance	2
Withdrawn	4

Since 1 July -1964 young men were required to register within 14 days of attaining their twentieth birthday, and for the year ending 31 March 1966, 18,728 persons applied for registration. An additional 82 applications were received for registration as conscientious objectors. These were dealt with as follows:[21]

Registered unconditionally	47
Registered for non-combatant service	27
Dismissed	3
Struck out—no appearance	4
Withdrawn	1

At the time of the report, 15 applicants were awaiting hearing.

For the year ending 31 March 1967, 22,184 persons registered for military service. The Conscientious Objection Committee received 71 applications for registration as conscientious objectors. These were disposed of as follows:[22]

Registered unconditionally	38
Registered for non-combatant service	26
Dismissed	4
Struck out—no appearance	1
Withdrawn	2
Awaiting hearing	25

[19] Appendix to Journals of House of Representatives, (1962), Vol. II, H 11, 27.
[20] (1965), Vol. II, H 11, 24.
[21] (1966), Vol. II, H 11, 25.
[22] (1967), Vol. II, H 11, 26.

For the year ending 31 March 1968, 22,802 persons registered for military service. The Committee dealt with 99 applications:[23]

Registered unconditionally	60
Registered for non-combatant service	28
Dismissed	4
Struck out	Nil
Withdrawn	7
Awaiting hearing	26

For the year ending 31 March 1969, 32,129 persons registered for military service. The Committee received 69 applications for registration as conscientious objectors.[24] Fifty seven cases were dealt with during the year and disposed of as follows:

Registered unconditionally	41
Registered for non-combatant service	8
Dismissed	1
Struck out—no appearance	3
Withdrawn	4
Awaiting hearing	39

For the year ending 31 March 1970, 32,633 persons registered for military service. The Committee received 122 applications for registration as conscientious objectors of which 93 cases were dealt with during the year.[25]

Registered unconditionally	66
Registered for non-combatant service	11
Dismissed	8
Withdrawn	8
Awaiting hearing	68

[23] (1968), Vol. II, H 11, 28.
[24] (1969), Vol. III, H 11, 32.
[25] (1970) H 11.