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Judicial Review of Classification by Selective Service System - United States v. Embrey

JUDICIAL REVIEW OF CLASSIFICATION BY SELECTIVE SERVICE SYSTEM

United States v. Embrey[1]

A petition for a writ of habeas corpus was filed by a mother to inquire into the detention of her son who had been inducted into the military service under the Selective Training and Service Act of 1940.[2] The ground for complaint was that the mother was dependent on the son and that the son should have been classified as 3-A instead of 1-A, and that accordingly her son's induction was premature. An order to show cause was allowed, setting a date for a hearing. The respondents answered, reciting the various formal proceedings before the Local Draft Board and the appropriate Appeals Board. The evidence at the hearing supported the answer (which also was not traversed) that there had been numerous hearings with reference to the appropriateness of the registrant's classification, and that he had been given and had exercised fully his right to present his case before the Local Board, the appropriate Appeal Board, and the National Headquarters, resulting in his ultimate classification as 1-A and his induc-

[1] 46 F. Supp. 916 (D. C. Md., 1942).
[2] 50 U. S. C. A. Appendix Sec. 301 *et seq.*

tion.[3] The Court said that it could not "be successfully urged that the registrant did not have adequate hearings in accordance with due process."[4] The petitioner urged, though, that the classification was "arbitrary and capricious . . . because without substantial evidence and by reason of personal bias and hostility against him."[5]

The Court, recognizing that the permissible scope of review "does not properly include a determination of the real merits of the case", nevertheless seems to have accepted a wide range of testimony, repeating for the most part what was probably before the Local Board. The Court, after reviewing the proceedings before the various boards and the evidence as submitted, said "I make *the ultimate finding of fact* that the actions of the Local Board and more particularly the Board of Appeals in this case were not arbitrary or capricious but were based on legally substantial evidence." Accordingly, the petition was dismissed.

The evidence before the Court as to the dependency of registrant's mother revealed that she had a husband from whom she was separated, and it was not shown that he was not legally obliged to support her. On the question as to whether registrant had in good faith assumed the support of his mother, the evidence was conflicting. It further appeared that registrant had made false statements on his questionnaire; although these statements were not relevant to the question of dependency, yet they did have a bearing on registrant's reliability. Registrant also contended that there was bias in that the Clerk of the Local Draft Board desired to obtain control of the registrant's restaurant business, and used his influence to poison the minds of the Board and caused them to reject the registrant's evidence of dependency and to disregard the sup-

[3] Petitioner's son registered on January 28, 1941; in his questionnaire his mother and sister were claimed as dependents; after a hearing before the Local Board on February 11 registrant was classified in class 1; registrant passed his physical examination and was classified, on March 4, as 1-A; he was given two deferments to arrange his business; on September 3, his classification was changed to 1-H because of his age; on December 1, the age limit having been changed by statute, he was reclassified as 1-A; an appeal to the Board of Appeals on January 8 resulted in an affirmance of his classification; an appeal was then taken to the National Headquarters, and because of the submission of new evidence the matter was sent back to the Local Board; after hearing the new evidence, the Local Board again classified him as 1-A; an appeal was taken to the Appeals Board which affirmed his classification; and on August 22 registrant was ordered to report for induction.

[4] 46 F. Supp. 916, 919 (D. C. Md., 1942).

[5] *Ibid.*

porting evidence of other witnesses. The Court found that this allegation of bias was not supported by substantial evidence, that the Clerk had not been called as a witness in the instant case, and that the Draft Board had heard witnesses as to the dependency of the mother. The Court also observed that there was nothing to indicate arbitrary action, personal bias, or prejudice on the part of the Appeals Board.

This decision is the first of the cases under the 1940 Act in this district, although there have been a number of such cases elsewhere.[6] It follows the usual pattern of such cases under the Act of 1940, as well as the earlier cases under the Act of 1917.[7] That is, most of such cases were habeas corpus proceedings,[8] and most of them resulted in dismissals after a judicial inquiry into the evidence on which the boards made their findings, the courts usually reciting that the findings were not arbitrary or capricious, or abuses of discretion. Under the Act of 1917, only six cases ordered the selectee released.[9] Under the present law, only one case, *Application of Greenberg,*[10] has ordered a discharge of the selectee.

In the *Greenberg* case a writ of habeas corpus was filed by a wife who alleged that her husband had been improperly classified. The petitioner and the registrant became engaged in December, 1939 and at that time set January 4, 1941 as the date for their wedding. The day before the wedding the registrant took his preliminary physical examination and on January 7, 1941 he was classified as 1-A.

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[6] See Petition of Soberman, 37 F. Supp. 522 (D. C. N. Y., 1941); Dick v. Tevlin, 37 F. Supp. 183 (D. C. N. J., 1942); Application of Greenberg, 39 F. Supp. 13 (D. C. N. J., 1941); United States ex rel. Errichetti v. Baird, 39 F. Supp. 388 (D. C. N. Y., 1941); United States ex rel. Ursitti v. Baird, 39 F. Supp. 872 (D. C. N. Y., 1941); Checinski v. United States, 129 F. (2d) 461 (C. C. A. 6th, 1942); Rase v. United States, 129 F. (2d) 204 (C. C. A. 6th, 1942). See, also, cases reviewed in Note, *Judicial Review of Selective Service Board Classifications by Habeas Corpus* (1942) 10 G. W. L. Rev. 827, 841-844.

[7] See Arbitman v. Woodside, 258 F. 441 (C. C. A. 4th, 1919) and cases cited in Note, *Judicial Review of Selective Service Board Classifications by Habeas Corpus* (1942) 10 G. W. L. Rev. 827, 829 n. 7.

[8] Two cases were denials of injunction, Bonifaci v. Thompson, 252 Fed. 878 (D. C. Wash., 1917); Angelus v. Sullivan, 246 Fed. 54 (C. C. A. 2d, 1917) (Court suggested either certiorari or habeas corpus would be appropriate). One case involved denial of certiorari, United States ex rel. Roman v. Rauch, 253 Fed. 814 (S. D. N. Y., 1918).

[9] Ex parte Beck, 245 Fed. 967 (D. C. Mont., 1917); Ex parte Fuston, 253 Fed. 90 (E. D. Tenn., 1918); Ex parte McDonald, 253 Fed. 99 (E. D. Wis., 1918); Ex parte Cohen, 254 Fed. 711 (E. D. Va., 1918); Arbitman v. Woodside, 258 Fed. 441 (C. C. A. 4th, 1919); Rome v. Marsh, 272 Fed. 982 (D. C. Mass., 1920).

[10] 39 F. Supp. 13 (D. C. N. J., 1941).

It was petitioner's contention that the proper classification was 3-A since she was entirely dependent upon registrant for support at the time of his classification. The Local Board made the 1-A classification because it felt that petitioner would suffer no hardship; this classification was upheld by the Appeal Board. The Court found that the wife had no independent income, that the husband's only income was his salary of $35 a week, that registrant's induction would force his wife to leave an apartment and return to her parents. The conclusion was that the Local Draft Board and the Appeal Board had acted arbitrarily in the matter and that petitioner was a bona fide dependent upon registrant on the date of his classification.

The *Greenberg* decision became the subject of an extended bit of criticism in The George Washington Law Review,[11] which took the position that the judicial function in such cases does not go beyond supervising the jurisdiction and procedure of the administrative machinery. That is, the deferments are not matters of constitutional, or even absolute statutory, right but are dependent upon administrative finding, under statutory set procedure, that a deferred classification of the particular individual is called for in the interests of national welfare under classes to be established by executive direction. The extent to which such deferment exists and the form under which it is granted depends upon legislative grant and executive direction only. If the legislature has directed, as it has, that a classification, after appropriate hearing and opportunity for appeal, is to be final, the Court's function on review would seem to be limited to a determination of whether the board (or system as a whole) to which that determination is left has stayed within the legislative mandate.[12]

The Court, in the instant case, seems to have been appreciative of these limitations,[13] but in its opinion gives the petitioner a full judicial consideration of the evidence in determining whether the administrative action of the Se-

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[11] *Op. cit. supra*, n. 6. The note relies mainly on analogy to the immigration cases: Nishimura Ekiu v. United States, 142 U. S. 661 (1892); Chin Yow v. United States, 208 U. S. 8 (1908); Tod v. Waldman, 266 U. S. 113 (1924); United States v. Petkas, 214 Fed. 978 (C. C. A. 1st, 1914).

[12] This assumes of course the constitutionality of the statutes. The constitutionality of the 1917 Act was upheld in the Selective Draft Cases (Arver v. United States), 245 U. S. 366, L. R. A. 1918C, 361, Ann. Cas. 1918 B, 856 (1918). The constitutionality of the 1940 Act has been upheld in United States v. Lambert, 123 Fed. (2d) 395 (1941) and was not questioned in the instant case.

[13] See text, *supra*, first sentence of second paragraph.

lective Service System had been so contrary to the evidence as to be arbitrary and capricious. Certainly, the petitioner was entitled to no more. It is questionable if the petitioner was entitled to that much.[14]

[14] See Note, *Judicial Review of Selective Service Board Classifications by Habeas Corpus* (1942) 10 G. W. L. Rev. 827, 841-844. A *quaere* might be raised as to whether the Court had doubts as to the appropriateness of the review under petition for habeas corpus where the ground for review was only that the fact determination of the Local Board and the Appeal Board was arbitrary. The opinion was prefaced by the observation: "Nor is any question raised as to the propriety of the procedure in applying for the writ of habeas corpus." *Cf.* Larson, *The Doctrine of Constitutional Fact* (1941) 15 Temple Univ. L. Q. 185, 199 *et seq.*, for a discussion of types of judicial review appropriate for various kinds of fact-finding by administrative boards.