IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

IACOVOS DEMETRIADES AND OTHERS,

Applicants,

and

THE REPUBLIC OF CYPRUS, THROUGH

1. THE COUNCIL OF MINISTERS,
2. THE MINISTER OF FINANCE,

Respondents.

(*Case No.* 112/69).

Public Officers—Pensions—Public officers retired under the Compensation (Entitled Officers) Law, 1962 (*Law No.* 52 *of* 1962) *and under section* 6(*f*) *of the Pensions Law, Cap.* 311—*Employed by the Greek Communal Chamber and subsequently by the Republic under the provisions of the Competence of the Greek Communal Chamber (Transfer of Exercise) and Ministry of Education Law*, 1965 (*Law No.* 12 *of* 1965)—*And receiving pensions in addition to their salaries—Not entitled to increases of pension granted under the Increase of Pensions Law*, 1968 (*Law No.* 128 *of* 1968)—*Proviso to section* 3(1)(*c*) *of said Law applicable—Not contrary to Article* 28.1 *and* 2 *of the Constitution.*

Increase of Pensions Law 1968 (*Law No.* 128 *of* 1968)—*Proviso to section* 3(1)(*c*)—*Not contrary to Article* 28.1 *and* 2 *of the Constitution.*

Pensions—See supra.

Constitutionality of legislation—Principle of equality—"Equal before the law" and "Discrimination" in paragraphs 1 *and* 2 *of Article* 28 *of the Constitution—Meaning and effect—Said terms do not convey the notion of exact arithmetical equality but safeguard only against arbitrary differentiations—They do not exclude reasonable distinctions which have to be made in view of the intrinsic nature of things—Principles laid down in* Mikrommatis *and* The Republic, 2 *R.S.C.C.* 125, *at p.* 131, applied.

Constitutionality of legislation—Judicial control of—Principles applicable in considering constitutionality of statutes—Principles laid down in the case Board for Registration of Architects *etc.* v. Kyriakides (1966) 3 *C.L.R.* 640, *at p.* 654, applied.

Equality—Principle of equality before the law—Discrimination—Principle against—Meaning and effect of those principles—Article 28.1 *and* 2 *of the Constitution—See also* supra.

Words and Phrases—"Equal before the law" and "discrimination" in Article 28.1 *and* 2 *of the Constitution.*

Cases referred to :

Varnava v. *The Republic* (1968) 3 C.L.R. 566, at pp. 575–576 ;

Board for Registration of Architects etc: v. *Kyriakides* (1966) 3 *C.L.R.* 640 *at p.* 654, applied ;

Pollock v. *Farmers Loan and Trust Co.* U.S. 39 Law. Ed. 601, at p. 635 ;

Mikrommatis and *The Republic*, 2 R.S.C.C. 125, at p. 131.

The facts sufficiently appear in the Judgment of the Court dismissing this recourse challenging the validity of the refusal of the respondents to grant to the applicant increased pension

Recourse.

Recourse against the omission of the respondents to grant to applicants increased pension retrospectively with effect from 1st January, 1968, and against a decision refusing to pay to applicants increased pension for the months of January, February and March, 1969.

A. Triantafyllides, for the applicant.

L. Loucaides, Senior Counsel of the Republic, for the respondents.

Cur. adv. vult.

The following judgment was delivered by :

HADJIANASTASSIOU, J. : In these proceedings, under Article 146 of the Constitution, the applicants claim the following relief :

(*a*) A declaration that the omission of the respondents to pay to the applicants increased pension retrospectively since the 1st January, 1968, ought not to have been made, and whatever has been omitted should have been performed ;

(*b*) a declaration that the decision of the respondents not to pay to the applicants increased pension for the

months of January, February and March, 1969, as in the case of other public servants and/or their decision not to increase the pension payable to applicants is null and void and of no effect whatsoever ; and

(*c*) a declaration that the decision of the respondents contained in a letter dated 7th April, 1969, to apply the provisions of Law 128/68 and/or not to grant increased pension to applicants in respect of their pension is null and void and of no effect whatsoever.

All the applicants, before the date of the coming into operation of the Constitution, held an office in the public service under the Government of Cyprus, and on the 16th August, 1960, by the operation of the Constitution, the office held by applicant No. 1 came within the competence of the Greek Communal Chamber. This applicant chose not to serve under the Greek Communal Chamber, and under the Compensation (Entitled Officers) Law, 1962, (Law No. 52/62), he opted to retire and to receive pension on abolition of office terms. Under the provisions of this Law, which was enacted to make provision for the payment of compensation to certain public officers, " entitled pensionable officer " means an officer who on the 15th day of August, 1960, held in a substantive capacity a pensionable post or office in the public service under the Government of the Colony of Cyprus, and whose post or office has, by operation of the Constitution, come within the competence of a communal chamber and who, not having waived the rights conferred upon him by paragraph 3 of Article 192 of the Constitution, has not been appointed in the public service of the Republic. Section 3 of the law is in these terms :—

> " Notwithstanding anything in the Pensions Law or in the Provident Fund Law contained, an entitled officer shall be deemed to have retired on the fifteenth day of August, 1960, or, in case he was eligible for any leave of absence on that date, on the date of the expiration of such leave :
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> Provided that an entitled officer who, before the date of the promulgation of this law by its publication in the Official *Gazette* of the Republic, has been re-appointed to the public service of the Republic shall not be deemed to have retired and the period which elapsed from the sixteenth day of August, 1969, inclusive, to the date immediately preceding the date of his re-appointment to the public service of the

Republic, shall be deemed to have been a period of leave without pay granted on grounds of public policy."

Then Section 4 (1) deals with benefits upon retirement and reads as follows :—

"Upon retirement as in section 3 provided, an entitled pensionable officer shall be eligible to receive, at his option exercised in the form set out in the First Schedule, which shall be sent to the Minister within a period of three months of the date of the coming into operation of this Law, either—

(*a*) pension on abolition of post or office terms ; or

(*b*) compensation in the form of a gratuity equal to the amount of the annual pension for which he would be eligible on the fifteenth day of August, 1960, under the Pensions Law as modified by this Law, multiplied by the factor set out in the Second Schedule to this Law which is appropriate to his age in completed years of the fifteenth day of August, 1960."

Because this applicant was over the age of 50, he was paid only the pension he had earned, as he was not entitled to any additional pension under Regulation 26 of the Pensions Law, Cap. 311.

The remaining applicants whose office did not come within the competence of the Greek Communal Chamber, elected to serve under it, because the Greek Communal Chamber asked the Government of the Republic to terminate their services, as the Chamber needed the services of those applicants. The Government agreed to terminate their employment in the public interest, (*viz.*, to be employed by the Greek Communal Chamber), under section 6 (*f*) of the Pensions Law, Cap. 311. These officers were paid the pension they had earned until the time of such determination of their employment. I should have added, however, that had it not been for the Government agreeing to retire them under section 6 (*f*) of the Pensions Law, Cap. 311, the applicants would not have been entitled to any retirement benefits.

All the applicants having agreed to be employed and to serve under the Greek Communal Chamber, they continued receiving the same salaries as before, and in addition they used to receive their annual pensions. On the abolition of the Greek Communal Chamber by Law 12/65,

the applicants were given the opportunity to return the pension they had received from 1960 to 1965 so that their service prior to 1960 might be considered together with their subsequent service for pension purposes. Section 16 (1) of Law 12/65 reads :—

> " Subject to the provisions of sub-sections (4) and (5), any person who, immediately before the date of the coming into operation of this Law, was in the service of the Chamber as a member of the staff of its offices shall be transferred, as from that date, to the service of the Republic and be thereafter posted by the appropriate authority of the Republic therein, if practically possible, to a post the functions of which are comparable to the functions of the post held in the service of the Republic.
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> (3) The service of any such person with the Republic shall be deemed to be an uninterrupted continuation of his service with the Chamber :
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> Provided that any public servant having elected to serve with the Chamber and having thereupon received any retirement allowance, pension, gratuity or other similar benefit (hereinafter referred to as ' the retirement benefit ') in respect of any period of service before such election may, within one month of the date of his posting under sub-section (1), elect either to return the retirement benefit received, whereupon his whole service from the beginning shall count as period of service for the purposes of retirement benefits, or not to return such retirement benefit, whereupon his period of service shall be reckoned for such purposes as having begun on the date of his assumption of duty with the Chamber."

It appears that the applicants did not elect to return the retirement benefit received by them, and preferred that their period of service should be reckoned as having begun on the date of their assumption of duty with the Chamber because as the respondent claims in paragraph 4 of the opposition, " it was much more beneficial to them to continue to draw their pension in addition to their salaries rather than to return it, and be eligible to draw a higher pension on retirement at the age of 55 (now 60). " In fact, they continued serving without any complaint, until the promulgation of the Increase of Pensions Law (Law 128 of 1968). The increases in pensions granted by Law 128 of 1968, were given in accordance with para. 5 of the opposition of the respondent—" because the increase of

the pensionable emoluments of serving public officers by 7 1/2% of salaries from the 1st April, 1967, and of the general increase of the salaries of serving officers by 18% as from the 1st January, 1968. Both these increases in the pensionable emoluments of officers benefited the applicants also and will also increase their pensions in respect of their service after 1960".

Because the applicants were specifically exempted from the Increase of Pensions Law (No. 128 of 1960) whereby increases were granted to all public officers, they wrote a letter through their counsel dated March 10, 1969, to the Minister of Finance complaining that under the provisions of Law 128/68 they were afforded a discriminatory treatment, since their own pensions were not increased, as was the case of the other pensionable officers ; and called upon the Minister to pay to them retrospectively the relevant increases in pension as from January 1, 1968. See *exhibit* 1.

On April 7, 1969, the Minister in reply in *exhibit* 2, said that as he considered the provisions of Law 128/68 as binding on him and his Ministry, he could not ignore the provisions of the law. On April 15, 1969, the applicants, feeling aggrieved because of the refusal of the Minister to order the increase of their pensions, filed the present application which was based on this ground of law : "That the decisions and/or omission complained of discriminate against applicants in that whereas the pensions of other public servants have by Law 128/68 been retrospectively increased since 1.1.68, no such increase was granted to applicants. It is submitted that the differentiation complained of is not a reasonable one but, on the contrary, it is arbitrary and unjustified, so that discrimination results, contrary to Article 28 of the Constitution".

On May 26, 1969, pursuant to an order of the Court dated May 10, 1969, particulars regarding other public officers mentioned were filed and are in these terms :—

> "Law 128/68 grants increased pension to all public servants since 1.1.68, the only exception of the law being the classes of public servants to which applicants belong, *i.e.* those officers who were retired on the basis of Law 52/62 and those officers whose services were terminated on the basis of section 6 (*f*) of Cap. 311. With the exception of the above two classes of public servants, they are entitled to increased pension retrospectively since 1.1.68."

On August 22, 1969, the opposition was filed, based on the ground of law " that the non-payment of the increased pension claimed by applicants was the result of a proper application of the proviso to section 3 (1) of Law 128/68, the provisions of which are not in any way contrary to Article 28 of the Constitution. The differentiation between applicants and those public officers who received the increased pension in question was proper and justified in view of the facts set out in this opposition ".

On December 2, 1969, counsel for the applicants has contended :

(*a*) that the proviso to section 3 (1) (*c*) of Law 128/68 is unconstitutional because the applicants were unreasonably excluded from the increase of their pensions, as the respondent believed that the applicants' financial position would be better than the other officers who remained serving under the Republic ;

(*b*) that the respondents misdirected themselves with regard to the law, because the only criterion which they ought to have taken into consideration was the reason for which the increases and salaries and pensions were given, *viz.* because of the loss of the purchase power of money and the increase of the high cost of living ;

(*c*) that the differentiation afforded to the applicants by the respondents is unreasonable, arbitrary, and contravenes Article 28 of the Constitution.

Counsel for the respondent, on the contrary, has contended :

(*a*) that there was no omission on the part of the respondents, because they had no duty under the proviso to Law 128/68 to discharge. He relies on the authority of *Varnava* v. *The Republic* (*District Officer and Another*) (1968) 3 C.L.R. 566, at pp. 575–576 ;

(*b*) that the said proviso to Law 128/68 is not unconstitutional, because the decision complained of does not amount to a discrimination, but only a reasonable differentiation. Moreover, counsel argued that it is clear that the applicants were not in a worse position than their colleagues, but in reality, in the light of the evidence before the Court, they were much better off ;

(*c*) that the purpose of the increases was to cover the increase in the cost of living and the devaluation of the pound, and these two aims have been covered in the case

of the applicants, because when this increase was given, the applicants were in the civil service, so they received at least 18% increase of their salaries ;

(*d*) that the applicants are wrongly complaining that they did not receive on top of the 18% of their salaries 6 1/2% on the pension they were receiving, because had they received the increase on their pension, then they would have been receiving a dual benefit ;

(*e*) the increase in the pension was given by the Government to the old pensioners so that they would bring them in line with the civil servants who were then working ;

(*f*) that the applicants are claiming the increase with regard to their benefits as pensioners, which is contrary to the purposes of Law 128/68 ;

(*g*) that under the provisions of Law 128/68 the applicants when they finally retire at the age of 60, would receive additional benefits.

Before dealing with the submissions of both counsel, I consider it constructive to quote in Greek section 3 (1) (*c*) and the proviso to Law 128/68 :—

«Ἀνεξαρτήτως τῶν διατάξεων οἱουδήποτε τῶν ἐν τῷ Πίνακι ἀναφερομένων Νόμων ἢ οἱουδήποτε ἑτέρου Νόμου καὶ τηρουμένων τῶν διατάξεων τοῦ ἐδαφίου (2)—

(*α*)

(*β*)

(*γ*) εἰς περίπτωσιν καθ' ἣν οἱοσδήποτε συνταξιοῦχος ἀφυπηρέτησε καὶ δικαιοῦται μεταξὺ τῆς 1ης Ἀπριλίου, 1967 καὶ τῆς 31ης Δεκεμβρίου 1967, ἀμφοτέρων τῶν ἡμερομηνιῶν περιλαμβανομένων, εἰς ἐξειδικευθεῖσαν σύνταξιν ὑπαλλήλου, ἡ τοιαύτη ἐξειδικευθεῖσα σύνταξις αὐξάνεται ἀπὸ τῆς 1ης Ἰανουαρίου, 1968, διὰ ποσοῦ ἴσου πρὸς δεκατρία ἐπὶ τοῖς ἑκατὸν τῆς τοιαύτης ἐξειδικευθείσης συντάξεως, ἐν πάσῃ δὲ περιπτώσει διὰ ποσοῦ οὐχὶ μικροτέρου τῶν τεσσαράκοντα καὶ ὀκτὼ λιρῶν κατ' ἔτος .

Νοεῖται ὅτι εἰς περίπτωσιν συνταξιούχου—

(i) ὁ ὁποῖος ἀφυπηρέτησε δυνάμει τῶν διατάξεων τῶν περὶ Ἀποζημιώσεως Δικαιούχων Ὑπαλλήλων Νόμων τοῦ 1962, ἢ

(ii) τοῦ ὁποίου αἱ ὑπηρεσίαι ἐτερματίσθησαν δυνάμει τοῦ ἄρθρου 6 (στ) τοῦ περὶ Συντάξεων Νόμου, καὶ ὁ ὁποῖος μετὰ ταῦτα ὑπερέτησεν ἄνευ διακοπῆς εἰς θέσιν ἥτις

εἶναι συντάξιμος δυνάμει οἱουδήποτε νόμου αἱ ὡς ἄνω αὐξήσεις θὰ ἀρχίσωσι νὰ καταβάλλωνται εἰς αὐτὸν ἀπὸ τῆς ἡμερομηνίας τῆς τελικῆς ἀφυπηρετήσεως του, ἢ ἀπὸ τῆς 1ης Ἰανουαρίου 1968, ἐὰν ἡ ἡμερομηνία αὕτη εἶναι μεταγενεστέρα.

Νοεῖται περαιτέρω ὅτι αἱ ὡς ἄνω αὐξήσεις, ὁμοῦ μετὰ τοῦ συνόλου τῶν συντάξεων οἱουδήποτε τοιούτου συνταξιούχου ὅστις ἀφυπηρέτησε τελικῶς μετὰ τὴν 31ην Μαρτίου, 1967, δὲν θὰ ὑπερβαίνωσι τὸ σύνολον τῆς συντάξεως εἰς τὴν ὁποίαν οὗτος θὰ ἐδικαιοῦτο ἐὰν εἶχε συνεχίσει νὰ ὑπηρετῇ μέχρι τῆς τελικῆς ἀφυπηρετήσεώς του καὶ ἡ σύνταξίς του εἶχεν ὑπολογισθῇ ἐπὶ τοῦ συνόλου τῆς ὑπηρεσίας του καὶ ἐπὶ τῇ βάσει τοῦ μισθοῦ τὸν ὁποῖον ἐλάμβανε κατὰ τὴν ἡμέραν τῆς τελικῆς ἀφυπηρετήσεώς του.»

I shall now proceed to deal first with the first relief claimed by the applicants, and I would state that I find myself in agreement with counsel for the respondent that in the light of the provisions of Law 128/68, there can be no question of an omission on the part of the respondent, because the administration had no duty to discharge under the law. Of course, the question whether or not the proviso to section 3 (1) of Law 128/68 is or is not unconstitutional, is another matter. In fairness, however, to counsel for the applicants, I would make it clear that he did not pursue the point of omission in his argument, and I take it, therefore, that he has abandoned the question of omission. I would, therefore, dismiss this ground of relief.

The question which is posed is whether section 3 (1) (*f*) of Law 128/68, particularly its proviso, is unconstitutional as offending against the provisions of Article 28 of the Constitution, because the applicants are specifically excluded from the increase of their pension.

I would, before answering this question, express the view that retired officers are in a different position from serving officers. Their pensions were granted under the Pensions Law, Cap. 311 (as amended) and were computed in accordance with the provision in force at the actual date of their retirement. It seems to me, therefore, that they are not entitled as of right, to participate in increases of pay which serving officers may secure after their retirement. I suppose the philosophy behind this is that the pensioners are placed by the Government in the same

position as other persons who have to live on their own income. However, the Government apparently realising that they have some obligation to those persons who have spent a big part of their lives serving their country, tried occasionally to alleviate the hardship which the pensioners suffer as a result of rises in the cost of living after their retirement. It has been stressed before that additions to pensions strengthen the confidence also of serving officers who can rely on sympathetic treatment by the Government the day after their own retirement. It is clear, therefore, that the justification to additions to pensions of the pensioners is to provide some compensation due to the hardship caused by a substantial increase in the cost of living after their retirement.

We have it that by Law 13/61, all the cost of living allowances payable to pensioners up to March, 1961, were consolidated with pensions, except the allowances of 10% granted from January 1, 1959. When salaries were revised as from January 1, 1968, by about 18%, an increase of 13% was also granted to pensioners, plus the 10% allowance, plus the 6.5% increase, and all these increases were consolidated with pensions by Law No. 128/68.

It is to be observed that by the provisions of this law, as the respondents claim in their opposition, the applicants will also benefit, and their pensions will increase in respect of their service after the year 1960, because they continued serving with the Greek Communal Chamber.

The position in Greece with regard to a public servant who had retired from service and who has been employed in the public service, is that he is not entitled to receive his salary and his pension. See the well-known textbook of Kyriakopoullos, 1962, on Greek Administrative Law, 4th edn., Vol. ' C ', at p. 261 (note 42) ; also Dendias on Administrative Law, 4th edn., at p. 295 (note 5).

As I have said earlier, the main argument for the applicants was that the proviso to s. 3 (1)(*c*) of Law 128/68, is repugnant to or inconsistent with the provisions of Article 28 of the Constitution, which provides that : " 1. All persons are equal before the law, the administration and justice and are entitled to equal protection thereof and treatment thereby. 2. Every person shall enjoy all the rights and liberties provided for in this Constitution without any direct or indirect discrimination against the person on the ground of his community, race, religion, language, sex, political or other convictions, national or

social descent, birth, colour, wealth, social class, or on any ground whatsoever, unless there is express provision to the contrary in this Constitution ".

In considering the question of constitutionality of a statute, I have to be guided by certain well-established principles, governing the exercise of judicial control of legislative enactments. In doing so, in this judgment, I have adopted and followed the principles applicable by American Courts, and which were clearly and lucidly expounded on appeal by Josephides, J. in the case of *Board for Registration of Architects etc.* v. *Kyriakides* (1966) 3 C.L.R. 640 at p. 654, that " A rule of precautionary nature is that no act of legislation will be declared void except in a very clear case, or unless the act is unconstitutional beyond all reasonable doubt (*Calder* v. *Bull*, 3 Dall. 386, 399 (1798)). Sometimes, this rule is expressed in another way in the formula that an act of Congress or a State Legislature is presumed to be constitutional until proved otherwise, ' beyond all reasonable doubt ': see *Ogden* v. *Saunders*, 12 Wheat 212 (1827) ; and other cases ending with *Federation of Labor* v. *McAdory*, 325 U.S. 450 (1945) ; see also *The Attorney-General* v. *Ibrahim*, 1964 C.L.R. 195 ".

With these principles in view, I now turn to consider and to answer the question posed by me earlier, *viz.*, whether the proviso to s. 3 (1)(*c*) of the law offends against the provisions of Article 28.1 and 2 of the Constitution.

It is a well-known principle that in cases involving statutes, portions of which are valid and other portions invalid, the Court will separate the valid from the invalid, and throw out only the latter, unless such portions are inextricably connected. See *Pollock* v. *Farmers Loan & Trust Co.*, 39 Law. Ed. U.S. 601 at p. 635.

In *Argyris Mikrommatis* and *The Republic of Cyprus* (1961) 2 R.S.C.C. 125, Article 28.1 and 2 was judicially interpreted by the Supreme Constitutional Court of Cyprus, and Forsthoff P. had this to say at p. 131 :—

> " In the opinion of the Court the term ' equal before the law ' in paragraph 1 of Article 28 does not convey the notion of exact arithmetical equality but it safeguards only against arbitrary differentiations and does not exclude reasonable distinctions which have to be made in view of the intrinsic nature of things. Likewise, the term ' discrimination ' in paragraph 2 of Article 28 does not exclude reasonable distinctions as aforesaid."

Having considered carefully the arguments of both counsel, and in the light of the evidence adduced on behalf of the respondents, I have reached the view that the applicants have failed to satisfy me beyond reasonable doubt that the proviso to s. 3 (1) (*c*) is unconstitutional for the following reasons :

(*a*) Because since the abolition of the Greek Communal Chamber by Law 12/65 the applicants were given the opportunity to return the pension they had received from 1960–1965 so that their services prior to 1960 would be considered together with their subsequent service for pension purposes in order that they would be placed in the same position as their colleagues who after independence, continued to serve under the Republic ;

(*b*) because they have not elected to return the pension they have received since, in accordance with the evidence of Mr. Phinikarides, it was much more beneficial to the applicants to continue to draw their pension, as well as their salaries ;

(*c*) that the increases granted under the provisions of Law 128/68 in the pensionable emoluments of the public officers, certainly has given benefit to the applicants, and in due course would also increase their pensions in respect of their service after the year 1960.

(*d*) that if the increases in pensions under the said law were also applied to the pensions received by the applicants in respect of their service prior to 1960, the applicants would have been receiving a more advantageous treatment, *vis-a-vis* their colleagues ;

(*e*) that although the application of the proviso to s. 3 (1) (*c*) might result in the making of a reasonable distinction between a class of officers like the applicants and the other public officers, it did not discriminate against the applicants, and was not, therefore, unconstitutional ;

(*f*) that the law does not discriminate against the applicants, but, on the contrary, it provides a reasonable distinction which had to be made in view of the intrinsic nature of things, particularly so because the applicants would have been receiving double benefits if this differentiation was not made under the law.

For the reasons I have tried to advance, and in view of the fact that increases of pensions are granted to retired officers to alleviate their hardship, and once the applicants found themselves in this privileged position to be earning

a pension for their pre-1960 years of service, as well as receiving a salary in addition to a full pension which they would be entitled to receive after their retirement, I have reached the view that the decision of the Minister is not contrary to any of the provisions of the Constitution or of any law, or is made in excess or in abuse of powers vested in such organ. I would, therefore, dismiss the application, but in view of the fact that this is the first case which came before the Court, I have decided not to make an order for costs against the applicants.

Application dismissed. No order as to costs.