1978 December 18

[MALACHTOS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

MARINOS PIERI, THROUGH HIS FATHER AND NATURAL GUARDIAN ANDREAS PIERI,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTER OF INTERIOR AND DEFENCE,

Respondent.

(*Case No.* 304/78).

Administrative Law—Act or decision in the sense of Article 146.1 *of the Constitution—Executory act—Meaning—Certificate by Migration Officer stating that applicant is a conscript for the purposes of the National Guard Laws* 1964 *to* 1978*—It is not an executory act—It amounts only to a legal opinion concerning the applicant which could not directly affect him—Therefore, it cannot be made the subject of a recourse under the said Article* 146.1.

The applicant, who was born in East Pakistan and is the holder of a British passport, applied to the Migration Officer for a certificate certifying that he is not a citizen of the Republic of Cyprus. The Migration Officer issued to him the following certificate dated 11.7.1978:

"It is hereby certified that Mr. Marinos Pieri, born in East Pakistan on the 3rd January, 1961, holder of a British Passport No. D898599, is not a citizen of the Republic of Cyprus according to Law No. 43/67 and Annex D of the Treaty of Establishment.

2. For the purposes of the National Guard Laws 1964 to 1978, where the term 'citizen of the Republic' has the meaning which is attributed to it by virtue of section 2 of the National Guard (Amendment) Law No. 22/78, Mr.

Marinos Pieri, according to our records, is, nevertheless a conscript.

3. The above are issued for the exclusive use of the Ministry of Interior and Defence of the Republic of Cyprus."

Upon receiving this certificate the applicant filed a recourse contending that the act or decision of the Migration Officer was illegal. Counsel for the respondent raised a ground of law in the opposition to the effect that the certificate issued by the Migration Officer does not amount to an executory act and, consequently, it could not be attacked by a recourse.

On the questions: (a) Whether the said certificate amounts to an act or decision in the sense of Article 146 *of the Constitution and can, therefore, be the subject of a recourse, and (b) whether section* 2 *(definition of "citizen of the Republic") of the National Guard (Amendment) Law,* 1978 *(Law* 22/78) *is unconstitutional:*

Held, (1) that a decision or act, in the sense of paragraph 1 of Article 146, must be such as would directly affect a right or interest protected by law, of a particular person ascertainable at the time of taking such decision or doing such an act; that an administrative act or decision must be of an executory nature in order to be amenable within the competence of this Court under Article 146 of the Constitution; that, in other words, it must be an act by means of which the "will" of the administrative organ concerned has been made known in a given matter, an act which is aimed at producing a legal situation concerning the citizen affected and which entails its execution by administrative means; that the said certificate cannot be considered as an administrative act or decision of an executory nature, as it amounts only to a legal opinion concerning the applicant and could not directly affect him because at the time of filing of this recourse his class had not yet been called up for conscription; and that, accordingly, it cannot be made the subject of a recourse under the said Article 146 (*Erotokritou* v. *Republic* (1972) 3 C.L.R. 523 *applied*).

(2) That in view of the above conclusion this Court will not pronounce on the question of constitutionality of section 2 of Law 22/78 as this point may be the subject of a new recourse.

Application dismissed.

Cases referred to:

Erotokritou v. *The Republic* (1972) 3 C.L.R. 523.

Recourse.

Recourse against the decision of the respondent that the applicant is a conscript.

L. Clerides, for the applicant.

N. Charalambous, Counsel of the Republic, for the respondent.

Cur. adv. vult.

MALACHTOS J. read the following judgment. The applicant in this recourse, which is filed under Article 146 of the Constitution, claims a declaration of the Court that the decision of the Migration Officer dated 11th July, 1978, that the applicant is a conscript should be declared *null* and *void* and of no legal effect whatsoever.

The facts of the case shortly put are as follows:

The father of the applicant, Andreas Pieris, a Greek Cypriot was born on 28th April, 1929, in Limassol, where his parents were permanently residing. In 1949 he emigrated to East Pakistan.

The mother of the applicant also a Greek Cypriot was born in Limassol on 4th April, 1932.

The applicant was born on 3rd January, 1961 in East Pakistan where his parents were residing and he is the holder of a British passport.

The family returned to Cyprus in 1971 and they are residing in Limassol ever since. They have retained their British Nationality as they neither applied to obtain the Cypriot Nationality either by virtue of the Cyprus legislation or by virtue of Annex D of the Treaty of Establishment.

On 24/6/77, the Migration Department of the Ministry of Interior issued a Certificate to the applicant, *exhibit* 1, which reads as follows:

> " It is hereby certified that Mr. Marinos Pieri, born in East Pakistan on 3/1/61, and holder of British Passport No. D898599 is not a citizen of the Republic of Cyprus.
>
> This certificate is issued for the purpose of exit from

Cyprus only and is valid for many trips for the period of one year only."

By letter dated 10/7/78, the applicant, through his advocate, applied to the Migration Officer for the issue of a similar certificate certifying that the applicant is not a citizen of the Republic of Cyprus and the following certificate dated 11/7/78, *exhibit* 3, was issued to him:

"It is hereby certified that Mr. Marinos Pieri, born in East Pakistan on the 3rd January, 1961, holder of a British Passport No. D898599, is not a citizen of the Republic of Cyprus according to Law No. 43/67 and Annex D of the Treaty of Establishment.

2. For the purposes of the National Guard Laws 1964 to 1978, where the term 'citizen of the Republic' has the meaning which is attributed to it by virtue of section 2 of the National Guard (Amendment) Law No. 22/78, Mr. Marinos Pieri, according to our records, is, nevertheless a conscript.

3. The above are issued for the exclusive use of the Ministry of Interior and Defence of the Republic of Cyprus."

On the 15th day of July, 1978, the applicant filed the present recourse and the grounds of law on which his application is based, as stated therein, are that: The act and/or decision of the Chief Migration Officer is illegal in that:–

(a) the Migration Officer has no power on subjects of conscripts. This subject is within the exclusive power of the Minister of the Interior and Defence;

(b) In any case, and since it is admitted that the applicant is not a citizen of the Republic by virtue of Law 43/67, (The Republic of Cyprus Citizenship Law), and Annex D of the Treaty of Establishment, it is not possible to be considered as citizen of the Republic by virtue of the National Guard Laws so as to be liable for military service; and

(c) the amendment of the Law by virtue of section 2 of Law 22/78, is contrary to the Treaty of Establishment,

Annex D, and, consequently, is unconstitutional and *null* and *void*.

In the opposition, which was filed on the 28th November, 1978, it is stated as a ground of law that the certificate issued by the Migration Officer dated 11/7/78, does not amount to an executory act and, consequently, cannot be attacked by a recourse. This point, however, was not heard first as a preliminary legal issue, but with the consent of both counsel it was heard as part of the whole case, in view of the urgency of the matter, as the applicant attains on 3rd January, 1979, the age of eighteen and he may be called for conscription at any moment.

In the present recourse the following two points fall for consideration by the Court:-

(a) Whether the certificate of the Migration Officer dated 11/7/78, amounts to an act or decision in the sense of Article 146 of the Constitution, and, therefore, can be the subject of a recourse; and

(b) whether section 2 of the National Guard (Amendment) Law, 22/1978 as far as the term "citizen of the Republic" is concerned, is unconstitutional.

Able arguments were advanced by both counsel in support of their respective cases on the above points.

It is common ground that before the enactment of section 2 of Law 22/1978, the applicant could not be considered as a citizen of the Republic and, therefore, he was not liable to serve in the National Guard. The said section reads as follows:

"2. (α) ....

(β) διὰ τῆς ἐν αὐτῷ ἐνθέσεως, εἰς τὴν δέουσαν ἀλφαβητικὴν αὐτοῦ σειράν, τοῦ ἀκολούθου νέου ὁρισμοῦ:–

'πολίτης τῆς Δημοκρατίας' σημαίνει πολίτην τῆς Δημοκρατίας καὶ περιλαμβάνει πρόσωπον Κυπριακῆς καταγωγῆς ἐξ ἀρρενογονίας, ἤτοι –

(α) πρόσωπον, τὸ ὁποῖον κατέστη Βρεττανὸς ὑπήκοος δυνάμει τῶν περὶ Προσαρτήσεως τῆς Κύπρου Διαταγμάτων ἐν Συμβουλίῳ τοῦ 1914 ἕως 1943· ἤ

(β) πρόσωπον, τὸ ὁποῖον ἐγεννήθη ἐν Κύπρῳ κατὰ ἢ μετὰ τὴν 5ην Νοεμβρίου, 1914, καθ' ὃν χρόνον οἱ γονεῖς αὐτοῦ διέμενον συνήθως ἐν Κύπρῳ· ἢ

(γ) ἐξώγαμον ἢ νόθον τέκνον τοῦ ὁποίου ἡ μήτηρ κατεῖχε κατὰ τὸν χρόνον τῆς γεννήσεως αὐτοῦ τὰ προσόντα τὰ ἀναφερόμενα ἐν τῇ ἄνω παραγράφῳ (α) ἢ (β) τοῦ παρόντος ὁρισμοῦ· ἢ

(δ) πρόσωπον καταγόμενον ἐξ ἀρρενογονίας ἐκ προσώπου οἷον ἀναφέρεται ἐν τῇ ἄνω παραγράφῳ (α) ἢ (β) ἢ (γ) τοῦ παρόντος ὁρισμοῦ·"

("2. (a) .....

(b) By the insertion therein, in its proper alphabetical order, of the following new definition:-

'Citizen of the Republic' means citizen of the Republic and includes a person of Cypriot origin descended in the male line, *i.e.*:-

(a) a person who has become a British subject under the provisions of the Annexation of Cyprus Orders in Council 1914-1943; or

(b) a person born in Cyprus on or after the 5th November, 1914 at a time when his parents were ordinarily residing in Cyprus; or

(c) an illegitimate child whose mother, at the time of his birth, possessed the qualifications referred to in paragraphs (a) or (b) of this definition; or

(d) a person descended in the male line from a person referred to in paragraphs (a) or (b) or (c) of this definition.")

Article 146 of the Constitution is as follows:

"146.1. The Supreme Constitutional Court shall have exclusive jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, an act or omission of any organ, authority or person, exercising any executive or administrative authority is contrary to any of the provi-

sions of this Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person.

2. Such a recourse may be made by a person whose any existing legitimate interest, which he has either as a person or by virtue of being a member of a Community, is adversely and directly affected by such decision or act or omission."

As regards the first point to be decided, I am of the view that this falls within the four corners of the decision of this Court in the case of *Erotokritou* v. *The Republic* (1972) 3 C.L.R. 523 where it was decided that a letter of the Director of Personnel dated 14/7/71 to the Senior Mines Officer concerning the applicant, expressed only an opinion as to what the legal situation would be when the applicant would attain the age of retirement and therefore, the direct executory character of the act complained of was missing. In that case the applicant, who was a public servant, holding the permanent pensionable post of messenger 1st Grade, in the Department of Mines, served as a sanitary labourer in the Medical Department from 1/3/1933 to 20/11/1940. During this period he was in the regular employment of the Government as a wages employee. On 26/11/1940 he joined H.M. Forces after resigning his post for that purpose and served in the Cyprus Regiment up to 12/3/1946 when he was demobilised. Soon after his demobilization he applied for reemployment and, finally, he was on 8/10/1946, appointed as a messenger. On 1/7/1971 the applicant applied to the Director of Personnel through the Senior Mines Officer, for recognition of his service as a sanitary labourer and as a member of H. M. Forces for purposes of his pension. The applicant being born on 21/6/1912 was due to retire on 30/6/1972. He based his application on a Circular No. 765 (MP 1323/40), and the conditions attached thereto under which members of the unestablished staff and wages employees in regular employment who joined H. M. Forces between 3rd September, 1939 and the 15th August, 1945, and who were reemployed within one month after the expiration of their demobilization leave were eligible to the benefits under the Pensions Law, Cap. 311, as the time spent on war service, would not be regarded as a break in the Government service.

By letter dated 14th June, 1971, the Director of Personnel through the Senior Mines Officer informed the applicant that his military service cannot count for pension purposes under the provisions of section 17 of the Pensions Law, nor can be considered pensionable his previous service as sanitary labourer, in the Medical Department due to break of his service.

At pages 527 to 528 of this report we read:

" It has been decided in *Eleni Vrahimi and Another* and *The Republic*, 4 R.S.C.C. 121 at page 123, that 'a decision or act, in the sense of paragraph 1 of Article 146, must be such as would directly affect a right or interest protected by law, of a particular person ascertainable at the time of taking such decision or doing such an act'.

It is well established that a decision, an act or omission of any organ, authority or person exercising any executive or administrative authority, must be of an executory nature in order to be amenable within the competence of this Court under Article 146 of the Constitution. This principle has been accepted by the Full Bench of this Court in its appellate jurisdiction in the case of *Nicos Kolokassides* v. *The Republic* (1965) 3 C.L.R. 542.

In the judgment of the trial Judge in the above case, which was upheld, and which appears at page 549 of the report, it is stated at page 551:

'An administrative act (and decision also) is only amenable within a competence, such as of this Court under Article 146, if it is executory (ektelesti); in other words it must be an act by means of which the 'will' of the administrative organ concerned has been made known in a given matter, an act which is aimed at producing a legal situation concerning the citizen affected and which entails its execution by administrative means (see Conclusions from the Jurisprudence of the Council of State in Greece 1929–1959, pp. 236–237).

I am quite aware that in Greece this attribute of an act, which may be the subject of a recourse for annulment, is specifically stated in the relevant legislation (section 46 of Law 3713 as codified in 1961) but in my opinion such express

provision was only intended to reaffirm a basic requirement of administrative law in relation to the notion of proceedings for annulment and, therefore, such requirement has to be treated as included by implication, because of the very nature of things, in our own Article 146, though it is not expressly mentioned.'

In Case No. 1690/60 of the Greek Council of State it has been decided that an act which merely expresses the opinion of the Administrative Council of the Pensions Fund on a subject placed before them by the applicant himself in various applications, without the prerequisite of the application of the law being really in existence, and since no change was effected in the legal situation concerning the applicant, is not an executory act."

In the present case the letter of the Migration Officer dated 11th July, 1977, cannot be considered as an administrative act or decision of an executory nature, as it amounts only to a legal opinion concerning the applicant and could not directly affect him. His class on 15/7/78, the time of filing of this recourse, had not yet been called up for conscription.

In view of the above I am not going to pronounce on the second point *i.e.* the constitutionality of section 2 of Law 22/78 which amends the National Guard Laws 1964 to 1978, as this point may be the subject of a new recourse.

This recourse, therefore, fails.

On the question of costs I make no Order.

Application dismissed.
No order as to costs.