1979 November 24

[HADJIANASTASSIOU J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

NICOLAOS CONSTANTINOU,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE COUNCIL OF MINISTERS AND OTHERS,

Respondents.

(*Case No* 15/77).

Equality—Article 28 of the Constitution—Principle of Equality—Does not exclude creation of distinctions or differentiations if such a course is justified by adequate reasons—Compulsory retirement of army officer in the public interest on health grounds—Other Officers in the same position not retired—No explanation for the differentiation—Said retirement in violation of the said Article 28 of the Constitution—Annulled.

The applicant was serving in the Cyprus Army as a Captain. Following his examination by a Medical Board it was found that he was suffering from myelopathy and servical spondylosis and it was recommended that he was fit for office work only in his regiment. On December 9, 1976 the Council of Ministers decided, by virtue of the provisions of sections 6(st) and 7 of the Pensions Law, Cap. 311, that the applicant should be retired compulsorily in the public interest; and hence this recourse.

The main contention of applicant has been that the respondents have acted in a discriminatory manner towards him, contrary to Article 28 of the Constitution, in that four army officers and two police officers were kept in the service, and were not retired compulsorily, even though they were in the same position or in a worse position as compared with the applicant. In reply the respondents gave the following reasons which in their view justified the differentiation between those persons and the applicant:

"In the case of the officers referred to in recourse 15/77

though they suffer from the diseases mentioned therein, they continue to work, because it was not deemed necessary to be examined by the Government Medical Board due to lack of symptoms etc. or even if some of them had been examined by the Government Medical Board, they were considered as capable for service or because their service cannot be compared with that of ex captain Nicolaos Constantinou".

Held, that in the light of the constitutional command (see Article 28 of the Constitution) the administrative authorities in approaching the case of the applicant, having regard to the treatment they had afforded to the said six officers, were bound to abstain from using unequal treatment because of their duty to follow the rules of law, and particularly when no other reason was used against the applicant; that though the principle of equality does not exclude the creation of distinctions or indeed differentiations, if such a course is justified by adequate reasons, in this case there was only a laconic statement by the respondents which is hiding rather than clearly and lucidly presenting the reasons of differentiation of treatment between those officers and the applicant; that, therefore, there is no explanation why there was a discrimination or unequal treatment towards the applicant or any reason for such differentiation; that, consequently, there has been a clear violation of Article 28 of the Constitution; and that, accordingly, the *sub judice* decision must be annulled.

Sub judice decision annulled.

Cases referred to:

Missouri Pacific Railway Company v. *Humes*, 115 U.S. 512, 29 L. ed. 463;

Lindsley v. *Natural Carbonic Gas Company*, 220 U.S. 61, 55 L. ed. 369;

Power Manufacturing Co. v. *Saunders*, 274 U.S. 490, 71 L. ed. 1165;

Tigner v. *State of Texas*, 310 U.S. 141, 84 L. ed. 1124;

Semler v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 79 L. ed. 1086;

American Federation of Labor v. *American Sash & Door Company*, 335 U.S. 538, 93 L. ed. 222;

Williamson v. *Lee Optical of Oklahoma*, 348 U.S. 483, 99 L. ed. 563;

Morey v. *Doud*, 354 U.S. 457, 1 L. ed. 2d. 1485;

Levy v. *Louisiana*, 391 U.S. 68, 20 L. ed. 2d. 436;

Republic v. *Arakian and Others* (1972) 3 C.L.R. 294 at pp. 302–303;

Tsangarides (No. 2) v. *Republic* (1975) 3 C.L.R. 290;

Republic v. *Demetriades* (1977) 12 J.S.C. 2102 (to be reported in (1977) 3 C.L.R. 213);

Ioannides v. *Republic* (1979) 3 C.L.R. 295.

Recourse.

Recourse against the decision of the respondents to retire applicant from the ranks of the Cyprus Army.

L. Papaphilippou, for the applicant.

R. Gavrielides, Counsel of the Republic, for the respondents.

Cur. adv. vult.

HADJIANASTASSIOU J. read the following judgment. In these proceedings, under Article 146 of the Constitution, the applicant Nicolaos Constantinou seeks to challenge the act or decision of the Council of Ministers dated 9th December, 1976 to retire him from the ranks of the Cyprus Army, and claimed that such act or decision is null and void and of no effect whatsoever.

The facts are simple and are these: The applicant was enlisted in the Cyprus Army on 5th July, 1961, and after serving for a period of time he was promoted to various ranks. On 1st November, 1971, he was promoted to a captain, a post which he held until the year 1976. Because he was feeling ill he was examined by a Medical Board which found him to be suffering from myelopathy and servical spondylosis. Furthermore the medical board found that the applicant was able to do office work only. In fact the decision of the medical board together with the rest of the correspondence was sent to the appropriate Office in order to inform the applicant; so in the decision of the Medical Board it was clearly stated that the applicant should be used only for office work in his regiment. In fact, the applicant claimed that even before he became ill, he was doing mostly office work in the Cyprus Army and he alleged that that was a substantial part of his duties.

On 29th December, 1976, a letter was addressed to the applicant on behalf of the Director–General of the Ministry of Defence, informing him that the Council of Ministers by a decision No. 15453 of the 9th December, 1976, had decided his compulsory retirement from the Cyprus Army in the public

interest as from 1st March, 1977. There was further correspondence, and on 13th January, 1977, a letter was sent on behalf of the Director-General of the same Ministry to counsel for the applicant, informing him that the compulsory retirement of his client was based on sections 6(st) and 7 of the Pensions Law Cap. 311.

The applicant feeling aggrieved because of his compulsory retirement filed the present recourse on 18th January, 1977, and the application was based on the following grounds of law: (1) The respondents have acted in excess and/or in abuse of power because sections 6(st) and 7 of the Pensions Law Cap. 311 upon which they have relied do not give power to the respondents to impose a compulsory retirement on the applicant; (2) The respondents have acted under a misconception of facts because the suffering and/or illness of the applicant is not of such a nature as to entail danger to and/or be contrary to the public interest; (3) The illness from which the applicant is suffering viz., myelopathy and servical spondylosis does not prevent the applicant to carry out his duties, and/or in any event does not constitute a reason to compulsorily retire the applicant once he could have been placed in a post where his illness would not have been an obstacle; and (4) The respondents have acted in a discriminatory manner towards the applicant because in many other cases they did not proceed to the compulsory retirement of other officers serving in the army in spite of their permanent partial disability.

On 27th April, 1977, counsel for the applicant applied to the Court under rule 10(2) of the Supreme Constitutional Court Rules for the following particular directions: (1) That discovery be made of the documents in respondents' possession which are in any way connected with the recourse; (2) That copies of the documents so discovered be made available to applicant's counsel; (3) Detailed facts which lead the respondents to the conclusion that for reasons of public interest applicant ought to be dismissed; and (4) The law upon which the respondents apply in dismissing the applicant.

On 20th June, 1977, counsel acting for the respondents informed the Court that he had received the documents required and that they were available for perusal by his colleague. On 21st June, 1977, counsel for the respondents filed the opposition where it was stated that the decision attacked by this recourse was taken lawfully having regard to all the facts and

circumstances of the present case and that the respondents have properly exercised their discretionary powers in retiring the applicant.

In support of the opposition these facts were put forward: That because of his illness the usefulness of the applicant in the National Guard has been affected to a high degree and the Council of Ministers had decided in accordance with section 6(st) of the Pensions Law Cap. 311 and the rest of the relevant laws to retire him from service in the public interest, and according to section 7 of the said laws to grant him pension, gratuity or other allowances due to him according to his service in the National Guard.

On 1st September, 1978, counsel for the applicant in support of his legal ground 4, filed a document containing the names of four army officers and two police officers, who were kept in the service in spite of the fact that they were in the same position or indeed even in a worse position as compared to the applicant.

On 22nd June, 1979, counsel for the respondents made this statement: "After Mr. Papaphilippou filed the particulars of the fourth legal ground on which the present application is based, I forwarded the names of the persons still serving and of whom it was alleged that a discrimination has taken place, to the Ministry of Defence by a letter dated 3rd October, 1978. In reply to that letter I received a brief note and in paragraph 7 the appropriate authority states the reasons which in their view justify the differentiation between those persons and the applicant. I produce a copy of the said brief note marked *exhibit* 3(a), and I have nothing more to add to my previous address."

Paragraph 7 reads as follows in Greek:-

"Εἰς τὴν περίπτωσιν τῶν ἐν τῇ αἰτήσει τῆς Προσ. 15/77 ἀναφερόμενοι ἀξιωματικοί, καίτοι πάσχουν ἐκ τῶν ἐν αὐτῇ ἀναφερομένων νοσημάτων, ἐξακολουθοῦν νὰ ἐργάζονται, διότι δὲν ἐθεωρήθη ἀναγκαῖον νὰ ἐξετασθοῦν ὑπὸ τοῦ Ἰατρικοῦ Κυβερνητικοῦ Συμβουλίου, λόγω ἐλλείψεως συμπτωμάτων κτλ., ἢ καὶ ἐὰν μερικοὶ ἐξ' αὐτῶν ἐξητάσθησαν ὑπὸ τοῦ Ἰατρικοῦ Κυβερνητικοῦ Συμβουλίου, ἐθεωρήθησαν ἱκανοὶ δι' ὑπηρεσίαν, ἢ καθ' ὅτι δὲν δύναται νὰ γίνῃ σύγκρισις τῆς ὑπηρεσίας των μετ' ἐκείνης τοῦ πρώην Λοχαγοῦ Νικολάου Κωνσταντίνου".

("In the case of the Officers referred to in Recourse 15/77,

though they suffer from the diseases mentioned therein, they continue to work, because it was not considered necessary to be examined by the Government Medical Board, due to lack of symptoms etc. or even if some of them were examined by the Government Medical Board, were considered as capable for service, or because there cannot be made a comparison of their service with that of ex captain Nicolaos Constantinou").

Then Mr. Papaphilippou made this statement: "I adopt my previous address and I need not refer to any other point except that I should like to commend on paragraph 7 of the brief note filed by Mr. Gavrielides. There is an admission that what I stated in my particulars is a fact. They admit all the factual circumstances as given by the applicant, and I do believe that there is no room for them to differentiate as this treatment in fact amounts to a very discriminating treatment for the applicant. I submit that the applicant has proved beyond any doubt that he is a victim of discrimination towards the persons named in the better and further particulars in legal ground 4 of the application."

It is said time and again that the doctrine of the separation of powers has played a most important part in the history of modern Constitutions, and this doctrine is best stated by the French Jurist Montesquieu who acknowledged that:-

"When the legislative and executive powers are united in the same person, or in the same body..., there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty if the judicial power be not separated from the legislative and executive. Were it joined with the legislative the life and liberty of the subject would be exposed to arbitrary control; for the Judge would then be the legislator. Were it joined to the executive power, the Judge might behave with violence and oppression.

There would be an end of everything were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting

laws, that of executing the public resolutions, or that of trying the causes of individuals."

This doctrine had a decisive influence in the framing of the American Constitution and a very considerable influence in other countries particularly in France. The following declaration by the framers of the Constitution of Massachusetts shows clearly the weight given to that doctrine:-

"In the Government of this Commonwealth the legislative department shall never exercise the executive and judicial powers or either of them; the executive shall never exercise the legislative and judicial powers or either of them; the judicial shall never exercise the executive and legislative powers or either of them: to the end that it may be a government of laws and not of men".

In spite of the fact that the Constitution of Cyprus has not been enacted from the free will of its people, who had no opportunity, either directly or through their elected representatives to express an opinion thereon, the Constitution has followed this principle of separation of powers. Our Constitution is safeguarding also the fundamental rights and liberties of the citizen and the equality of all persons before the law. Article 28 of the Constitution says 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 any 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."

See also the recent Constitution of Greece of 1975 which in Article 4 introduces the principle enunciated by our Article 28.

In my view, in the light of our Constitutional command, the administrative authorities in approaching the case of the applicant, having regard to the treatment they had afforded to the six officers referred to earlier in this judgment, were

bound to abstain from using unequal treatment because of their duty to follow the rules of law, and particularly when no other reason was put forward against the applicant. The principle of equality, I repeat, does not exclude the creation of distinctions or indeed differentiations if such a course if justified by adequate reasons. In the present case, unfortunately, there was only a laconic statement by Mr. Houris of the Ministry of Defence, and I confess the way in which paragraph 7 of *exhibit* 3(a) has been drafted hides, rather than clearly and lucidly presents the reasons of differentiation of treatment between those officers and the present applicant in this case.

Having given the matter my full consideration, I find no explanation why there was a discrimination or unequal treatment towards the applicant or any reason for such differentiation, and I therefore accept the contention of counsel for the applicant that in this case there has been a clear violation of Article 28 of the Constitution. I would reiterate, no adequate reasons have been put forward that could indeed justify the different treatment afforded to the applicant from the rest of the six officers, and the administration has failed to adduce evidence regarding the medical history of the six other officers who were retained in the service of the Government.

In the United States of America, the application of the principle of equality has been dealt with in numerous cases decided by the Supreme Court. See *Missouri Pacific Railway Company* v. *Humes*, 115 U.S. 512, 29 L. ed. 463, *Lindsley* v. *Natural Carbonic Gas Company*, 220 U.S. 61, 55 L. ed. 369, *Power Manufacturing Co.* v. *Saunders*, 274 U.S. 490, 71 L. ed. 1165, and *Tigner* v. *State of Texas*, 310 U.S. 141, 84 L. ed. 1124.

In *Semler* v. *Oregon State Board of Dental Examiners*, 294 U.S. 608, 79 L. ed. 1086, it was held that an enactment making the use of certain types of advertising a ground for revocation of a licence to practise dentistry was not unconstitutionally discriminatory because it did not extend to other professional classes; in his judgment Chief Justice Hughes stressed (at p. 1089):-

> " The State was not bound to deal alike with all these classes, or to strike at all evils at the same time or in the same way."

In *American Federation of Labor* v. *American Sash & Door*

Company, 335 U.S. 538, 93 L. ed. 222, it was held that a State constitutional amendment which prohibits employment discrimination against non-union workers, but not against union workers, does not deny union workers equal protection of the laws, particularly where they are afforded protection by State Laws, even though it is not clear whether there is afforded the same kind of sanction to both clasess of workers.

In *Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483, 99 L. ed. 563, it was held that no violation of the equal protection clause of the Fourteenth Amendment to the U.S.A. Constitution had resulted from the fact that a State statute regulating the business of opticians exempted from regulation all sellers of ready-to-wear glasses. In his judgment Mr. Justice Douglas stated (at p. 573):-

> " Evils in the same field may be of different dimensions and proportions, requiring different remedies... The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."

In *Morey* v. *Doud*, 354 U.S. 457, 1 L. ed. 2d. 1485, Mr. Justice Burton adopted (at p. 1490), *inter alia*, the view, which was expressed earlier in the *Lindsley* case (*supra*) by Mr. Justice Van Devanter, that

> " A classification having some reasonable basis does not offend against that clause"—the equal protection clause— "merely because it is not made with mathematical nicety or because it results in some inequality".

In *Levy* v. *Louisiana*, 391 U.S. 68, 20 L. ed. 2d, 436, Mr. Justice Douglas pointed out (at p. 439) in his judgment:-

> " In applying the Equal Protection Clause to social and economic legislation, we give great latitude to the legislature in making classifications."

An exposition of the principle of equality can be found, also, in the decision of the European Court of Human Rights, of the Council of Europe, in the case "Relating to certain aspects of the laws on the use of languages in education in Belgium", which was decided in 1968; it was stated in this decision (at p. 34):-

> "...the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of

treatment is violated if the distinction has no objective and reasonable justification."

In *Republic (Minister of Finance)* v. *Nishan Arakian and Others*, (1972) 3 C.L.R. 294, the Court had this to say regarding Article 28.1 of our Constitution at pp. 302–303:–

" In the circumstances, and especially as the *sub judice* refusal of the Ministry of Finance to grant to the respondents a cost of living allowance tied to the cost of living index has been coupled with a statement of readiness to consider, instead, when necessary, the grant of increases of pensions in accordance with the aforementioned established practice, we are of the opinion that it ought not to be held that such refusal amounts to a differentiation between serving public officers and pensioners public officers which, in the light of the proper application of the principle of equality, is contrary to, or inconsistent with, Article 28.1 of the Constitution. It was up to the respondents, as the persons complaining of unequal treatment (see, *inter alia*, Lindsley, *supra*, and Morey, *supra*), to show that the decision in question of the Ministry of Finance did not rest upon any reasonable basis and that it was essentially arbitrary; and they have failed to do so."

In the light of the authorities and the reasons I have given at length, I do not propose to deal with the rest of the arguments of counsel for the applicant, and exercising my powers under Article 146 of the Constitution, I declare that the decision or act of the administrative authorities is null and void and of no effect whatsoever. (See *Nicos Tsangarides and Others (No. 2)* v. *The Republic* (Minister of Defence and Another), (1975) 3 C.L.R. 290; *The Republic* v. *Demetriades*, (1977) 12 J.S.C. 2102;* and *Constantinos Ioannides* v. *The Republic*, (1979) 3 C.L.R. 295).

Decision annulled, but in the particular circumstances of this case, I do not propose making an order for costs against the Republic.

Sub judice decision annulled. No order as to costs.

* To be reported in (1977) 3 C.L.R. 213.