1980 October 4

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

SIMEON DROUSIOTIS,

Applicant,

v.

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

Respondent.

(*Case No.* 123/80).

Constitutional Law—Constitutionality of legislation—Section 2(b) of the National Guard (Amendment) Law, 1978 (Law 22/78)—Unconstitutional as offending Article 198 of the Constitution and Annex "D" to the Treaty of Establishment.

National Guard—Military service—Citizen of the Republic—Alien—Liability to serve in the National Guard—Section 2(b) of the National Guard (Amendment) Law, 1978 (Law 22/78) imposing such a liability on persons who are not citizens of the Republic, but have descended in the male line from persons of Cyprus origin—Unconstitutional as offending Article 198 of the Constitution and Annex "D" to the Treaty of Establishment.

Citizenship—Law applicable.

Alien—Obligation for military service—Principles of International Law.

The applicant was a national of South Africa and was born there on the 14th April, 1961 at the time when both his parents were residing there. His father was born in Cyprus on the 18th February, 1918 and in 1948 he emigrated to South Africa where he became a permanent resident and acquired the nationality of South Africa. He died in South Africa in 1962. Applicant's mother was born in Cyprus on the 13th October, 1926, got married to his father in 1953 and joined him in South Africa where she resided permanently. She was a british subject and holder of a British passport. Applicant's parents were residing outside Cyprus before 1955;

and, consequently, they were never citizens of the Republic of Cyprus under the provisions of Annex "D" to the Treaty of Establishment of the Republic of Cyprus or the Republic of Cyprus Citizenship Law, 1967 (Law 43/67). Applicant came to Cyprus in 1962 with his mother after the death of his father and has been living in Cyprus ever since. It was an undisputed fact that the applicant was not a citizen of the Republic but was a person who has descended in the male line from a person of Cyprus origin; and that before the enactment of section 2* of the National Guard (Amendment) Law, 1978 (Law 22/78) he was not liable for service in the National Guard under section 4 of the National Guard Laws 1964–1977 which imposed such duty on citizens of the Republic only. Following the enactment of the above section 2 applicant was considered as liable for service in the National Guard and when he was called up for such service he challenged the relevant decision by means of this recourse whereby he sought a declaration that he was not bound to enlist and serve in the National Guard.

Counsel for the applicant contended that section 2 of Law 22/78 was unconstitutional as offending the provisions of Annex "D" to the Treaty of Establishment, which was safeguarded by Article 198 of the Constitution and was, also, contrary to the provisions of Law 43/67.

Held (*after dealing with citizenship under the Constitution and the relevant legislation and with the obligation of aliens to military service under International Law vide pp.* 570–83 *post*), that section 2(b) of the National Guard (Amendment) Law, 1978 (Law 22/78) is contrary to the provisions of Article 198 of the Constitution and Annex "D" to the Treaty of Establishment which has been incorporated in Article 198 and the Republic of Cyprus Citizenship Law, 1967 (Law 43/67) (*Pieri* v. *The Republic* (1979) 3 C.L.R. 91 at p. 98 *adopted*); and that, accordingly, applicant is entitled to the declarations prayed for in this recourse.

Sub judice decision annulled.

Cases referred to:

Simadhiakos v. *The Police*, 1961 C.L.R. 4;

Pieri v. *The Republic* (1979) 3 C.L.R. 91;

Polites v. *The Commonwealth of Australia* (1945) C.L.R. Vol. 70 at p. 60.

* Quoted at pp. 574–75 *post*.

Recourse.

Recourse against the decision of the respondent whereby the applicant was asked to enlist and serve in the National Guard.

X. Xenopoulos, for the applicant.

K. Michaelides, for the respondent.

Cur. adv. vult.

SAVVIDES J. read the following judgment. The applicant in this recourse claims for—

(a) A declaration that the applicant is not bound to enlist and serve in the National Guard.

(b) A declaration that the act and/or decision of the respondent communicated through the person in charge of the Army Recruiting Office on or about the 10th April, 1980, whereby the applicant was asked to enlist and serve in the National Guard, should be declared null and void.

The applicant is a national of South Africa and was born there on the 14th April, 1961 at the time when both his parents were residing there. His father was born in Cyprus on the 18th February, 1918 and in 1948 he emigrated to South Africa where he became a permanent resident and acquired the nationality of South Africa. Applicant's father died on the 26th July, 1962 and was burried in South Africa. Applicant's mother was born in Pano Lefkara on the 13th October, 1926 and she got married to his father in 1953 and joined him in South Africa where she resided permanently. She is a British subject and holder of a British passport. Applicant's parents were residents outside Cyprus long before 1955 and they never had their permanent residence in Cyprus at any time between the years 1950 and 1960. In consequence, they were never citizens of the Republic of Cyprus under the provisions of Annex "D" of the Constitution or the Law of Citizenship of 1967 (Law 43/67).

After the death of his father applicant's mother came to Cyprus in September, 1962 bringing with her applicant and her two daughters and all of them have been living in Cyprus ever since.

On the 16th April, 1979 applicant through his advocate

applied for exemption from service in the National Guard on the ground that he was not a citizen of the Republic of Cyprus. Copy of such letter was produced as *exhibit* 1 and reads as follows:

" 'Ενετάλην ὑπὸ τοῦ ὡς ἄνω πελάτου μου νὰ ἀπευθυνθῶ πρὸς ὑμᾶς καὶ εὐσεβάστως νὰ ὑποβάλω αἴτησιν ὅπως οὗτος ἐξαιρεθῆ ἐκ τῆς ὑποχρεώσεως κατατάξεως καὶ ὑπηρεσίας εἰς τὴν 'Εθνικὴν Φρουράν, διὰ τοὺς κάτωθι ἀναγραφομένους λόγους:

(α) 'Ο ὡς ἄνω πελάτης μου/αἰτητὴς, ἐγεννήθη εἰς τὴν Νότιον 'Αφρικὴν τὴν 14ην 'Απριλίου, 1961 καὶ εἶναι 'Υπήκοος τῆς Νοτίου 'Αφρικῆς καὶ κάτοχος διαβατηρίου τῆς χώρας αὐτῆς ὑπ' ἀριθμὸν PO34334. ("Ιδετε ἐσωκλείστους φωτοτυπίας, τεκμήρια Α, Β καὶ Γ).

(β) 'Ο πατὴρ αὐτοῦ Νῖκος Σ. Δρουσιώτης ἐγεννήθη ἐν Κύπρω τὴν 18ην Φεβρουαρίου 1918, κατὰ δὲ ἢ περὶ τὸ 1946 μετηνάστευσεν εἰς Νότιον 'Αφρικὴν ὅπου καὶ ἀπέκτησεν 'Υπηκοότηταν τῆς Νοτίου 'Αφρικῆς καὶ ἦτο κάτοχος διαβατηρίου τῆς χώρας αὐτῆς ὑπ' ἀρ. J65303. Κατὰ ἢ περὶ τὴν 26ην 'Ιουλίου 1962, οὗτος ἀπεβίωσεν καὶ ἐτάφη εἰς Νότιον 'Αφρικὴν, τὴν 28ην 'Ιουλίου, 1962. ("Ιδετε τεκμήρια Δ, Ε καὶ Ζ).

(γ) 'Η μήτηρ αὐτοῦ Χλόη Ν. Δρουσιώτη, πρώην Παυλίδου, ἐγεννήθη εἰς Πάνω Λεύκαρα τὴν 13ην 'Οκτωβρίου, 1926, συνεζεύχθη δὲ τὸν ἀποβιώσαντα Νῖκον Σ. Δρουσιώτη κατὰ/ἢ περὶ τὸ 1953 καὶ μεταβάσα μετ' αὐτοῦ εἰς Νότιον 'Αφρικὴν, ἐγκατεστάθη μονίμως. Εἶναι 'Υπήκοος τοῦ 'Ηνωμένου Βασιλείου καὶ κάτοχος τοῦ ὑπ' ἀρ. 80321 Βρεττανικοῦ Διαβατηρίου.

(δ) Κατὰ ἢ περὶ τὴν 4ην Σεπτεμβρίου, 1962, ὁ ὡς ἄνω πελάτης μου μετὰ τῆς μητρὸς αὐτοῦ καὶ τῶν δύο ἀδελφῶν αὐτοῦ Δήμητρας καὶ 'Ελίζας, ἀφίχθησαν καὶ ἐγκατεστάθησαν εἰς τὴν Κύπρον, ὅπου καὶ διαμένουν ἔκτοτε.

(ε) 'Εν ὄψει τῶν ἀνωτέρω καὶ ἐν ὄψει τοῦ γεγονότος ὅτι οἱ γονεῖς τοῦ ὡς ἄνω πελάτου μου ἦσαν ἐγκατεστημένοι ἐκτὸς Κύπρου πρὸ τοῦ 1955, καὶ οὗτοι οὐδέποτε ὑπῆρξαν Κύπριοι 'Υπήκοοι, ἢ καθ' οἱονδήποτε χρόνον μεταξὺ 1955 καὶ 1960 εἶχον τὴν συνήθη αὐτῶν διαμονὴν ἐν Κύπρω, καθ' ὅτι κατὰ τὸν χρόνον ποὺ ἐγκατέλειψαν

την Κύπρον ήσαν Βρεττανοί Ύπήκοοι της Κύπρου, ούσης τότε Βρεττανικής Αποικίας, άποκτήσαντες μεταγενεστέρως, ό μέν άποβιώσας πατήρ Ύπηκοότητα Νοτίου Αφρικής, ή δέ μήτηρ διατηρήσασα την Βρεττανικήν τοιαύτην, εύσεβάστως ύποβάλλω ότι ό ώς άνω πελάτης μου δέν δύναται νά χαρακτηρισθή ώς Πολίτης της Δημοκρατίας δυνάμει τού Νόμου 43/67 καί τού παραρτήματος 'Δ' της Συνθήκης Εγκαθιδρύσεως.

(ζ) Περαιτέρω δέ έπιθυμώ νά άναφερθώ είς την πρόσφατον άπόφασιν τού Ανωτάτου Δικαστηρίου Κύπρου ύπ' άρ. 304/78 μεταξύ Μαρίνου Πιερή καί της Κυπριακής Δημοκρατίας, ή όποία πιστεύω ότι είναι χρήσιμος καί είς την παρούσαν ύπόθεσιν.

Εν όψει τών άνωτέρω, εύσεβάστως ύποβάλλω αίτησιν όπως έκδοθή Πιστοποιητικόν ότι ό ώς άνω πελάτης μου δέν είναι Πολίτης της Κυπριακής Δημοκρατίας καθώς καί Βεβαίωσις ότι ούτος δέν θεωρείται στρατεύσιμος καί έξαιρείται της ύποχρεώσεως κατατάξεως καί ύπηρεσίας είς την Εθνικήν Φρουράν."

("I have been directed by my above client to apply to you and humbly submit an application so that he may be exempted from the obligation to enlist and serve in the National Guard for the following reasons:

(a) My above client/applicant, was born in South Africa on the 14th April, 1961 and is a citizen of South Africa and holder of passport No. PO34334 of this country. (See enclosed photocopies, *exhibits* A, B and C).

(b) His father Nicos S. Drousiotis was born in Cyprus on the 18th February, 1918, and on or about 1946 he emigrated to South Africa where he obtained the citizenship of South Africa and was the holder of passport No. J. 65303 of this country. On or about the 26th July, 1962 he died and was buried in South Africa on the 28th July, 1962. (See *exhibits* D, E and F).

(c) His mother Chloi N. Drousioti, formerly Pavlidou, was born at Pano Lefkara on the 13th October, 1926, was married to the deceased Nicos S. Drousiotis

on or about 1953 and having gone with him to South Africa, she settled there permanently. She is a citizen of the United Kingdom and holder of British passport No. 80321.

(d) On or about the 4th September, 1962, my above client with his mother and his two sisters Demetra and Eliza, came and settled in Cyprus, where they have been residing ever since.

(e) In view of the above and in view of the fact that the parents of my above client were residing outside Cyprus before 1955, and that they have never been citizens of Cyprus, or at any time between 1955 and 1960 had their residence in Cyprus, since at the time when they left Cyprus they were British subjects of Cyprus, which was then a British Colony, and the deceased father having acquired later the citizenship of South Africa, and the mother having retained the British citizenship, I humbly submit that my above client cannot be considered as a citizen of the Republic by virtue of Law 43/67 and Annex 'D' to the Treaty of Establishment.

(f) Further I would like to refer to the recent decision of the Supreme Court of Cyprus No. 304/78 between *Marinos Pieri and The Republic* which I believe is useful in the instant case.

In view of the above I humbly submit an application for the issue of a certificate that my above client is not a citizen of the Republic of Cyprus and a confirmation that he is not considered as a conscript and is exempted from the obligation to enlist and serve in the National Guard").

On or about the 26th May, 1979 the respondent in reply to such letter, informed the applicant that he was not a citizen of the Republic and in consequence he had no duty to serve in the National Guard. Such letter reads as follows:

" 'Ενετάλην ὅπως ἀναφερθῶ εἰς τὴν ἐπιστολήν σας ἡμερομηνίας 16ης 'Απριλίου 1979 ἐν σχέσει μὲ τὰς στρατιωτικὰς ὑποχρεώσεις τοῦ πελάτου σας Συμεών Δρουσιώτη τοῦ Νίκου καὶ τῆς Χλόης ὁ ὁποῖος ἐγεννήθη εἰς Νότιον 'Αφρικὴν τὴν

14.4.1961 καὶ νὰ σᾶς πληροφορήσω ὅτι ἐκ τῆς ἐξετάσεως τῶν παρ' ἡμῖν στοιχείων προκύπτει ὅτι ὁ ἐν θέματι Συμεὼν Δρουσιώτης δὲν ἀπέκτησεν μέχρι σήμερον τὴν Κυπριακὴν ὑπηκοότητα δυνάμει τοῦ ἐν Κύπρῳ κρατοῦντος δικαίου περὶ 'Ιθαγενείας, καὶ ἐφ' ὅσον δὲν εἶναι πολίτης τῆς Δημοκρατίας, οὗτος δὲν ὑπέχει ἐπὶ τοῦ παρόντος ὑποχρέωσιν θητείας εἰς τὴν 'Εθνικὴν Φρουράν."

("I have been directed to refer to your letter dated 16th April, 1979 in respect of the military obligations of your client Symeon Droushiotis, son of Nicos and Chloi, who was born in South Africa on the 14.4.1961 and to inform you that on examination of our records it appears that the above-named Symeon Droushiotis, until to-day, has not acquired, the Cypriot citizenship in accordance with Citizenship legislation in force in Cyprus and since he is not a citizen of the Republic, he is not liable, for the time being, to serve in the National Guard").

Relying on the said letter he continued residing in Cyprus preparing himself for admission in a University in Italy.

In the summer of 1979 applicant left Cyprus for a short period and returned back without any problem arising concerning an exit permit. After his re-entry to Cyprus he was issued with an alien's registration certificate issued by the Republic of Cyprus dated the 14th November, 1979, photocopy of which appears in *exhibits* 3 and 4 and with a temporary resident's permit (*exhibit* 12) permitting him to stay in Cyprus as a visitor till the 30th August, 1980. The applicant intends now to proceed to Italy for University studies in architecture.

On or about the 10th of April, 1980, applicant was informed by the Police authorities to appear at the police station where he was told that he should enlist in the National Guard for service as from July, 1980. The applicant got in touch with the Army recruiting office to whom he produced the letter of the Minister exempting him from service and he was informed that if he fails to enlist in July, 1980 he will be prosecuted before the Court Marshal. As a result, he filed the present recourse.

Though there is no written document embodying the alleged decision for his enlistment in the National Guard, there is no

dispute about this fact as by para. 7 of the facts set out in the Opposition, it is admitted that applicant was called to serve in the National Guard and that in any event such act was lawful. The decision complained of is admitted under para. 1 of the Opposition, whereby it is stated that the decision complained of was lawful and had been taken in accordance with the National Guard Laws 1964–1979.

It is an undisputed fact that the applicant is an alien with permission to stay in Cyprus till the end of August, 1980, subject to the renewal of his permit.

It is also a common ground that before the enactment of section 2 of the National Guard (Amendment) Law, 1978 (Law 22/78), the applicant could not be considered as a citizen of the Republic and therefore, he was not liable for service in the National Guard under the provisions of section 4 of the National Guard Laws 1964–1977 which imposed such duty on citizens of the Republic only.

As there was no material dispute about the facts of the case, counsel restricted themselves in arguing the legal aspect of the case which turns around the question of the constitutionality of section 2(b) of the National Guard (Amendment) Law, 1978 (Law 22/78) whereby the previous section 2 of the National Guard Laws 1964–1977 is amended. Counsel for applicant submitted that such amendment is unconstitutional, as offending the provisions of Annex "D" of the Treaty of Establishment the provisions of which were safeguarded by Article 198 of the Constitution and also is contrary to the provisions of Law 43/67 which makes provision about the citizenship of Cyprus.

I shall first consider the position regarding citizenship under our Constitution and the respective legislation. The Constitution of Cyprus which resulted from the Zurich and London agreements, presents certain features resulting from the recognition of two communities, the Greek and the Turkish. Such division is permeating the whole Constitution of the Republic of Cyprus. Some examples of this, are the creation of two separate Communal Chambers having separate exclusive jurisdiction on certain matters, the structure of the judiciary, the rights given to the Turkish minority members of the House of Representatives in respect of certain matters and certain

other powers safeguarded for the Vice-President of the Republic. The particular features resulting from such recognition concerning the judiciary appear in the judgment of Vassiliades, J. as he then was, in the case of *Simadhiakos* v. *The Police*, 1961 C.L.R. p. 64. Provisions which establish the recognition of two communities and certain rights safeguarded for each community separately appear not only in the text of the Constitution but also in some of the agreements signed by the interested parties and attached to the Constitution as annexes thereto at the time of the signing of the Constitution.

One of these Annexes, Annex "D" makes express provision as to the citizenship. Certain categories of people become entitled to acquire automatically the citizenship of Cyprus, under the provisions of section 2 of such Annex. Other provisions are made in respect of persons not falling within section 2 as to when and how they can acquire the citizenship of Cyprus. An important feature of Annex "D" which shows clearly the intention of the drafters of our Constitution and the participants in the signing of the agreements to keep a balance between the Greek and the Turkish communities regarding the acquisition of citizenship is the express provision of paragraph 7(a) of section 4 and the table set out in such paragraph whereby it is provided that a percentage of 80 per cent in respect of Greeks and 20 per cent in respect of Turks is to be preserved, in case of applications for the acquisition of the citizenship of Cyprus. Provision is made under such paragraph that—

> "Applications shall be granted up to the full number given in each space in that Table in respect of applicants of each class irrespective of the number of applications made by or granted to applicants of any other class".

This restriction refers to persons falling within the provisions of paragraphs (1)—(6) of section 4. Paragraph 2 reads as follows:

> "A person of Cypriot origin who immediately before the date of this Treaty was not a citizen of the United Kingdom and Colonies shall be entitled, on application to the appropriate authority of the Republic of Cyprus, to be granted on or after the agreed date citizenship of the Republic of Cyprus. For the purpose of this paragraph, 'a person of Cypriot origin' means a person who was, on the 5th

of November, 1914, an Ottoman subject ordinarily resident in the Island of Cyprus or who is descended in the male line from such a person".

The provisions of Annex "D" were incorporated in Article 198 of the Constitution which provides as follows:

"1. The following provisions shall have effect until a law of citizenship is made incorporating such provisions—

(a) any matter relating to citizenship shall be governed by the provisions of Annex 'D' to the Treaty of Establishment;

(b) any person born in Cyprus on or after the date of the coming into operation of this Constitution, shall become on the date of his birth a citizen of the Republic if on that date his father has become a citizen of the Republic or would but for his death have become such a citizen under the provisions of Annex 'D' to the Treaty of Establishment.

2. For the purposes of this Article 'Treaty of Establishment' means the Treaty concerning the Establishment of the Republic of Cyprus between the Republic, the kingdom of Greece, the Republic of Turkey and the United Kingdom of Great Britain and Northern Ireland".

In 1967 Law 43/67 was enacted under the provisions of Article 198 making provision about citizenship of Cyprus. Under section 3 of the said Law, the provisions of Annex "D" were incorporated in the said Law. Section 3 reads as follows:

"3. Πολῖται τῆς Δημοκρατίας εἶναι τὰ πρόσωπα τὰ ὁποῖα, κατὰ τὴν ἡμερομηνίαν τῆς ἐνάρξεως τῆς ἰσχύος τοῦ παρόντος Νόμου, ἀπέκτησαν ἢ δικαιοῦνται νὰ ἀποκτήσωσι τὴν ἰδιότητα τοῦ πολίτου τῆς Δημοκρατίας δυνάμει τῶν διατάξεων τοῦ Παραρτήματος Δ ἢ τὰ ὁποῖα μετὰ τὴν ρηθεῖσαν ἡμερομηνίαν ἀποκτῶσι τὴν τοιαύτην ἰδιότητα τοῦ πολίτου δυνάμει τῶν διατάξεων τοῦ παρόντος Νόμου."

("3. Citizens of the Republic are the persons who, on the date of the coming into operation of this Law, either have acquired or are entitled to acquire citizenship of the Republic under the provisions of Annex D or who acquire

thereafter such citizenship under the provisions of this Law").

In 1964 due to the abnormal situation which was created as a result of the intercommunal troubles, Law 20/64 was enacted, providing for the setting up of a military force under the name "National Guard". S. 3 empowers the Council of Ministers whenever considering it necessary, to proceed with the settling up of the National Guard and also it makes provision as to the persons liable to serve in such force. Section 3 reads as follows:

"3. (1) Τὸ Ὑπουργικὸν Συμβούλιον δύναται ὅταν θεωρήσῃ τοῦτο σκόπιμον λόγῳ ἀπειλουμένης εἰσβολῆς ἢ οἱασδήποτε ἐνεργείας κατευθυνομένης κατὰ τῆς ἀνεξαρτησίας ἢ τῆς ἐδαφικῆς ἀκεραιότητος τῆς Δημοκρατίας ἢ ἀπειλούσης τὴν ἀσφάλειαν ζωῆς ἢ περιουσίας νὰ προβῇ εἰς τὸν σχηματισμὸν δυνάμεως, ἥτις θὰ καλῆται 'Ἐθνικὴ Φρουρά', ἐπὶ σκοπῷ βοηθείας τοῦ στρατοῦ τῆς Δημοκρατίας ἢ τῶν δυνάμεων ἀσφαλείας ταύτης ἢ καὶ ἀμφοτέρων εἰς ὅλα τὰ μέτρα τὰ ἀπαιτούμενα διὰ τὴν ἄμυναν αὐτῆς.

(2) Τηρουμένων τῶν διατάξεων τοῦ ἄρθρου 10 ἡ Δύναμις συνίσταται ἐκ στρατευσίμων πολιτῶν τῆς Δημοκρατίας οἵτινες ἠθελον κληθῇ δι' ὑπηρεσίαν δυνάμει τῶν διατάξεων τοῦ παρόντος Νόμου καὶ συγκροτεῖται ἐξ ἀξιωματικῶν καὶ ἀνθυπασπιστῶν μονίμων, δοκίμων καὶ ἐπικούρων καὶ ἐξ ὁπλιτῶν ἀποτελουμένων ἐκ στρατευσίμων καὶ στρατευσίμων ἐθελοντῶν.

(3) Τὸ Ὑπουργικὸν Συμβούλιον κέκτηται ἐξουσίαν ἀπὸ καιροῦ εἰς καιρὸν ὅπως καθορίζῃ τὸν ἀριθμὸν τῆς Δυνάμεως εἰς ἀξιωματικοὺς καὶ ὁπλίτας."

("3.–(1) The Council of Ministers may, when it considers it expedient because of a threatened invasion or any activity directed against the independence or the territorial integrity of the Republic or threatening the security of life or property, proceed to the establishment of a force, to be called 'National Guard', with the object of aiding the army of the Republic or its security forces or both in all measures required for its defence.

(2) Subject to the provisions of section 10, the Force shall consist of citizens of the Republic who are liable to serve and who may be called out for service under the

provisions of this Law and be composed of officers and warrant officers, regular, on probation and auxiliary, and other ranks comprising servicemen and service volunteers.

(3) The Council of Ministers may from time to time prescribe the strength of the Force in officers and other ranks.")

It is clear from the provisions of section 3 sub-section (2) that such force could only be set up of citizens of the Republic and was not intended to extend to any other persons. In section 2 of the said Law, there is no provision as to who are considered citizens of the Republic. It was obvious that there was no need for such provision as it was clear from the provisions of Article 198 of the Constitution as to the persons who could be treated as citizens of the Republic. The said law underwent numerous amendments by subsequent legislation but there was no amendment of section 3. In 1978, Law 22/78 was enacted, effecting certain amendments to the previous laws, all of which, except one, are not material for the purposes of the present case. The only material amendment was effected by section 2 of such law by introducing a definition of the words "citizen of the Republic" for the purposes of such law. Such section reads as follows:

"2. Τὸ ἄρθρον 2 τοῦ βασικοῦ νόμου τροποποιεῖται ὡς ἀκολούθως:

(α) ---

(β) διὰ τῆς αὐτῶ ἐνθέσεως εἰς τὴν δέουσαν ἀλφαβητικὴν αὐτοῦ σειρὰν, 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 Συμβουλίω τοῦ 1914 ἕως 1943· ἢ

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

("Section 2 of the principal law is hereby amended as follows:–

(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, that is–

(a) a person who has become a British subject under the provisions of the Cyprus (Annexation) 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").

It is clear that such definition was creating a situation in which a person otherwise treated as an alien under the Constitution and the legislation of Cyprus concerning aliens was to be deemed as a citizen of the Republic for the purposes of the National Guard Law. The question of constitutionality of such section was raised before this Court in the case of *Pieri* v. *The Republic* (1979) 3 C.L.R. 91 in which the Court after considering such section in the light of Article 198 of the Constitution, reached the conclusion that such provision was uncon-

stitutional as offending Article 198 of the Constitution. In concluding the judgment, Malachtos, J. at page 98 had this to say:

> "It is clear from the provisions of Article 198 that any law of citizenship made which does not incorporate the provisions of Annex D to the Treaty of Establishment or incorporates provisions which are contrary to the provisions of Annex D, is unconstitutional, as offending the said article. Therefore, section 2(b) of the National Guard (Amendment) Law, 1978, is unconstitutional. Consequently, the decision of the Council of Ministers under No. 17378 dated 2/11/1978, which was published in the official Gazette of the Republic of the 17th November, 1978, by which the class of the applicant was called up for conscription, in so far as the applicant is concerned, is declared null and void and of no legal effect whatsoever."

The said judgment, though a judgment of a Judge exercising original jurisdiction, was not appealed from and formed the basis of future conduct of the Government till the time that they decided to ignore the said judgment and treat the persons of the category of the applicant as liable to military conscription under the 1978 amendment.

Counsel for respondent contested the validity of the said judgment and submitted that the said amendment was made for the purposes of that particular law, and that even under the International Law, aliens were subject to military conscription in cases of emergency

Once International Law was raised by counsel, I shall deal briefly with the position arising under the International Law before making my final verdict on the issue before me. In Greig's International Law, 1st Edition, 1970 at p. 66, it reads as follows:-

> "Not surprisingly, the rule that customary international law is part of the law of the land is generally accepted, and in cases of conflict with municipal legislation, the statutory provision prevails. One of the best known authorities for this proposition is the decision of the Australian High Court in *Polites* v. *The Commonwealth*, in which it was held that though there was a rule of international law that

aliens should not be compelled to serve in the military forces of the foreign state where they happened to be, and though such a rule was therefore part of the law of the land, the rule of construction that, in the interpretation of statutes, it must be presumed that Parliament did not intend to act in derogation of the principles of international law was ousted in this case by the express provisions of the National Security Act."

The case of *Polites* v. *The Commonwealth of Australia* is reported in 1945 C.L.R. vol. 70 at p. 60. In this case which was in fact the judgment of the Court in two cases heard together (*Polites* v. *The Commonwealth and another* and *Kondiliotes* v. *The Commonwealth and Another*), the question whether aliens can be compelled to serve in the Military Force of a foreign state in which they happened to be notwithstanding any rule of international law to the contrary, was in issue. The facts of these cases as briefly stated in the judgment of Latham C.J. at p. 67, are as follows:

"These demurrers raise the question of the validity of reg. 7 of the National Security (Aliens Service) Regulations as appearing in Statutory Rules 1942 No. 39, and of Part II of the National Security (Aliens Service) Regulations as enacted in substitution for that regulation by Statutory Rules 1943 No. 108.

The plaintiff Speros Polites is a national of the Kingdom of Greece, and is 29 years of age. A notice was served upon him in pursuance of the first-mentioned regulation requiring him to serve in the military forces of the Commonwealth. The plaintiff in the second action, Orpheus Kondiliotes, is also a Greek national, and is 25 years of age. He was required to serve with the military forces of the Commonwealth by a notice given to him in pursuance of reg. 7 contained in Part II of the later Regulations mentioned. The two sets of regulations are substantially identical. They purport to authorize an area officer to serve a notice requiring any male allied national, with certain exceptions which are not material to the present cases, to serve in the military forces of the Commonwealth."

In dealing with the issues before him, Latham C.J. is reported to have said the following:-

"Under the provisions of these Regulations, the service of a notice by an area officer imposes an obligation of military service upon certain aliens. It is argued for the plaintiffs, first, that there is a general rule of construction of statutes according to which, unless the contrary intention is clear, it is to be presumed that they do not violate any recognized rule of international law; secondly, that there is a well-established rule of international law that aliens cannot be compelled to serve in the military forces of a foreign State in which they happen to be; thirdly, that the Regulations are made under a provision in the National Security Act 1939 as amended, namely s. 13A, which refers to persons generally; that these general words must be limited in some way, as otherwise they would apply to all persons in the world, and that one proper limitation is to be found in the recognition and application of the rule of international law to which reference has been made. By this course of reasoning, it is sought to establish the propositions that the Regulations are a clear breach of an established rule of international law, and that s. 13A of the National Security Act should be construed as not intended to authorize such a violation of established principle.

The first proposition for which the plaintiffs contend is well established by many authorities. Perhaps it is most conveniently stated in *Bloxam* v. *Favre* (1883) 8 P.D. 101, at p. 107) where Sir James Hannen approved the statement in Maxwell on Interpretation of Statutes, 8th ed. (1937), p. 130 that 'every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations or with the established rules of international law'. See also Craies on Statute Law, 4th ed. (1936), p. 379, and Oppenheim, International Law, 5th ed. (1937), vol. I., p. 37.

But all the authorities in English law also recognize that Courts are bound by the statute law of their country, even if that law should violate a rule of international law: See, e.g. *Croft* v. *Dunphy* where, after reference to the well-known authorities of R. v. *Burah and Hodge* v. *The Queen* establishing that Dominion Parliaments have, within the limits of their powers, authority as plenary

and as ample as that of the Imperial Parliament, it is said that 'legislation of the Imperial Parliament, even in contravention of generally acknowledged principles of international law, is binding upon and must be enforced by the Courts of this country, for in these Courts the legislation of the Imperial Parliament cannot be challenged as ultra vires', that is, as ultra vires by reason of being inconsistent with international law.

It was not really argued, and it could not, I think, successfully be contended, that the powers conferred on the Commonwealth Parliament itself by the Constitution, s. 51(vi), relating to naval and military defence, and s. 51(xix), 'naturalization and aliens', were limited in any other manner than by the description of the subject matter. The Commonwealth Parliament can legislate on these matters in breach of international law, taking the risk of international complications. This is recognized as being the position in Great Britain –cf. *Craies on Statute Law*, 4th ed. (1936), p. 393: 'Each State can, at its own international risks, reject the opinions of other States as to international law'. The position is the same in the United States of America: See *United States* v. *Ferreira*; *Botiller* v. *Dominquez*; *Hijo* v. *United States*. And see *Willoughby on the Constitution of the United States*, 2nd ed. (1929) vol. 2, pp. 1316 et seq.. It must be held that legislation otherwise within the power of the Commonwealth Parliament does not become invalid because it conflicts with a rule of international law, though every effort should be made to construe Commonwealth statutes so as to avoid breaches of international law and of international comity. The question, therefore, is not a question of the power of the Commonwealth Parliament to legislate in breach of international law, but is a question whether in fact it has done so.

The next step in the plaintiffs' argument depends upon the establishment of the proposition that there is a rule of international law which prevents a State from imposing an obligation of military service upon aliens resident within the territory. In order to establish this proposition Mr. Phillips referred to the writings of jurists, to diplomatic practice, and, in particular, to the practice and the policy adopted by Great Britain. He clearly showed that there

was a rule which prevented the imposition upon resident aliens of an obligation to serve in the armed forces of the country in which they resided, unless the State to which they belonged consented to waive this ordinarily recognized exemption. (No such consent is alleged in the present cases.) This rule, however, does not prevent compulsory service in a local police force, or, apparently, compulsory service for the purpose of maintaining public order or repelling a sudden invasion. Authority for these propositions is to be found in Oppenheim, International Law, 5th ed. (1937), vol. I., pp. 541, 542; Walker's Manual of Public International Law (1895), p. 47; Pitt Cobbett's Cases on International Law, 5th ed. (1937), vol. I., p. 203; Hall, Treatise on International Law, 8th ed. (1924), pp. 259, 260, where the distinction is drawn between the use of military forces for ordinary national or political objects and police action to preserve social order or to protect the population against an invasion by savages."

Reference to the same case is also made by O'Connell International Law, 2nd Edition, at p. 703 dealing with the subject of liability of aliens to military service. The following is stated therein:

"A distinction is usually drawn for jurisdictional purposes between casual and permanent sojourn of aliens, but it is one which only practice can elucidate. The heart of the distinction is the duty of aliens to serve in the armed forces of the receiving State. In *Polites* v. *The Commonwealth the* High Court of Australia was of opinion that an alien was exempted from service in virtue of a rule of international law, though it found itself obliged to apply the Australian conscription legislation which failed to distinguish between nationals and aliens. .....

.....

The United States practice provides the acid test. In December 1941, it was enacted that all resident males between the ages of twenty and forty-five were liable to military service, but nationals of neutral States could apply for exemption. The effect of such application was to debar them from becoming citizens. Under the Immigration and Nationality Act of 1952 an alien who claims

exemption from military service becomes permanently ineligible for citizenship. The practical result is that an alien resident in the United States for the purpose of qualifying for citizenship must serve if he does not wish to be disqualified. He may, however, not serve, in which case he is in danger of losing his residence rights. A distinction is thus set up between permanent and impermanent residence, the onus of choice between permanency and impermanency in fact resting on the alien. There has been no significant protest to this jurisdiction, and it cannot be concluded that this conscription of permanently resident aliens who are candidates for citizenship is in violation of international law.

The basis of the obligation to military service is defence of the community of which one forms part. Nationality as such is a much less relevant consideration than permanence of residence. There are a number of historical occasions when a distinction was urged between permanent and temporary residence, and a tendency in treaties has been to accord the right of conscription rather than to endorse it. However, at times it has been inferred that foreign nationals may not be conscripted at all, even when they also have the nationality of the conscripting State. In 1929 the Tripartite Claims Commission between the United States, Austria and Hungary dealt with a person who was a national of the United States Jure soli and a national of Austria jure sanguinis. The issue was whether the Government of the Dual Monarchy had breached international law in calling him to the colours when he was at the time within its territory. The Commission upheld the conscription in the circumstances of the case, but it accepted as a general principle that a State may call up only its own nationals. It is probable that in the circumstances of modern defence, and with the relaxation of national sentiment in favour of a sentiment of collective security, this rule, if it was ever firmly settled, must be taken to apply in its stringency only to aliens temporarily resident.

The Hague Codification Conference in 1930 adopted a Protocol Relating to Military Obligation in Certain Cases of Double Nationality, which provides that a person

possessing two or more nationalities but habitually resident in one of the countries whose nationality he possesses and with which he is in fact most closely connected, shall be exempt from all military obligations in the other country or countries, although this may result in the loss of the alternative nationality or nationalities. If a person possesses a nationality of two or more States, and under the law of any one of them he has the right at majority to renounce the nationality of that State, he shall be exempt from military service in such State during his minority. A person who has lost the nationality of a State ceases to be liable to military service therein.

Sometimes commercial treaties contain exemptions from military service."

In Oppenheim's International Law, Vol. I, 8th Edition at pages 680, 681 and 682, the following are stated:

"If in consequence of a public calamity, such as the outbreak of a fire or an infectious disease, certain administrative restrictions are enforced, they can be enforced against all aliens, as well as against citizens. But apart from jurisdiction, and mere local administrative arrangements, which concern all aliens alike, a distinction must be made between such aliens as are merely travelling, and stay, therefore, only temporarily on the territory, and such as take up their residence there either permanently or for some length of time. A State has wider powers over aliens of the latter kind; it can make them pay rates and taxes, and can even compel them in case of need, and under the same conditions as citizens, to serve in the local police and the local fire brigade for the purpose of maintaining public order and safety. On the other hand, an alien does not fall under the personal supremacy of the local State; therefore he cannot, unless his own State consents, be made to serve in its army or navy, and cannot, like a citizen, be treated according to discretion."

In *Polites* case (*supra*) the Court was dealing with legislation concerning aliens and not nationals of the Commonwealth of Australia. Also, the extracts to which reference I have made from the various authorities on International Law, are dealing with the position of aliens in respect of military service.

In the present case the National Guard Laws 1964–1977, section 4, make no provision about the obligation of aliens to serve in the National Guard but it limits the provisions to citizens of the Republic only. Therefore, I find it rather academic to deal with the position as to whether by amendment of the legislation concerning aliens, or by special legislation in respect thereto, an alien in Cyprus can be forced to serve in the National Guard. I wish, however, to point out that any such legislation should take cognizance of the provisions of Article 32 of the Constitution which provides as follows:

> "Nothing in this Part contained shall preclude the Republic from regulating by law any matter relating to aliens in accordance with International Law."

Furthermore, citizenship is not a status which can be imposed on a person without his consent. In this respect, see Marithakis, Private International Law, 2nd Ed., Vol. A, page 253 which reads as follows:

> "Διὰ τῆς τρίτης ἀρχῆς αἱ Πολιτεῖαι πραγματοποιοῦν τὴν ἀντίληψιν καθ' ἣν οὐδεὶς πρέπει νὰ ἐξαναγκάζεται εἰς τὴν διατήρησιν τῆς ἰθαγενείας τὴν ὁποίαν ἔχει, ὡς ἐκ τοῦ ὁποίου, πᾶς τις πρέπει νὰ ἔχει τὸ δικαίωμα ὅπως, ἐὰν θέλη, ἀλλάξη ἰθαγένειαν. Ἡ Πολιτεία, μόνον μετὰ ρητὴν δήλωσιν βουλήσεως, ἐπιτρέπει τὴν ἔξοδον ἐκ τῶν μελῶν της ἢ τὴν εἴσδοχὴν νέων μελῶν. Ἡ ἰθαγένεια οὔτε ἀποβάλλεται οὔτε ἀπονέμεται ἐὰν δὲν διατυπωθῇ ρητῶς ἐκπεφρασμένη βούλησις."
>
> ("By means of the third principle the States realize the notion by virtue of which no one should be forced to retain the citizenship which he has, which means that every one has the right to change, if he wishes, citizenship. The State, only after an express declaration of will, allows the exit of its members or the entry of new members. Citizenship can neither be rejected nor awarded if no will is expressly formulated").

I adopt the view held by my brother Judge Malachtos in *Pieri* v. *The Republic* (1979) 3 C.L.R. 91 at p. 98, that section 2(b) of the National Guard (Amendment) Law, 1978 (Law 22/78) is contrary to the provisions of Article 198 of the Constitution and Annex "D" which, Annex, has been incorporated in Article 198 and the Citizenship Law, 1967 (Law 43/67).

Consequently, I find that applicant is entitled to the declarations prayed for in this recourse, and I make such declarations accordingly.

Taking into consideration the circumstances of this case and the interesting points argued, I make no order for costs. 5

Sub judice decision annulled. No order as to costs.