

1981 October 12

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CHARALAMBOS K. PROESTOU,

*Applicant.*

v.

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

*Respondents.*

(Case No. 356/80):

*National Guard—Military service—Exemption from—On ground of permanent residence abroad—Suspension of applicant’s enlistment in order to complete his studies abroad—Not returning to Cyprus in order to discharge his military duties and thus committing breach of the National Guard Laws—Decision not to exempt him from military service lawfully taken in view of proviso to section 4(3) of the said laws.*

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*Constitutional Law—Equality—Discrimination—Article 28.1 of the Constitution—Wrong application of law on one occasion does not entitle another person to insist on continuation of such wrong application even on the same facts.*

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*National Guard Laws—Proviso to section 4(3)(c) of the Law—Application of—*

The applicant was born in 1943 and his class was called up for service in the National Guard in June, 1964. From July 1967 until December 1975 he was granted suspension of his enlistment in the National Guard in order to complete his studies at the University of Athens. He obtained his degree in medicine in 1968 and in 1975 he completed his specialization in surgery. In that year he married a Greek national resident of Greece and he was appointed as Registrar of the Seriaes Hospital in Greece where he worked until 1979. By a letter

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dated June 8, 1978 he applied for exemption from liability to serve in the National Guard on the ground that he was permanently residing outside Cyprus. The respondents dismissed his application and hence this recourse.

5 Respondents contended that after the expiration of the last  
suspension of his enlistment on the 31st December, 1975 he  
was bound to return to Cyprus for the discharge of his military  
duties and that by his non-return he committed a breach of the  
law. They could, therefore, by acting under the proviso\* to  
10 section 4(3) of the National Guard Laws, which follows para-  
graph (f) thereof, lawfully refuse his application.

*Held*, that the proviso to section 4(3)(c), though connected  
from the drafting point of view, and on the face of the printing  
of the section to para. (f) of section 4(3), yet its wording  
15 is such that it clearly refers to all the provisions of the  
Law; that it speaks of "any provision of this Law" and of "any  
decision of the Council of Ministers issued under the Law"  
and it does not speak of the exemption granted in para. (f)  
of section 4(3) of the Law; that it inevitably follows that the  
20 respondents have correctly applied the Law to the facts of the  
case, taking these facts as claimed to be by the applicant himself,  
inasmuch as after the expiration of the last period of suspension  
granted to him he was bound to return to Cyprus for the dis-  
charge of his military obligations and his failure to do so amounts  
25 to a contravention of the provisions of the Law and in fact to  
compliance of the call up order of his category of persons issued  
by the Council of Ministers; that, therefore, it cannot be said  
that the respondents acted under any misconception of Law or  
of fact or that the subject decision lacks due reasoning which  
30 in any event is to be found in the material in the file; accordingly  
the recourse must fail.

\* The said proviso reads as follows:

"Provided that, unless the Minister, on account of the special circumstances of the case otherwise decides no one will be granted exemption or suspension of his enlistment under any provisions of this Law or any decision of the Council of Ministers issued on the basis of this Law, if he has contravened or he has not complied with any provisions of this Law or any decision of the Council of Ministers issued or any order of the Minister issued under this Law:

Provided further that the provisions of the aforesaid proviso will not apply to the case of a service-man who is exempted from obligation to serve in the force on the date of his call out for service".

*Held, further, on the contention that the sub judice decision was discriminatory against the applicant, contrary to Article 28.1 of the Constitution, inasmuch as in the case of Ioannides v. Republic (1980) 3 C.L.R. 233 on more or less the same facts the applicant was exempted from military service:*

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That although the facts in the *Ioannides* case are not exactly the same and that might be the answer to this point, yet, there is ample authority for the proposition that in matters of equality of treatment, the wrong application of the law on one occasion does not entitle another person even on the same facts, to insist on the continuation of such wrong application of the law.

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*Application dismissed.*

Cases referred to:

*Ioannides v. Republic* (1980) 3 C.L.R. 233 at p. 236.

**Recourse.**

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Recourse against the decision of the respondents not to exempt applicant from his obligation for service in the National Guard.

*Ph. Valiantis for L. Papaphilippou*, for the applicant.

*M. Flourentzos*, Counsel of the Republic, for the respondents.

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*Cur. adv. vult.*

A. LOIZOU J. read the following judgment. By the present recourse the applicant seeks a declaration that the act and/or decision of the respondents, dated 13th August, 1980, not to exempt him from his obligation for service in the National Guard is null and void and of no effect whatsoever and that what was omitted ought to have been done.

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The facts of the case are as follows:

The applicant was born in Kalogrea village in 1943 and his class was called up for service in the National Guard in June 1964. Studying, however, medicine at the University of Athens, he was granted suspension of his enlistment from 18th July, 1967, until the 31st December, 1975. He had applied for that purpose whilst in Athens on the 2nd March, 1967, as per *exhibit "G"*, whereby he sought such suspension from enlistment for

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the purpose of the completion of his studies. He obtained his degree in medicine on the 15th June, 1968, and in 1975 he completed his specialization in surgery. In that year he married a Greek national resident of Greece and he was appointed as Registrar of the Serraes Hospital where he worked until 1979, when he moved to Aegina Hospital having at the same time his own consulting rooms.

The first suspension granted to him by the Minister of Interior on the 18th July, 1967, reads as follows:

10        "In the exercise of the powers vested in me by virtue of exemption (a) referred to in the decision of the Council of Ministers published under Notification 148 in the Third Supplement to the official Gazette of the Republic of the 16th July, 1964, and by virtue of Section 26 of the National Guard Law 1964, I hereby grant to Charalambos K. Proestos of Kalogrea, holder of Cyprus Passport No. 27678, issued in Nicosia on the 5th September, 1961..... I grant him suspension of enlistment until the 31st December, 1967, for the completion of his studies and I give him special permit for departure from Cyprus for the said purpose".

And there followed the successive suspensions of enlistment that I have referred to earlier in this judgment.

25        The applicant by a letter dated 8th June, 1978, applied for exemption from liability for service in the National Guard on the ground that he is permanently residing outside Cyprus. His application was examined by the Advisory Committee and on the facts set out it expressed the following opinion:

30        "In the present case there are new elements that the applicant continues to be a permanent resident abroad during the period from the 21st March, 1979, (the date of the previous suggestion of the Committee) until to-day. So the suggestion of the Committee remains the same as that of the 21st March, 1979, but it is possible the Minister, if he deems it proper, to re-examine the case in view of the said new element of the permanent residence of the applicant abroad 35        for the additional said period from 21.3.1979 till to-day".

The respondent 1, the Minister of Interior, obtained also

the views of the General Staff of the National Guard and decided to dismiss the applicant's case.

It is the case for the respondents that after the expiration of the period of suspension for enlistment of the applicant on the 31st December, 1975, he was bound to return to Cyprus for the discharge of his military obligations and that by his non return he committed a breach of the Law, and/or he did not comply with a decision of the Council of Ministers, inasmuch as he was included in the decision of the Council of Ministers calling out, *inter alia*, a category of persons to which the applicant belongs. This order dated 29.12.1975 made under section 6(4) of the National Guard Laws 1964-1975, published under No. 13 in Supplement No. 3 (Part II) to the official Gazette No. 1246 dated 2.1.76, brings the case of the applicant within the proviso to section 4(3) of the National Guard Laws, which follows paragraph (f), thereof and which reads:

“Νοεΐται ὅτι, ἐκτὸς ἐὰν ὁ Ὑπουργὸς, λόγω ἐιδικῶν περιστάσεων τῆς ὑποθέσεως, ἤθελεν ἄλλως ἀποφασίσει, οὐδεὶς θὰ τυγχάνη ἐξαιρέσεως ἢ ἀναστολῆς κατατάξεως δυνάμει οἰασδῆποτε διατάξεως τοῦ παρόντος Νόμου ἢ οἰασδῆποτε ἀποφάσεως τοῦ Ὑπουργικοῦ Συμβουλίου ἐκδοθείσης βάσει τοῦ παρόντος Νόμου, ἐὰν οὗτος ἔχη παραβῆ ἢ δὲν ἔχη συμμορφωθῆ πρὸς οἰανδῆποτε διάταξιν τοῦ παρόντος Νόμου ἢ οἰανδῆποτε ἀπόφασιν τοῦ Ὑπουργικοῦ Συμβουλίου ἐκδοθεῖσαν ἢ οἰονδῆποτε διάταγμα τοῦ Ὑπουργοῦ ἐκδοθὲν δυνάμει τοῦ παρόντος Νόμου:

Νοεΐται περαιτέρω ὅτι αἱ διατάξεις τῆς ὡς ἄνω ἐπιφυλάξεως δὲν θὰ ἐφαρμόζωνται εἰς τὴν περίπτωσιν στρατευσίμου ὅστις ἐξηρεῖτο τῆς ὑποχρέσεως πρὸς ὑπηρεσίαν ἐν τῇ Δυνάμει κατὰ τὴν ἡμέραν τῆς κλήσεως αὐτοῦ πρὸς ὑπηρεσίαν”.

In English it reads:

“Provided that, unless the Minister, on account of the special circumstances of the case otherwise decides no-one will be granted exemption or suspension of his enlistment under any provision of this Law or any decision of the Council of Ministers issued on the basis of this Law, if he has contravened or he has not complied with any provisions of this Law or any decision of the Council of Ministers issued or any order of the Minister issued under this Law:

Provided further that the provisions of the aforesaid proviso will not apply to the case of a serviceman who is exempted from obligation to serve in the force on the date of his call out for service”.

- 5 It was urged that the provisions of section 4(3) (c) that they are exempted from military service citizens of the Republic permanently residing outside Cyprus, is subject to this proviso.

10 It is the case for the applicant that the respondents acted contrary to law and especially in violation of the National Guard Laws 1964-1977, section 4(3)(c) just referred to and that support for the view that section 4(3)(c) is applicable is drawn from what was decided in the case of *Ioannides v. The Republic* (1980) 3 C.L.R. p. 233, where at p. 236 Malachos J. stated:

15 “I must say that in the particular circumstances of this case and in view of the fact that in 1973 the applicant was allowed to leave Cyprus in order to complete his studies, he cannot be considered that he failed to enlist in the National Guard after the 15th July, 1972. But irrespective of my above  
20 view, the wording of section 4(3)(c) of the National Guard Law is clear and unambiguous. Once it has been established that the applicant is permanently residing abroad, he is entitled to exemption from the obligation to serve in the National Guard”.

25 In my view the aforesaid proviso, though connected from the drafting point of view, and on the face of the printing of the section to para. (f) of section 4(3), yet its wording is such that it clearly refers to all the provisions of the Law. It speaks of “any provision of this Law” and of “any decision of the  
30 Council of Ministers issued under the Law” and it does not speak of the exemption granted in para. (f) of section 4(3) of the Law.

Once therefore I have reached this conclusion as to the meaning and effect of this proviso, it inevitably follows that the respondents have correctly applied the Law to the facts of the case, taking these facts as claimed to be by the applicant himself, inasmuch as after the expiration of the last period of suspension granted to him he was bound to return to Cyprus for the discharge of his military obligations and his failure to do so amounts

to a contravention of the provisions of the Law and in fact to non-compliance of the call up order of his category of persons issued by the Council of Ministers, earlier referred to in this judgment.

This being so it cannot be said that the respondents acted under any misconception of Law or of fact or that the subject decision lacks due reasoning which in any event is to be found in the material in the file. 5

The next point to be examined is that the *sub judice* decision is discriminatory against the applicant contrary to Article 28.1 of the Constitution inasmuch as in the case of *Ioannides (supra)* on more or less the same facts, the applicant in that case was exempted from service, whereas the present applicant has not been so exempted. 10

Although the facts are not exactly the same and that might be the answer to this point, yet, it must be said that there is ample authority for the proposition that in matters of equality of treatment, the wrong application of the law on one occasion does not entitle another person even on the same facts, to insist on the continuation of such wrong application of the law. 15  
Therefore this ground also fails. 20

For all the above reasons this recourse is dismissed but in the circumstances I make no order as to costs.

*Application dismissed. No order as to costs.* 25