1982 December 2

[LORIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

SERGHIOS FLORIDES,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTER OF INTERIOR,

Respondent.

(*Case No.* 18/82).

Administrative Law—Administrative acts or decisions—Executory act—Confirmatory act—It is not of an executory nature and cannot be made the subject of a recourse unless it has been taken after a new inquiry—A new inquiry takes place when administration takes into consideration new substantive legal or real material—No new material placed before the administration—Sub judice decision a confirmatory one of the previous executory decision.

National Guard Law, 1964 (*Law* 20/64 *as amended*)—*Construction of section* 4(3)(e) *of the Law.*

On December 21, 1981 counsel for the applicant addressed to the respondent Minister a letter praying for applicant's exemption from or suspension of service in the National Guard pursuant to the provisions of section 4(3)(e)* of the National Guard Law, 1964 (Law 20/64 as amended) on the ground that he was the eldest son of the family and his father was in receipt of disablement pension by virtue of the provisions of Law 4/62. The respondent Minister rejected applicant's request by letter dated 7.1.82. On 13.1.1982 applicant's counsel sent a telegram** to the respondent Minister protesting against his private

* Section 4(3)(e) is quoted at pp. 1107–1108 post.

** The telegram is quoted at p. 1105 post.

secretary for her alleged hindrance of counsel to speak to the Minister over the telephone; and on the same day counsel was informed by the Director-General of the Ministry over the telephone that applicant's request could not be acceded to: Hence the present recourse for a declaration that the act and/or decision of the respondent communicated to applicant's counsel orally by respondent on the 13.1.1982 not to grant applicant exemption or suspension from service in the National Guard should be declared null and void.

Counsel for the respondent raised a preliminary objection that the alleged sub judice decision was not justiciable on the ground that it was not an executory act or decision but merely a confirmatory one.

Held (I), *on the preliminary objection:*

That a confirmatory decision of the administration is not of an executory nature and it cannot be made the subject of a recourse but when the administration confirms a previous executory act after a new inquiry then the resulting new act or decision is itself executory too and therefore justiciable; that a new inquiry exists when the administration takes into consideration new substantive legal or real material; that since what is being impugned by means of the present recourse is the confirmation by the respondent orally over the telephone on 13.1.1982 of his previous stand expressed in his decision contained in his letter dated 7.1.1982 such oral confirmation having been given in reply to the telegram; and since by the said telegram counsel was not placing before the respondent new substantive legal or real material there was no question for the respondent to hold a new inquiry; accordingly the oral reply which is being challenged by means of the present recourse was nothing more than a confirmatory decision not of an executory character and therefore not justiciable.

Held, (II) *on the merits of the recourse:*

That the person entitled to exemption from service in the National Guard pursuant to the provisions of s. 4(3)(e) of Law 20/64 must be the "only or eldest son" of the family and must have had a dead or missing "father" or "brother"; that these "father" or "brother" (a) must have died as a result of events described in the Law (b) their families are in receipt of pension

under the provisions of Law 4/62 of the Greek Communal Chamber; that though applicant is the eldest son of the family his father is not dead or missing; accordingly he is not entitled to exception from service under the above section.

Recourse dismissed.

Cases referred to:

Florides v. The Republic (1973) 3 C.L.R. 37;

Kolokassides v. The Republic (1965) 3 C.L.R. 549;

Papanicolaou (No. 1) v. The Republic (1968) 3 C.L.R. 225;

Ktenas and Another (No. 1) v. The Republic (1966) 3 C.L.R. 64; and on Appeal (1966) 3 C.L.R. 820;

Papaleontiou v. The Republic (1966) 3 C.L.R. 557;

Varnava v. The Republic (1968) 3 C.L.R. 566;

Ioannou v. The Grain Commission (1968) 3 C.L.R. 612;

Megalemou v. The Republic (1968) 3 C.L.R. 581;

Kelpis v. The Republic (1970) 3 C.L.R. 196;

HjiKyriakos & Sons Ltd. v. The Republic (1971) 3 C.L.R. 286;

The Police Association & Others v. the Republic (1972) 3 C.L.R.1;

Liasidou v. The Municipality of Famagusta (1972) 3 C.L.R. 278;

Salamis Holdings Ltd. v. The Municipality of Famagusta (1974) 3 C.L.R. 344;

Lordos Apartotels Ltd. v. The Republic (1974) 3 C.L.R. 471;

Ioannou v. The Commander of Police (1974) 3 C.L.R. 504;

Limassol Chemical Products Company Ltd. v. The Republic (1978) 3 C.L.R. 52;

Dr. G.N. Marangos Ltd. v. The Municipality of Famagusta (1979) 3 C.L.R. 73.

Recourse.

Recourse against the decision of the respondent not to grant applicant exemption and/or suspension from service in the National Guard.

L. Clerides, for the applicant.

M. Florentzos, Counsel of the Republic, for the respondent.

Cur. adv. vult.

LORIS J. read the following judgment. The applicant in the present recourse was born at Kaimakli village on the 14th November, 1956.

Counsel acting on applicant's behalf addressed to the Minister of Interior a letter on 26.7.73 seeking thereby the 'confirmation' of the Minister to the effect that the applicant being the eldest son of a father who is in receipt of a disablement pension of £16.- monthly, granted to him under the provisions of the Pensions and Extraordinary Gratuities to the Dependants of the Fallen and the Victims of the Struggle and its Invalids Fund Law (Law No. 4 of 1962 of the Greek Communal Chamber as amended), is exempted from enlistment in the National Guard pursuant to the provisions of s. 4(3)(ε) of the National Guard Law (Law 20/64 as amended). The aforesaid letter to the Minister was accompanied by a certificate issued by the Ministry of Finance dated 30.11.72 certifying to the effect that applicant's father was in fact drawing from the above mentioned Fund an amount of £16.- monthly 'as disabled combatant of E.O.K.A. Struggle' (certificate and letter referred to above are marked under red 1 and red 2 respectively in the relevant file of the Ministry of Interior which was produced as an exhibit in the present recourse).

The Minister of Interior after seeking (red 4) and obtaining (red 5) the legal opinion of the Attorney-General of the Republic addressed to counsel acting for applicant letter dated 17.9.73 (red 6) informing the applicant that his case is not covered by the relevant section and therefore the applicant cannot be exempted from service in the National Guard.

Counsel for applicant addressed to the Minister a letter dated 5.10.73 (red 7) applying for further particulars indicating the reasons why the case of his client does not fall within the ambit of the section in question.

By a letter dated 11.10.73 (red 8) the Director-General of the Ministry of Interior informed applicant's counsel that, "that the case of his client is not covered by the section in question is being deduced from the grammatical, logical and teleological interpretation of the aforesaid section".

On 6.11.73 the applicant filed Recourse No. 494/73 attacking the said decision of the Minister of Interior contained in latters letters of 17.9.73 and 11.10.73. This recourse was determined on 17.2.79; it was dismissed on the ground that the alleged decisions of the respondent were non-executory acts or decisions

and therefore not justiciable. (*Vide Florides v. The Republic* (1979) 3 C.L.R. 37).

In the meantime there was a calling out for service in the National Guard of the class of 1974 (all males born between 1.1.56 - 31.12.56) i.e. the class of the applicant. Thus

(a) on 30.11.73 the decision of the Council of Ministers (under No. 12833 of 15.11.73) was published in the Official Gazette of the Republic (Part IV in G.N. 1054 of 30.11.73) calling out for service the class of 1974 (vide exh. 4).

(b) On 7.12.73 an order of the Minister of Interior dated 3.12.73 was published in the Official Gazette of the Republic prescribing the necessary arrangements for the enforcement of the said decision of the Council of Ministers (vide exh. 5).

(c) On 25.6.74 an order of the Minister of Interior was again published in the Official Gazette of the Republic in connection with the calling out of servicemen of the class of 1974 (vide exh. 6).

The applicant failed to enlist in the National Guard till the present day; it may be added here that the applicant did not ever challenge the aforesaid decision of the Council of Ministers calling out for service the class of servicemen to which he belongs.

In the meantime the applicant got married and he has now a child as well.

On 21.12.81 counsel for applicant addressed to the Minister of Interior a letter (attached to the recourse, Appendix 'B' to the opposition) explaining the present position of the applicant and praying for exemption from or suspension of service in the National Guard.

In reply thereto the Director-General of the Ministry of Interior addressed to applicant's counsel a letter on 7.1.82 (vide exh. 2) informing him that the applicant is not entitled according to the National Guard Law either to exemption from or suspension of service in the National Guard. The aforesaid letter went on to request counsel "to advise his client to present

himself for enlistment in the force on 13.1.82 otherwise his client will be prosecuted".

On 13.1.82 counsel for applicant sent a telegram (exh. 1) to the Minister on the same subject and later on on the same day he was informed by the Director-General of the Ministry over the telephone that applicant's request could not be acceded to. Hence the present recourse by virtue of which the applicant prays for:

"1. A declaration of the Hon. Court that the act and/or decision of the respondent communicated to applicant's counsel orally by respondent on the 13.1.1982 not to grant applicant exemption from service in the National Guard should be declared null and void and of no legal effect whatsoever.

2. A declaration of the Hon. Court that the act and/or decision of the respondent communicated to applicant's counsel orally by respondent on the 13.1.1982 not to grant applicant suspension from service in the National Guard should be declared null and void and of no effect whatsoever."

The applicant bases his application on the following grounds of law.

"1. Respondent's decision is null and void as it is not reasoned at all contrary to Art. 29 of the Constitution.

2. Respondent's decision has been taken in circumstances amounting to abuse of power taking into account the facts and circumstances in support of the recourse.

3. The respondent's decision was taken contrary to s.4 (3) (ε) of Law 20/64 in that applicant has a father who is living and who is in receipt of a monthly pension of £16.- on the basis of Law 4/62 and 4/64 of the Greek Communal Chamber.

4. The respondent's decision was taken contrary to the provisions of s. 11 & 17 of Law 20/64."

The respondent in his opposition raised objection to the jurisdiction of this Court maintaining that the alleged sub judice

decision is not justiciable on the ground that it is not an executory act or decision but merely a confirmatory one.

Subject to the above objection the respondent maintains that the sub judice decision was taken according to Law and the Constitution, that it is duly reasoned and that all material facts and surrounding circumstances were duly considered by him.

I intend to examine in the first place the objection of the respondent which goes to the jurisdiction of this Court.

In the case of *Kolokassides v. The Republic* (1965) 3 C.L.R. 549 (decided on appeal) it was held that a recourse under Art. 146 of the Constitution lies only against executory acts.

An executory act or decision was defined in the case of *Papanicolaou (No. 1) v. The Republic*, (1968) 3 C.L.R. 225, as "an act by means of which the 'will' of the Administration is made known on a given matter, and which aims at producing a legal situation concerning the person affected. (See the *Conclusions from the Jurisprudence of the Council of State in Greece*, 1929–1959, pp. 236–237); and the executory nature of an act is closely linked to the requirement under paragraph 2 of Art. 146 of the Constitution, that a person can make a recourse only if an existing legitimate interest of his has been adversely and directly affected by the act complained of".

It is a well settled principle of Administrative Law that a confirmatory decision of the administration is not of an executory nature and therefore it cannot be made the subject-matter of a recourse. According to *Stassinopoulos* on the *Law of Administrative Disputes*, 4th ed. at p. 175 a confirmatory act is one which repeats the contents of a previous executory act and signifies the adherence of the administration to a course already adopted; but when the administration confirms a previous executory act after a new enquiry then the resulting new act or decision is itself executory too, and therefore justiciable.

These principles have been adopted by our Supreme Court in a great number of cases such as:

Ktenas and another (No. 1) v. The Republic (1966) 3 C.L.R. 64 and on Appeal (1966) 3 C.L.R. 820.
Papaleontiou v. The Republic (1966) 3 C.L.R. 557.

Varnava v. *The Republic* (1968) 3 C.L.R. 566.
Ioannou v. *The Grain Commission* (1968) 3 C.L.R. 612.
Megalemou v. *The Republic* (1968) 3 C.L.R. 581.
Kelpis v. *The Republic* (1970) 3 C.L.R. 196.
HjKyriakos & Sons Ltd. v. *The Republic* (1971) 3 C.L.R. 286.
The Police Association & others v. *The Republic* (1972) 3 C.L.R. 1.
Liasidou v. *The Municipality of Famagusta* (1972) 3 C.L.R. 278.
Salamis Holdings Ltd. v. *The Municipality of Famagusta* (1974) 3 C.L.R. 344.
Lordos Apartotels Ltd. v. *The Republic* (1974) 3 C.L.R. 471.
Ioannou v. *The Commander of Police* (1974) 3 C.L.R. 504.
Limassol Chemical Products Company Ltd. v. *The Republic* (1978) 3 C.L.R. 52.
Dr. G.N. Marangos Ltd. v. *The Municipality of Famagusta* (1979) 3 C.L.R. 73.

As to the question when does a new enquiry exist *Stassinopoulos* (supra) *states* the following at p. 176:

> "When does a new inquiry exist, is a question of fact: In general, it is considered to be a new inquiry the taking into consideration of new substantive legal or real material, and the new material is meticulously considered, for he who has been out of time in attacking an executory act, should not circumvent such a time limit by the creation of a new act, which it was issued nominally after a new inquiry, but in substance on the basis of the same material.
>
> Especially there does exist a new inquiry where, before the issue of the subsequent act, there takes place consideration of newly produced material or pre-existing but unknown, which are now taken into consideration in addition, but for the first time ....."

Apart from confirmatory acts or decisions there are certain other acts of the administration which cannot be impugned by a recourse for annulment on the ground that they are not executory.

Amongst such other acts *Kyriacopoulos* on *Greek Admi-*

nistrative Law 4th ed. Vol. III at p. 95 mentions "The acts in which simply the views or information of the Administration are contained in respect of a certain subject". (Reference in support thereof is made to the following decisions of the Greek Council of State: Σ/Ε 321, 708, 866/1931, 154, 430/1936, 133/1937, 952/1938, 935/1939, 1034/1940, 367/1941, 1830/1947, 1605/1948, 1191/1950, 80/1951, 1482/1952, 1708/1960).

Reverting now to the facts of this case: I cannot lose sight of the fact that what is being impugned by means of the present recourse is the confirmation by the respondent orally, over the telephone, on 13.1.1982 of his previous stand expressed in his decision contained in his letter dated 7.1.1982 (exh. 2) such oral confirmation having been given in reply to the telegram (exh. 1) sent earlier on the same day by counsel for applicant to the respondent; it is significant to note that by the said telegram counsel for applicant was not placing before the respondent new substantive legal or real material for consideration; in fact he was not placing before the respondent any material at all; he was simply voicing his protest against the private secretary of the respondent Minister for her alleged hindrance of counsel to speak to the Minister over the phone.

Telegram (exhibit 1) reads as follows:

"YPOURGON ESOTERIKON, ENTAFTHA PROSPATHO MATEOS APO TIS PARELTHOUSIS DEFTERAS NA ELTHO IS TILEFONIKIN EPIKINONIAN MAZI SAS EPI TOU THEMATOS KATATAXEOS TOU PELATOU MAS SERGIOU FLORIDES EK KAIMAKLIOU DISTIHOS OMOS ME DIAFOROUS TROPOUS I IDIETERA SAS DEN IDINITHI NA ME ENOSI MAZI SAS. DIAMARTIROME DIOTI ENAS POLITIS TIS DIMOKRATIAS EMPODIZETE NA EPIKINONISI ME TON ARMODION YPOURGON EPI THEMATOS TIS ARMODIOTITOS TOU KE DI THEMATOS KATATAXEOS STRATEFSIMOU I OPIA LIGI TIN 15 TREXONTOS. ZITO AMESON EPEMVASIN SAS DIA NA SAS OMILISO KE AN PARASTI ANANGI NA SAS IDO SIMERON I AYRION

LEFKOS CLERIDES
DIKIGOROS"

In view of the contents of the above telegram which is the only new material alleged by the applicant to have been placed before the respondent there was no question for the respondent to hold a new enquiry; in fact no new enquiry was held but simply the Director-General of the Ministry spoke to counsel for applicant over the telephone on the same day and signified to him the adherence of the respondent to a course already adopted by his decision which was communicated to the applicant by letter of the respondent dated 7.1.1982 (exh. 2) and I lay stress on the fact that such decision contained in exh. 2 was never challenged by applicant.

So it is quite apparent that the oral reply of the respondent which is being challenged by means of the present recourse was nothing more than a confirmatory decision not of an executory character and therefore not justiciable.

In view of argument by counsel for applicant, I feel that I should even go further and say that I entertain serious doubts as to whether exh. 2 itself contains a decision of executory character. The sequence of events in the present case points rather to the contrary and denotes that it is rather confirmatory of a much earlier decision, notably the decision to call out the class of the applicant to enlist in the National Guard, a decision which was never challenged either; and the statement in the last paragraph of exh. 2 to the effect that the applicant will be prosecuted if he fails to present himself for enlistment in the force would not have altered the aforesaid decision's character, as the contents of the last paragraph are purely informatory of the views of the respondent on the matter (vide *Kyriacopoulos* (supra) at p. 95).

In spite of my finding that the sub judice decision is not executory in character and therefore not justiciable, I intend to proceed further and deal very briefly with the main substative complaint of the applicant.

The applicant maintains that he is entitled to be exempted from service in the National Guard; he bases his submission on the provisions of s.4(3)(ε) of the National Guard Law 20/64 as amended; the relevant section of the law (as amended by Laws 26/65 and 27/65) reads as follows:-

"4.-(1) - - -

(2) --

(3) Ἐξαιροῦνται τῆς ὑπὸ τοῦ ἐδαφίου (1) ὑποχρεώσεως-

(α) --

(β) - - - - - - - - - -

(γ) - - - - -

(δ) --

(ε) Ὁ μόνος ἢ ὁ πρεσβύτερος υἱὸς ὁ ἔχων πατέρα ἢ ἀδελφὸν φονευθέντα ἢ ἐξαφανισθέντα ἢ θανόντα ἐκ τραυμάτων ἢ κακουχιῶν κατὰ τὴν διάρκειαν τῆς ὑπηρεσίας αὐτοῦ ἐν τῇ Δυνάμει ἢ ὑπηρεσίας αὐτοῦ ἀπὸ τῆς 21ης Δεκεμβρίου, 1963, ὡς εἰδικοῦ ἀστυφύλακος, ἢ λόγῳ τῶν ἀπὸ τῆς ἡμερομηνίας ταύτης δημιουργηθεισῶν περιστάσεων ἢ ἡ οἰκογένεια τοῦ ὁποίου λαμβάνει σύνταξιν δυνάμει τῶν περὶ Ταμείου Συντάξεων καὶ Ἐκτάκτων Ἐπιδομάτων τῶν ἐκ τῶν Πεσόντων καὶ τῶν θυμάτων τοῦ Ἀγῶνος Ἐξαρτωμένων καὶ τῶν Ἀναπήρων αὐτοῦ Νόμων τοῦ 1962 ἕως 1975

- - - - - - ".

("4. -1) - - - - - - - -

(2) -

(3) There shall be exempted from the liability under sub-section (1)—

(a) - -

(b)

(c) - - - - - - -

(d) -

(e) the only or the elder son, having had a father or brother who was killed or disappeared or died of wounds or privations during his service in the Force or his service as from the twenty-first day of December, 1963, as a special constable or due to the circumstances created as from that date or whose

family receives a pension under the Dependants of Persons who were killed in, and of the Victims of, the Struggle and the Persons Incapacitated therein Laws, 1962-1975").

The Law as I read it requires that a claimant for exemption from service in the force must have the following qualifications:

(a) He must be the only, or the eldest son of the family and

(b) He must have had a "father" or "brother"

(I) who was killed or who is missing or who died either (i) during his service in the force

(ii) during his service as from 21.12.1963 as special constable

(iii) owing to events brought about as from that dated (i.e. 21.12.1963)

or (II) whose family is in receipt of pension under the provisions of Law 4/62 of the Greek Communal Chamber (as amended).

More concisely the person entitled to exemption from service in the National Guard pursuant to the provisions of s.4(3)(ε) must be the "only or the eldest son" of the family and must have had a dead or missing "father" of "brother". These "father" or "brother" (a) must have died as a result of events described in sub-paras (i) (ii) & (iii) above or (b) their families are in receipt of pension under the provisions of law 4/62 of the Greek Communal Chamber (as amended).

In short the last disjunctive phrase "whose family is in receipt..." ("Η οἰκογένεια τοῦ ὁποίου λαμβάνει σύνταξιν...") refers to the family of the dead or missing "father" or "brother". It is abundantly clear from the sub-section itself that when referring to killed, missing or dead "father" or "brother" the legislature intended to cover not only the class of persons who lost their lives during service in the National Guard but also to other classes of persons who met their death either in the course of deliberating or defending their country considerable time prior to the establishment of the National Guard in 1964; thus the legislature proceeded enumerating disjunctively various classes e.g. those who died during their service as special con-

stables as from 21.12.63, those who died owing to events brought about as from that date etc; it seems that for the sake of brevity in the law on the one hand and in an effort of avoiding on the other, an oversight that might occur in the listing down of the innumerable classes of persons who suffered, the legislature resorted to the creation of a wider class - the class of those who are in receipt of pension according to Law 4/62 of the Greek Communal Chamber (as amended).

How wide the latter class of persons is, is indicated by the number of groups of persons benefited from the Funds thereof, something reflected even on the title of the law in question (Pensions and Extraordinary Gratuities to the Dependants of the Fallen and the Victims of the Struggle and its Invalids Fund Law.)

For all the above reasons I hold the view that inspite of the fact that s.4(3)(ε) of the National Guard Law 1964 as amended is not very happily worded yet the last disjunctive phrase in same "whose family is in receipt..." ('Η οἰκογένεια τοῦ ὁποίου λαμβάνει σύνταξιν...) refers to the family of the dead or missing "father" or "brother" and this is the only interpretation that can be given to it grammatically, logically and teleologically.

According to the undisputed facts of this case the applicant is the eldest son of the family but his father is not dead or missing; on the contrary his father is alive and is personally in receipt of disablement pension of £16.- monthly according to the certificate of the Ministry of Finance (red 1 in the file) "as disabled combatant of E.O.K.A. Struggle, by virtue of the provisions of Law 4/62 of the Greek Communal Chamber (as amended).

This disposes of the main complaint of the applicant. Having decided earlier on, that the oral reply of the respondent dated 13.1.82 which is being challenged by means of the present recourse has no executory character and is therefore not justiciable. I do not intend to proceed in examining other subsidiary complaints of the applicant.

In the result the present recourse fails and it is accordingly dismissed; I shall not make any order as to costs.

Application dismissed. No order as to costs.