

1982 January 23

[TRIANTAFYLIDIS, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

GEORGHIOS L. LOIZIDES,

*Applicant,*

v.

THE REPUBLIC OF CYPRUS, THROUGH  
THE MINISTER OF INTERIOR,

*Respondent.*

(Case No. 242/81).

*Provisional order—Flagrant illegality—A ground justifying the making of a provisional order—Sub judice decision given by treating a judgment of this Court in relation to an earlier recourse of applicant, in connection with issues which are disputed in this case, as wrong—Thus usurping unlawfully the role of an appellate tribunal—Sub judice decision tainted by a flagrant illegality—Provisional order granted.*

*Provisional order—Rule 13 of the Supreme Constitutional Court Rules, 1962—Form of framing of.*

On July 25, 1981 the Court made a provisional order directing that the applicant should be discharged from the ranks of the National Guard, pending the determination of his recourse; and as on that date there was no appearance on behalf of the respondent, though he had been duly notified, the Court gave subsequently the opportunity to counsel for the respondent to show cause why the provisional order should not remain in force.

*Held*, that on the basis of the material now before the Court it appears, prima facie, that the sub judice decision of the respondent is tainted by a flagrant illegality in that an Advisory Committee set up in the Ministry, for the purpose of advising the respondent Minister as regards matters such as that in

respect of which this recourse was made, has proceeded to “pronounce” that the judgment of a Judge of the Supreme Court in relation to an earlier recourse of the applicant (see *Loizides v. The Republic*, (1981) 3 C.L.R. 103) in connection with issues which are, also, disputed in the present case was wrong, and, having, in effect, “overruled” the said judgment, the Committee advised the respondent Minister in a manner leading up to his new sub judice decision; that, thus, the said Committee appears to have usurped unlawfully the role of an appellate tribunal and this Court cannot countenance conduct of this nature on the part of the administration and that if the Committee felt that the decision in the *Loizides* case, supra, was erroneous the proper course for it was to advise the respondent Minister to appeal against it; and that was not done; that flagrant illegality is a ground justifying the making of a provisional order; accordingly the provisional order in question is to remain in force until the determination of this recourse or until further order.

*Held*, further, that the submission of counsel for the respondent that the provisional order as made on 25th July 1981 was framed in a mandatory form in a manner not coming within the ambit of the powers granted in this respect to this Court under regulation 13 of the Supreme Constitutional Court Rules of Court cannot be accepted as correct because under the said rule this Court is empowered to make a provisional order “if the justice of the case so requires” and the order made on the present occasion was required by the justice of the present case; and, in any event, it is, in substance, nothing more than an order suspending the effect of the sub judice decision of the respondent Minister.

*Application granted.*

Cases referred to:

- Xenophontos v. The Republic* (1979) 3 C.L.R. 546;  
*Loizides v. The Republic* (1981) 3 C.L.R. 103;  
*Petrolina Ltd. v. The Republic* (1977) 3 C.L.R. 173 at p. 179;  
*Michaelides v. Republic* (1980) 3 C.L.R. 430 at p. 435.

**Application for provisional order.**

After the making of a provisional order in the absence of the respondent although duly notified, directing the discharge of

applicant from the ranks of the National Guard pending the determination of the present recourse, the Court gave the opportunity to the respondent to show cause why the provisional order should not remain in force.

5 C. Clerides, for the applicant.

K. Michaelides, for the respondent.

*Cur. adv. vult.*

10 TRIANTAFYLIDIS P. read the following judgment. In this case a provisional order directing that the applicant should be discharged from the ranks of the National Guard, pending the determination of the present recourse, was made on 25th July 1981.

15 On that date there was no appearance on behalf of the respondent, though the respondent had been duly notified about the application for a provisional order.

I have, therefore, in accordance with the practice adopted by this Court in, inter alia, *Xenophontos v. The Republic*, (1979) 3 C.L.R. 546, given subsequently the opportunity to counsel for the respondent to show cause why the provisional order should not remain in force.

25 Some of the arguments advanced by counsel for the respondent against the continuance in force of the provisional order relate to the merits of this case and, though I am not pronouncing now in respect of them, I have duly taken them into account to the extent necessary for deciding whether or not there exists a probability that the applicant's present recourse will be successful, because if no such probability exists, then, obviously, the provisional order ought to be discharged.

30 On the basis of the material now before me it appears, prima facie, that the sub judice decision of the respondent is tainted by a flagrant illegality in that an Advisory Committee set up in the Ministry, for the purpose of advising the respondent Minister as regards matters such as that in respect of which this recourse was made, has proceeded to "pronounce" that the judgment of a Judge of the Supreme Court in relation to an earlier recourse of the applicant (see *Loizides v. The Republic*, (1981) 3 C.L.R. 103) in connection with issues which are, also, disputed in the present case was wrong, and, having, in effect, "overruled" the said

judgment, the Committee advised the respondent Minister in a manner leading up to his new sub judice decision.

Thus, the said Committee appears to have usurped unlawfully the role of an appellate tribunal and this Court cannot countenance conduct of this nature on the part of the administration. If the Committee felt that the decision in the *Loizides* case, supra, was erroneous the proper course for it was to advise the respondent Minister to appeal against it; and that was not done. 5

I do not overlook that the Advisory Committee in advising the Minister afresh in respect of the claim of the applicant to be discharged from the National Guard had to take into account all relevant considerations, including any new factors, in order to reach a new decision in the matter, but I cannot accept that it was open to the said Committee to proceed to find that the judgment in the *Loizides* case, supra, was erroneous and to base, even partly, its new decision on this premise. 10 15

As I have stated earlier in this judgment it appears, prima facie, that, for the reasons already explained, the sub judice decision of the respondent is tainted by flagrant illegality, which is a ground justifying the making of a provisional order (see, inter alia, in this respect, *Petrolina Ltd. v. The Republic*, (1977) 3 C.L.R. 173, 179, and *Michaelides v. The Republic*, (1980) 3 C.L.R. 430, 435). Of course, before this case is to be determined on its merits counsel for the respondent will be perfectly free to argue once again that there does not exist any flagrant illegality and I will carefully reconsider this issue, because in respect of it I have reached now only a prima facie view which is based on the arguments and on the material at present before me and I have done so solely for the purpose of deciding whether or not the provisional order should continue in force. 20 25 30

Before concluding this judgment I should state that I cannot accept as correct the submission of counsel for the respondent that the provisional order as made on 25th July 1981 was framed in a mandatory form in a manner not coming within the ambit of the powers granted in this respect to this Court under regulation 13 of the Supreme Constitutional Court Rules of Court. In my opinion, under the said rule this Court is em- 35

powered to make a provisional order "if the justice of the case so requires" and the order made on the present occasion was required by the justice of the present case; and, in any event, it is, in substance, nothing more than an order suspending the effect of the sub judice decision of the respondent Minister.

In the light of all the foregoing considerations it is hereby ordered that the provisional order in question is to remain in force until the determination of this recourse or until further order of the Court; but, in view of the fact that counsel for the respondent was, indeed, entitled, in the circumstances of this case, to try to show cause why the provisional order, which was made in his absence, should not continue in force, I am not making any order for costs against the respondent in this connection.

*Provisional order to remain in force.*