

1982 April 2

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CHARALAMBOS POULIAS,

Applicant.

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE MINISTER OF INTERIOR,

Respondent.

(Case No. 51/81).

Act or decision in the sense of Article 146.1 of the Constitution—
Which can be made the subject of a recourse—Call up for military
service of applicant's class—Applicant not challenging his call
up by recourse—But applying by letter, almost three years later,
5 for a certificate that he was not a citizen of the Republic of Cyprus
and not liable to military service—Respondent's reply that he
was liable to such service not an executory administrative act
or decision but only an act of an informatory nature expressing
a legal opinion, which cannot be considered as a decision in the
10 sense of Article 146 of the Constitution.

Citizenship—"Citizen of the Republic of Cyprus"—Person born in
Cyprus before the date of the Treaty of Establishment of the
Republic of Cyprus—And ordinarily resident in Cyprus between
date of his birth and the date of the Treaty—Became a citizen
15 of the United Kingdom and Colonies by birth by virtue of section 4
of the British Nationality Act, 1948—On date of said Treaty
he became a citizen of the Republic of Cyprus by virtue of section
3 of Annex "D" to the said Treaty and because he possessed
the qualifications contemplated by section 2(2)(b) of the said Annex
20 "D" and did not possess any of the qualifications in section 3(2)
of the said Annex enabling him to retain the citizenship of the
United Kingdom and Colonies—Cyprus Citizenship acquired

preserved under Article 198 of the Constitution and under section 3 of the Republic of Cyprus Citizenship Law, 1967 (Law 43/67).

The applicant was born in Nicosia on the 15th February, 1959, and at the time of his birth his parents had their permanent residence in Nicosia, Cyprus. His father was born in Athens on the 24th July, 1927 and was a Greek national. He came to Cyprus in 1936 and he has been residing here permanently ever since. His wife was born in Cyprus on the 22nd October, 1929, and was a Cypriot citizen, holder of a Cyprus passport. When applicant's class was called up for conscription in the National Guard in January, 1977, he did not call for enlistment then or at any subsequent time; and on the 27th October, 1980 he sent, through his lawyers, a letter to the respondent Minister of Interior and Defence, by means of which he asked to be supplied with a certificate that he was not a citizen of the Republic of Cyprus and therefore he was not liable for conscription in the National Guard. The respondent Minister by his reply dated the 18th December, 1980 informed the applicant that he was liable to serve in the National Guard on the ground that he acquired the Cyprus citizenship automatically on the 16th August, 1960, in accordance with Article 2(1) and 2(2)(b) of Annex "D" of the Treaty of Establishment of the Republic of Cyprus because of his birth in Cyprus on the 15th February 1959, and the permanent residence of the whole of the family in Cyprus from his birth till the 16th August, 1960. Hence this recourse.

Counsel for the respondent raised the preliminary objection that the sub judice act was not an executory administrative act but only a confirmatory and/or informatory one of the executory act which was the call of the class of the applicant for military conscription in January 1977 by order of the Minister of Interior dated 2nd December 1976 and in respect of which no recourse could be filed as the time for attacking such decision has elapsed.

On the preliminary objection:

Held, that what is stated in the letter of the 18th December, 1980, which was sent to the applicant in reply to his counsel's letter requesting for a certificate that the applicant was not a citizen of the Republic of Cyprus and not liable to military service,

cannot be considered as amounting to an executory administrative act and/or decision but is only of an informative nature expressing a legal opinion in the case which cannot be considered as a decision in the sense of Article 146 of the Constitution; accordingly the recourse should fail.

Held, further, on the merits of the recourse:

That since applicant acquired at the time of his birth the British Nationality and became a citizen of the United Kingdom and colonies by birth (see section 4* of the British Nationality Act of 1948) and was ordinarily resident in Cyprus between the date of his birth and the date of the Treaty of Establishment of the Republic of Cyprus, which is within the period of five years provided under section 2(1)** of Annex "D" to the said Treaty; and that since he possessed one of the necessary qualifications contemplated by section 2(2)*** and in particular the qualification under section 2(2)(b)**** of the Treaty he became a citizen of the Republic of Cyprus on the date of the Treaty and under section 3***** of the Treaty he lost his citizenship of the United Kingdom and Colonies as he did not possess any of the qualifications set out in s. 3(2) enabling him to retain the citizenship of the United Kingdom and Colonies; that the Cyprus Citizenship acquired by applicant, as above, was preserved under Article 198 of the Constitution and under s. 3 of the Republic of Cyprus Citizenship Law, 1967 (Law 43/1967); that, therefore, applicant's contention that he is not bound to do his military service under the National Guard Laws 20/64 to 88/79 is legally unfounded; accordingly the recourse should be dismissed.

Application dismissed:

Cases referred to:

Pitsillides v. Republic (1973) 3 C.L.R. 15;

Pieri v. Republic (1978) 3 C.L.R. 356;

Florides v. Republic (1979) 3 C.L.R. 37;

* Section 4 is quoted at pp. 173-74 *post*.

** Section 2(1) is quoted at p. 174 *post*.

*** Section 2(2) is quoted at p. 174 *post*.

**** Section 2(2)(b) is quoted at p. 174 *post*.

***** Section 3 is quoted at p. 175 *post*.

Razis v. Republic (1979) 3 C.L.R. 127 (affirmed on appeal vide (1982) 3 C.L.R. 45);

In re P. (G.E.) (An infant) [1965] Ch. 568 at p. 585-586.

Recourse.

Recourse against the decision of the respondent whereby applicant was held liable for military service in the National Guard. 5

L. N. Clerides, for the applicant.

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

Cup. adv. vult. 10

SAVVIDES J. read the following judgment. By this recourse, as originally filed, the applicant was seeking a declaration that he, not being a citizen of the Republic of Cyprus, was not liable to serve in the National Guard.

In view of the legal grounds set out in the opposition, one of which was that the recourse was not directed against any specific act and/or decision and/or omission within the scope of article 146 of the Constitution, applicant felt bound to apply for an amendment of the original prayer and for such purpose he filed an application on 6th October 1981. Such application was opposed but the opposition was later withdrawn and by consent the application was amended to read as follows: 15 20

“The applicant prays for a declaration of the Court that the act and/or decision of the respondent dated 18.12.1980, by which it was stated that the applicant is liable to military service in the National Guard whilst his class has already been called up for service, be declared null and void and of no legal effect whatsoever”. 25

The uncontested facts of the case are briefly as follows: Applicant’s father was born in Athens on 24th July 1927 and is a Greek national. He came to Cyprus in 1936 and he has been residing here permanently ever since. Applicant’s father got married in Cyprus to his present wife, a Cypriot born in Lefkoniko village on 22nd October, 1929, who is a Cypriot citizen, holder of a Cyprus passport under No. A34703. 30 35

The applicant was born in Nicosia on the 15th February, 1959, and at the time of his birth, both his parents had their permanent residence in Nicosia, Cyprus.

5 The applicant belongs to a class which was called up for conscription in the National Guard for 26 months service, in January 1977 (enlistment dates being the 7th and 8th of January). The applicant did not call for enlistment then or at any subsequent time material to the present recourse, and on 27th October 1980, he sent (through his lawyers) a letter to the Minister of Interior and Defence (attached to the opposition as Appendix 'A'), by which he asked to be supplied with a certificate that he is not a citizen of the Republic of Cyprus and therefore he is not liable for conscription in the National Guard.

15 By letter dated 18th December 1980 (Appendix 'C' attached to the opposition), the Director General of the Ministry of Defence replied to applicant's letter as follows:

20 "I have been instructed to refer to your letter dated 27th October 1980, by which you apply on behalf of your client Charalambos N. Poulias of Nicosia that we supply you with a relevant certificate that your said client is not a citizen of the Republic of Cyprus and is not liable to military service and to inform you as follows:-

-----"

25 The letter goes on to set out the family history of the parents of the applicant and then in paragraphs 4 and 5 it continues as follows:-

30 "4. From the examination of the above material it appears that Charalambos Poulias acquired the Cyprus citizenship automatically on the 16th August, 1960, in accordance with Article 2(1) and 2(2)(b) of Annex 'D' of the Treaty of Establishment of the Republic of Cyprus because of his birth in Cyprus on the 15th February 1959, and the permanent residence of the whole of the family in Cyprus from his birth till the 16th August, 1960.

35 5. In view of the above, your said client is liable to service in the National Guard of the Republic the duration of which is 26 months.

6.”

Counsel for applicant based his application solely on the ground that the applicant does not fall within the provisions of Annex ‘D’ of the Treaty of Establishment either from a male descendant or personally and therefore he is not bound to serve in the National Guard.

5

Counsel for the respondent based his opposition on three grounds, namely,

- “1. The application for annulment does not turn against and/or does not attack by its prayer any specific act and/or decision and/or omission within the meaning of Article 146 of the Constitution. 10
- 2. In any event the application of the applicant for annulment was out of time in that, as is shown by paragraph 5 of the facts in the application for annulment, it attacks the act and/or decision of the respondent dated 18.12.1980 which does not constitute an executory administrative act but a confirmatory and/or inforamatory one of the preceding summons of the applicant for conscription in the National Guard in or about January, 1977. 15
- 3. Independently of the above preliminary objections the sub judice act and/or decision is duly reasoned and was rightly and lawfully taken in accordance with the provisions of the relevant laws and/or regulations, after a proper exercise of the powers of the respondent and after all relevant facts, material and circumstances of the case were duly taken into consideration”. 20 25

The first legal ground on which the opposition is based was subsequently abandoned by counsel for respondent after the original prayer was amended by order of the Court dated 14th December 1981, which was made after the filing of the opposition. 30

The first question I have to examine is the preliminary legal objection of the present recourse raised in the grounds of law set out in the opposition (legal ground 2) in that the sub judice act and/or decision is not an executory administrative act, but merely confirmatory or inforamatory of a previous decision. 35

Counsel for the applicant contended that the sub judice act and/or decision amounts to an executory administrative act and not to a confirmatory act and in consequence it creates a legitimate interest vested in the applicant.

- 5 Counsel for the respondent, on the other hand, submitted that the sub judice act is not an executory administrative act but only a confirmatory and/or informatory one of the execu-
10 tory act which was the call of the class of the applicant for mili-
tary conscription in January 1977 by order of the Minister
of Interior and Defence under No. 15435 dated 2nd December
1976, published in the Cyprus Gazette of the 10th December
1976, and in respect of which no recourse could be filed as the
time for attacking such decision has elapsed.

- 15 The letter in which the alleged sub judice act and/or decision
was communicated to the applicant is before the Court and it
is from the contents of such letter and all other material before
me and the circumstances of the case that I have to decide
20 whether what is stated therein amounts to an administrative
act and/or decision of an executory nature within the meaning
of article 146 of the Constitution. Letters of a similar nature
as the present one came for consideration before this Court
on a number of occasions. See on this point *Pitsillides v. The*
Republic (1973) 3 C.L.R. 15; *Pieri v. The Republic* (1978) 3
25 C.L.R. 356; *Florides v. The Republic* (1979) 3 C.L.R. 37; *Razis*
v. The Republic (1979) 3 C.L.R. 127; affirmed on appeal (see
(1982) 3 C.L.R. 45) by the Full Bench.

In the *Pieri* case (supra), at p. 364, the Court found that:-

- 30 "In the present case the letter of the Migration Officer
dated 11th July, 1977, cannot be considered as an admini-
strative act or decision of an executory nature, as it
amounts only to a legal opinion concerning the applicant
and could not directly affect him. His class on 15.7.1978,
the time of filing of this recourse, had not yet been called
up for conscription".

- 35 The letter of the Migration Officer in the above case is in
a similar style to the one in the present case. The only difference
between *Pieri* case and the present case is that in the present
case the letter embodying the alleged act and/or decision was
written in reply to applicant's letter sent nearly four years after

the class of the applicant was called for conscription, whereas in the *Pieri* case it was written before the class of the applicant had been called for military conscription.

In *Florides v. Republic* (supra) the trial Judge at pp. 39, 40 found that the respondent's letters were, in the circumstances of the case, merely "opinions" and not matters of an executory nature. 5

In *Razis and another v. Republic* (supra) at pp. 133-134, the court in dealing with the same question and after referring to and considering the case law on the point, found that the letter containing the decision was not an executory act. The judgment of the court in that case was upheld on appeal*. The judgment of the appellate court concludes as follows:- 10

"In the light of the authorities and in view of the fact that in the present case the decision challenged is nothing more than a legal opinion from the office of the Attorney-General, we affirm the decision of the trial Judge because in our view a legal opinion cannot be considered as a decision in the sense of Article 146 of the Constitution". 15

In *Kyriacopoulos Greek Administrative Law*, Vol. C, 1962 p. 94, it is stated that: 20

"On the contrary, the following acts are not executory and therefore are not attacked by a recourse:-

(a) _____

(b) _____

(c) Opinions, decisions and acts of boards or committees inasmuch as they are not compulsory and have an advisory character". 25

A number of cases decided by the Greek Council of State to this effect are cited at footnote 63 of the same page of *Kyriacopoulos*.

Having directed my mind to the facts of the present case and the contents of the letter of the 18th December 1980, signed by the Director General of the Ministry of Defence, which was sent to the applicant in reply to his counsel's letter requesting 30

* See (1982) 3 C.L.R. 45.

for a certificate that the applicant was not a citizen of the Republic of Cyprus and not liable to military service, I have reached the conclusion that what is stated in the said letter cannot be considered as amounting to an executory administrative act and/or decision but is only of an informatory nature expressing a legal opinion in the case which cannot be considered as a decision in the sense of Article 146 of the Constitution.

In the result the present recourse fails and has to be dismissed.

Notwithstanding my above finding I propose to deal also with the substance of the case and consider whether the applicant is a citizen of the Republic of Cyprus and as such subject to military conscription.

Applicant was born in Cyprus on 15th February 1959, at a time when Cyprus was a British Colony. Questions of Nationality at the material time were governed by the British Nationality Acts 1948 to 1958 of the United Kingdom, the application of which was extended to all British Colonies including Cyprus. Reference is made to the Act of 1948 by the British Nationality (Offences and Fees) Law CAP 106 of the Laws of Cyprus whereby under s. 1, such law shall be read in conjunction with the British Nationality Act 1948 and under s. 2 the word "Act" as referred to in such law, unless the context otherwise requires, is interpreted as meaning the British Nationality Act, 1948 or any other Act amending or substituted for the same.

Under the provisions of s. 4 of the British Nationality Act of 1948 (prior to any amendments after 1960, which are immaterial for the purposes of the present case) the following are stated:-

"4. Citizenship by birth.- Subject to the provisions of this section, every person born within the United Kingdom and Colonies after the commencement of this Act shall be a citizen of the United Kingdom and Colonies by birth:

Provided that a person shall not be such a citizen by virtue of this section if at the time of his birth-

- (a) his father possesses such immunity from suit and legal process as is accorded to an envoy of a foreign sove-

reign power accredited to His Majesty, and is not a citizen of the United Kingdom and Colonies; or

- (b) his father is an enemy alien and the birth occurs in a place then under occupation by the enemy”.

Once the father of the applicant did not fall within any of the categories set out in the above section, applicant acquired at the time of his birth the British Nationality and became a citizen of the United Kingdom and Colonies by birth. 5

Having found as above I am now coming to consider how the position of the applicant was affected by the Treaty of Establishment between the United Kingdom, Greece, Turkey and the Republic of Cyprus, which led to the establishment of the Republic of Cyprus, an independent State functioning under its own Constitution. 10

The question of Nationality is dealt with under Annex D of the Treaty of Establishment. The respective provisions of Annex D which are material to the present case are the following: 15

“SECTION 2

1. Any citizen of the United Kingdom and Colonies who on the date of this Treaty possesses any of the qualifications specified in paragraph 2 of this Section shall on that date become a citizen of the Republic of Cyprus if he was ordinarily resident in the Island of Cyprus at any time in the period of five years immediately before the date of this Treaty. 20 25
2. The qualifications referred to in paragraph 1 of this Section are that the person concerned is—
 - (a) a person who became a British subject under the provisions of the Cyprus (Annexation) Orders in Council, 1914 to 1943; or 30
 - (b) a person who was born in the Island of Cyprus on or after the 5th of November, 1914; or
 - (c) a person descended in the male line from such a person as is referred to in sub-paragraph (a) or (b) of this paragraph. 35

3. Any citizen of the United Kingdom and Colonies born between the date of this Treaty and the agreed date shall become a citizen of the Republic of Cyprus at the date of his birth if his father becomes such a citizen under this Section or would but for his death have done so.

SECTION 3

1. Any citizen of the United Kingdom and Colonies who on the date of this Treaty (or, in the case of a person born between that date and the agreed date, who on the date of his birth) possesses any of the qualifications specified in paragraph 2 of Section 2 of this Annex shall on the agreed date cease to be a citizen of the United Kingdom and Colonies unless he possesses any of the qualifications specified in paragraph 2 of this Section.

2. _____”

The “date of the Treaty” which is referred to in Annex D is the 16th August, 1960, when the Treaty was officially signed and the “agreed date” is according to the definition in s.1(a) of Annex D “a date six months after the date of the Treaty”.

- It is common ground that the parents of the applicant were ordinarily residing in Cyprus, his father since 1936 when he settled in Cyprus till to-day and his mother since the 22nd October, 1929, the date of her birth, and were living together in their matrimonial home ever since they got married. This appears in the letter attached both to the application and the opposition as Annex “A” and “C” respectively and nothing has been alleged to the contrary. This being so, the applicant, who at the time of his birth and the date of the Treaty was of tender years and could not decide for himself where to live, was ordinarily resident in his parents’ matrimonial home (see *Razis* case (supra); also *In re P. (G.E.) (An infant)* [1965] Ch. 568 at pp. 585-586 (C.A.)).

- As I have already mentioned, the applicant was a citizen of the United Kingdom and Colonies by birth and was ordinarily resident in Cyprus between the date of his birth and the date of the Treaty, which is within the period of five years provided

for under section 2(1) of Annex D. In consequence thereof and once the applicant possessed one of the necessary qualifications contemplated by section 2(2) and in particular the qualification under s. 2(2)(b) he became a citizen of the Republic of Cyprus on the date of the Treaty and under section 3 he lost his citizenship of the United Kingdom and Colonies as he did not possess any of the qualifications set out in s. 3(2) enabling him to retain the citizenship of the United Kingdom and Colonies. The Cyprus Citizenship acquired by applicant, as above, was preserved under Article 198 of the Constitution and under s. 3 of the Republic of Cyprus Citizenship Law 1967 (Law 43/1967). 5 10

Having found as above applicant's contention that he is not bound to do his military service under the National Guard Laws 20/64 to 88/79 is legally unfounded. 15

For all the above reasons the present recourse fails and is hereby dismissed. In the circumstances I make no order for costs.

Application dismissed. No order as to costs. 20