

1982 April 26

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ALKIS SARRIS,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH

1. THE COUNCIL OF MINISTERS

2. THE MINISTER OF INTERIOR AND DEFENCE,

Respondents.

(Case No. 150/80).

Constitutional Law—Constitutionality of legislation—Section 2(b) of the National Guard (Amendment) Law, 1978 (Law 22/78) not contrary to Article 198 of the Constitution and to the provisions of Annex “D” to the Treaty of Establishment of the Republic of Cyprus of 1960—Republic v. Droushiotis and Others (1981) 3 C.L.R. 623 followed.

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Citizenship—Citizen of the Republic of Cyprus—Foreign citizen descended in the male line from a foreign citizen—Though born in Cyprus at a time when his parents were ordinarily resident in Cyprus, does not fall within the category of “citizen of the Republic” as defined by section 2(b) of the National Guard (Amendment) Law, 1976 (Law 22/78)—And he cannot be considered as a conscript under the National Guard Laws 1964 to 1979—Armenis v. Republic (1979) 3 C.L.R. 41 followed; Republic v. Droushiotis and Others (1981) 3 C.L.R. 623 distinguished.

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The applicant was born in Famagusta on 27.3.1962 at a time when his parents had their ordinary residence at Famagusta. He was a Greek citizen, a holder of a Greek passport and at the time of the filing of this recourse he was resident in Limassol and he was a student of the Limassol Grammar School. Applicant’s father was a Greek citizen, a holder of a Greek passport and descended in the male line from a Greek citizen. He came

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to Cyprus in 1935 and in 1946 he obtained a permanent residence permit in Cyprus, where he got married to the mother of the applicant on the 18th May, 1952 and both had been residing continuously in Cyprus ever since, till 1975 when they left for Greece and since then they have been ordinarily residing in Greece. By virtue of section 4(1) of the National Guard Laws all citizens of the Republic are liable to serve in the National Guard. When applicant's class was called up for conscription applicant applied to the respondent Minister for a certificate that he was not subject to military service on the ground that he was a Greek citizen and holder of a Greek passport, descended in the male line from a Greek citizen and that his parents since 1975 have been ordinarily residing in Greece. The respondent Minister turned down the application on the ground that applicant was a person of "Cyprus origin due to his birth in Cyprus whilst his parents were ordinarily residing in Cyprus and, therefore, in accordance with the definition of the term 'citizen of the Republic' ascribed to it by section 2 of the National Guard Laws 1964-1979 (Law 22/78 is relative thereto), he is subject to military service in Cyprus". Hence this recourse.

Counsel for the applicant mainly contended:

- (a) That section 2(b)* of the National Guard (Amendment) Law, 1978 (Law 22/78) which amended section 2 of the principal National Guard Law, 1964 (Law 20/64) is unconstitutional as being repugnant to Annex "D" of the Treaty of Establishment and to Article 198 of the Constitution.
- (b) That the provisions of section 2(b) of Law 22/78 do not extend to the case of the applicant and they do not render him subject to military conscription under the National Guard Laws, 1964-1979.

Held, that section 2(b) of the National Guard (Amendment) Law, 1978 (Law 22/78) is not repugnant to Article 198 of the Constitution and to the provisions of Annex "D" to the Treaty of Establishment of the Republic of Cyprus of 1960; accordingly contention (a) should fail (*Republic v. Droushiotis and Others* (1981) 3 C.L.R. 623 followed).

* Section 2(b) is quoted at pp. 336-37 *post*.

(2) That since applicant is not a citizen of the Republic under the citizenship Laws or Annex "D" to the Treaty of Establishment; and that since he is a foreign (Greek) citizen descended in the male line from a Greek citizen and not a foreign citizen descended in the male line from a person born in Cyprus as was the position in the *Droushiotis* case (supra), he does not fall within the category of "citizen of the Republic" as defined by section 2(b) of the National Guard (Amendment) Law, 1978 (Law 22/78) and he cannot be considered as a concript under the National Guard Laws 1964 to 1979; accordingly the sub judice decision must be annulled (*Armenis v. Republic* (1979) 3 C.L.R. 41 followed; *Republic v. Droushiotis and Others* (1981) 3 C.L.R. distinguished).

Sub judice decision annulled.

Cases referred to:

Pieri v. Republic (1979) 3 C.L.R. 91;
Droushiotis v. Republic (1980) 3 C.L.R. 523;
Georghiou and Others v. Republic (1980) 3 C.L.R. 585;
Republic v. Droushiotis and Others (1981) 3 C.L.R. 623;
Poulias v. Republic (reported in this Part at p. 165 ante)
Armenis v. Republic (1979) 3 C.L.R. 41.

Recourse.

Recourse against the decision of the respondent not to exempt applicant from the obligation to serve in the National Guard.

G. Cacoyannis, for the applicant.
K. Michaelides, for the respondents.

Cur. adv. vult.

SAVVIDES J. read the following judgment. The applicant was born in Famagusta on 27.3.1962 at a time when his parents had their ordinary residence at Famagusta. He is a Greek citizen and a holder of a Greek passport under No. 980/74 issued on 24.8.74. At the time of the filing of this recourse, he was resident in Limassol and he was a student of the last class of the Limassol Grammar School. The applicant's father is a Greek citizen and a holder of Greek passport No. YI33238 descended in the male line from a Greek citizen. He came to Cyprus in 1935 and in 1946 he obtained a permanent residence permit in Cyprus, where he got married to the mother of the applicant on 18th May, 1952 and both had been residing continuously in Cyprus ever since, till 1975

when they left for Greece and since 1975 they have been ordinarily residing at Volos, Greece.

5 The applicant belongs to a class which was called up for conscription in the National Guard in 1980, for 26 months' service, by decision of the Council of Ministers No. 18531. By an order of the Minister of Defence under No. 1294 dated 21.11.1979, and published in Supplement No. 4 of the official Gazette of the Republic on 30.11.1976 under Notification 1567, by virtue of the powers vested in him, the class of the
10 applicant was called up to comply with the decision of the Council of Ministers and enlist in the National Guard at the enlistment centres on the dates fixed in January, 1980.

15 On 27.12.1979 the applicant by letter of his counsel addressed to the Minister of Interior and Defence, copy of which is attached to the application as Annex 'A', informed him that he was a Greek citizen and holder of a Greek passport, descended in male line from a Greek citizen and that his parents since 1975 have been ordinarily residing in Greece. By the said letter counsel for the applicant alleged that the applicant was not
20 subject to military conscription and requested respondent 2 to consider applicant's case in the light of the facts set out in the letter and issue a certificate to the applicant that he was not subject to military service.

25 By letter dated 11.3.1980, signed by the Director-General of the Ministry of Defence, copy of which is attached to the application as Annex 'B', the applicant's counsel was informed as follows:-

30 "I have been instructed to refer to your letter dated 27.12.1979 in respect of the subject of military obligation of Alkis Sarris born in Famagusta in 1962 and to inform you that after examination it has emerged that the said person is of Cyprus origin due to his birth in Cyprus whilst his parents were ordinarily residing in Cyprus and, therefore, in accordance with the definition of the term 'citizen of
35 the Republic' ascribed to it by section 2 of the National Guard Laws 1964-1979 (Law 22/78 is relative thereto), he is bound to military service in Cyprus".

As a result, the applicant filed the present recourse whereby he prays for:

- (1) A declaration of the Court that the decision of the Council of Ministers No. 18531, published in Supplement No. 4 of the official Gazette of the Republic of the 30.11.1979, whereby the class of the applicant was called for enlistment in the National Guard, is, in so far as the applicant is concerned, unconstitutional and illegal in that the amendment of the National Guard Law, by virtue of section 2 of Law 22/78, is repugnant to Annex 'D' of the Treaty of Establishment and in consequence it is unconstitutional, null and void ab initio. 5
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- (2) A declaration of the Court that the act and/or decision communicated to the applicant by respondent 2, dated 11.3.1980 to the effect that the applicant is subject to military service "because of his birth in Cyprus whilst his parents were ordinarily residing in Cyprus", is null and void and of no legal effect, being contrary to the provisions of the Constitution and/or the Law and/or that it was taken in excess and/or abuse of powers. 15
- (3) A declaration of the Court that Law 22/78, and in particular section 2 by virtue of which the principal National Guard Law 20/64 has been amended, violates Articles 181 and 198 of the Constitution and, therefore, it is unconstitutional, null and void and of no legal effect. 20

By their opposition the respondents rely on the following grounds of law:- 25

- "1. The decision complained of is lawful and has been taken in accordance with the National Guard Laws 1964-1979.
2. Section 2 of the National Guard Laws as amended by section 2(b) of the National Guard (Amendment) Law 22/78 is not unconstitutional. There is no constitutional or other legal provision prohibiting the Republic of Cyprus from enacting Law 22/78. 30
3. The Treaty of Establishment and Annex 'D' thereof are irrelevant for the purposes of the present proceedings. Furthermore the object of the Treaty of Establishment was to safeguard the right to the citizenship of Cyprus to certain categories of persons, who satisfied certain requirements enumerated therein. But a new law might 35

enlarge the categories of persons who could acquire the citizenship of Cyprus, even though same was not provided in the Treaty of Establishment.

- 5 4. The object of the amendment of the National Guard Laws was to specify and/or enlarge the categories of persons who are liable to serve in the National Guard independently of their nationality. By Law 22/78 it was not intended to bestow upon applicant the Cyprus citizenship.
- 10 5. The definition 'citizen of Cyprus' set out in section 2(b) of Law 22/78 is solely for the purposes of the National Guard Laws.
- 15 6. The applicant is a person which was born in Cyprus after the 5th of November, 1914 while his parents were ordinarily resident in Cyprus and, therefore, liable to serve in the National Guard under the National Guard (Amendment) Law, 22/78.
- 20 7. Since applicant enjoys all rights and privileges of a Cypriot national including the right to hold and own immovable property he has the duty to share also the burdens of the State.
- 25 8. Applicant though technically an alien is in a privileged position vis-a-vis all other aliens and he cannot on the one hand enjoy all the rights and privileges of a Cypriot national and on the other hand avoid the honorary obligation to serve in the National Guard imposed on all Cypriots, hiding behind the fact that he is not a citizen of the Republic under Annex 'D' of the Constitution or Law 43/67.
- 30 9. The obligation to serve in the National Guard is the necessary consequence of the equality enjoyed by applicant before the law and the Administration".

It is apparent both from the legal grounds and the facts set out in the application and the opposition and the written addresses of counsel that there is no dispute as to the facts of the case and that the only issues which are posing for consideration are the following legal issues:

- (a) Whether section 2(b) of Law 22/78 which amended

section 2 of the principal National Guard Law 20/64 is unconstitutional as being repugnant to Annex 'D' of the Treaty of Establishment and to Article 198 of the Constitution.

- (b) Whether the provisions of section 2(b) of Law 22/78 extend to and apply in the case of the applicant, thus rendering him subject to military conscription under the National Guard Laws 1964-1979. 5

By virtue of section 4(1) of Law 20/64 it is provided that all citizens of the Republic are, subject to the provisions of such Law, liable to serve in the National Guard. 10

Section 2(b) of the National Guard (Amendment) Law, 1978, (Law 22/78) which amended Law 20/64 by inserting a definition of "citizen of the Republic" in section 2 of Law 20/64 reads as follows: 15

"2. Το άρθρον 2 του βασικοῦ νόμου τροποποιεῖται ὡς ἀκολουθῶς:-

(α) -----

- (β) διὰ τῆς ἐν αὐτῷ ἐνθέσεως, εἰς τὴν δέουσαν ἀλφαβητικὴν αὐτοῦ σειράν, τοῦ ἀκολουθοῦ νέου ὁρισμοῦ:-

'πολίτης τῆς Δημοκρατίας' σημαίνει πολίτην τῆς Δημοκρατίας καὶ περιλαμβάνει πρόσωπον Κυπριακῆς καταγωγῆς ἐξ ἀρρενογονίας, ἥτοι- 20

(α) πρόσωπον, τὸ ὁποῖον κατέστη Βρεττανὸς ὑπήκοος δυνάμει τῶν περὶ Προσαρτήσεως τῆς Κύπρου Διαταγμάτων ἐν Συμβουλίῳ τοῦ 1914 ἕως 1943· ἢ 25

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

(γ) ἐξώγαμον ἢ νόθον τέκνον τοῦ ὁποῖου ἡ μήτηρ κατεῖχε κατὰ τὸν χρόνον τῆς γεννήσεως αὐτοῦ τὰ προσόντα τὰ ἀναφερόμενα ἐν τῇ ἄνω παραγράφῳ (α) ἢ (β) τοῦ παρόντος ὁρισμοῦ· ἢ 30

(δ) πρόσωπον καταγόμενον ἐξ ἀρρενογονίας ἐκ προσώπου οἷον ἀναφέρεται ἐν τῇ ἄνω παραγράφῳ (α) ἢ (β) ἢ (γ) τοῦ παρόντος ὁρισμοῦ." 35

("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:-

5 'Citizen of the Republic' means citizen of the Republic and includes a person of Cypriot origin descended in the male line, that is—

10 (a) a person who has become a British subject under the provisions of the Cyprus (Annexation) Orders in Council 1914 to 1943; or

(b) a person who was born in Cyprus on or after the 5th of November, 1914, at a time when his parents were ordinarily residing in Cyprus; or

15 (c) an illegitimate child whose mother, at the time of his birth, possessed the qualifications referred to in paragraph (a) or (b), above, of this definition; or

20 (d) a person descended in the male line from a person referred to in paragraph (a) or (b), or (c), above, of this definition").

The constitutionality of section 2(b) of Law 22/78 came up for consideration for the first time before a Judge of this Court sitting as first instance trial judge, in *Pieri v. The Republic*, (1979) 3 C.L.R. 91 in which it was found that such section was
25 contrary to the provisions of Article 198 of the Constitution and of Annex 'D' to the Treaty of Establishment of the Republic of Cyprus of 1960. There was no appeal from such decision and it was followed later in *Droushiotis v. The Republic* (1980) 3 C.L.R. 523 and *Georghiou and others v. The Republic* (1980)
30 3 C.L.R. 585. There was an appeal from the decisions in the latter cases before the Full Bench of this Court, (*Republic v. Droushiotis and others* (1981) 3 C.L.R. 623) the result of which was to overrule by majority the decisions in both cases and also the decision in the *Pieri* case (supra). The decision of the Full
35 Bench in *Republic v. Droushiotis and others* (supra) reads as follows at pp. 627, 628 (per Triantafyllides, P.):

“We have eventually been persuaded, however, by counsel for the appellant that when section 2(b) of Law 22/78 is construed in accordance with its true meaning and effect it should not be regarded as a Law intended to make provision about citizenship of the Republic but, merely, as a Law extending the notion of ‘citizen of the Republic’, which is found in section 4(1) of Law 20/64, only for the purposes of such Law; in other words, those foreign nationals, such as the present respondents, who are descended in the male line from persons born in Cyprus are not rendered, ipso facto, by means of section 2(b) of Law 22/78, citizens of the Republic, but are only burdened with the obligation to serve in the National Guard in the same manner as citizens of the Republic; therefore, it is only for the purposes of the National Guard legislation that they are treated as being citizens of the Republic and this is done in a descriptive manner not affecting their citizenship status at all.

Even assuming, therefore, that we were to hold that, in view of Article 198 of the Constitution, only a Law of citizenship can make provision about the status as such of a citizen of the Republic, and that any other Law purporting to do so would be unconstitutional as being contrary to Article 198, above, we are of the view that section 2(b) of Law 22/78 is not contrary to Article 198, because it is not at all a legislative provision related to the status of Cyprus citizens; it is only a legislative drafting device which has been resorted to in order to bring within the ambit of the description of Cyprus citizens, for the purposes only of Law 20/64, certain persons who are not, from the point of view of national status, citizens of the Republic, even though they are descended in the male line from Cypriots.

In any case, in our view, Article 198 does not go so far as to exclude the making of provision about Cyprus citizenship by a Law which is not the Law of citizenship envisaged by such Article. All that Article 198 provides is that certain provisions, which are referred to therein, including the provision of Annex ‘D’ to the Treaty of Establishment, shall have effect until a Law of citizenship is made

5 incorporating such provisions, and since this has been done by means of Law 43/67, there is nothing to prevent the Legislature from making further provisions about citizenship by means of any other Law or for the particular purposes of any other Law".

10 In view of the above decision I find that the answer for the first legal issue in the present case is that section 2(b) of the National Guard (Amendment) Law, 1978 (Law 22/78) is not repugnant to Article 198 of the Constitution and to the provisions of Annex 'D' to the Treaty of Establishment of the Republic of Cyprus of 1960. Therefore, applicant's recourse fails on this ground.

15 I come now to consider the second question as to whether section 2(b) of Law 22/78 extends to the applicant in the circumstances of this case. The facts of the present case are different from those in *Droushiotis* case (supra). In that case the applicant though a foreign citizen was descended in the male line from a person born in Cyprus, whereas in the present case the applicant was a Greek citizen descended in the male line from a Greek citizen. From what appears in the first paragraph (middle) and the second paragraph (last six lines) of the part of the judgment referred to earlier, the Court in deciding that case took into consideration the facts of that and of other similar cases. To draw the distinction between that case and 20 the present one, I wish to stress once again what is referred to in the said two paragraphs: First paragraph, "in other words, those foreign nationals such as the present respondents, *who are descended in the male line from persons born in Cyprus* are not rendered _____" Second paragraph, "to bring within the ambit of the description of Cyprus citizens for the purposes only of Law 20/64, certain persons who are not, from the point of view of national status, citizens of the Republic, *even though they are descended in the male line from Cypriots*". (The underlining is mine).

35 The applicant, therefore, does not fall within the category of persons contemplated by *Droushiotis* case. He does not fall either within the category of a person with which I have recently dealt in the case of *Poulias v. The Republic* (1982) 3 C.L.R. 165 who though descended in the male line from foreign citizens was 40 born in Cyprus after the 5th of November, 1914 and the date

of the Treaty of Establishment (16th August, 1960) and by reason of his birth in Cyprus which was then a Colony, acquired the citizenship of the United Kingdom and the Colonies and was ordinarily resident in Cyprus at any time in the period of five years immediately before the date of the Treaty, qualifications which vested such person with the status of citizen of the Republic of Cyprus under sections 2 and 3 of Annex 'D' to the Treaty of Establishment. The applicant in the present case was born on 27.3.62, that is, after the date of the Treaty and more than six months after the agreed date and, therefore, he is not a person to whom either section 2(1)(2) or section 2(3) or section 3 of Annex 'D' can apply.

The question as to whether section 2(b) of Law 22/78 applies in cases similar to the present one, was considered by this Court in the case of *Armenis v. The Republic* (1979) 3 C.L.R. 41 from which there was no appeal. The facts of that case were briefly as follows: The applicant's father was a Greek citizen descended from parents who were Greek citizens. He got married to a Cypriot on 8th October, 1960 and since the 13th May, 1961 he continuously resided in Cyprus with his family. Applicant was born in Limassol on the 13th October, 1961, at a time when his parents had continuously their ordinary residence in Cyprus. When applicant was called to enlist in the National Guard, his counsel wrote to the Minister of Interior that the applicant had no obligation to serve in the National Guard because, inter alia, he was not a citizen of the Republic. The Minister replied that under section 2(b) of the National Guard (Amendment) Law (Law 22/78) the applicant was considered to be a conscript. The learned trial Judge after making reference to the contents of the written opinion of the Attorney-General on the issue before him, which was produced to the Court by counsel for the Republic, concluded as follows at pages 54, 55 (per A. Loizou J.):

"I fully agree with the conclusion and reasoning of the above opinion which is also applicable to the case in hand.

Paragraph (b) of section 2(b) of Law 22/78 as set out above, should be read together with the second part of the definition, that is the phrase 'includes every person of Cypriot origin descended in the male line', because this

phrase would have been rendered meaningless if not read together with paragraph (b) with which it is joined by the words 'that is'. Thus the above definition of citizen of the Republic, for the purposes of the National Guard Laws, means, on the one hand 'citizen of the Republic' as this term is defined in the relevant Citizenship Laws and in addition it includes every other person of Cypriot origin but descended in the male line which, moreover, was born in Cyprus on or after the 5th November, 1914 at a time when his parents were ordinarily resident in Cyprus. In the instant case there is no allegation that the applicant is a citizen of the Republic under the Citizenship Laws or Annex D to the Treaty of Establishment and he cannot be treated, as was done by the sub judice decision, that he falls within the above definition of section 2(b) of the National Guard (Amendment) Law, 1978 (Law 22/78) and particularly within the second leg thereof because there is lacking the necessary element of descent in the male line.

This construction is not only consonant with the letter of the said legislative provision but also with the principle that provisions affecting the liberty of the subject, even in cases permitted by the Constitution or the Laws, should be strictly construed.

Though in the case in hand there was consensus of opinion, it is upto the Court to consider the legality or not of the sub judice administrative act, because the administrative act is valid until revoked, expressly repealed, or by the issuing of an act to the contrary, or cancelled, or, in exceptional cases, loses its force or its implementation is rendered unreasonable or superfluous due to the external objective change of circumstances. Since therefore nothing of the sort happened the annulment of the sub judice administrative act is the task of this Court in the exercise of its powers under Article 146 of the Constitution".

I fully agree with the above conclusions and reasoning and I adopt same for the purpose of the present case. Therefore, I find on the second legal ground that the applicant does not fall within the category of "citizen of the Republic" as defined

by section 2(b) of the National Guard (Amendment) Law, 1978 and he cannot be considered as a conscript under the National Guard Laws 1964 to 1979. In the result, the sub judice decision has to be and is hereby annulled.

In the circumstances I make no order for costs.

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Sub judice decision annulled. No order as to costs.