

1982 October 16

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

MICHALAKIS SERGHIU,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE COMMANDER OF THE POLICE,

Respondent.

(Case No. 180/80).

5 *Interdiction—Member of the Police—Non-payment of emoluments withheld during interdiction—Possible even in cases where the interdicted member was charged and convicted of an offence other than the one for the inquiry into which he had been interdicted—Regulation 23(f)(i) of the Police Regulations, 1958–1977*

10 *Constitutional Law—Equality—Principle of equality—Article 28 of the Constitution—Entails the equal or similar treatment of all those who are found to be in the same situation—Refusal of Commander of Police to refund to member of Police Force of the part of his pay which was withheld during his interdiction—In exercise of powers under regulation 23(f) of the Police Regulations, 1958–1977—Principle of equality not contravened.*

15 *Act or decision in the sense of Article 146.1 of the Constitution—Which can be made the subject of a recourse—Commander of Police refusing to pay to member of the Police Force of the part of his pay withheld during interdiction and informing him of refusal by letter—Non-payment by operation of Law (Regulation 23(f) of the Police Regulations 1958–1977) and not by any decision, act or omission of the Commander—Said letter only informative—An act in the sense of the above Article being an act or omission which produces legal results and affects a person, said refusal not amenable to the jurisdiction of this Court—But even if Commander empowered in Law to take any decision*

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such decision not wrong in Law and not taken after a defective inquiry.

The applicant, a member of the Police Force was on 11.4.1978 arrested in Limassol in connection with a seditious conspiracy against the State and as from that day he was duly interdicted pending an inquiry into the commission of that offence. In respect of the period of interdiction from his duty he was receiving an interdiction allowance equal to half of his pay, as provided by Police Regulation 23(b). He was remanded in custody until 18.5.1978 when he was released. He was not prosecuted for that offence but in the course of the inquiry evidence revealed that he had committed disciplinary offences. Two parallel proceedings were put in motion against him for disciplinary offences. After the proper procedure was followed, he was found guilty of disciplinary offences including the carrying of an automatic weapon during the days of the coup, and a fine of £200.- was imposed on him on 17.10.1979. On 18.10.1979 he resumed his normal duties.

The applicant has not challenged either his interdiction or his conviction or sentence.

By letter dated 7.3.1980 addressed to the Commander of the Police he requested payment of half of his pay for the period of his interdiction, amounting to £2,087.- as the disciplinary offence for which he was found guilty and fined was unconnected with the offence due to the inquiry into which he was interdicted. The Commander of Police, by letter dated 12.4.1980, turned down his request on the ground that the disciplinary proceedings and the applicant's conviction were the result of his unlawful activities even though he was not criminally prosecuted.

Counsel for the applicant mainly contended:

- (a) That the applicant was not prosecuted or charged in disciplinary proceedings for the offence for which he was interdicted and, therefore, under regulation 23(f)(i)* of the Police Regulations he was entitled to receive the pay and allowances to which he would have been entitled but for his interdiction from duty;

* Regulation 23(f)(i) is quoted at p. 876 post.

(b) That the sub judice decision infringes the principle of equality safeguarded by Article 28 of the Constitution; and, lastly,

5 (c) That the Commander of the Police acted under a misconception of fact and in abuse of his powers as he took into consideration "unlawful activities" of the applicant for which he was not prosecuted either criminally or disciplinarily.

10 *Held*, (1) that the applicant was charged, found guilty and fined for a disciplinary offence; that the wording of regulation 23(f)(i) does not permit the construction placed on it by counsel for the applicant; that the interdicted member of the Force need not be charged with the offence for the inquiry into which he was interdicted; that the indefinite article "an" is used;
15 that it would have been really absurd if a member of the Police was interdicted and during the inquiry it was found out that he had committed criminal or disciplinary offences other than the one for which the interdiction, and when charged and found guilty on these charges, to be entitled to his pay as if exonerated
20 from any liability; that the only literal and reasonable construction of the words of this Regulation is that a member of the Police is entitled to his pay if no charge for any disciplinary offence against him is preferred and not when he is proceeded with any disciplinary offence other than the one for which the
25 inquiry started; accordingly contention (a) should fail.

(2) That the principle of equality entails the equal or similar treatment of all those who are found to be in the same situation; that regulation 23 governs interdiction of all members of the Police Force, their pay allowance during the interdiction and the circumstances under which, after the interdiction, a member of the Force may receive the allowance not paid him due to the interdiction; that it is of general application to all members of the Police Force; that the Police Force is a class of its own; that there is no differentiation between the members of the Force;
30 that the only differentiation in regulation 23(f) is between those who were either not charged or the charge against them was dismissed or on whom a light sentence was imposed (regulation 23(f)(iii)) and those who were charged, found guilty and received a form and extent of punishment more severe than the one set
35 out in paragraph (f)(ii); that this is a reasonable differentiation
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and it does not infringe the principle of equality; that the members of each of these two broad categories receive equal treatment; accordingly contention (b) should fail.

(3) That under the Regulations the Commander of the Police in the case of this applicant, who received a punishment of £200.- fine, which exceeds 10 days of his pay, had no discretion to exercise; he simply applied the Law; that the letter of 12.4.1980 is only informative irrespective of its wording; that the non-payment of the applicant is by operation of law and not by any decision, act or omission of the Commander; that an administrative act in the sense of Art. 146.1 of the Constitution is an act or omission which produces legal results and affects a person; that only such act is amenable to the jurisdiction of this Court; that even if it is argued that the Commander was empowered by Law to take any decision, which he did, and his decision is contained in the letter of 12.4.1980, I am of the view and so hold, that such decision was neither wrong in Law nor taken after defective inquiry, as he did not fail to take into consideration anything existent or took into consideration anything non existent; that the "unlawful activities" referred to in that letter are those for which the applicant was charged and convicted.

Application dismissed.

Cases referred to:

- Burton v. United States*, 196 U.S. 283, 295; 49 Law. ed. 482, 485; 25
- Saba and Another v. Republic* (1980) 3 C.L.R. 149;
- Mikrommatis v. Republic*, 2 R.S.C.C. 125;
- Panayides v. The Republic* (1965) 3 C.L.R. 107;
- Loucas v. The Republic* (1965) 3 C.L.R. 383; 30
- Impalex Agencies Ltd. v. The Republic* (1970) 3 C.L.R. 361;
- The Republic v. Nishan Arakian and Others* (1972) 3 C.L.R. 294, at p. 298;
- Lordos & Sons v. The Water Board of Limassol* (1978) 3 C.L.R. 215; 35
- Decisions of the Greek Council of State in Case Nos. 1273/65, 1247/67, 2063/68 and 1215/69.*

Recourse.

Recourse against the refusal of the respondent to direct the payment to applicant of half of his pay not received by him due to his interdiction.

5 *N. Neocleous, for the applicant.*

S. Georghiades, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

10 STYLIANIDES J. read the following judgment. By this recourse the applicant seeks a declaration that the refusal of the Commander of the Police to direct the payment to him of half of his pay not received by him during his interdiction from 11.4.78 - 18.10.79 is null and void and of no effect.

15 The applicant joined the Police Force on 16.6.58. His services were terminated for the public interest on 1.8.73 and on the day following the coup of 15th July, 1974, he was restored to his previous position and posted at Limassol Police Division.

20 On 11.4.78 he was arrested in Limassol in connection with a seditious conspiracy against the State and as from that day he was duly interdicted pending an inquiry into the commission of that offence. In respect of the period of interdiction from his duty he was receiving an interdiction allowance equal to half of his pay, as provided by Police Regulation R.23(b). He was remanded in custody until 18.5.78 when he was released.

25 He was not prosecuted for that offence but in the course of the inquiry evidence revealed that he had committed disciplinary offences. Two parallel proceedings were put in motion against him for disciplinary offences. After the proper procedure was

30 followed, he was found guilty of disciplinary offences including the carrying of an automatic weapon during the days of the coup, and a fine of £200.- was imposed on him on 17.10.79. On 18.10.79 he resumed his normal duties.

The applicant has not challenged either his interdiction or his conviction or sentence.

35 By letter dated 7.3.80 addressed to the Commander of the Police he requested payment of half of his pay for the period of his interdiction, amounting to £2,087.-, as the disciplinary

offence for which he was found guilty and fined was unconnected with the offence due to the inquiry into which he was interdicted.

On 12.4.80 the Commander of the Police by letter, exhibit "A", informed him that having considered the facts and circumstances of his case he was of the opinion that rightly he was not paid as the disciplinary proceedings and the applicant's conviction were the result of his unlawful activities though he was not criminally prosecuted. 5

The relevant regulation governing the matter is regulation 23(f) of the Police Regulations, 1958-1977, which reads as follows:- 10

"Any such member, who having been interdicted from duty, returns to duty shall receive, as from the date of his interdiction, the pay and allowances to which he would have been entitled by virtue of the Police (General) Regulations, 1958-1977, or any regulations amending or substituted for the same made under the Police Law, 1958, and then in force, but for his interdiction from duty, if - 15

- (i) it has been decided that he shall not be charged with an offence against discipline; or 20
- (ii) all charges against him have been dismissed; or
- (iii) he has been punished by withholding, stoppage or deferment of increment, a fine not exceeding ten days' pay, severe reprimand, reprimand or admonition, unless the Chief Constable directs that he shall not receive the said pay and allowances". 25

It was submitted by counsel for the applicant:-

- (a) That the applicant was not prosecuted or charged in disciplinary proceedings for the offence for which he was interdicted and, therefore, under regulation 23(f) (i) he was entitled to receive the pay and allowances to which he would have been entitled but for his interdiction from duty; 30
- (b) That the non-payment to him of the aforesaid amount is repugnant to Article 12.2 of the Constitution in the sense that he is punished twice for the same act or omission; 35

(c) That it infringes the principle of equality safeguarded by Article 28 of the Constitution; and, lastly,

5 (d) That the Commander of the Police acted under a misconception of fact and in abuse of his powers as he took into consideration “unlawful activities” of the applicant for which he was not prosecuted either criminally or disciplinarily.

10 In his oral clarification he rightly withdrew ground (b) above and, therefore, I need not pronounce in abstracto. It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case. (*Burton v. United States*, 196 U.S. 283, 295; 49 Law. ed. 482, 485; *Saba and Another v. The Republic*, (1980) 3 C.L.R. 149).

15 A member of the Police on returning to duty after interdiction shall receive his allowance if it has been decided that he shall not be charged with an offence against discipline.

20 The applicant was charged, found guilty and fined for a disciplinary offence. The wording of regulation 23(f)(i) does not permit the construction placed on it by counsel for the applicant. The interdicted member of the Force need not be charged with the offence for the inquiry into which he was interdicted. The indefinite article “an” is used. It would have been really absurd if a member of the Police was interdicted and during the inquiry it was found out that he had committed 25 criminal or disciplinary offences other than the one for which the interdiction, and when charged and found guilty on these charges, to be entitled to his pay as if exonerated from any liability. The only literal and reasonable construction of the words of this Regulation is that a member of the Police is 30 entitled to his pay if no charge for any disciplinary offence against him is preferred and not when he is proceeded with any disciplinary offence other than the one for which the inquiry started.

35 The principle of equality is enunciated and safeguarded by the express provision of Article 28 of the Constitution. The application of the principle of equality has been considered in *Mikrommatis v. The Republic*, 2 R.S.C.C. 125, where it was stated at p.131:-

“Equal before the law’ in paragraph 1 of Article 28 does

not convey the notion of exact arithmetical equality but it safeguards only against arbitrary differentiations and does not exclude reasonable distinctions which have to be made in view of the intrinsic nature of things”.

The *Mikrommatis* case was followed in, inter alia, *Panayides v. The Republic*, (1965) 3 C.L.R. 107; *Loucas v. The Republic* (1965) 3 C.L.R. 383; *Impalex Agencies Ltd. v. The Republic*, (1970) 3 C.L.R. 361; *The Republic v. Nishan Arakian and Others*, (1972) 3 C.L.R. 294, at p.298; *Lordos & Sons v. The Water Board of Limassol*, (1978) 3 C.L.R. 215. 5 10

Article 28.1 of our Constitution corresponds to Art. 3 of the Greek Constitution of 1952. The provision of Art. 28.1 excludes discrimination in State action both in the legislative and in the administrative sphere of Government.

The Greek Council of State in Case No. 1273/65 stated that the principle of equality entails the equal or similar treatment of all those who are found to be in the same situation – (“Η συνταγματική αρχή τῆς ἰσότητος, ὑπὸ τὴν ἔννοιαν τῆς ἴσης ἢ ὁμοιομόρφου μεταχειρίσεως πάντων τῶν ὑπὸ τὰς αὐτὰς συνθήκας τελούντων”). (See also Cases No. 1247/67, 2063/68 and 1215/69). 15 20

(“The constitutional principle of equality, entails the equal or similar treatment of all those who are found to be in the same situation”).

Regulation 23 governs interdiction of all members of the Police Force, their pay allowance during the interdiction and the circumstances under which, after the interdiction, a member of the Force may receive the allowance not paid to him due to the interdiction. It is of general application to all members of the Police Force. The Police Force is a class of its own. There is no differentiation between the members of the Force. The only differentiation in regulation 23(f) is between those who were either not charged or the charge against them was dismissed or on whom a light sentence was imposed (regulation 23(f) (iii)) and those who were charged, found guilty and received a form and extent of punishment more severe than the one set out in paragraph (f)(iii). This is a reasonable differentiation and it does not infringe the principle of equality. The members of each of these two broad categories receive equal treatment. 25 30 35

This ground fails.

Under the Regulations the Commander of the Police in the case of this applicant, who received a punishment of £200.- fine, which exceeds 10 days of his pay, had no discretion to exercise; he simply applied the Law. The letter of 12.4.80 is only informative irrespective of its wording. The non-payment of the applicant is by operation of law and not by any decision, act or omission of the Commander. An administrative act in the sense of Art. 146.1 of the Constitution is an act or omission which produces legal results and affects a person. Only such act is amenable to the jurisdiction of this Court.

Even if it is argued that the Commander was empowered by Law to take any decision, which he did, and his decision is contained in the letter of 12.4.80, I am of the view, and so hold, that such decision was neither wrong in Law nor taken after defective inquiry, as he did not fail to take into consideration anything existent or took into consideration anything non-existent. The "unlawful activities" referred to in that letter are those for which the applicant was charged and convicted.

For all the aforesaid reasons this recourse fails. Though the tendency of this Court is not to award costs when a recourse fails, nevertheless I am of the opinion that it is high time for costs to be awarded in a proper case against unsuccessful applicants. In this case I make no order for costs but instead I discharge the order for costs made against the Republic on 15.5.82.

Recourse dismissed. Order for costs as above.