1983 October 31

[A. Loizou, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

1. PANOS A. RAZIS,
2. LAMBROS A. RAZIS,

Applicants.

v.

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTER OF INTERIOR,

Respondent.

(*Case No.* 461/82).

Administrative Law—Administrative acts or decisions—Executory act—Confirmatory act—Examination from a legal point of view of a case so long as it is not based on new factual elements or on changes of the provisions of the law does not constitute a new inquiry giving executory character to the subsequently issued act.

Citizenship—Citizen of the Republic of Cyprus "Ordinarily resident" in section 2(1) of Annex D to the Treaty of Establishment of the Republic of Cyprus—Infants—"Ordinary residence"—Infants cannot decide for themselves where to live—"Ordinarily resident" in their parents matrimonial home.

The two applicants who were twin brothers were born in 1957. Their father was born in Argostolion, Greece, in 1924 and came to Cyprus in 1950 for work at the Evrychou Gymnasium as a physical training school master. He was the holder of a Greek passpart and in 1955 he was married to his present wife, a Cypriot, who was born in Limassol in 1935. She was issued with a British Cypriot passport in 1958 and became a Cypriot citizen automatically on the 16th August, 1960, the day of the Establishment of the Republic of Cyprus, by virtue of section 2 of Annex 'D' to the Treaty of Establishment.

Between the years 1950 and 1960, the applicants' father

remained in Cyprus and worked as a school master at various secondary schools, on a temporary residence permit, for the purposes of employment, granted to him under the Aliens and Immigration Laws and Regulations in force at the time. On the 22nd January, 1960, he applied for a certificate of naturalization under the British Nationality Act, 1948, which was issued to him on the 8th June, 1960. In 1969, he applied, under section 5(1) of Annex 'D' to the Treaty of Establishment to be granted citizenship of the Republic of Cyprus; he was asked to produce and he did produce, a certificate of the chairman of the Committee of the Quarter he was residing, to the effect that he was a permanent resident of Cyprus at any time in the period of five years immediately before the 16th August, 1960, as required by section 5(1) of the said Annex 'D'. Thereupon his application was approved and in September, 1969 the father was issued with a Cyprus passport.

On July 4, 1977, the applicants, through their Counsel, wrote to the respondent Ministry and asked that they might be declared as aliens. The respondent replied by letter dated July 14, 1977 and stated that applicants were citizens of the Republic of Cyprus. As against this reply the applicants filed on August 17, 1977 recourse No. 299/77 for a declaration that the decision of the respondent by virtue of which they were considered as citizens of the Republic and as such liable to conscription was null and void. This recourse was finally withdrawn and dismissed on April 22, 1978 upon a statement being made by both Counsel that they had seen the Attorney-General of the Republic and he had agreed to a re-examination of the case. By letter dated July 14, 1978, Counsel of the Republic informed Counsel for the applicants that the Attorney-General of the Republic re-examined the legal aspect of the case and was of the opinion that the decision which formed the subject matter of the said recourse was correctly taken because his clients fell within section 2 of Annex 'D' to the Treaty of Establishment.

Upon receiving this letter the applicants filed a recourse on August 12, 1978, for a declaration that the act and/or decision of the respondent dated July 14, 1978 by virtue of which they were considered as citizens of the Republic was null and void. The trial Judge after examining ex proprio motu the question whether the administrative act complained of was an executory

one or not, held (*Panos A. Razis and Another* v. *The Republic of Cyprus, through the Ministry of Interior* (1979) 3 C.L.R. 127) that it was nothing more than a legal opinion from the office of the Attorney-General which could not be considered as a decision within the meaning of Article 146 of the Constitution. This decision was affirmed on appeal.

On the 20th July, 1982, counsel for the applicants wrote to the respondent and asked for reconsideration of the case of the applicants; and he relied in this respect on the cases of *Republic* v. *Droushiotis* (1981) 3 C.L.R. 623 and *Armenis* v. *Republic* (1979) 3 C.L.R. 41.

The respondent replied by means of a letter dated 16.8.1982 and informed Counsel that he had nothing to add to his letter of the 15th July, 1977. In this letter it was stated that after a thorough study of the whole subject, it was ascertained that the two applicants were "citizens of the Republic of Cyprus having acquired the said status automatically on the 16th August, 1960, by virtue of section 2(1) and 2(2)(b) of Annex 'D' of the Treaty of Establishment of the Republic of Cyprus. Hence ....they were liable to military service".

As against the letter of 16.8.1982 applicants filed the present recourse.

Counsel for the respondent raised two objections (a) that the act or omission challenged was not an executory one, and (b) that the recourse of the applicants was out of time.

Held, (I) on the preliminary objection:

That in the present case there are neither new facts nor a new legal situation; that the examination from a legal only point of view of a case so long as it is not based on new factual elements or on changes of the provisions of the law which regulate this concrete case, does not constitute a new inquiry giving executory character to the subsequently issued act; accordingly the sub judice decision is not executory and cannot be made the subject of a recourse; that, moreover, there is no omission to re-examine the application of the applicants dated 20.7.1982 that they are not liable to military service; that, that being so, the present recourse is also out of time as the period of 75 days provided by Article 146.3 of the Constitution has long expired. The recourse, therefore, should be dismissed.

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

That the two applicants who between their birth in 1957 to the date of the Treaty in 1960 were children of tender years and could not decide for themselves where to live, were "ordinarily resident" in their parents matrimonial home; that they are, therefore "ordinarily resident" in Cyprus within the meaning of section 2(1) of Annex 'D' to the Treaty of Establishment and they are citizens of the Republic of Cyprus and liable to military service (*Razis and Another* v. *Republic* (1979) 3 C.L.R. 127 at p. 138 followed).

Application dismissed.

Cases referred to:

Razis and Another v. *Republic* (1979) 3 C.L.R. 127;

Pieris v. *Republic* (1983) 3 C.L.R. 1054;

Koudounaris v. *Republic* (1967) 3 C.L.R. 479;

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

Papademetriou v. *Republic* (1974) 3 C.L.R. 28;

Theodorou v. *Republic* (1974) 3 C.L.R. 213;

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

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

Armenis v. *Republic* (1979) 3 C.L.R. 41;

Republic v. *Droushiotis* (1981) 3 C.L.R. 623.

Recourse.

Recourse against the decision of the respondent whereby the applicants were considered as citizens of the Republic.

L. N. Clerides, for the applicants.

N. Charalambous, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

A. Loizou J. read the following judgment. With regard to the two applicants in this recourse, a lot has already been said on the same or related issues in judgments of this Court, both at first instance and on appeal to the Full Beanch. I can afford, therefore, to be as brief as possible as the history and relevant facts of this case can be found in these reported judgments, more so as there is no disagreement as to them. Briefly they are as follows:

The two applicants are twin brothers and were born in Limassol in 1957. Their father was born in Argostolion, Greece, in 1924 and came to Cyprus in 1950 for work at the Evrychou Gymnasium as a physical training school master. He was the holder of a Greek passport which was issued in Athens in 1950 and exptred in 1953. In 1955 he was married to his present wife, a Cypriot, who was born in Limassol in 1935. She was issued with a Brittsh Cypriot passport in 1958 and became a Cypriot citizen automatically on the 16th August, 1960, the day of the Establishment of the Republic of Cyprus, by virtue of section 2 of Annex 'D' to the Treaty of Establishment.

Between the years 1950 and 1960, the applicants' father remained in Cyprus and worked as a school master at various secondary schools, on a temporary residence permit, for the purposes of employment, granted to him under the Aliens and Immigration Laws and Regulations in force at the time. On the 22nd January, 1960, he applied for a certificate of naturalization under the British Nationality Act, 1948, which was issued to him on the 8th June, 1960. In 1969, he applied, under section 5(1) of Annex 'D' to the Treaty of Establishment to be granted citizenship of the Republic of Cyprus; he was asked to produce, and he did produce, a certificate of the chairman of the Committee of the Quarter he was residing, to the effect that he was a permanent resident of Cyprus at any time in the period of five years immediately before the 16th August, 1960, as required by section 5(1) of the said Annex 'D'. Thereupon his application was approved and in September, 1969 the father was issued with a Cyprus passport.

On July 4, 1977, the applicants, through their Counsel, wrote to the respondent Ministry and asked that they might be declared as aliens. The respondent replied by letter dated July 14, 1977 and stated that applicants were citizens of the Republic of Cyprus. As against this reply the applicants filed on August 17, 1977 recourse No. 299/77 for a declaration that the decision of the respondent by virtue of which they were considered as citizens of the Republic and as such liable to conscription was null and void. This recourse was finally withdrawn and dismissed on April 22, 1978 upon a statement being made by both Counsel that they had seen the Attorney-General of the Republic and he had agreed to a re-examination of the case. By letter

dated July 14, 1978, Counsel of the Republic informed Counsel for the applicants that the Attorney-General of the Republic re-examined the legal aspect of the case and was of the opinion that the decision which formed the subject matter of the said recourse was correctly taken because his clients fell within section 2 of Annex 'D' to the Treaty of Establishment.

After the receipt of this letter the applicants filed a recourse on August 12, 1978, for a declaration that the act and/or decision of the respondent dated July 14, 1978 by virtue of which they were considered as citizens of the Republic was null and void. The trial Judge after examining ex proprio motu the question whether the administrative act complained of was an executory one or not, held (*Panos A. Razis and Another v. The Republic of Cyprus, through the Ministry of Interior* (1979) 3 C.L.R. 127) that it was nothing more than a legal opinion from the office of the Attorney-General which could not be considered as a decision within the meaning of Article 146 of the Constitution.

An appeal against that judgment was filed and it was held by the Full Bench:

"(1) That the trial Judge was competent to examine ex proprio motu the question whether the administrative act or decision complained of was of an executory nature or not (see *Lambrakis v. The Republic* (1970) 3 C.L.R. 72 at pp. 73-74).

(2) That the decision challenged is nothing more than a legal opinion from the Office of the Attorney-General of the Republic; that a legal opinion cannot be considered as a decision in the sense of Article 146 of the Constitution; accordingly the appeal must be dismissed".

On the 20th July, 1982, counsel for the applicants wrote to the respondent and the Attorney-General of the Republic the following letter which is Appendix 'H' in the bundle of documents attached to the Opposition:

"*Subject: Nationality of Panos and Lambros A. Razi, of Limassol, now residents of Athens.*

We refer to the aforesaid subject as well as the judgment of the Full Bench of the Supreme Court in Revisional Appeal No. 208 by which the Supreme Court decided that the letter

which was sent to us on the 15th July, 1977 on the aforesaid subject by which we were informed that our said clients are citizens of the Republic of Cyprus in reply to our letter dated 4.7.77, is not an executory and therefore an act which can be challenged by recourse to the Supreme Court.

2. As you realize the aforesaid judgment in no way solves the question if and whether our clients Razi brothers are or are not citizens of the Republic and as after the delivery of the aforesaid judgment on 18.1.82 the Suprme Court gave the known judgment *The Republic of Cyprus, through The Ministry of Interior v. Symeou Drousiotis & Others* (see Judgments of the Supreme Court (1981) 3 C.L.R. p. 623) by which judgment the Suprme Court decided that section 2(b) of Law 22/78 was not unconstitutional, we request that you re-examine the whole subject given that the said judgment does not apply to the case of persons born before 16.8.60. As it is known, our clients were born in Limassol on 19.2.57.

3. The question, therefore, arises whether they not being affected by the said judgment, what nationality they have.

4. We suggest that given that their father was a Greek national and taking into consideration all the circumstances of the case, if the reasoning of the said judgment in Recourse 39/82 between *Georghios Armeni v. The Republic* which was delivered on 15.1.79 is followed, you will come to the conclusion that the applicants do not come within the definition of 'citizen of the Republic of Cyprus' (as defined in section 2 of the National Guard Law, in the Appendix to the Treaty of Establishment) and consequently they are not liable to military service not being citizens of the Republic.

5. Given that the problem of our clients is pending since a long time, we request that you expedite your reply."

The reply to this letter is contained in a letter dated 16th August, 1982, appended to the application which reads as follows:

"Regarding your letter under File No. 26, dated 20th July, 1982, which refers to the question of the Nationality of your clients, the brothers Panos and Lambros A. Razi, of

Limassol, I wish to inform you that I have nothing to add to my letter under the same number and dated 15th July, 1977."

In this letter, Appendix 'F' attached to the Opposition, it was stated that after a thorough study of the whole subject, it was ascertained that the two applicants are "citizens of the Republic of Cyprus having acquired the said status automatically on the 16th August, 1960, by virtue of section 2(1) and 2(2)(b) of Annex 'D' of the Treaty of Establishment of the Republic of Cyprus. Hence..... they are liable to military service".

Upon receipt of the reply of the respondents of the 16th August, 1982, the applicants filed the present recourse whereby they seek:

(a) A declaration that the act and/or decision of the Principal Migration Officer that being citizens of the Republic of Cyprus they are liable to Military Service which was communicated to their counsel by letter dated 16.8.82, received on 17.8.82, is null and void and with no legal effect.

(b) A declaration that the omission of the Principal Migration Officer to re-examine the application of the applicants dated 20.7.82 that they are not liable to Military Service, constitutes an omission to act what he was duly bound to do and that he had a legal obligation to do so.

The first prayer for relief is in substance identical to the one sought in Recourse No. 345/78, except that the decision challenged by that recourse was an earlier one dated 14.7.78.

Counsel for the respondent has raised two objections (a) that the act or omission challenged is not an executory one, and (b) that the recourse of the applicants is out of time.

The Full Bench of this Court had the occasion of reviewing the position with regard to confirmatory acts which not being of an executory nature cannot be the subject of a recourse. In the case of *Marinos Pieris v. The Republic,* Revisional Jurisdiction Appeal No. 298,* Justice Pikis, in delivering the judgment of the

* Reported in (1983) 3 C.L.R. 1054.

Court summed up the situation and after referring to the previous caselaw of this Court to be found in *Koudounaris v. Republic* (1967) 3 C.L.R. 479; *Varnava v. Republic* (1968) 3 C.L.R. 566; *Papademetriou v. Republic* (1974) 3 C.L.R. 28; *Theodorou v. Attorney-General* (1974) 3 C.L.R. 213; *Lordos Apartotels Ltd. v. Republic* (1974) 3 C.L.R. 471; *Ioannou v. Commander of Police* (1974) 3 C.L.R. 504; went on to say this:

"... The foremost consideration is the content of the two acts and their effect in law. If they are essentially similar, that is, if they produce identical consequences in law, the second act is properly regarded as confirmatory of the first - See, *Conclusions of Greek Council of State* 1929-59, pp. 240 -241 and Decisions 212/45, 1215/49, 582/50, 978/55, 1812 /57. A decision is properly regarded as confirmatory of a previous one, if both are aimed to regulate the same relationship and both derive from the same factual and legal basis. A subsequent act or decision, though identical in effect to a pre-existing one, may qualify as an executory act in either of two situations:-

(a) If it springs from a new inquiry into the facts of the case or,

(b) It derived from subsequent legislation, different in content from the one in force at the time of the first act. However, if subsequent legislation simply reproduces the previous law, the second act is regarded as confirmatory of the first - see, *Conclusions of Greek Council of State* 1929-59, p. 240 and Case 516/36.

An examination of the matter from the legal angle alone, unaffected by a fresh inquiry into the facts, does not give rise to an executory act and this is so where reliance is placed for the issue of the second act on pre-existing statutory provisions not taken into consideration in the first place - see, *Decision of the Greek Council of State, Case* 574/71.

In sum, an act is confirmatory of a previous one if -

(a) it is issued by the same authority;

(b) it is addressed to the same person or persons and

(c) it produces identical results in law with a previous decision.

(For an analysis of the law, see *Kyriacopoulos - Greek Administrative Law,* 4th ed., Vol. 6, p. 96)."

In the present case there are neither new facts nor a new legal situation. The reference by learned counsel to the two cases of *Armenis v. The Republic* (1979) 3 C.L.R. , p. 41 and *The Republic v. Drousiotis* (1981) 3 C.L.R. 623, does not change the situation and in any event they are both irrelevant to the case under examination. There exists a new inquiry if before the issuing of the new act or decision there takes place an examination of arising or pre-existing but until recently unknown main substantial factors for consideration which are presently taken into consideration. But the examination from a legal only point of view of a case so long as it is not based on new factual elements or on changes of the provisions of the law which regulate this concrete case, does not constitute a new inquiry giving executory character to the subsequently issued act (see *Conclusions of Greek Council of State* 1929–1959, p. 241 and the decisions of the Greek Council of State therein mentioned). Moreover, there is no omission to re-examine the application of the applicants dated 20.7.82 that they are not liable to military service. The tenor of the reply of the respondent through his Migration Officer, is that the matter was examined but there being nothing new, they had but to confirm their previous decisions to the effect that the two applicants are liable to military service as communicated to them by their letter dated 15th July, 1977, which as already seen in this judgment was the subject of their previous recourses.

That being so, this present recourse is also out of time as the period of 75 days provided by Article 146.3 of the Constitution has long expired. The recourse, therefore, should, for the aforesaid reasons, be dismissed.

As regards the recourse on its merits, I have nothing to add to what I said in my judgment reported in (1979) 3 C.L.R., 127, at p. 134 et seq. where out of respect to counsel for the very elaborate argument advanced on the substance of the recourse, I did answer his question raised whether the sub judice decision was in law a valid one or not. I need only quote

here the concluding paragraphs of that judgment which are to be found at p. 138:-

"Applying the meaning given to the words 'ordinarily resident' in the cases hereinabove set out and giving the words 'ordinarily resident' their natural meaning and effect that they connote residence in a place with some degree of continuity, I hold that on the facts of this case the father of the applicants was ordinarily resident in Cyprus within the meaning of section 2 of Annex 'D' to the Treaty of Establishment. He had been living and was physically present with a considerable degree of continuity apart from accidental or temporary absences since 1950 up to the present time, though for our purposes up to 1960 would be enough. He was continuously employed in Cyprus, he married a Cypriot, he applied and he was granted a British naturalization certificate and the two applicants were born and have been living with him ever-since their birth in 1957 in Cyprus.

This being so it need only be pointed out that the ordinary residence of the two applicants who between their birth in 1957 to the date of the Treaty in 1960 were children of tender years and who could not decide for themselves where to live, were ordinarily resident in their parents' matrimonial home (*Re: P. (G.E.) (An Infant)* [1965] Ch. 568, 585-586 (C.A.)). This answers also the argument advanced that the Court had to examine the residence of the two applicants and not that of their father in connection with the present case".

For all the above reasons the present recourse is dismissed, but in the circumstances I make no order as to costs.

Recourse dismissed. No order as to costs.