1983 September 22

[HADJIANASTASSIOU, A. LOIZOU, DEMETRIADES, LORIS, STYLIANIDES, PIKIS, JJ.]

MARINOS PIERIS,

Appellant

v.

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTER OF INTERIOR,

Respondent

(*Revisional Jurisdiction Appeal No.* 298).

Administrative Law—Administrative acts or decisions—Executory act—Confirmatory act—It cannot be made the subject of a recourse—When is an act confirmatory of a previous one—Call-up for service in the National Guard—No recourse against such call within the time prescribed by Article 146 3 *of the Constitution—Subsequent call resting on the same factual and legal substratum as the original call and with identical results in law—Subsequent call confirmatory of the previous call—It cannot be inquired into on account of the time bar set up by Article* 146 3 *of the Constitution*

Res judicata—Doctrine of—Applicable in administrative Law—Article 146.5 *of the Constitution—Annulment of administrative act—Not competent for the administration, in the absence of statutory changes in the law, to issue a new executory act, identical to the one annulled, merely because of a new understanding of the law following its interpretation by a final judgment of the Supreme Court.*

The applicant was first called-up for Military Service, by virtue of the provisions of section 2 of the National Guard (Amendment) Law, 1978 (Law 22/78) and he challenged his call-up by means of a recourse. In a first instance judgment of this Court it was held that he was not bound to do military service because section 2 of Law 22/78 was unconstitutional. No appeal was filed by the Republic against such judgment and the applicant was demobilized.

Subsequently, on 2nd June 1981, a Full Bench of the Supreme Court, in allowing appeals of the Republic against first instance judgments of another Judge of the Court in recourses of applicants other than the applicant in the present recourse, held that section 2 of Law 22/78 was not unconstitutionally or otherwise invalidly enacted (see *The Republic of Cyprus v. Droushiotis* (1981) 3 C.L.R. 623).

As a result of the judgment in the *Droushiotis* case, supra, instructions were given by the appropriate authorities for the re-enlistment, in order to complete the periods or their military service, of all those, including the applicant, who was called-up for military service on the 19th October 1981.

After some correspondence between the respondent Minister and counsel for the applicant his re-enlistment was deferred "for the last time" up to 30th June 1982. Eventually the respondent Minister persisted in his view that the applicant was bound to re-enlist in the National Guard and applicant's counsel was informed accordingly by a letter dated 21st June 1982. Also, on 16th June 1982 the applicant was called-up once again and was instructed to enlist on 14th July 1982.

Applicant having challenged his call-up for military service by means of a recourse, which was filed on 8.7.1972, counsel for the respondent contended that the only executory act in the present case was the call-up dated 19th October 1981 and that the subsequent letter to applicant's counsel dated 21st June, 1982 and the further call-up of the 16th June, 1982 were acts of merely confirmatory or informative nature and could not be challenged by means of the recourse under Article 146 of the Constitution.

The trial Judge held* that the decision challenged was confirmatory of the decision of the 19th October, 1981 and as such non justiciable. The trial Judge having gone into the merits of the case as well, that is the issue of res judicata, ruled that the recourse could, under no circumstances, succeed for, the decision to call applicant was altogether a new act divorced from the decision annulled in 1979 and there was no room for the application of the doctrine of res judicata as applicable in administrative Law. Hence this appeal.

* See (1983) 3 C.L.R. 614.

Held, that confirmatory acts are not justiciable; that an act is confirmatory of a previous one if it is issued by the same authority, if it is addressed to the same person or persons and if it produces identical results in law with a previous decision: that examining the two decisions under consideration—the October and June decisions—it is obvious that both rest on the same factual and legal substratum with identical results in law for each established the liability of the appellant to military service; that the June decision neither added nor detracted from the October decision that went unchallenged; that in June the administration merely signified its adherence to the course plotted by the October decision; that in no way did it redefine the obligation of the appellant to military service; and that it confirmed an existing decision, a decision that cannot be inquired into on account of the time bar set up by Article 146.3 of the Constitution; and that, therefore, the recourse is not justiciable because it is directed towards a confirmatory act; accordingly the appeal must fail (pp. 1061–1064 post).

On the question of the doctrine of res judicata the Court, after making an exposition of the doctrine (*vide pp.* 1064–1067 *post*), *observed:*

That regarding administrative Law the doctrine of res judicata is constitutionally entrenched by the provisions of Article 146.5 of the Constitution; that under this doctrine it is not competent for the administration to issue a new executory act, identical to the one annulled, merely because of a new understanding of the law; that it was, therefore, impossible for the administration to require the appellant to undergo military service after a crystallization of the position on the subject by the decision in *Republic* v. *Droushiotis* (supra), in the absence of statutory changes in the law; that the statutory law remained unaltered and the facts were the same; and that, consequently, the administration was estopped from requiring the appellant to do military service; that the decision in the *Droushiotis* case shed new light on the interpretation of the law, but offered no justification for a review of the act annulled by a valid decision of the Court.

Appeal dismissed.

Per curiam: Notwithstanding the non-justiciability of the act, we debated the issue of res judicata because of its novelty and implications upon the legality of the action of the admi-

nistration. For the reasons given, it is not open to us to annul the call-up order. That should not stop the administration from revoking the act in question in the interests of legality and sound administration.

Cases referred to:

Pieris v. *Republic* (1979) 3 C.L.R. 91;

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

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. 213;

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

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

Decisions of the Greek Council of State Nos. 212/45, 1215/49, 582/50, 978/55, 1812/57, 574/71 and 1375/56;

New Brunswick Ry. Co. v. *British and French Trust Corp.n.* [1938] 4 All E.R. 747 at p. 754;

Re Koeningsberg (deceased) Public Trustee v. *Koeningsberg* [1949] 1 All E.R. 804;

Kok Hoong v. *Leong Cheong Mines* [1964] 1 All E.R. 300;

Carl-Zeiss-Stiftung v. *Rayner (No. 2)* [1966] 2 All E.R. 536;

Pople v. *Evans* [1968] 2 All E.R. 743;

Carl-Zeiss-Stiftung v. *Rayner (No. 3)* [1969] 3 All E.R. 897;

Spens v. *I.R.C.* [1970] 3 All E.R. 295;

Tak Ming Ltd. v. *Yee Sang Co. (Lord Pearson)* [1973] 1 All E.R. 569;

Lambert v. *Mainland Market* [1977] 2 All E.R. 826;

Boyadji v. *Papachristoforou*, 23 C.L.R. 299;

Christodoulou v. *HadjiTofi*, 24 C.L.R. 87;

Pavlides v. *Republic* (1966) 3 C.L.R. 530.

Appeal.

Appeal against the judgment of the President of the Supreme Court of Cyprus (Triantafyllides, P.) given on the 13th November, 1982 (Revisional Jurisdiction Case No. 279/82)* whereby appellant's recourse against the decision of the

* Reported in (1983) 3 C.L.R. 614.

respondent to require applicant to re-enlist in the National Guard was dismissed.

L.N. Clerides, for the appellant.

M. Florentzos, Counsel of the Republic with *E. Aspri (Miss)*, for the respondent.

Cur. adv. vult.

HADJIANASTASSIOU J.: The judgment of the Court will be delivered by Mr. Justice Pikis.

PIKIS, J.: Marinos Pieris was born a British subject on 3.1.1961, in what used to be "East Pakistan", now Bangladesh, of Greek-Cypriot parents. The family returned and settled in Cyprus in 1971. They reside in Cyprus ever since. The liability of the appellant to conscription under the National Guard Laws became a matter of heated controversy when he obtained the age prescribed by law for military service. He was called-up for service in virtue of the provisions of s.2(d) of Law 22/78 amending the basic National Guard Law 20/64. The 1978 amendment made persons in the position of the appellant, that is foreign nationals born of Greek-Cypriot fathers, liable to military service. The appellant responded to the call by enlisting, while disputing his liability to military service by a recourse filed under Article 146.1 of the Constitution. His recourse was successful and the order for his enlistment set aside—see *Pieris* v. *The Republic* (1979) 3 C.L.R. 91.

The Court annulled the decision for the reason that the law was found to be unconstitutional. The Republic did not appeal against the decision. Thereafter, the appellant was released from the ranks of the National Guard and returned to his usual occupation. About two years later, again in proceedings under Article 146, totally unconnected with the appellant—namely in *Republic* v. *Droushiotis & Others* (1981) 3 C.L.R. 623—the Full Bench of the Supreme Court declared s.2(d) of Law 22/78 valid, taking a different view on the question of its constitutionality from the single Judge who adjudicated in *Pieris*, supra.

Following the decision in *Droushiotis*, supra, a policy decision was taken to call-up for military service all foreign nationals born of Greek-Cypriot fathers, including the appellant. A decision of the Council of Ministers and the regulatory order that followed thereupon of the Minister of Interior, were implemented in the case of the appellant by serving upon him a

call-up order on 19.10.1981, requiring him to enlist for service in the National Guard on 26.10.1981. Appellant through his counsel applied for the postponement of the date of his enlistment. The application was granted and his enlistment suspended upto 30.6.1982. The Minister of Defence signified he would be unprepared to consider any fresh request for postponement. It is noteworthy that appellant refrained from claiming exemption or challenging the validity of the call-up order respecting his obligation to military service.

The appellant was awakened, it seems, to the implications of the call-up order on 16.6.1982, when a second enlistment notice was served upon him on the authority of a new decision of the Council of Ministers dated 27.11.1981, supplemented by an order of the Minister of Defence dated 19.5.1982. The new notice was in terms similar to the October notice, except that it derived its force from the order of the Minister of 19.5.1982, whereas the October notice was issued on 6.9.1981. This time the appellant reacted promptly to the enlistment order and claimed a right to exemption on the basis of the decision in *Pieris* v. *The Republic*. By a letter dated 17.6.1982, addressed to the Minister of Defence by counsel acting on his behalf, he claimed exemption from military service, contending it was incompetent on the part of the authorities to require him to enlist because of the 1979 Court decision. The authorities were precluded from embarking on the course they followed because the matter was, as between the appellant and the authorities, res judicata. The Minister replied promptly, dismissing the application for exemption. The appellant became, according to the Ministerial view, liable to military service after the authoritative declaration of the law on the subject of constitutionality of s.2(d) of the 1978 legislation in the case of *Droushiotis*. A recourse was filed on 8.7.82 for the nullification of the call-up notice of 16.6.82 and the order upon which it rested so far as it purported to apply to the appellant.

The essence of the case for the appellant, as foreshadowed in the recourse and later crystallized before the trial Court, was that the liability of the appellant to military service became definitively settled in *Pieris*, estopping the authorities thereafter from requiring him to undergo military service in the absence of a new inquiry into the facts or a change in the statutory law. The recourse was resisted on two grounds:

Firstly, that the enlistment notice of June, 1982, was confirmatory of the October decision and, as such, could not be the subject-matter of a recourse. Secondly, that the decision to call him up for military service was a new decision, separate and distinct from that annulled by the 1979 decision in *Pieris v. The Republic*, and as such, not subject to res judicata.

The learned trial Judge upheld both submissions of the respondent. He found the decision challenged confirmatory of the October decision and as such non justiciable. Any attempt to litigate the October decision would founder on the provisions of Article 146.3 of the Constitution, making inamenable to review decisions challenged after the lapse of 75 days. The learned trial Judge went into the merits of the case as well, that is, the issue of res judicata, and ruled that the recourse could, under no circumstances, succeed for, the decision to call him up was altogether a new act divorced from the decision annulled in 1979. There was no room for the application of the doctrine of res judicata as applicable in administrative law.

Two are the prominent issues requiring resolution in this appeal:-

(a) The determination of the nature of the enlistment order of 16.6.82. If confirmatory of an earlier decision, it is beyond dispute that the recourse could not be judicially reviewed.

(b) The amenity of the administration to issue a new act based on the self same facts as a previous decision annulled by a competent Court because of a new understanding of the law, fashioned by a subsequent decision of the Court. The central issue here is whether it is competent for the administration to issue an act identical in substance and form to the one annulled because of a different view of the pre-existing law, compared to the one taken by the Court in the first place.

It was held that the order to call-up the appellant, individualised by the enlistment notice of 16.6.82, was a confirmatory act and as such not justiciable under Article 146.1 of the Constitution. In the judgment of the trial Court, it accomplished no more than affirm the decision taken in October, 1981, to

require the appellant to undergo military service in view of the decision in *Droushiotis*. And inasmuch as the executory decision was inamenable to review because of the lapse of time, no cognizance could be taken of the recourse of the appellant. The learned trial Judge did not confine his deliberations to the amenity of review but proceeded and examined the merits of the case as well, whether the decision to require the appellant to undergo military service, assuming it to be executory, was not one that the authorities could legitimately take because of the decision in *Pieris v. The Republic*, in other words, because of the application of the doctrine of res judicata. It was held the submission of the appellant was unsustainable on account of the fact that the decision complained of was a new act, separate and distinct from the one annulled by the decision in *Pieris v. The Republic*. In the opinion of the Court, it was open to the authorities to review the matter afresh in view of the decision in *Droushiotis*, and the declaration of the law made therein. Below, we shall examine in turn the two aspects of the appeal in the sequence outlined above.

CONFIRMATORY ACTS

As the expression suggests, an act is confirmatory if it affirms a pre-existing act. It does not break a new ground by substituting or altering legal relationships. In contradistinction, an executory act is one that produces legal consequences by redefining a relationship in law between the administration and the subject.

Here, we must decide whether the decision to require the appellant to do military service, embodied in the enlistment notice of 16th June, was an executory or a confirmatory act. Counsel made conflicting submissions on the subject. Mr. Clerides argued that the act, subject-matter of the recourse, was executory, productive on its own of legal consequences independent of those produced, if any, by the October decision. The regulatory acts upon which the June decision was based, notably the decision of the Council of Ministers and that of the Minister of Defence that purported to implement the decision of the Council, were acts separate and distinct from those upon which the October decision was based. The two acts were separate with legal consequences of their own, having originated from separate decisions of the Council of Ministers and the Minister of Defence. Mr. Florentzos on the other hand, sub-

mitted that the two acts were identical in law and that their similarities were not extinguished by the fact that they derived from different decisions of the organs competent to order enlistment in the National Guard.

It is settled in principle, as well as on authority, that confirmatory acts are not justiciable - see, *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.

A comparison of the two decisions, notably the October and June decisions, reveals the following: Both decisions purported to define the liability of the appellant for military service and were based upon the same factual and legal background. The regulatory acts wherefrom the two decisions emanated were, so far as persons in the position of the appellant were concerned, similar in content and derived their authority from the decision of the Supreme Court in the case of *Droushiotis*. The only differences of any significance between the two acts laid in the fact that the regulatory acts were issued on different dates. A study of Greek jurisprudence on the subject of confirmatory acts shows that the test to determine whether an act is confirmatory or executory, is a substantive and not a formal one. 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 derives from subsequent legislation, different in content from the one in force at the time of the first act. However, if subsequent legislation simply re-

produces 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).

Examining the two decisions under consideration, it is obvious that both rest on the same factual and legal substratum with identical results in law. Each established the liability of the appellant to military service. That this was so, becomes manifest on a consideration of the implications of annulling the June decision, that is the one presently under consideration. If this were to happen, the appellant would still be liable to military service in precisely the same way and for similar reasons by virtue of the October decision. The June decision neither added nor detracted from the October decision that went unchallenged. In June the administration merely signified its adherence to the course plotted by the October decision. In no way did it redefine the obligation of the appellant to military service. It confirmed an existing decision, a decision that cannot be inquired into on account of the time bar set up by Article 146.3 of the Constitution.

In agreement with the learned trial Judge, we rule that the recourse is not justiciable for it is directed towards a confirmatory act and the appeal must necessarily fail. A final Court does not ordinarily debate alternative grounds if the fate of the appeal is sealed by the decision given on the first ground of

appeal. Nevertheless, we shall, in this case, proceed to express our opinion on the second ground upon which the appeal was argued, namely that of res judicata, on account of its importance in public law, as well as because we differ from the opinion expressed by the learned trial Judge. The opinion we shall express, is not binding upon the authorities but, as with every judicial pronouncement, it should seriously be taken into account, out of obligation to rule according to law. The absence of remedial means to question an administrative act does not mitigate the duty to observe the law and heed its commands.

RES JUDICATA

The rule of res judicata is a doctrine of public policy, encountered in almost every system of law, though its application may take different forms in different branches of the law. The principal reasons that give credence to public policy in this area, are -

(a) The need for certainty in the law, particularly with regard to the rights of citizens.

(b) Finality in litigation and, last but not least

(c) the need to sustain the efficacy of the judicial process.

In countries where the powers of the State are formally separated as in Cyprus, there is a fourth reason as well,

(d) the effect of separation of the powers of the State. A reversal of a judicial decision by the executive branch of the Government constitutes an interference with the exercise of the judicial power.

Res judicata is a doctrine of the civil as well as the administrative law. It forms an important aspect of the English law applicable in Cyprus by virtue of the provisions of s.29(1)(c) of Law 14/60. With regard to administrative law, it is constitutionally entrenched by the provisions of Article 146.5 of the Constitution which reads:

"Any decision given under para. 4 of this article shall be binding on all courts and all organs or authorities in the Republic and shall be given effect to and acted upon by the organ or authority or person concerned".

Article 146.5 aims to introduce the doctrine of res judicata in

the domain of administrative law in much the same way as it finds expression in other jurisdictions practising a similar system of administrative law. In Greece it has long been recognised that res judicata is part of the system of administrative justice. It was given legislative effect by the provisions of s.50 of Law 3713/28. The application of the doctrine of res judicata is extensively discussed in the following works - *Conclusions of Greek Council of State* 1929-59, p. 291 et seq. - *Kyriacopoulos, Greek Administrative Law*, 4th ed., Vol. 6, p. 157 et seq. - *M. Dendias, Administrative Law*, 2nd ed., Vol. C., *Administrative Justice* 1965, p. 364 et seq. The ambit and limits of the doctrine will be discussed below.

The administration is precluded or, better still, estopped from issuing a decision identical in content to one annulled by an administrative Court. Not only is the administration barred from reintroducing a decision nullified by a Court of law but it is under a positive obligation to erase the effects of a decision struck down as null and void. The duty of the administration after judgment annulling an administrative act, is to examine the matter afresh, subject to this qualification: They cannot depart from the factual and legal regime prevailing at the time the first act was issued. A new decision, identical in content to the one annulled, can be validly taken only if there is a new inquiry into the facts or the assessment of evidential materials not considered on the first occasion. Secondly, it is permissible to issue a similar decision if it is based on a new Act, changing the statutory law as it stood at the time that the first decision was taken (see in particular, *Case* 1375/56 *of the Greek Council of State*).

As it can be gathered from a study of a number of English and Cyprus cases, the doctrine of res judicata, as applied in civil cases, has many features in common with the doctrine of res judicata as applied in administrative law. In both fields there must be an adjudication on the merits; similarly the estoppel arising therefrom extends to all matters in issue, directly or by necessary implication. For a comparison, see the English cases of *New Brunswick Ry. Co. v. British & French Trust Corpn.* [1938] 4 All E.R. 747, 754; *Re Koenigsberg (deceased) Public Trustee v. Koenigsberg* [1949] 1 All E.R. 804; *Kok Hoong v. Leong Cheong Mines* [1964] 1 All E.R. 300; *Carl-Zeiss-Stiftung*

v. Rayner (*No.* 2) [1966] 2 All E.R. 536; *Pople v. Evans* [1968] 2 All E.R. 743; *Carl-Zeiss-Stiftung v. Rayner* (*No.* 3) [1969] 3 All E.R. 897; *Spens v. IRC* [1970] 3 All E.R. 295; *Tak Ming Ltd. v. Yee Sang Co.* (*Lord Pearson*) [1973] 1 All E.R. 569; *Lambert v. Mainland Market* [1977] 2 All E.R. 826; *Christos H. Boyadji v. Eleni Papachristoforou* (1958) 23 C.L.R. 299; *Gavriel Christodoulou v. Pavlos Petrou Hadji Tofi* (1959-60) 24 C.L.R. 87; *Byron Pavlides v. The Republic* (1966) 3 C.L.R. 530.

As fashioned in administrative law, the doctrine of res judicata has many features in common with the doctrine, as applied under English law.

For the doctrine of res judicata to be validly invoked, the following prerequisites must be satisfied:-

(a) The decision relied upon to set up res judicata, must involve an adjudication on the merits, in contradistinction to an adjudication resting on the absence of the requisite formalities. For example a decision issuing out of an incompetent organ or one challenged out of time.

(b) The point in issue must have been decided directly or by necessary implication in the first recourse.

Already we noted, while debating the nature of confirmatory acts, that a fresh view of the legal aspects of a case does not constitute a new inquiry capable of producing an executory act. Any other stand would have defeated the doctrine of res judicata at its core, considering that a law may admit of more than one interpretations. It is not competent for the administration to issue a new executory act identical to one annulled, merely because of a new understanding of the law. It may appropriately be reminded that the doctrine of res judicata is especially designed to inject certainty in the definition of the rights of parties to litigation, so that thereafter they may contemplate their affairs with the necessary degree of certainty. Of course, the interpretation accorded to the law by an administrative Court in any one decision, is binding upon the administration only so far as the particular decision is concerned - see *Case* 2406/69 *of the Greek Council of State.*

In the light of the exposition of the doctrine of res judicata made above, it becomes clear that it was impermissible for the administration to require the appellant to undergo military service after a crystallization of the position on the subject by the decision in *Republic* v. *Droushiotis,* in the absence of statutory changes in the law. The statutory law remained unaltered and the facts were the same. Consequently, the administration was estopped from requiring Pieris to do military service. The decision in *Droushiotis,* shed new light on the interpretation of the law, but offered no justification for a review of the act annulled by a valid decision of the Court. So, while the decision in *Droushiotis* enabled the Republic to require other persons in the position of the appellant to do military service, it furnished no warrant for the administration to bypass a valid decision of the Court given under Article 146.1.

Result:

Notwithstanding the non-justiciability of the act, we debated the issue of res judicata because of its novelty and implications upon the legality of the action of the administration. For the reasons given, it is not open to us to annul the call-up order. That should not stop the administration from revoking the act in question in the interests of legality and sound administration.

The appeal is dismissed. There shall be no order as to costs.

Appeal dismissed with no order as to costs.