1984 June 5

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CHRISTOFOROS GEORGALLIDES,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
1. THE MINISTER OF INTERIOR
2. THE COUNCIL OF MINISTERS,

Respondents,

(*Case No.* 206/79).

Administrative Law—Army Officers—Acquittal by a criminal Court—Does not preclude administrative organ concerned from taking into consideration the circumstances of the case in order to form a judgment on the character of such officer except those circumstances and facts which have been objectively found not to exist by the Criminal Court.

Administrative Law—Omission—There is no omission when there is no duty in law cast upon the respondents to act in any way.

The applicant, who was called up for service in the National Guard on the 12th July, 1976, was on the 22nd December 1976 promoted as Cadet Reserve Officer. Following the alleged Commission by him of indecent assault and indecent acts with several soldiers he was on the 9th June, 1977 demoted to the ranks. In the meantime charges against him as regards the above acts were dismissed by the Military Court, having been withdrawn by the Attorney-General of the Republic. On the 6th March, 1979, the applicant applied to be reinstated to his office; and on the 12th March 1979 he was discharged from the National Guard as a private soldier having completed his military service. The grading of his conduct as recorded in his discharge document was "bad".

By means of this recourse the applicant sought the annulment

of the decision of the respondent whereby he was discharged from the National Guard as other rank and not as an Officer; and his conduct was graded as bad. He, further, sought a declaration that the omission of the respondents to reinstate him to the rank of officer after his acquittal by the Military Court and the taking of no further steps towards disciplinary prosecution against him was null and void.

Held, (1) that since applicant has filed no recourse against his demotion to the ranks, of which he was informed on the 18th October, 1977 any attempt to seek the annulment of the said decision is out of time and has to be dismissed as offending Article 146.3 of the Constitution.

(2) That it is a well established principle of Administrative Law that the acquittal of an Officer by a Criminal Court does not preclude the administrative organ concerned from taking into consideration the circumstances of the case in order to form a judgment on the character of such Officer, except those circumstances and facts which they have objectively been found not to exist by the Criminal Court (see Conclusions of the Greek Council of State 1929–1959, p. 391, and Decision No. 752/1956); that being so the opinion formed by the administrative organ concerned on the conduct of the applicant, even based to some extent on the facts and circumstances that took place and on which the criminal prosecution was based, is not contrary to the general principles of Administrative Law and none of the grounds relied upon in respect of this issue can succeed, as the grading of the applicants' conduct was reasonably open to the Military Authority on the material before them and nothing has been shown apart from the fact of the withdrawal of the charges against him and his consequential acquittal to persuade this Court that there has been an excess or abuse of power or wrong exercise of their discretion.

(3) That as far as the alleged omission is concerned, there has been no omission as there was no duty in law cast upon the respondents to reinstate him after the withdrawal of the charges that were pending against him.

Application dismissed.

Cases referred to:

Decisions Nos. 752/1956, 1092/46 *and* 1603/48 *of the Greek Council of State.*

Recourse.

Recourse against the decision of the respondents to discharge applicant from the National Guard as other rank and not as an officer and/or as a Cadet Reserve Officer (DEA).

M. Christofides, for the applicant.

R. Gavrielides, Senior Counsel of the Republic, for the respondents.

Cur. adv. vult.

A. LOIZOU J. read the following judgment. By the present recourse the applicant seeks the annulment of the decision of the respondents by which he:-

(a) was discharged from the National Guard as other rank and not as an Officer and/or as a Cadet Reserve Officer (DEA);

(b) his conduct was graded as bad as appearing in the relevant Discharge paper dated 12th March, 1979, and,

(c) a declaration of the Court that the omission of the respondents to reinstate him to the rank of officer and/or Cadet Reserve Officer after his acquittal by the Military Court and the taking of no further steps towards a disciplinary prosecution against him, as regards the facts upon which the respondents relied for the demotion of the applicant from a Cadet Officer to the ranks was null and void, and that what was omitted had to be performed.

The applicant was born in Nicosia in 1957 and was called up for service in the National Guard on the 12th July, 1976.

The General Staff of the National Guard (G.E.E.F.) by document dated 15th January, 1977, addressed to the Ministry of Defence sent a list of national guardsmen which it proposed that they be selected as Cadet Reserve Officers. One of them was the applicant. On the submission of the Ministry of Defence the Council of Ministers by its Decision No. 15.756 dated 21st April, 1977, approved by virtue of section 13 of the National Guard Laws, 1964-1976, the promotion as Cadet Reserve Officers as from 22nd December, 1976, of all those on the said list.

The General Staff by letter dated the 13th May, 1977, informed the Ministry of Defence the following:-

"We have the honour to submit a summary report on the investigation carried out on DEA Georgalides Christoforos of Georghios.....accused for acts of indecency on soldiers of his unit.

2. The said DEA on the Opinion of the Physical Fitness Examination Committee (No. 154/5530) was granted six months suspension of service on account of disturbed conduct because of immature personality.

3. G.E.E.F. will proceed with a criminal prosecution of the aforesaid as on the basis of the Opinion of the Specialist -Psychiatrist, he is not exonerated by being irresponsible of his acts.

4. On account of the aforesaid, DEA Georgallides Christoforos is considered unsuitable as Officer and it is proposed that he be reduced to the other ranks.

5. We request action by you".

Before proceeding any further, it may be mentioned that a summary of the Investigating Officer's report, including the version of the applicant, was attached thereto and both these documents are in the file, exhibit 1—Red 8—11.

The Council of Ministers by its decision No. 15.917, dated 9.6.1977, decided his demotion to the ranks and the General Staff was informed accordingly by letter dated 17.6.1977. In the meantime, the charges against the applicant, as regards indecent assault and indecent acts with several soldiers—his subordinates—were dismissed by the Military Court having been withdrawn by the Attorney-General. The applicant on that date appeared before the Military Court in person, whereas his two co-accused were represented by counsel. The statement made by the Prosecuting Officer was as follows:-

"..... In this case we have instructions from the Attorney-General on account of the facts of the case to withdraw, with the leave of the Court, under section 91 this case. The facts of the case, Honourable President, are that accused 1 suffers psychologically and there is

in that respect the relevant certificate of Dr. Neophytou. Also there is a temporary discharge document of accused 1 as suffering from disturbed conduct on account of immature personality and this temporary discharge document is valid until the 16th October, 1977. It was issued to the accused on the 16th April, 1977. As it is probable to affect adversely his treatment, we have decided and we request the leave of the Court in order to withdraw the present case against accused 1. We also withdraw the case against accused 2 and 3 and this is a matter of fair administration of justice".

Copy of the relevant record of the proceedings appeared in exhibit 1, Red 15–16.

On the 6th March, 1979, the applicant applied to the Minister of Defence and attached thereto two reports, one from his two successive Commanding Officers (exhibit 1—Red 17–19). In his said application, after referring to the facts of the case as already outlined, he says:

"On the 18th October, 1977, I returned to the National Guard as a soldier after my six months suspension of service. As from the 20.11.1977 I served in the 256 I.B. and I am one of the excellent soldiers of my unit. I attach reports of my Commanding Officers.

Having in mind the aforesaid and especially the following:

(a) that I was acquitted of the charges which were preferred against me and that the facts and the evidence on which the charges were based were untrue and false;

(b) the serious health ground that I had;

(c) the excellent conduct and my performance as shown from the attached certificate;

I appeal to you with the warm request to take the necessary action in order to help me so that I shall be reinstated to my office and I shall be rated with excellent conduct in my discharge document.....".

The Ministry of Defence by their letter dated 8.3.1979 (exhibit 1—Red 20) acknowledged receipt of the aforesaid letter and informed the applicant that the matter was sent to G.E.E.F./

First Staff Office within the competence of which the matter came for examination.

On the 12th March, 1979, the applicant was discharged from the National Guard as a private soldier having apparently completed his military service.

The grading for his "Conduct" as recorded in his Discharge Document, photocopy of which is attached to the recourse is "bad".

As against his demotion to the ranks of which he was certainly informed when his commission was taken from him, and that must be the latest the 18th October, 1977, when he returned to the National Guard as a private soldier after the six months suspension of his service on medical grounds, as it appears from his own letter earlier referred to, the applicant filed no recourse and therefore any attempt to seek the annulment of the said decision is out of time and has to be dismissed as offending Article 146.3 of the Constitution. What, however, his counsel has urged in the written address filed on his behalf, the applicant seeks is the annulment of the decision of the respondents by which he was discharged from the National Guard as other ranks and not as an Officer and/or as a Cadet Reserve Officer (DEA) and graded with "Bad Conduct".

It is a well established principle of Administrative Law that the acquittal of an Officer by a Criminal Court does not preclude the administrative organ concerned from taking into consideration the circumstances of the case in order to form a judgment on the character of such Officer, except those circumstances and facts which they have objectively been found not to exist by the Criminal Court (See Conclusions of the Greek Council of State 1929–1959, p. 391, and Decision No. 752/1956).

That being so the opinion formed by the administrative organ concerned on the conduct of the applicant, even based to some extent on the facts and circumstances that took place and on which the criminal prosecution was based, is not contrary to the general principles of Administrative Law and none of the grounds relied upon in respect of this issue can succeed, as the grading of the applicant's conduct was reasonably open to the Military Authorities on the material before them and nothing

has been shown apart from the fact of the withdrawal of the charges against him and his consequential acquittal to persuade me that there has been an excess or abuse of power or wrong exercise of their discretion.

I have approached this matter on the assumption that the grading of the conduct of a person in the armed forces could be the subject of an administrative recourse under Article 146 of the Constitution and leave the objection raised on behalf of the respondents, to the effect that such grading cannot be the subject of a recourse, open although reference has been made in support of such proposition to the Decisions of the Council of State No. 1092/46 and 1603/48, as I could not myself find their full report and they have not been made available to me.

Moreover, there has been no violation of the right to be heard as there was nothing disciplinary in the whole process leading to the preparation of the Discharge Document of the applicant which was only an administrative process.

As regards that part of the relief sought by the applicant to the effect that the respondents have omitted to reinstate him after he was acquitted by the Military Court, I have already answered the aspect of the issue as regards the time limits within which the decision of the Council of Ministers by which the applicant was demoted to the ranks could be challenged.

As far as the alleged omission is concerned, there has been no omission as there was no duty in law cast upon the respondents to reinstate him after the withdrawal of the charges that were pending against him. The applicant, in fact, never asked for anything to be done in that direction which by his conduct he must be taken to have accepted and waived thereby any right, thus losing his legitimate interest in the matter. The only step taken is in the form of his last application which, if it is considered to have been answered by the issue of the Discharge Document which constitutes the sub judice decision, challenged by this recourse, renders same as filed within time but cannot succeed as the said sub judice decision is good in law, duly warranted by the material before the authorities issuing same in exercise of their discretion and it is neither contrary to law nor in abuse or excess of power. If, on the other hand,

the said Discharge Document is not treated as an answer to the application of the applicant, this recourse is premature and again ought to be dismissed.

For all the above reasons, the recourse is dismissed but in the circumstances I make no order as to costs. 5

Recourse dismissed with no order as to costs.