1986 July 18

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ROGIROS SAVVA,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTER OF DEFENCE,

Resondent.

(Case No. 108/86).

Administrative act—Executory—Informatory—An informatory act cannot be made the subject of a recourse under Article 146 of the Constitution.

Time within which to file a recourse—Administrative act—Executory—Confirmatory—An act would only be confirmatory of an earlier act, if the latter was of an executory nature—Sub judice act, which is of an executory nature, referred to a previous act of an informatory nature—Since recourse was filed within 75 days from the date of the sub judice act, the recourse is not out of time.

Constitutional Law—Military Court—Applicant a National Guardsman was convicted by the said Court and sentenced to three months' imprisonment—Applicant did not exercise his right of appeal—Composition of Military Court declared to be unconstitutional by the Full Bench of this Court—Applicant's application that his conviction should not constitute a criminal record and that he should not serve the period he remained in prison in addition to his normal period of service with the National Guard turned down—Applicant is not entitled to raise the issue of constitutionality of the Military Court in the present proceedings.

On 28.3.85 the applicant, whilst serving in the National Guard, was convicted for a criminal offence by the Military Court sitting in Nicosia and sentenced to imprisonment of three months. He did not appeal and served the said sentence. After his discharge from prison he continued his service with the National Guard in order to complete the prescribed period of service.

On 3.10.85 the applicant submitted through his counsel an application to the Director-General of the Ministry of Defence asking to be informed what was the stand of the Ministry as to whether (a) the applicant was obliged to serve in addition to the period of normal service the period he was in prison and (b) whether his said conviction constituted a criminal record.

By letter dated 12.11.85 the said Director, acting on instructions, informed counsel for the applicant that the applicant was obliged to serve the period of imprisonment in addition to his period of normal service and that the conviction constituted a criminal record.

On 30.11.85 counsel for applicant addressed a letter to the Minister of Defence asking that the applicant be discharged from the National Guard upon completion of the normal period of service and that his conviction be not mentioned in his record. A request was made in the said letter that the Minister "consented to the above within the period prescribed by the Constitution."

On 16.1.86 the Minister through the Director-General replied that ".... a written reply has already been given to you .... dated 12.11.85" and that "the contents of the aforementioned letter continued to be valid."

As a result on the 14.2.86 the applicant filed the present recourse.

Counsel for the respondents raised two preliminary objections, namely that the sub judice act is not of an executory nature and that in any event the recourse was out of time.

Counsel for the applicant based his recourse on the case of *Pastellopoulos* v. *The Republic* (1985) 2 C.L.R.

165 where the Full Bench of this Court held that the Military Court was unconstitutional for reasons relating to its composition. It was the same Military Court which had convicted the appellant as aforesaid.

Held, dismissing both the preliminary objections and the recourse: (1) The letter of the 12.11.85 was of an informative nature proceeding along the lines of the inquiries made by the letter of 3.10.85. It did not contain a decision creating a new legal situation. It follows that as it was not of an executory nature, it could not be made the subject of a recourse under Article 146 of the Constitution. The request of the 30.11.85 was asking for a definite course of action. Although in the sub judice act contained in the letter of the 16.1.86 reference is made to the contents of the letter of the 12.11.85, it constitutes an executory administrative act. The sub judice act would only be confirmatory of the one dated 12.11.85, if the latter was of an executory nature. That being the situation, the recourse is not out of time.

(2) The unconstitutionality of the Military Court that tried and convicted the applicant cannot validly be raised by him in the present proceedings because as between the parties to the criminal proceedings the judgment is final as the applicant did not exercise his right of appeal and the relevant law as it then stood was the law so far as the entitlement of the parties was concerned.

Recourse dismissed.
No order as to costs.

Cases referred to:

Kyprianides v. *The Republic* (1982) 3 C.L.R. 611;

Pastellopoulos v. *The Republic* (1985) 2 C.L.R. 165;

Theodorides v. *Ploussiou* (1976) 3 C.L.R. 319;

Chokolingo v. *Attorney-General of Trinidad and Tobago* [1981] 1 All E.R. 244;

Diagoras Development Ltd. v. *National Bank of Greece S.A.* (1985) 1 C.L.R. 581.

Recourse.

Recourse for a declaration that the decision of the respondent to insist on the extension of the army service of the applicant by a length of time equal to the period of imprisonment imposed on applicant by the Nicosia Military Court and that the conviction of applicant by the Nicosia Military Court constitutes a criminal record for him, are null and void and of no effect.

Chr. Triantafyllides, for the applicant.

A. Papasavvas, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

A. LOIZOU J. read the following judgment. By the present recourse the applicant seeks:-

"(A) Declaration that the decision of the respondent as contained in his letter dated 16th January 1986, (Attachment 1, to the application), is null and void and of no effect whatsoever AND/OR

(B) Declaration that the decision of the respondent to insist on the extension of the Army service of the applicant by a length of time equal to the period of imprisonment imposed on the applicant by the Nicosia Military Court on the 28th March, 1985, is null and void and of no effect whatsoever, AND

(C) Declaration that the decision of the respondent that the conviction of the applicant on the 28th March, 1985, constitutes a criminal record for him is null and void and of no effect whatsoever."

The relevant facts which are not in dispute are these:

The applicant was born in Nicosia in 1967 and in July 1984, he joined the National Guard in order to do his twenty-six months National Service in discharge of his obligations under The National Guard Laws.

On the 28th March, 1985, and whilst so serving, he was convicted for a criminal offence by the Military Court

sitting in Nicosia and sentenced to imprisonment for three months.

The applicant served the said sentence and when discharged from prison on the 8th June, 1985, continued his service with the National Guard in order to complete the prescribed period. Under the provisions of Section 5(3)(b) of the National Guard Laws 1964-1984, it shall not be counted in the duration of the term of service under the National Guard Laws and of military service in general, "any period of service of a term of imprisonment imposed by any Court and period of remand in custody where no acquittal of the remanded person has ensued". (See Law No. 26 of 1965 Section 3, amending Section 5 of the principal law.)

The applicant on the 3rd October 1985, submitted through his counsel to the Director-General of the Ministry of Defence an application asking to be informed what was the stand of the Ministry of Defence as to whether (a) he was obliged to serve in addition to the period of normal service the time he was in prison serving the sentence imposed by the Military Court and (b) whether his conviction by the Military Court constituted a criminal record.

On the 12th November, 1985, the Director-General of the Ministry acting on instructions, informed the said counsel (Attachment 3), that the position of the Ministry of Defence to the questions submitted were the following:

"(1) Your National Guardsman, client, is obliged to serve in addition to his service in the National Guard, the period during which he was in prison and this because the validity of his conviction, since it has not been removed by a judicial decision, continue to be valid.

(2) Since the conviction of your client has not been removed in any way same constitutes a criminal record for the National Guardsman."

On the 30th November, 1985, the applicant addressed through his lawyer a letter to the Minister of Defence (Attachment 2), asking the following:

"(a) My client be discharged upon the completion of the normal period of his military service and not to serve in addition the period during which he was in the Central Prisons.

(b) The conviction of my client in the Military Court be not mentioned in his record and consequently he should have a clean criminal record."

A request was made in the said letter that the said Minister "consented to the above within the period prescribed by the Constitution."

On the 16th January 1986, the Minister through his Director-General replied (Attachment 1) as follows:

".... regarding the military service of your client National Guardsman Rogiros Savva and to-day's telephone conversation (Theofanides-Triantafyllides), on the same subject I inform you that on the subject to which you refer a written reply has already been given to you under the same number and dated 12th November, 1985.

2. The contents of the aforementioned letter continue to be valid."

The applicant filed on the 14th February 1986, the present recourse and contents therein that the said decision of the respondent causes great damage and hardship to him because a prolongation of his military service meant the delay in commencing his university studies by one year and further the existence of a criminal record would hinder and obstruct him in all his future life and activities.

It may be mentioned here that the applicant has taken no step to have, the said conviction imposed on him, on the 28th March, 1985, by the Military Court of Cyprus, annulled. Two preliminary points have been raised by the respondents (1) namely that the said decision is not an

executory administrative act within the ambit of Article 146 of the Constitution, (2) that even if the sub judice act was found to be within the ambit of the said article the recourse is out of time.

In support of the aforesaid objections learned counsel for the respondents has referred me to the case of *Sotiris Economides* v. *The Republic* (1980) 3 C.L.R. 219 at p. 223 and to the case of *Vassos Kyprianides* v. *The Republic* (1982) 3 C.L.R. 611, where at p. 619 it is mentioned:

> "It is well settled that a letter, which is merely of an informative nature and does not contain a decision creating a new legal situation, is not of an executory nature and, therefore, it cannot be made the subject-matter of a recourse under Article 146. *(Economides* v. *Republic,* (1980) 3 C.L.R. 219; *Koudounaris* v. *The Republic* (1967) 3 C.L.R. 479, 482; *Lardis* v. *The Republic,* (1970) 3 C.L.R. 356, 359; *Hadji Kyriacos and Sons Limited* v. *The Republic* (1971) 3 C.L.R. 286, 290; *The Republic* v. *Demetriou,* (1972) 3 C.L.R. 219, 223; *Theodorou* v. *The Attorney-General of the Republic* (1974) 3 C.L.R. 213; *Hji Panayi* v. *The Municipal Committee of Nicosia* (1974) 3 C.L.R. 366, 375)."

It is true that the letter of the 12th November, 1985, (Attachment 3) was of an informative nature and proceeded along the lines of the inquiries made by the letter of his counsel of the 3rd October 1985. As such it could not be the subject of a recourse as not containing a decision creating a new legal situation and consequently not being of an executory nature it could not be made the subject of a recourse under Article 146 of the Constitution.

The request, however, of the 30th November 1985, contained in Attachment 2, was asking for a definite course of action, namely the discharge of the applicant after the expiration of his normal period of military service and the striking off from his record of the conviction by the Military Court. Although in the sub judice act contained in the letter of the respondent of the 16th January 1986, (Attachment 3) reference is made to what is contained in

the letter of the 12th November 1985, I shall consider it as constituting an executory administrative act and proceed on that basis to examine the recourse on the merits. On that assumption the recourse cannot be held out of time.

It was the contention of the applicant that it was immaterial that they refer to the contents of the previous letter for a reply and that the letter of the 16th January 1986 would only be confirmatory of the one dated 12th November 1985, if the latter was of an executory nature but it is not, as the phraseology used could not affect the real situation and that it would convert the real expression of will of the administration for the first time (whether done expressly or by incorporation) to a confirmatory decision. That being the situation the recourse having been filed on the 14th February 1986, was not out of time as the seventy-five days prescribed by Article 146(3) of the Constitution do not expire.

Learned counsel for the applicant based his recourse on the effect of the case of *Pastellopoullos* v. *The Republic* (1985) 2 C.L.R. 165, where the Full Bench of this Court held that the Military Court was unconstitutional for reasons relating to its composition and that it was the same Military Court that convicted earlier the applicant. It was argued that the insistence of the respondent to treat the judgment of the Military Court, a subsequently declared unconstitutional organ, as valid and capable of creating "situations" —a criminal record for the applicant and the extension of his military service beyond the period provided by Statute for such time as the period for his conviction—is contrary to the Constitution and the Law and as such should be annulled.

The attention of the Court was drawn to what was said at p. 186 that, "it follows that the Military Court was set up in an unconstitutional manner and could not consequently validly exercise the jurisdiction vested in it...".

It was submitted that the Military Court was declared unconstitutional ab initio since it had from the start the same composition which was the basis for being so declared.

It was further submitted that the decisions of an unconstitutional organ are void ab initio as there was no valid exercise of its jurisdiction and powers and that it could not be argued that the applicant submitted to its jurisdiction and did not raise the issue of its constitutionality as such issue cannot be waived.

The respondent maintained that once the conviction was not annulled the decision in *Pastellopoullos case* could not affect the situation.

In the case of *Theodorides* v. *Plousiou* (1976) 3 C.L.R. 319 it was held that an objection of unconstitutionality is considered only in relation to the issue of the validity of the subject matter of the recourse and is decided solely for the purpose of the particular case. Triantafyllides P., at p. 340 had this to say:

> "... thus, an 'objection of unconstitutionality' is considered only in relation to the issue of the validity of the subject matter of the recourse and is decided solely for the purpose of the particular case (see, in this connection, Βλάχου 'Η 'Ερευνα της Συνταγματικότητος των Νόμων', 1954, p. 106, Σγουρίτσα 'Συνταγματικόν Δίκαιον' 3rd ed. 1965, vol A, p. 66, Burdeau 'Traité De Science Politique', 2nd ed., vol, 4, p. 469)."

Relevant to the issue in my view also is what was said in the case of *Chokolingo* v. *Attorney-General of Trinidad and Tobago* [1981] 1 All E.R. 244 to which I referred in *Diagoras Development Ltd.*, v. *National Bank of Greece S.A.* (1985) 1 C.L.R. 581. Lord Diplock had this to say at pp. 247-248:

> "In dismissing the appellant's application under s. 6(1) the Court of Appeal relied on the statement by this *Board in Maharaj* v. *Attorney-General of Trinidad and Tobago (No. 2)* [1978] 2 All E.R. 670 at 679, [1979] AC 385 at 399:
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> '.... no human right or fundamental freedom recognised by Chapter 1 of the Constitution is contravened by a judgment or order that is wrong and

liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kind is the appeal to a higher court. Where there is no higher court to appeal to then none can say that there was error.'

It may be that technically this statement was obiter, but, as the context indicates, it was the subject of careful deliberation by the Board in the light of the judgments of Hyatali CJ and Corbin JA in the Court of Appeal and the minority judgment in the Judicial Committee itself.

The arguments addressed to their Lorships in the instant appeal, however, call for some expansion of that statement."

He then went on to say that:

"It is fundamental to the administration of justice under a constitution which claims to enshrine the rule of law (preamble, paras (d) and (e) that if between the parties to the litigation the decision of that Court is final (either because there is no right of appeal to a higher Court or because neither party has availed himself of an existing right of appeal) the relevant law as interpreted by the Judge in reaching the Court's decision is the 'law' so far as the entitlement of the parties to 'due process of law' under s. 1(a) and the 'protection of the law' under s. 1(b) are concerned. Their Lordships repeat what was said in *Maharaj* v. *Attorney-General for Trinidad and Tobago (No. 2)*. The fundamental human right guaranteed by s. 1(a) and (b), and s. 2, of the Constitution is not to a legal system which is infallible but to one which is fair."

The facts in the *Chokolingo case* were that a newspaper in Trinidad and Tobago published a short story written by the appellant who was prosecuted for contempt of Court. On advice from counsel he pleaded guilty to the offence and he was sentenced to twenty-one days' imprisonment.

He did not appeal and served the sentence. Three years later he applied for a declaration under a particular provision of the Constitution of Trinidad and Tobago that his committal was unconstitutional and void because it contravened his right under Section 1(a) not to be deprived of his liberty except by "due process of Law."

The unconstitutionality of the Military Court that tried and convicted the applicant in the present case cannot validly be raised by him in the present proceedings because as between the parties to these criminal proceedings the judgment of the Court is final as there was not exercised the existing right of appeal and the relevant law as it then stood was the law so far as the entitlement of the parties was concerned. For all the above reasons this recourse should fail.

The remedies sought by the applicant could not, for the reasons hereinabove stated, be obtained from this Court through the present proceedings but possible relief may be sought from other authorities in the exercise of their own powers, under the Law and the Constitution.

The application, therefore, is dismissed with no order as to costs.

Recourse dismissed.
No order as to costs.