1986 November 28

[KOURRIS, J]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

CHRISTOFOROS TORNARITIS,

Applicant,

v.

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

Respondents.

(Case No. 625/86).

Legitimate interest—Acceptance of the act in question—Free and voluntary with full knowedge of facts—Deprives acceptor of his legitimate interest to challenge such act.

Acts or decisions in the sense of Article 146 of the Constitution—Omission to discharge applicant from National Guard upon completion of his normal period of service—Such non-discharge was the direct consequence and result of previous decision of Council of Ministers calling up reservists—As such the non-discharge is not amenable to a recourse for annulment.

National Guard—The National Guard Laws, 1964 - 1984—Decision of Council of Ministers under s. 16 calling up reservists—Section 15 does not prohibit the calling up of persons still serving as conscripts as reservists for further service, following the ordinary period of service.

This recourse is directed against a decision of the Council of Ministers taken on 25.5.83 and the omission of the Minister of Defence to discharge the applicant from the National Guard upon completion of 26 months' service in accordance with section 5 of the National Guard Law 20/64, as amended.

The said decision of the Council of Ministers reads as follows:

"The Council acting under s. 16 of the National Guard Laws 1964 - 1981, calls up as Reservists for service in the National Guard for three months immediately after the completion of the Service envisaged by the said Laws, all those conscripts who after enlisting for service in the National Guard are to be selected for service as Lieutenants on probation and Reserve Lieutenants".

On 19.7.84 the applicant was enlisted in the National Guard. He was selected for the post of Commissioned Officer among conscripts who wanted to become Lieutenants and for this purpose he signed a document, acknowledging that he would serve as a Reservist for three months immediately after completion of his service in the National Guard.

Counsel for the respondents raised, inter alia, the question of applicant's legitimate interest to challenge the sub judice decision of the Council of Ministers, which he had accepted freely and voluntarily by signing the said acknowledgement. Counsel for the applicant replied that if the applicant had refused to sign the document, the obvious adverse consequence would have been his rejection from becoming an officer and such fear is enough to show that the acceptance was not freely given.

As regards the merits counsel for the applicant argued that the decision of the Council of Ministers is contrary to section 15* of the National Guard Laws in that the applicant was called upon to serve as a reservist without first becoming a "reservist" within the meaning of the said laws, i.e. without first being duly and actually demobilised.

Held, dismissing the recourse: (1) In the light of all the material before it, this Court is satisfied that the acceptance of the sub judice decision of the Council of Ministers was unreserved and free with full knowledge that had the applicant volunteered to be trained as an Officer,

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The relevant part of this section is quoted at p. 2342 post.

he would have to serve another three months following completion of the normal period of service. It follows that the applicant has no legitimate interest to challenge the said decision.

(2) This recourse is, as regards the sub judice decision of the Council of Ministers, out of time.

(3) The alleged omission occurred on 19.9.86, when the applicant completed the normal period of his service (26 months) and this recourse was filed on 9.10.86, that is within the time limit of 75 days from such omission. However, the non-discharge of the applicant from the National Guard cannot be challenged by this recourse as it is a direct result and consequence of the sub judice decision of the Council of Ministers and as such is not amenable to a recourse under Article 146 of the Constitution.

(4) In any event the sub judice decision of the Council of Ministers is not contrary to section 15 of the National Guard Laws *(Myrianthis* v. *The Republic* (1978) 3 C.L.R. 254 at pp. 260 - 262 adopted).

Recourse dismissed.
No order as to costs.

Cases referred to:

Myrianthis v. *The Republic* (1977) 3 C.L.R. 165;

Ioannou and Others v. *The Republic* (1968) 3 C.L.R. 146;

Tomboli v. *CY.T.A.* (1980) 3 C.L.R. 266;

Piperis v. *The Republic* (1967) 3 C.L.R. 295;

Vlachou and Others v. *The Republic* (1985) 3 C.L.R. 1319;

Provita Ltd. v. *Grain Commission* (1986) 3 C.L.R. 737;

Shafkalis v. *Cyprus Theatrical Organization* (1984) 3 C.L.R. 1382;

Papasavvas v. *The Republic* (1973) 3 C.L.R. 475;

Mourtouvanis v. *The Republic* (1966) 3 C.L.R. 108;

Myrianthis v. *The Republic* (1978) 3 C.L.R. 254.

Recourse.

Recourse against the omission of the respondents to discharge or demobilize the applicant from the National Guard after the completion of 26 months service.

N. Clerides, for the applicant.

M. Tsiappa (Mrs.), for the respondent.

Cur. adv. vult.

KOURRIS J. read the following judgment. The applicant, by the present recourse, seeks:-

(1) A declaration of the Court that the decision of the Council of Ministers taken on 25.5.1983, acting under s. s. 16 of the National Guard Laws 1964 - 1984, is void and of no effect whatsoever and

(2) Challenges the omission of the Minister of Defence to discharge or demobilize the applicant from the National Guard after the completion of 26 months of service in accordance with s. 5 of the National Guard Laws 20/64 as amended.

The decision of the Council of Ministers, acting under s. 16 of the National Guard Laws 1964 - 1984 under No. 23193 dated 25.5.83 (Appendix 2) and published in the Official Gazette (Appendix 3), is as follows:-

«Το Συμβούλιο, σύμφωνα με το Άρθρο 16 των Περί της Εθνικής Φρουράς Νόμων του 1964 - 1981, καλεί ως Εφέδρους, για υπηρεσία στη Δύναμη για περίοδο τριών μηνών αμέσως μετά τη συμπλήρωση της θητείας που προβλέπεται από το Νόμο, όλους τους στρατευσίμους που θα κατατάσσονται μελλοντικά, ανεξάρτητα κλάσης, και που επιλέγονται για να υπηρετήσουν ως Δόκιμοι και Έφεδροι Αξιωματικοί».

("The Council, acting under s. 16 of the National Guard Laws 1964 - 1981, calls up as Reservists for service in the National Guard for three months immediately after the completion of the Service envisaged by the said Laws, all those conscripts who after enlisting for service in the National Guard are to be se-

lected for service as Lieutenants on probation and Reserve Lieutenants)".

Counsel for the respondent raised two preliminary objections the following:-

(1) The applicant has no legitimate interest within the meaning of Article 146.2 of the Constitution, and

(2) The recourse which impugns the decision of the Council of Ministers was not brought within the 75 days limit prescribed under Article 146.3 of the Constitution.

I propose to examine the preliminary objections before dealing with the substance of the case but, before doing so, I shall state briefly the salient facts of the case.

The applicant had been called up to do his National Service and on 19.7.1984 was enlisted in the National Guard. He was selected on a voluntary basis and in accordance with the procedure approved after the issue of the sub judice decision for the selection of Reserve Lieutenants on probation (Appendix 8 to the Opposition), as a candidate for the post of Commissioned Officer on 4.10.1984 (Appendix 5 to the Opposition), and for training as a Reserve Lieutenant on probation on 17.11.84 (Appendices 6 and 7 to the Opposition).

In accordance with the said procedure (Appendix 8), the applicant was selected with others for the post of Commissioned Officer among conscripts who wanted to become Lieutenants and for this purpose he signed a document (Appendix 9), acknowledging that he would serve as a Reservist for three months immediately after completion of his service in the National Guard. He was thereafter trained in the companies of candidates for the post of Commissioned Officer, and after taking written examinations was selected with others among the said candidates for training as a Reserve Lieutenant on probation.

Applicant, before his departure for training in the said companies of candidates for the post of Commissioned Officer in October, 1984, had acquired knowledge of the sub judice decision that if selected as a candidate Reserve

Lieutenant, he would serve as a Reservist for three months immediately after completion of his service in the National Guard (Appendix 5 to the Opposition and Appendix 1 to the final address) and he signed a document to that effect (Appendix 9 to the Opposition). The Council of Ministers by its decision of 23.5.85 appointed the applicant as a Reserve Lieutenant and on probation as from 16.2.1985 (See exh. 1).

With regard to the first preliminary objection Counsel for the respondents submitted that the applicant accepted expressly or impliedly the sub judice decision of the Council of Ministers unreservedly and freely, thus, depriving the applicant of a legitimate interest entitling him to make the present recourse for the annulment of such decision. She contended that the applicant without any compulsion and exercising his will freely he expressed his wish to be trained as a Reserve Lieutenant acknowledging at the same time that he would serve as a Reservist for three months immediately after completion of his service in the National Guard (Appendix 9 to the Opposition and Appendix 1 to the final address). She said that the selection of candidates as trainees for Lieutenants on probation was made among those conscripts who expressed the wish to become candidates for the post of Commissioned Officers and to be trained as Reserve Lieutenants on probation. If a conscript did not wish to be trained as Commisioned Officer then, he would not have been obliged to be trained as a Reserve Officer. With this knowledge the applicant continued with his training in the said companies and took regular examinations in order to be evaluated on his performance for the purpose of his selection as a Reserve Lieutenant on probation and thereby competing with others for the said selection.

Counsel for the applicant submitted that the acceptance of the applicant was not unreserved and free but it was the result of fear of adverse consequences. He alleged that the applicant had no any free choice to refuse to sign the document (Appendix 9 to the Opposition), since he had been selected to be trained as an Officer in the National Guard. He said that, had the applicant refused to

sign, the obvious adverse consequence was to be rejected from becoming an Officer in the National Guard and therefore this fear was by itself enough to show that the acceptance of the contents of the document signed was not voluntary. Counsel relied on the case of *Myrianthis* v. *The Republic* (1977) 3 C.L.R. 165. I may say at once that the facts of the *Myrianthis* case are different from the facts of the present case.

I am satisfied, in view of the material before me, that the acceptance of the applicant of the sub judice decision was unreserved and free with full knowledge that had he volunteered to be trained as an Officer in the National Guard he would have to serve another three months immediately after the completion of his service in the National Guard and the contention of Counsel for the applicant that he did so out of fear of adverse consequences is untenable *(Ioannou and others* v. *The Republic* (1968) 3 C.L.R. 146, *Tomboli* v. *CY.T.A.* (1980) 3 C.L.R. 266, *Piperis* v. *The Republic* (1967) 3 C.L.R. 295, *Vlahou and others* v. *The Republic* (1985) 3 C.L.R. 1319, *Provita Ltd.*, v. *Grain Commission* (1986) 3 C.L.R. 737 at p. 744). This objection of Counsel of the respondent succeeds and the recourse is dismissed but I propose to proceed with the second preliminary objection that the recourse was filed out of time.

It appears that this recourse was filed long after the lapse of 75 days' time within which the applicant was entitled to file a recourse. The applicant had acquired knowledge of the sub judice decision and became affected by it in November, 1984 when he was selected to be trained as an Officer and signed the document Appendix 9 to the Opposition or the latest in May, 1985 when he was appointed to the rank of Reserve Lieutenant and on probation (Δόκιμος Έφεδρος Αξιωματικός) as from 16.2.1985 by the decision of the Council of Ministers dated 23.5. 1985 (exh. 1).

I have no doubt in my mind that in the light of the circumstances of this case, that the recourse of the applicant regarding the decision of the Council of Ministers is

clearly out of time (See *Shajkalis* v. *Cyprus Theatrical Organisation* (1984) 3 C.L.R. 1382 at p. 1387).

Counsel, however, for the applicant, contended that the recourse challenges both the decision of the Council of Ministers taken on 25.5.83 and also the omission of the respondent Minister of Defence to duly demobilize the applicant in accordance with the National Guard Laws s. 5, after the completion of 26 months of Military Service. He went on to say that the said omission is of a continuing nature commencing on 19.9.86 when applicant ought to have been duly demobilized and continuing every day up to the present day. He relied on the cases of *Lefki Papasavva* v. *The Republic* (1973) 3 C.L.R. 475 and *Mourtouvanis* v. *Republic* (1966) 3 C.L.R. 108 at p. 124.

If counsel for the applicant is correct, then, no question of an omission of a continuing nature arises because the alleged omission occurred on 19.9.86 and the recourse was filed on 9.10.1986 which is within the 75 days time limit.

In relation to this contention counsel for the respondents argued that the applicant is not, in effect, seeking a declaration of the Court that the failure to issue with a discharge certificate ought not to have been made. The applicant, in effect is seeking a declaration of the Court that he ought to have been discharged from the National Guard on completion of his service on the ground of alleged illegality of the Council of Ministers' decision by virtue of which applicant was to serve and is serving as a Reservist. She argued that the applicant has been serving as a Reservist by virtue of the sub judice decision of the Council of Ministers whose validity cannot be attacked by the present recourse not only because it was accepted by the applicant together with his relevant service as Reservist but also because the present recourse was clearly not filed within the time limit prescribed by Article 146.3 of the Constitution. She went on to say that the non-discharge of the applicant on 19.9.1986 from the National Guard and his service as a Reservist ever since is the direct consequ-

ence and the result of the relevant Council of Ministers' decision.

She pointed out that since the recourse is out of time in relation to the said decision and since the applicant has accepted same, there is no jurisdiction under Article 146 of the Constitution to declare the Council of Ministers' decision by virtue of which the applicant has not been discharged and is serving as a Reservist null and void. If the validity of the Council of Ministers' decision by virtue of which the applicant was not discharged and is serving as a Reservist, cannot be challenged by the present recourse, no question for determination can possibly arise as to whether respondents ought to have discharged the applicant on the ground that the Council of Ministers' decision was, in some way, illegal.

I agree with the above submission of counsel for the respondents that the non-discharge of the applicant from the National Guard cannot be challenged by the present recourse for the reasons she gave to the Court and also from the fact that the non-discharge of the applicant from the National Guard is a direct consequence and result of the sub judice decision of the Council of Ministers and as such is not ammenable to recourse under Article 146 of the Constitution and, the contention of counsel for the applicant that the applicant had no legal means to challenge the Council of Ministers' decision as this was forming part of a composite administrative process that was not yet complete i.e. that both the Council of Ministers' decision and the omission were part of the same administrative process resulting in the non-discharge of the applicant and therefore, not time-barred, cannot stand.

In view of the above the recourse cannot succeed and it fails but I propose to deal with the merits of the case despite my above conclusions.

Counsel for the applicant submitted that the omission to release the applicant from the National Guard on 19.9.86 was wrong in law as the applicant had duly completed his military service in accordance with the National Guard

Laws s. 5 and he was therefore entitled to be duly released. He contended that the omission of the respondents was based upon the decision of the Council of Ministers No. 25193 of 25.5.83 and the call up for service as reservist after the completion of his military service was taken in excess of the provisions of s. 16 of the National Guard Law 20/64 as amended inasmuch as it referred to future conscripts and to persons who in future acquire the status of Officers and Reservist Officers. He argued that the applicant could not be called upon to serve as a reservist in the National Guard without him first becoming a "reservist" within the meaning of the National Guard Laws i.e. being duly and factually demobilized under s. 15 which reads:

«Την Εφεδρεία της Δυνάμεως αποτελούσι οι εκπληρώσαντες την υποχρέωση θητείας αυτών συμφώνως των Άρθρων 5 και 12 απολυόμενοι οριστικώς της Δυνάμεως».

("The reserve of the Force consists of those who have completed their obligation for service in accordance with sections 5 and 12. and discharged definitely from the Force").

Counsel for the applicant, further submitted that, in any event, the omission by the Minister of Defence to demobilize the applicant from the National Guard was tantamount to an increase in the length of his military service beyond the length prescribed by s. 5 of the National Guard Laws by adding a further period of three months to the 26 month period of his service.

Counsel for the respondents stated that the submission of counsel for the applicants is covered by authority in the case of *Myrianthis* v. *The Republic* (1978) 3 C.L.R. 254. Counsel for the applicant reiterated that the *Myrianthis* case is to be distinguished because in fact and in law the respondents' omission was tantamount to an increase of the length of the applicant's period of service and this was camouflaged by the term "Reserve Service".

The points raised by counsel for the applicant are indeed answered by the decision in *Myrianthis* case (supra)

where Triantafyllides, P., at pp. 260 - 262, said as follows:-

"The decision of the Council of Ministers to call him up for further service as a reservist, together with the rest of the conscripts in his class, was taken under section 16 of Law 20/64, on September 16, 1976.

Section 15(1)(a) of Law 20/64, as amended by means of section 5 of the National Guard (Amendment) (No. 3) Law, 1965 (Law 44/65), provides that the reserve of the National Guard is composed, inter alia of those who have completed their normal military service under the relevant legislative provisions, and are discharged definitely from the National Guard; the material part of its Greek text reads as follows:-

'(1) Την εφεδρείαν της Δυνάμεως αποτελούσι -
(α) οι εκπληρώσαντες την υποχρέωσιν θητείας αυτών ως προνοείται εν τοις άρθροις 5 και 12 απολυόμενοι οριστικώς της Δυνάμεως'

('(1) The reserve of the Force consists of -
(a) Those who have completed their obligation for service as provided in sections 5 and 12 and discharged definitely from the Force').

It has been the contention of counsel for the applicant that the aforesaid decision of the Council of Ministers was taken contrary to law in that it is not possible to call up a conscript for service as a reservist in the National Guard before he has completed his normal period of military service, as has been done with the class of conscripts to which the applicant belongs; in this respect stress was placed on the words 'εκπληρώσαντες' ('those who have completed') and 'απολυόμενοι οριστικώς' ('discharged definitely') in order to support the argument that section 15(1)(a), above, envisages a call up of a reservist only after he has completed his normal period of military service and has been definitely discharged from the National Guard.

In *Murray* v. *Commissioners of Inland Revenue* [1918] A.C. 541, Lord Dunedin stated (at p. 553):-

> 'It is our duty to make what we can of statutes, knowing that they are meant to be operative, and not inept, and nothing short of impossibility should in my judgment allow a Judge to declare a statute unworkable.'

Lord Dunedin reverted to the same principle in the later case of *Whitney* v. *Commissioners of Inland Revenue* [1926] A.C. 37, and said the following (at p. 52):-

> 'A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable.'

It would obviously render section 15(1)(a) of Law 20/64, as amended by Law 44/65, unworkable, by limiting its ambit to an unreasonable and utterly inconsistent with the object of the relevant legislation extent, if I were to interpret it as suggested by counsel for the applicant.

In my opinion, there is nothing in it which prevents the Council of Ministers from calling up as reservists for further service in the National Guard, in the exercise of the powers under section 16 of the relevant legislation, conscripts who are still doing their ordinary military service; and I cannot accept that the words 'ἐκπληρώσαντες' and 'ἀπολυόμενοι ὁριστικῶς' have been used by the Legislature so literally as to exclude such a course; I am of the view that they were merely used to convey the notion that a reservist is, as a rule, a conscript who has completed his normal period of military service and at the end of it has been 'definitely discharged' from the ranks of the National Guard, in the sense that he is no longer bound to serve except as a reservist.

The premature call-up of a conscript to serve in

the National Guard as a reservist after completion of his normal period of military service does not prevent him, in a way, from being 'definitely discharged' from the National Guard in the afore-mentioned sense even if, and when, he is continuing to serve as a reservist.

I, therefore, find nothing contrary to law in so far as the relevant decision of the Council of Ministers is concerned."

With due respect, I agree fully with the above reasoning and adopt it, and I find that the sub judice decision is not contrary to Law.

For all the above reasons the recourse is dismissed but without order for costs.

Recourse dismissed.
No order as to costs.