1966
June 24, 28,
Sept. 12,
Oct. 21

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ANTONIOS CHRISTOU ANTONIOU *and* THE MINISTER OF INTERIOR AND DEFENCE

[TRIANTAFYLLIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ANTONIOS CHRISTOU ANTONIOU,

*Applicant,*

*and*

THE MINISTER OF INTERIOR AND DEFENCE,

*Respondent.*

*(Case No. 140/66).*

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*Military Service—National Guard—Exemption from military service of a conscript on the ground of his maintaining more than three dependants—Section 4 (3)(f) of the National Guard Law, 1964 (Law No. 20 of 1964) as amended by section 2 of the National Guard (Amendment) Law, 1965 (Law No. 26 of 1965) and section 2 of the National Guard (Amendment) (No. 3) Law, 1965 (Law No. 44 of 1965)—Conscript maintaining more than three dependants within the provisions of the relevant legislation* (supra)*—Meaning and scope of the notion of maintenance—Entitling the conscript to claim exemption from service—A conscript qualifies for exemption even if he is not providing total maintenance—It is sufficient that he is the main breadwinner* viz. *the main source of maintenance of more than three dependants—The notion of maintenance in the relevant legislation* (supra) *should be understood to refer primarily to the necessaries not to extra comforts.*

*National Guard—Exemption from service—See above.*

*Exemption from service in the National Guard—See above.*

*Dependants—Maintaining more than three—Partial maintenance—Total maintenance—Main source of maintenance sufficient to qualify the conscript for exemption from military service—See, also, above.*

*Administrative Law—Administrative acts—Misconception of fact or of law—In the present case the* sub judice *decision not to exempt applicant from military service under section 4(3)(f) of the National Guard Law, 1964, as amended* (supra) *was held not to be based on misconception of fact or of Law.*

Cases referred to:

*Hji Stephanou and The Republic*, reported in this Part at p. 289 *ante*.

**Recourse.**

Recourse against the decision of the Respondent that the Applicant, a national guardsman, be sent to Greece in the course of his military service and against the decision of the Respondent not to exempt Applicant from military service.

*M. Houry with St. G. McBride* for the Applicant.

*L. Demetriades with I. Ipsilanti (Miss)* for the Respondent.

*Cur. adv. vult.*

The following Judgment was delivered by:-

TRIANTAFYLLIDES, J.: The Applicant in this recourse complains:-

(a) against a decision of the Respondent that the Applicant, a national guardsman, be sent to Greece in the course of his military service; and

(b) against a decision of the Respondent not to exempt Applicant from military service.

At the hearing of the Case complaint (a), above, was not pressed by counsel for Applicant, nor was any actual decision of the Respondent, relevant to such complaint, placed before the Court, so that its validity could be examined; in the circumstances, it is proper to treat the said complaint as, in effect, abandoned; the relevant part of this recourse stands, therefore, dismissed accordingly.

We are left, thus, only with complaint (b), above, of the Applicant. It is based on the contention that he ought to have been exempted from military service because he has in fact more than three dependants and it is alleged that the Respondent wrongly took the view that the Applicant did not have, at the material time, more than three dependants.

Applicant's claim for exemption has been based on section 4(3)(f) of the National Guard Law, 1964 (Law 20/64) as amended by section 2 of the National Guard (Amendment) Law, 1965 (Law 26/65) and section 2 of the National Guard (Amendment) (No. 3) Law, 1965 (Law 44/65).

The Applicant, who is nineteen years old and not married, alleges that he has more than three dependants, in the sense

of paragraph (iii) of the definition of "dependants" in section 4(3)(f) of the Law; such paragraph reads:

"(iii) Ἐξώγαμα τέκνα, τέκνα ἄνω τῶν δεκαοκτὼ ἐτῶν, γονεῖς, ἀδελφοὺς καὶ ἀδελφὰς οἱ ὁποῖοι συντηροῦνται ὑπὸ τοῦ στρατευσίμου". (iii) "illegitimate children, children over the age of eighteen, parents, brothers and sisters, who are maintained by the conscript".

Applicant's family consists of his two parents, and, also, of three brothers and one sister all younger than Applicant.

Applicant applied at first for exemption from military service on the 27th July, 1965 (see *exhibit* 5), before he had actually enlisted; then, after his enlistment, Applicant applied afresh on the 16th January, 1966, (see *exhibit* 6).

Applicant's claim for exemption having been turned down, he filed a recourse before this Court, Case 97/66. In relation to such Case the learned Attorney-General of the Republic gave certain advice to the Respondent on the 28th April, 1966 (see *exhibit* 7) to the effect that the matter be reconsidered, in the light of relevant principles set out in such advice.

Eventually, the Respondent reached a new decision on the 11th May, 1966, (see *exhibit* 4); he decided to reject Applicant's claim for exemption.

This fact was made known to Applicant's side in the course of the proceedings in Case 97/66—which was subsequently withdrawn—and, also, a formal letter to the same effect was addressed to Applicant's advocates on the 4th June, 1966, (see *exhibit 1*).

The present recourse has been filed on the 7th June, 1966.

In reaching his sub judice decision the Respondent has relied on a report (*exhibit* 4) made by an Advisory Committee, which was set up under the provisions of section 4 of Law 20/64, as amended by section 2 of the National Guard (Amendment) (No. 2) Law, 1966 (Law 14/66). Such Committee, which had been functioning in the past without express legal sanction for the purpose (see *HjiStephanou and The Republic*, reported in this Part at p. 289 *ante*) had, apparently, dealt, earlier, before the promulgation of Law 14/66 on the 5th May, 1966, with Applicant's claim for exemption. On the 9th May, 1966, the said Committee, having been, in the meantime, formally set up by the Respondent on the 7th May, 1966, under Law 14/66, (see *exhibit* 7) reverted to the

case of the Applicant and submitted a report to the Respondent, as aforesaid. In such report it was stated that Applicant was not entitled to exemption from military service under section 4(3)(f), because he did not have more than three dependants. The Respondent wrote at the bottom of the report:
"Συμφωνῶ καὶ υἱοθετῶ τὰς συστάσεις τῆς 'Επιτροπῆς". (I agree, and adopt the recommendations of the Committee).

In the Committee's report there were set out, inter alia, the following salient facts, as found by it:-

—That the Applicant's father was working as a cook at Episkopi with a salary of about £30 per month, and that one of his brothers, Haris, who was about to graduate from the Technical School, Limassol, as an electrician, was already in part employment earning about £9 per month.

—That the family resided in Limassol in a rented house; the rent of £10 per month being contributed to equally by the father of the Applicant and the Applicant himself.

—That the Applicant, at the time of his enlistment, and since 1964, had been employed as the technical manager of a concern in Limassol at a salary of £50 per month.

—That the family did not have any debts except a liability for £60 in respect of a refrigerator.

—That the mother of Applicant had undergone heart surgery in 1965, in England, and that after her return to Cyprus, in November, 1965, she was well.

The Committee's findings of fact appear to have been based on an investigation carried out by an Assistant District Inspector, of the Limassol District Officer's Office, (see *exhibit* 3).

The Committee, in advising the Minister, was of the opinion (see *exhibit* 4) that, on the most favourable for the Applicant view of the relevant facts, the members of his family who were his dependants did not exceed three and, therefore, he was not entitled to exemption from military service under section 4(3)(f) of the Law.

Having followed carefully all the evidence adduced, as well as the submissions of counsel, I am satisfied that the conclusions reached by the aforesaid Committee, which the Respondent adopted in coming to his sub judice decision,

were reasonably and properly open to the Committee, and to the Respondent, in the circumstances of the present Case.

I should add that I was not at all favourably impressed by the quality of the evidence adduced in support of the case of the Applicant; the Applicant was not, in my opinion, particularly anxious about the accuracy of his testimony; the parents of the Applicant were inclined to colour their evidence in such a manner so as to help as much as possible the case of their son.

Counsel for Applicant has argued that the sub judice decision has been based on misconceptions of fact. He has, inter alia, argued that the financial position of the Applicant, as stated at page 4 of *exhibit* 4, has been misconceived.

The question of the financial position of the Applicant has been particularly dwelt upon by both sides in this Case, during the proceedings before the Court; but as it is stated later in this Judgment it does not appear to have been treated as the crucial factor in *exhibit* 4, the report of the Committee. In any case, once it has been alleged that the financial position of Applicant has been misconceived, I think it would be useful to deal with the matter, at this stage, in this Judgment.

On the material before me, I find the financial position of the Applicant to be as follows:- Applicant has come under a veritable shower of generosity on the part of Mr. George Peristiani, who is in charge of the concern which was employing Applicant at the time of his enlistment. Mr. Peristiani has given, in July 1965, to the Applicant 17,800 shares of George Peristiani Ltd., of a nominal value of £1.- each; according to a trust-deed, which was prepared on the very day of the hearing of this Case, the Applicant is not entitled to the income of such shares, so long as the donor lives.

I am strongly inclined to the view, on the material before me, including Applicant's demeanour when giving evidence on this point, that the said trust-deed is a last-minute measure, resorted to for the purposes of this Case only and for none other, with a view to minimizing the income of the Applicant from sources other than his salary.

Mr. Peristiani has, moreover, advanced to the Applicant the funds needed to purchase, in December, 1964, a house

in Limassol, valued at £3,500.–, which was registered in Applicant's own name and which is let out at £25 a month. Though the rent is paid into a separate bank account with a view, allegedly, to repaying, eventually, to Mr. Peristiani the amount of £3,500.–, yet to-date the total of the amounts paid into such account stands to the credit of the Applicant and no amount whatsoever has been refunded to Mr. Peristiani by way of repayment of the debt of £3,500.

On the material before me, including Applicant's demeanour as a witness, I am not prepared to believe that there is, or has ever existed, indeed any real possibility of repaying to Mr. Peristiani the amount of £3,500.– or any part thereof, out of the rents of the house in question; after all, had there been any such possibility the rents, instead of being still deposited in an account in the name of Applicant, would no doubt have been deposited directly in the name of Mr. Peristiani. I am of the view that the amount of £3,500.– was donated to the Applicant by Mr. Peristiani, without any obligation of Applicant to repay it.

Mr. Peristiani has advanced, also, to the Applicant £1,000.– for the cost of the operation of his mother, and though the Applicant was receiving the very good, for his age and experience, salary of £50.– per month, nevertheless, no deductions have ever been made from such salary with a view to repaying the said amount of £1,000 to Mr. Peristiani.

Furthermore, the secret of the manufacture of the "Peristiani brandy", which was known only to Mr. Peristiani, has been made known to Applicant, too.

The facts set out in the two immediately preceding paragraphs are very indicative of the exceptionally generous attitude of Mr. Peristiani towards the Applicant, and strengthen my already expressed views regarding the real nature of the transactions involving the 17,800 shares of George Peristiani Ltd. and the £3,500 utilized for the purchase of the house.

The highlights of the above described financial position of the Applicant have been referred to, in a substantially correct manner, in the report of the Advisory Committee, as a mere perusal of what is stated at page 4 of *exhibit* 4 will readily show. I am, therefore, of the opinion that no significant misconception as to Applicant's financial position

has influenced the recommendations of the Committee or the eventual decision of the Respondent in the matter of the application of the Applicant for exemption from military service.

Even if, however, any significant misconception, as regards the financial position of Applicant, were to be traced in *exhibit* 4, I would still be of the view that it could not lead to the annulment of the sub judice decision of the Respondent, because it is clear from the whole context of the report of the Committee, (*exhibit* 4), that the financial position of the Applicant was set out therein not with a view to deciding the crucial issue of the number of the dependants of the Applicant, but in order to show, only, that the Applicant in his application for exemption, dated the 11th January, 1966, had not told the truth.

I have dealt with the most serious of the misconceptions of fact alleged by counsel for Applicant viz. the one relating to Applicant's financial position. I need not deal specifically with other minor points raised by Applicant's side under the heading of misconceptions of fact in this Case. It suffices to say that on the material before me I am satisfied that on the whole the Committee and the Respondent have acted on a correct view of all relevant facts, free of any material misconception of fact.

Moreover, I am satisfied that the view taken by the Respondent, and the Committee, to the effect that Applicant did not support more than three dependants is *actually* correct in fact. Had he been supporting more than three dependants, out of a family of seven—including Applicant—he would have been the major breadwinner of the family; yet Applicant's own conduct is not consistent at all with such a proposition, for the following reasons, inter alia:-

Firstly, there is the fact that, after Applicant had enlisted, it was arranged that his employers would advance to him £15.- per month so that he could contribute towards the expenses of his family, during the time he was doing his military service. As Applicant has told the Court in evidence, it was he who decided to ask for £15.- only; he did not ask for more and met with a refusal. This means that he did consider this amount sufficient for the purpose; he must have known, bearing in mind the undoubtedly great generosity

of Mr. Peristiani towards him, that had he asked for more than £15 per month he would have been readily given it. Once, therefore, Applicant himself felt that £15.– half the salary of his father—was sufficient to meet the vacuum in the family budget created by his enlistment, I do fail to see how he could have been himself, and not his father, the major breadwinner of the family.

Secondly, it is clear to me on the material before me that Applicant never made a persistent and serious effort to secure from the appropriate authorities a dependants' allowance, during the period of his military service. Had he been really the major breadwinner of his family he would have no doubt had made strenuous efforts, up to the end, to secure such an allowance, and had he been refused it then he would have pursued any legal means of redress open to him; in fact, from the whole tenor of his evidence on this point, it appears that he made only a very feeble attempt in this respect, and did not press it to a conclusion, at all.

On the material before me, had I had to decide as a matter of actual fact the extent of support which Applicant was providing to his family when he enlisted I would not be prepared to hold that he even had three dependants out of the members of his family, if the number of the dependants is to be used as a measure of the extent and proportion of his contribution for the family expenses.

In this respect I specifically disbelieve the evidence of the Applicant and his mother, that he was contributing to the family budget as *much* as they have testified, and I, also, disbelieve the evidence of the father of the Applicant that he, the father, was contributing to the common family budget as *little* as he said; it must have been much more, otherwise the family would not have moved into a more expensive house in August, 1963 (long before Applicant had started work with George Peristiani Ltd.) and still manage to subsist and keep out of debt even if due allowance were to be made for the possibility that, as alleged (though not very credibly, in my opinion) by the parents of the Applicant, there were some old savings which were used from time to time to meet family expences.

There is really no doubt at all in my mind that before the Applicant took up employment with George Peristiani Ltd. his family was subsisting on admittedly modest means,

but they were not destitute. When the Applicant took up employment, as aforesaid, at £50 per month, the standards of comfort of the family were improved, due to the assistance rendered by the Applicant. His enlistment resulted in reducing such standards, but it cannot be said, also, to have left the family without the very necessaries of life; and, in my opinion, the notion of maintenance in the relevant legislative provisions should be understood to refer primarily to the necessaries, and not to extra comforts.

Coming now to the relevant legislative provisions, I am of the opinion that such provisions have been duly applied to the facts of the present Case, in the course of reaching the sub judice decision.

Much has been made, by counsel for the Applicant, of the views expressed by the Advisory Committee, regarding the said provisions, in sub-paragraphs (i) and (ii) of paragraph 2 of the Committee's report (*exhibit* 4).

In the first place, what is stated therein should be read together with the aforementioned advice of the Attorney-General (*exhibit* 7) so that it can become a comprehensible whole; in the said sub-paragraphs the Committee made an effort, in view of such advice, to explain its stand in the matter.

In any case, I, really, can find nothing wrong with what is stated in sub-paragraph (i); it is a correct view of the relevant provisions.

Regarding what is stated in sub-paragraph (ii), I must say that I would not be inclined to think that partial maintenance of parents, brothers, or sisters, falling short of total maintenance, but being, nevertheless, the *main* source of maintenance, would never possibly suffice in order to entitle a conscript to exemption from military service— as the Committee appears to think; but, as made clear in the opening sentences of this sub-paragraph (ii), the view set out therein, regarding partial maintenance, did not influence the Committee in making its recommendations on the case of the Applicant; therefore, I would not be prepared to hold that what is stated in the said sub-paragraph (ii)—assuming that it is a wrong view of the relevant law— is a material consideration which was taken into account in relation to, and which can consequently be properly relied upon in order to annul,

the sub judice decision. In any case, the question of partial maintenance could only have arisen, as a material consideration in this Case, if it were to be found that the Applicant was the *main* source of maintenance of his family, its main bread-winner; and it has been found, as already stated earlier in this Judgment, that this was not so, at all.

For all the foregoing reasons I am of the view that this recourse cannot succeed, on either the ground of misconception of fact or the ground of misconception of law, and that it must, in the circumstances, be dismissed.

There is a further matter to which I ought to refer before concluding my Judgment: After I had reserved Judgment in this Case, counsel for Applicant, by means of an affidavit sworn by the father of the Applicant on the 19th July, 1966, informed the Court that, in the meantime, the father's employment at Episkopi had been terminated. This, indeed, might conceivably be regarded as constituting a material change in the circumstances of the case of Applicant and one cannot tell, with certainty, what the outcome of his application to Respondent for exemption would have been if Applicant's father were unemployed when the Respondent came to deal with the matter. I decided, *ex abundanti cautela,* to reopen the hearing, so as to hear counsel as to whether the aforesaid development could properly be taken into account in relation to the reserved Judgment; but counsel for Applicant, quite rightly, in my opinion, conceded, eventually, that facts which had supervened in the meantime could not affect the position in this Case; because the Judgment should examine the validity of the sub judice decision in the light of the facts existing when it was reached. So the contents of the aforementioned affidavit were excluded from consideration in the present proceedings. Applicant, is, on the other hand, free to base on such contents a further application to Respondent for exemption—as to the outcome of which I express no opinion at all at this stage.

Regarding costs, I have decided that the Applicant should pay part of the costs of the Respondent, which I assess at £20.-

*Application dismissed.*

*Order for costs as aforesaid.*