IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

KTORIS MICHAEL AND OTHERS,

Applicants,

and

THE REPUBLIC, THROUGH
THE MINISTER OF INTERIOR.

Respondent.

(*Cases* 87/67, 88/67, 92/67).

Military Service—National Guard—Auxiliary Military Service—Enlistment of Applicants for auxiliary military service—Decisions of Respondent in relation to requests of Applicants for reconsideration of their enlistment in the National Guard for auxiliary military service—The National Guard Laws 1964–1967—Legality of action taken in the Applicants' cases by virtue of section 8 (4) of the Laws—Decisions annulled as the Respondent did not exercise duly and adequately his statutory powers under section 9A of the Laws and has, also, failed to comply with the requirements of Article 29 of the Constitution.

The Applicants in these recourses complain against the decisions of the Respondent relative to their request for reconsideration of the matter of their enlistment in the National Guard for Auxiliary Military Service.

Applicants having been found medically unfit for military service they were originally granted temporary discharges from such service. In pursuance of a decision, taken by Respondent on the 8th September, 1966, appearing to have been based on s. 8(4) of the National Guard Laws 1964–1967, all Applicants were summoned for a new physical examination, which took place in October, 1966, as a result of which they were pronounced to be fit for auxiliary military service and they were required to enlist in the National Guard as from the 31st October, 1966, and they did so. Applicants applied for a reconsideration of their cases in March, 1967, and the *sub judice* decision concerning two of them was communicated to Applicants by letter dated the 30th March, 1967, and to the other Applicant by letter dated 18th April, 1967.

In the course of the hearing of the recourses counsel for Applicants has attacked not only the decision relating to the reconsideration of Applicants' cases, but also the validity of the decision taken under s. 8 (4) of the National Guard Laws, 1964–1967, by arguing that *only* individual decisions and not a general one, were legally possible under the provisions of the aforesaid section 8 (4). Counsel for the Respondent has stated that the Respondent did not examine afresh the matters raised by Applicants and that he did not conduct any further investigation for the purpose but that replies were given to the Applicants on the basis of the already existing material.

Held, (I). On the question of the decision taken under s. 8 (4) :

(1) As it is common ground that the result of this new physical examination was communicated to each Applicant on the date on which it took place, in October 1966 as aforestated, these recourses, which were filed on the 19th and 25th April, 1967 respectively, are clearly out-of-time, under Article 146.3 of the Constitution, in so far as they seek to challenge directly the validity of the process commencing with the decision to call upon the Applicants to submit to new physical examinations and resulting in the findings that they were fit for auxiliary military service.

(2) Nor could it be said that the time under Article 146.3 was prevented from running as against the Applicants in view of their applications to the Respondent for reconsideration of their cases, because all such applications were made well after the expiration of the respective periods within which the Applicants could, in the light of the provisions of Article 146.3, have filed recourses against the decisions that they were fit for auxiliary military service (see Conclusions from the Jurisprudence of the Greek Council of State 1929–1959, p. 256).

Held, (II). With regard to the decisions concerning reconsideration :

(1) The decisions reached by the Respondent and communicated to all the Applicants (see *exhibits* 1, 2 *and* 3) related only to the aspect of the Applicants being, in fact, fit for auxiliary military service. But all three Applicants had, also, raised the issue of the legality of the action taken in their cases by virtue of section 8 (4) of the relevant legislation—that being the only provision under which the issue of their fitness to enlist at all could have been re-opened. The Respondent had, therefore, to consider not only the validity of the findings

regarding the physical fitness of the Applicants for auxiliary military service, but he had, also, to examine whether the process by means of which the Applicants found themselves, eventually, obliged to enlist, after new physical examinations in October, 1966, was a legally valid or invalid one ; and in the latter alternative he had to decide whether, in the circumstances, the enlistment of the Applicants was as a result contrary to law, so as to warrant their discharge, or whether irrespective of the invalidity of the process which led to the new physical examinations of the Applicants in October, 1966, their enlistment was, nevertheless, legal, once he were to be satisfied that the findings made as a result of such examinations were properly arrived at.

(2) From the *sub judice* decisions it is clear that the Respondent has failed to examine the issue of legality relating to the application of the provisions of section 8 (4) to the cases of the Applicants, and he has, moreover, failed to give a reasoned reply to the Applicants' complaints. He has, therefore, not exercised duly and adequately his statutory powers under section 9A of the National Guard Laws 1964–1967, and he has, also, failed to comply with the requirements of Article 29 of the Constitution. (See, *inter alia, Pikis and The Republic* (1965) 3 C.L.R., p. 131).

(3) I have, therefore, decided to annul the *sub judice* decisions of the Respondent.

(4) In the result these recourses succeed and the *sub judice* decisions are declared to be null and void and of no effect whatsoever.

Held, (III). With regard to costs :

I have decided to award to the Applicants part of their costs which I assess, for all three of them together, at £20.–.

Sub judice decisions annulled. Order for costs as aforesaid.

Cases referred to :

Pikis and The Republic (1965) 3 C.L.R. 131.

Recourse.

Recourse against decisions of the Respondent in relation to requests of the Applicants for reconsideration of the matter of

their enlistment in the National Guard for auxiliary military service.

L. Clerides, for the Applicants.

A. Frangos, Counsel of the Republic, for the Respondents.

Cur. adv. vult.

The following Judgment was delivered by:

TRIANTAFYLLIDES, J.: In these recourses, which have all been heard together as they involve common issues—and in respect of which this Judgment is now to be delivered—the three Applicants complain against decisions of the Respondent in relation to requests of theirs for reconsideration of the matter of their enlistment in the National Guard for auxiliary military service.

The *sub judice* decisions were communicated to the Applicants in Cases 87/67 and 88/67 by letters dated the 30th March, 1967 (see *exhibits* 1 *and* 2) and to the Applicant in Case 92/67 by letter dated the 18th April, 1967, (see *exhibit* 3).

The several applications of the Applicants for reconsideration of their cases were made as follows:

Counsel acting for the Applicant in Case 87/67 applied, accordingly, to the Respondent by letter dated the 7th March, 1967 (see *exhibit* 6); he also applied, likewise, on behalf of the Applicant in Case 88/67 by letter dated the 3rd March, 1967 (see *exhibit* 7). The Applicant in Case 92/67 applied for the purpose in person, at first, by addressing to the Respondent a letter dated the 22nd February, 1967 (see *exhibit* 8); then counsel acting for him wrote, too, to the Respondent a letter on the subject, dated the 6th March, 1967 (see *exhibit* 9).

The events which led to the enlistment of the Applicants for auxiliary military service are shortly as follows:–

All the Applicants were originally granted temporary discharges from military service, having been found medically unfit for such service (see, by way of a specimen, the relevant certificate, *exhibit* 4, granted to the Applicant in Case 87/67 on the 13th January, 1965).

They were, subsequently, summoned, all three, for a new physical examination pursuant to a decision signed by, *inter alia,* the Respondent and dated the 8th September, 1966 (see *exhibit* 18); such decision which appears, on the face of it, to

have been based on section 8(4) of the National Guard Laws 1964–1967 (see, particularly, section 5 of the National Guard (Amendment) Law 1965, Law 26/65, amending section 8 of the National Guard Laws, (Laws 20/64–68/64))was a general one providing for a new physical examination of all those who had till then been found unfit for military service

As a result the three Applicants were examined by a Medical Board set up for the purpose and they were pronounced to be fit for auxiliary military service, the Applicants in Cases 87/67 and 88/67 were examined and pronounced fit for such service on the 5th October, 1966 (see *exhibits* 10 *and* 11) and the Applicant in Case 92/67 was examined and pronounced fit for such service on the 19th October, 1966 (see *exhibit* 12)

All the Applicants were required to enlist in the National Guard as from the 31st October, 1966, and they did so

They then applied, as aforestated, to the Respondent for reconsideration of their cases

Though these three recourses are aimed only at the decisions communicated by the Respondent to the Applicants in relation to their applications for reconsideration of their cases, yet, during the hearing of these Cases, counsel for Applicants has attacked, *inter alia* the validity of the decision taken under section 8(4) of the National Guard Laws, 1964–1967, for the purpose of calling those such as the Applicants to submit afresh to a physical examination in October, 1966, by arguing that *only* individual decisions, and not a general one, were legally possible under the provisions of the said section 8(4), counsel has, also, challenged the validity of the manner and findings of the physical examinations of the Applicants in October, 1966

As it is common ground that the result of his new physical examination was communicated to each Applicant on the date on which it took place, in October 1966 as aforestated, these recourses, which were filed on the 19th and 25th April, 1967 respectively, are clearly out-of-time, under Article 146 3 of the Constitution, in so far as they seek to challenge directly the validity of the process commencing with the decision to call upon the Applicants to submit to new physical examinations and resulting in the findings that they were fit for auxiliary military service.

Nor could it be said that the time under Article 146.3 was prevented from running as against the Applicants in view of their applications to the Respondent for reconsideration of their cases, because all such applications were made well after the expiration of the respective periods within which the Applicants could, in the light of the provisions of Article 146.3, have filed recourses against the decisions that they were fit for auxiliary military service (see Conclusions from the Jurisprudence of the Greek Council of State 1929–1959, p. 256).

Thus, all that can, and has to, be determined in these recourses is the validity of the decisions of the Respondent conveyed to the Applicants, as aforementioned, by letters dated 30th March and 18th April, 1967 (*exhibits* 1, 2 *and* 3).

The relevant powers of the Respondent, to deal with the applications of the Applicants for reconsideration of their cases, are to be found in section 9A of the National Guard Laws 1964–1967 (see, particularly section 7 of the National Guard (Amendment) Law 1965, Law 26/65, adding a new section 9A to the National Guard Laws, Laws 20/64–68/64). Such section 9A reads as follows:–

> «Ὁ Ὑπουργὸς δύναται, ἐὰν ἱκανοποιηθῇ ὅτι στρατεύσιμος κατετάγη ἐν τῇ Δυνάμει ἢ ὑπηρετεῖ ἐν αὐτῇ κατὰ παράβασιν τῶν διατάξεων τοῦ παρόντος Νόμου ἢ τῶν ἐπὶ τῇ βάσει τούτου γενομένων Κανονισμῶν ἢ ἐκδοθεισῶν ἀποφάσεων τοῦ Ὑπουργικοῦ Συμβουλίου, νὰ διατάξῃ τὴν ἄμεσον ἀπόλυσιν τούτου».
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> ("The Minister may, if satisfied that a conscript has been enlisted in the Force or is serving therein contrary to the provisions of the present Law or of any Regulations enacted under such Law or of any decisions of the Council of Ministers, order his immediate discharge").

The Minister referred to in section 9A, above, is the Respondent Minister of Interior.

In my view section 9A confers upon the Respondent not only a statutory power, but also a corresponding statutory duty, to examine and deal appropriately with cases within its ambit.

Of course, the extent of the consideration to be given by the Respondent to each case, in relation to which he has to

deal with under section 9A, does depend on the circumstances of the particular case.

In the present Cases, counsel for the Respondent has stated that the Respondent did not examine afresh the matters raised by the Applicants and that he did not conduct any further investigations for the purpose, but that replies were given to the Applicants on the basis of the already existing material.

Such existing material appears to have included the findings of even further physical examinations of the Applicants in Cases 88/67 and 92/67 (see *exhibits* 14 *and* 16), but, as counsel for the Respondent has stated, such further examinations were routine ones and did not take place as a result of the applications of the Applicants concerned for reconsideration of their cases.

The decisions reached by the Respondent and communicated to all the Applicants (see *exhibits* 1, 2 *and* 3) related only to the aspect of the Applicants being, in fact, fit for auxiliary military service. But all three Applicants had, also, raised the issue of the legality of the action taken in their cases by virtue of section 8(4) of the relevant legislation—that being the only provision under which the issue of their fitness to enlist at all could have been re-opened. The Respondent had, therefore, to consider not only the validity of the findings regarding the physical fitness of the Applicants for auxiliary military service, but he had, also, to examine whether the process by means of which the Applicants found themselves, eventually, obliged to enlist, after new physical examinations in October, 1966, was a legally valid or invalid one; and in the latter alternative he had to decide whether, in the circumstances, the enlistment of the Applicants was as a result contrary to law, so as to warrant their discharge, or whether irrespective of the invalidity of the process which led to the new physical examinations of the Applicants in October, 1966, their enlistment was, nevertheless, legal, once he were to be satisfied that the findings made as a result of such examinations were properly arrived at.

From the *sub judice* decisions it is clear that the Respondent has failed to examine the issue of legality relating to the application of the provisions of section 8(4) to the cases of the Applicants, and he has, moreover, failed to give a reasoned reply to the Applicants' complaints. He has, therefore, not exercised duly and adequately his statutory powers under section 9A of the National Guard Laws 1964–1967, and he has, also, failed

to comply with the requirements of Article 29 of the Constitution. (See, *inter alia, Pikis* and *The Republic,* (1965) 3 C.L.R. 131).

I have, therefore, decided to annul the *sub judice* decisions of the Respondent.

All the matters raised by the Applicants in their applications to the Respondent for reconsideration of their cases will have to be examined from all proper aspects and reasoned replies have to be given to them. In view of the outcome of these recourses I express at this stage no opinion whatsoever either on the factual or the legal issues arising out of the aforesaid applications of the Applicants. They are to be decided upon by the Respondent in the first instance, as the appropriate organ; and it is needless, really, to stress that a factual misconception leading to the enlistment of an Applicant could result in the illegality of his enlistment—as entailing a wrong application of the relevant legislation to his case—just as much as a direct contravention of the law governing the matter of his enlistment.

I do appreciate that the Respondent in dealing with the issue of legality related to section 8(4) of the relevant legislation—(and he, no doubt, may seek proper legal advice on the point)—will be dealing with the legality of action in which he, himself, has participated (see *exhibit* 18); but there is nothing wrong in that, because he will not be determining judicially the validity of his own action, but he will be re-examining—as any executive organ has the power, and duty, to do—such validity, once it has been put in issue by the applications of the Applicants for reconsideration of their cases, and once he is vested with the relevant power, and has the duty, to do so, under section 9(A) of the National Guard Laws 1964-1967.

In the result these recourses succeed and the *sub judice* decisions are declared to be null and void and of no effect whatsoever.

I have decided to award to the Applicants part of their costs which I assess, for all three of them together, at £20.-.

Sub judice decisions annulled.
Order for costs as aforesaid.