IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ANTONIOS CHRISTOU ANTONIOU

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTER OF THE INTERIOR AND DEFENCE

Respondent.

(Case No. 288/66).

Military Service—National Guard—Exemption from military service—"Dependants" in section 4(3)(f) of the National Guard Law, 1964 (Law No. 20 of 1964) as amended by the National Guard (Amendment) (No. 3) Law, 1965.

National Guard—Exemption from service—"Dependants"— Meaning of—See above.

Words and Phrases—"Dependants" in section 4(3)(f) of the National Guard Law, 1964 (Law No. 20 of 1964) as amended—See above.

"Dependants"—In section 4(3)(f) of the National Guard Law, 1964, as amended—See above.

Exemption—Exemption from military service—See above.

By this recourse the Applicant challenges the decision of the Respondent dated November 11, 1966, not to exempt the Applicant from service in the National Guard, taken on the ground that he does not have or did not have more than three dependants within the meaning of the National Guard Law, 1964 (Law No. 20 of 1964), section 4(3) *(f)*, as amended by the National Guard (Amendment) (No. 3) Law, 1965. It reads:

"The following persons are exempted from the obligation (of service in the Force)—

....

(f) all persons who at the date when they are called up for service have more than three dependants;

Provided that every person liable to service and serving, in the Force who, during his service, should acquire (ἤθελεν ἀποκτήσει) more than three dependants is exempted from further service. For the purposes of this paragraph the expression 'dependants' means:

(i) children under the age of eighteen years;

(ii) a wife;

(iii) children born out of wedlock, children, over the age of eighteen years, parents, brothers and sisters, who are maintained by the persons liable to military service".

The Applicant enlisted in the Force after unsuccessfully applying to the Minister for exemption. Subsequently to his enlistment he made four applications to this Court with the same end in view, this being the latest one. Only the second of those three previous applications was pursued to trial and that was dismissed (see *Antoniou and the Republic,* (1966) 3 C.L.R. 774, affirmed on appeal (1967) 3 C.L.R. 259).

The case for the Applicant in the instant application is that as from July 11, 1966, that is while the trial Judge's decision in this aforementioned application was being awaited, his father lost, by compulsory retirement on account of age, his job as a cook in the Sovereign Base Area of Akrotiri, which he was holding when that application was made; that thereafter his father has been unable owing to ill health to work, at any rate regularly; and that therefore at the time of the decision, dated the 11th November, 1966, the subject of these proceedings, the whole of his family, comprising more than three persons, became substantially dependent on him; so that during his service he "acquired more than three dependants" within the meaning of section 4(3)*(f)* as amended *(supra).*

The Applicant's father has old savings of £100 and on the termination of his employment at the Akrotiri Sovereign Base he received a gratuity of £100; and since such termination in July 1966 the Applicant's father is in receipt of about £40 per month by way of unemployment benefit.

Dismissing the recourse, the Court:-

Held, (1). It is clear that in determining whether the

subject decision must stand or fall I can only have regard to the situation as it stood at the time it was taken (i.e. November 11, 1966), subsequent developments being irrelevant. Therefore, neither the stoppage in January 1967, of the father's unemployment benefit, nor the running out, some time in February, 1967, of the retirement gratuity and any other savings, whether the father's or his wife's can avail the Applicant in the present proceedings.

(2) "Dependants" within section 4(3)*(f)* *(supra)* are persons to whom the earnings of the conscript are necessary, at least to a substantial extent, so that they "may not find themselves destitute and without the minimum necessaries of life when the conscript answers the call" (See *Antoniou and The Republic* (1967) 3 C.L.R. 259).

(3) Then did any member of the Applicant's family find himself distitute as a result of his enlistment? In my opinion the answer on the evidence is no. It makes no difference that the family drew on the retirement gratuity and the £100 old savings. The family kept going until, at any rate, February, 1967, even if then, without suffering anything like destitution by using resources which, by their very nature, were primarily destined for such a situation. It is not as if it had been necessary to part with any furniture or other necessaries, or even family heirlooms or ordinary capital assets of the family.

Recourse dismissed. No order as to costs.

Cases referred to:

Antoniou and The Republic, (1966) 3 C.L.R. 774; and on appeal (1967) 3 C.L.R. 259.

Recourse.

Recourse against the decision of the Respondent not to exempt the Applicant from service in the National Guard.

M. Houry, for the Applicant.

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

Cur. adv. vult.

The following Judgment was delivered by:-

STAVRINIDES, J.: By this application the Applicant seeks

"*(a)* a declaration that the decision of the Respondent dated November 11, 1966, not to exempt the Applicant from service in the National Guard on the ground that he does not have or did not have more than three dependants within the meaning of Law 20 of 1964, as amended since, is in excess and/or in abuse of his powers and is *null* and *void* and of no effect whatsoever;

(b) a declaration that the omission of the Respondent not to exempt the Applicant from service in the National Guard ought not to have been made and that the Respondent should have performed his duty by exempting the Applicant from such service".

It is based on s. 4(3) *(f)* of the National Guard Law, 1964, which, as amended by the National Guard (Amendment) (No. 3) Law, 1965, reads as follows:

"The following persons are exempted from the obligation (of service in the Force)—

. . . .

(f) all persons who at the date when they are called up for service have more than three dependants:

Provided that every person liable to service, and serving, in the Force who, during his service, should acquire (ἤθελεν ἀποκτήσει) more than three dependants is exempted from further service.

For the purposes of this paragraph the expression 'dependants' means —

(i) children under the age of eighteen years;

(ii) a wife;

(iii) children born out of wedlock, children over the age of eighteen years, parents, brothers and sisters, who are maintained by the persons liable to military service".

The Applicant, who was born in 1947, has a family consisting of his parents, a brother, named Haris, born in 1948, two

other brothers, aged respectively fourteen and eleven, and a sister aged nine years. He enlisted in the Force after unsuccessfully applying to the Minister of the Interior for exemption. Subsequently to his enlistment he made four applications to this Court with the same end in view, this being the latest one. Only the second of these applications, viz. that numbered 140/66, was pursued to trial, and that was dismissed (*Antoniou and Republic*, (1966) 3 C.L.R. 774). The Applicant appealed, and the judgment of the learned trial Judge was affirmed ((1967) 3 C.L.R. 259). The other two applications to the Court were withdrawn for reasons which are of no relevance to the present proceedings.

The facts on which the application No. 140/66 was based are thus summarised in the judgment of the appellate bench at p. 262 of the report:

> "When he came under the provisions of the National Guard Law as a conscript for military service, the appellant was living in his parental home together with the rest of the family consisting of his father, mother, three younger brothers and one sister. The family live in a rented house for which they pay £10 per month. The appellant is the owner of a house which yields £25 per month rent; but this is said to be going towards payment of the house.
>
> The family depended for their subsistence at the material time, on the earnings of the father as a cook, amounting to £30 per month; the earnings of the appellant as a 'technical manager' of a firm of brandy manufacturers, with a salary of £50 per month; and the earnings of appellant's younger brother aged 17, amounting to £9 per month. Besides the house referred to above, the appellant also owns 49% of the shares of the firm of brandy manufacturers who employ him, which, however, are said to yield no income to the appellant under the terms in which they were transferred to him".

The judgment continues (pp. 262-264):

> "Be that as it may, and on the footing that the family depended on the earnings of the father and the two sons, as above, the appropriate statutory committee who reported to the Minister upon the matter (in order to enable the Minister to decide on the merits of the appel-

lant's application for exemption) took the view in their report (which is before the court as *exhibit 4*) that the father being primarily the supporter of the three elder members of the family (his wife, his boy of 17, and himself) the appellant could not be a person having more than three dependants, even if he were to be considered as the supporter of the three younger members of the family.

Learned counsel for the appellant submitted that this approach of the committee, to the question of dependency of the members of this family, was not correct. The family cannot be split in this arbitrary manner, learned counsel argued. It must be taken as a whole, i.e. a family consisting of the parents and the five children (including appellant) depending on the earnings of the three elder members of the family, i.e. the father, the appellant and the younger son of 17.

This being a question of fact, with different merits in each particular case, we are inclined to accept the submission in the circumstances of the present case. We are, therefore, concerned with a family of seven persons (including the appellant) depending for its living on the earnings of three of its members, one being the appellant. *In these circumstances, the question arises whether* the members of his family can be considered as the 'dependants' of the appellant for the purposes of the National Guard Law, in its present form. Obviously they do not depend entirely on him; but they depend partly on the appellant.

In this connection, the learned trial Judge felt 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 possibly suffice in order to entitle a conscript to exemption from military service'; rejecting in this way, the contrary opinion adopted by the Minister on the advice of his committee. 'In any case' — the learned trial Judge went on to say — '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* bread winner; and it has been found, as already stated earlier in this judgment that

this was not so at all'.

The relative provision in the statute, in the definition of dependants set out above, speaks of persons who 'συντηροῦνται' by the conscript.

We are unanimously of the opinion that where such persons 'συντηροῦνται' partly by the conscript and partly from other sources, exemption from service can only be claimed if the conscript can show that the dependants in question substantially depend upon his earning; and not otherwise. It is a question of fact in each case; and question of degree which the trial judge described with the expression '*main* bread winner'. It is, we think, sufficiently clear that the intention of the legislator in making this provision, was to exempt from military service persons whose earnings from their work, were necessary for the maintenance of more than three dependants; necessary to, at least, a substantial extent. So that such dependants may not find themselves destitute and without the minimum necessaries of life when the conscript answers the call".

The case for the Applicant in the instant application is that, as from July 11, 1966, that is while the trial Judge's decision in the application No. 140/66 was being awaited, his father lost, by compulsory retirement on account of age, his job as a cook at Episkopi, in the Sovereign Base Area of Akrotiri, which he was holding when the previous application was made; that thereafter his father has been unable owing to ill health to work, at any rate regularly; and that therefore at the time of the decision the subject of these proceedings (hereafter "the subject decision") the whole of his family, comprising more than three persons, became substantially dependent on him, so that during his service he "acquired more than three dependants" within the meaning of s. 4(3) *(f)* of the National Guard Law, 1964, as amended by the 1965 Law referred to (hereafter "s.4(3) *(f)*").

The subject decision is based on a report *(exhibit 6)* of the "advisory committee" set up by the Minister under s.4(4) of the 1964 Law (enacted by the National Guard (Amendment) (No. 2) Law, 1966), which provides that

"The Minister decides on all matters arising under sub-s. (3) in connection with the exemption of persons

liable to military service.

For this purpose the Minister sets up an advisory committee consisting of members appointed by him and presided over by a person possessing legal knowledge nominated by the Minister for the determination of the real facts of each case and the submission to him of the conclusion of the inquiry made by the committee".

Paras. 2, 3 and 4 of the committee's report read as follows:

"2. The *facts of the case and the present financial position* of the Applicant's father are set out in the report of the District Inspector, Limassol, dated October 21, 1966, and in the statement of the Applicant's father dated October 20, 1966.

In accordance with the said report and statement, *inter alia* —*(a)* the Applicant's brother Haris enlisted in the National Guard on July 16, 1966, and thus the members of the family were reduced by one; *(b)* the Applicant's father has old savings of about £100 and on the termination of his services at the Episkopi Base received a gratuity of £100; and *(c)* the Applicant's father since such termination is in receipt of about £40 per month by way of unemployment benefit under the Social Insurance Law, which is paid for about six months if he is unemployed during that time.

In conjunction with the foregoing it must be mentioned that Mr. G. Peristianis continues, as he has been doing since the Applicant's enlistment, to pay to the Applicant's father by way of assistance for the family expenses the sum of £15 per month. Although the committee doubts whether the sum in question is a loan of Mr. Peristianis's to the Applicant (for this in all probability, or rather certainty, is one of the non-returnable subventions of Mr. Peristianis to the family), for the purposes of this report the committee has treated the said sum as assistance by the Applicant for the maintenance of the family.

3. On the basis of the foregoing the committee finds that the Applicant's father himself and at least two of the members of his family are maintained, and can be maintained, out of the sums in his hands above referred to (even without the unemployment benefit) and that by the sum of £15 paid monthly by Mr. Peristianis the

two other members of the family are maintained. As a result of this the finding of the committee is that on the facts refusal of the discharge requested can be supported.

4. In considering this case the committee did not go into the matter of the health and capacity to work of the Applicant's father or the matter of his earnings from casual employment because it was of the opinion that the materials before it relating to his financial position were sufficient to lead to its conclusion and that at least for the present it was not necessary to go into those matters".

The statement by the Applicant's father (hereafter "Mr. Antoniou") which is referred to in para. 2 of the committee's report was reduced to writing and signed by him *(exhibit 4)*; and the District Inspector's report, also referred to in the same para. of *exhibit 6*, is in writing and signed by the Inspector *(exhibit 5)*.

While the words in paras. 2 and 6 of the committee's report "in accordance with the said report and statement" are apt to give the impression that the findings of the committee which are set out thereafter are based partly on material to be found only in the District Inspector's report, a comparison of the committee's report with Mr. Antoniou's statement shows that they are actually all based on material contained in Mr. Antoniou's statement.

Evidence in these proceedings was given only on the Applicant's side — by his parents, Dr. A. Syrimis and Mr. G. Taliadoros - Templar. Mr. Antoniou's evidence contains certain discrepancies compared with his statement *exhibit 4*. Thus in his evidence he gave the amount of the gratuity paid to him on his retirement from his Episkopi job as "about £120"; in *exhibit 4* the figure is simply "£110" without any qualification. Again, from *exhibit 4* it appears that after his retirement he worked "for a period of about fifteen days as a waiter in cafes and restaurants at a wage of 750 mils"; but in his evidence he said that his post-retirement employment was for "only a day or two on two occasions", which, when reminded of his statement *exhibit 4*, he increased to "four or five days on three or four occasions". He was then asked why in his evidence he had said "one or two days on two occasions"; he replied "I forgot". These two points aside, Mr. Antoniou's evidence is to the same effect

as his statement *exhibit 4*, with the addition that his unemployment benefit had in the meantime been stopped, the last payment having been for a period ending on January 12, 1967.

Mrs. Antoniou's evidence was intended to corroborate that of her husband, and while it did so in a general way — in spite of certain discrepancies — it contains nothing else that was relied upon by learned counsel for the Applicant. But in reply to Mr. Frangos for the Respondent she said "Our savings were exhausted about a week ago" and in re-examination she explained that by "our savings" she had been referring to her husband's retirement gratuity and a sum of £100 which "she had before her marriage". She also said that she was a cardiac patient; that she was "under observation" by Dr. Syrimis; and that she had to take medicines costing £4 to £5 per month. Dr. Syrimis, a heart specialist, confirmed this part of her testimony. Mr. Taliadoros-Templar, who is a next-door neighbour of the Antonious, was called to give evidence regarding their financial position. On his chief examination he stated "I can say that they suffer severe privations"; but when questioned by Mr. Frangos he said "They do not go short of necessaries, but of reasonable comforts and entertainment".

It is clear that in determining whether the subject decision must stand or fall I can only have regard to the situation as it stood at the time it was taken, subsequent developments being irrelevant. Therefore neither the stoppage, in January, 1967, of Mr. Antoniou's unemployment benefit, nor the running out, some time in February of that year, of the retirement gratuity and any other savings, whether Mr. Antoniou's or his wife's, can avail the Applicant in the present proceedings.

Now when is any of the persons set out in s.4(3) *(f)* actually "a dependant" of a person liable to military service within that provision? The answer is to be found in the second quotation from the judgment of the appellate bench: persons to whom the earnings of that other person are necessary, to at least a substantial extent, so that they "may not find themselves destitute and without the minimum necessaries of life when the conscript answers the call".

Then did any member of the Applicant's family find himself or herself destitute as a result of his enlistment? Mr.

Taliadoros-Templar's evidence is to the contrary. According to Mrs. Antoniou's evidence that would be because the family drew on the retirement gratuity and the £100 savings. Does it make any difference that the family had to fall back on those resources? In my opinion the answer is no. It is not as if it had been necessary to part with any furniture or other necessaries, or even family heirlooms or ordinary capital assets of the family. The family kept itself going without suffering anything like destitution by using resources which, by their very nature, were primarily destined for such a situation; and in my opinion it would be far-fetched and contrary to the true meaning and intendment of s. 4(3) *(f)* to say of the Applicant's family, so long as it could and in fact did keep itself going the way it did, by the use of those resources, that any part of it was dependent on him. In my judgment none of his family was so dependent until, at any rate, February, 1967, even if then.

In the light of the foregoing it is unnecessary to go further into the facts and pointless to discuss a submission made on behalf of the Respondent that "dependants" in s. 4(3) *(f)* means only dependants of the class set out in s. 5(4) *(a)* & *(b)* of the National Guard Laws. In my judgment there is no reason for annulling the subject decision and therefore the application must fail and is hereby dismissed, but, although not without some hesitation, I think I may spare the Applicant an order for payment of costs.

Application dismissed without costs.

Order in terms.