IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

COSTAS G. ALETRAS,

Applicant,

and

1. THE COUNCIL OF MINISTERS,
2. THE MINISTER OF INTERIOR AND DEFENCE,

Respondents.

(*Case No.* 98/75).

Military Service—Prisoners of war—Civilian subject to military service whose enlistment was suspended until graduation from secondary school—Captured as "civilian prisoner" and transported to Turkey—On repatriation he is not exempted from Military Service—Articles 2, 4, 6, 17, 117, 118 *and* 119 *of the Geneva Conventions of* 1949, *ratified by the Geneva Conventions (Ratification) Law,* 1966 (*Law* 40 *of* 1966).

Prisoners of war—"Civilian prisoner"—Repatriation—Exemption from military service—See, also, under "Military Service".

Geneva Conventions of 1949—"*Repatriated person*" *in Article* 117—*Meaning.*

The applicant was on the 22nd August, 1974, captured by the Turks as a "civilian prisoner", and transported to Adana in Turkey, from where he was repatriated on the 23rd September, 1974.

Though his age group was in July, 1974 called up for military service, applicant being at the time a full-time pupil of a secondary school, was on his own application, given the benefit of the exemption and had his enlistment suspended until his graduation. After his application for exemption from military service on the ground of his "prisoner of war status" was refused, applicant filed a recourse whereby he contended:

(a) That the Geneva Conventions of 1949, ratified by the Geneva Conventions (Ratification) Law, 1966 (Law 40/66) apply to his case, particularly so Articles 2, 4, 6, 17, 117 and 118 of its Third Schedule.

(b) That though the applicant was not at the time a member of the armed forces, yet, on account of his age, the call-up of his age-group and the fact that his enlistment was merely suspended because of his status as a pupil, he comes within the first category of persons entitled to be treated as prisoners of war under Article 4.A.1 of the Convention which reads:

"A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) members of the armed forces of a party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces".

(c) That applicant was entitled to be exempted from military service under Article 117 of the Convention which reads:

"No repatriated person may be employed on active military service".

Held, (I) with regard to contentions (a) and (b) above:

(1) The circumstances of this case relating to the applicant do not justify a finding that at the time he had fallen into the power of the enemy he was a member of the armed forces or a member of military or volunteer corps forming part of such armed forces, nor could, as suggested by counsel be treated, for the purposes of this case, as such. He was at the time a private individual, as his liability for military service would commence only on the date of the servicemen's enlistment, in accordance with the provisions of section 5 (2) of the National Guard Laws, 1964–1975.

(2) Private enemy individuals do not become prisoners of war upon capture by the armed forces. (See Manual of Military Law, Part III, the Law of War on Land, London, Her Majesty's Stationery Office, 1958, para. 127).

Held, (II) with regard to contention (c) above:

(1) Section I of Part IV of the Convention sets out in eight Articles (Articles 109–116) the obligations and the procedure for, *inter alia,* the repatriation or placement of two categories

of prisoners of war, namely, the seriously wounded and seriously sick ones, and the able-bodied prisoners of war who have undergone a long period of captivity. It applies only to prisoners of war, that is to say to persons that fall within any of the categories enumerated in Article 4.A of the same schedule to the Convention and the non-employment of such repatriated persons on active military service, refers to them and to other category of prisoners or detainees, unless in the agreement for the exchange of such other persons, there is a specific condition to that effect, which, as already indicated, did not exist in the present case.

(2) Article 117 relates to the preceding Articles of the same section and cannot be taken to govern also the Articles to be found in the following section dealing with the release and repatriation of prisoners of war at the close of hostilities (see, also, Manual of Military Law (*supra*) paragraphs 249 and 262).

(3) The words "repatriated person" in Article 117, refer to the prisoners of war, whose captivity is terminated upon repatriation and, therefore, they cease being prisoners of war and became repatriated persons. Furthermore Articles 118 and 119 which deal with release and repatriation of prisoners of war at the close of hostilities do not carry the case of the applicant any further, there being no similar limitation corresponding to the one of Article 117.

Application dismissed.

Recourse.

Recourse against the refusal of the respondents to exempt applicant from military service.

A. E. Georghiades, for the applicant.

C. Kypridemos, Counsel of the Republic, for the respondents.

Cur. adv. vult.

The facts sufficiently appear in the judgment of the Court delivered by:-

A. LOIZOU, J.: The applicant graduated the Terra Santa College of Nicosia, in June, 1975. He was born on the 19th June, 1956 and his age group was called up for military service

in the National Guard and enlistment thereto, in July, 1974. The applicant, however, being at the time a full-time pupil of a secondary school, could, by virtue of the decision of the Council of Ministers, be exempted from military service, upon satisfying the conditions set out therein, and on his own application to the Minister of Interior, he was given the benefit of the exemption and had his enlistment suspended until his graduation.

At the time of the Turkish invasion he was at his village of Bella Bais. On the 22nd August, 1974 he was taken by the Turks as a "civilian prisoner", as stated in paragraph 3 of the facts in the application, and transported to Adana in Turkey, from where he was repatriated on the 23rd September, 1974. In fact, in the Attestation issued by the International Committee of the Red Cross—Tracing Agency (*exhibit* 4)—he was also described as "civilian prisoner", in contradistinction to Attestations issued to other prisoners (vide *exhibit* 7) described as "taken prisoners" on such and such date "military".

The repatriation of the applicant was the result of negotiations that took place at meetings between Mr. Clerides and Mr. Denktash where a number of humanitarian matters were discussed with the assistance of the Special Representative of the Secretary-General and other U.N. officials, including a representative of the United Nations High Commission for Refugees. A representative of the International Committee of the Red Cross was also present.

The first communique issued on the 6th September, (*exhibit* 8 (b)) stated:-

> " In view of the expressed willingness of the parties concerned to comply fully with the humanitarian principles as stated in the Geneva Conventions, it was agreed:-
>
> 1. To complete the lists of prisoners and detainees and to transmit them without delay to ICRC.
>
> 2. To set up immediately a scheme for the general release of prisoners and detainees.
>
> 3. To give urgent priority in the scheme to the release of sick and wounded prisoners and detainees and to

the prisoners and detainees under 18 and over 50 years of age".

On the 20th September, 1974, at the Ledra Palace U.N. Conference area, Mr. Clerides and Mr. Denktash continued to discuss humanitarian matters and it was, according to the communique issued, on that occasion (*exhibit* 8 (b)) agreed:–

"(1) The release of the remaining sick and wounded persons and detainees will be completed on Saturday the 21st September.

(2) The ICRC scheme for the general release of all remaining prisoners and detainees will commence on Monday 23rd September, 1974 and will continue daily until all are released. .....".

There has been no term of this agreement setting out any limits of their future employment during the war and in particular that they were not to be used on active military service.

Repatriated persons and detainees were faced upon their repatriation with the question whether they were liable to military service or not. The question then arose, if these repatriated persons, who were at the time of their capture on active service, either in discharge of their term of service or their obligation as reservists called out for service in the National Guard, were obliged to rejoin the force and continue serving or entitled to be released. A number of them filed in the Supreme Court a recourse under Article 146 of the Constitution, seeking a declaration of the Court that "as repatriated prisoners, could not be used for military service or service in the National Guard".

The Attorney-General of the Republic, gave an opinion on the matter, copy of which has been produced as *exhibit* 6. After dealing with the Geneva Convention and in particular with Articles 117, 118 and 119, and other incidental matters, he concludes by saying that—"in the circumstances and although the aforesaid section 11 (of the Convention) cannot validly be argued that it was applied at the repatriation of the said prisoners, yet, in compliance with Article 117 (which in accordance with Article 169 (3) of the Constitution has superior force to the municipal National Guard Laws, 1964–1968) all the repatriated should not be used in any active service". It appears that these servicemen were thereupon released from the National Guard.

The applicant apparently became aware of this opinion, and invoked same in an application he submitted on the 29th June, 1975 (*exhibit* 5) to the Minister of Interior and Defence. After giving therein the circumstances of his arrest and repatriation, he states that in view of them and "on the basis of the opinion of the Attorney-General of Cyprus for the exemption from service of those taken prisoners in the aforesaid circumstances, I request that I be given the relative exemption and exit permit as I intend to go abroad for higher studies". This application of the applicant was refused, hence the present recourse.

It has been the case for the applicant that the Geneva Conventions of 1949 ratified by the Geneva Conventions (Ratification) Law, 1966 (Law 40/66) apply to this case, particularly so Articles 2, 4, 6, 17, 117 and 118 of its Third Schedule. It was argued that though the applicant was not at the time a member of the armed forces, yet, on account of his age, the call-up of his age-group and the fact that his enlistment was merely suspended because of his status as a pupil, he comes within the first category of persons entitled to be treated as prisoners of war under Article 4.A.1. which reads:-

> " A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy;
>
> (1) members of the armed forces of a party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces;"

The enumeration of categories in the aforesaid Article is not exhaustive in the sense that it is open to a belligerent to confer prisoner of war status upon a person not included in the categories listed in the said Article. There is, however, nothing in the facts of this case to suggest that such status was conferred on the applicant, nor is this claimed by the applicant to be his case.

The circumstances of this case relating to the applicant do not justify a finding that at the time he had fallen into the power of the enemy he was a member of the armed forces or a member of militias or volunteer corps forming part of such armed forces, nor could, as suggested by counsel be treated, for the purposes of this case, as such. He was at the time a private individual, as his liability for military service would commence only on the date of the servicemen's enlistment, in accordance

with the provisions of section 5(2) of the National Guard Laws, 1964–1975.

The calling out of the 1974 class was made by Decision No. 12833, published in Supplement No. 4, Part I, under Notification No. 102, to the official Gazette of the 30th November, 1973, No. 1064. By paragraph 2 thereof, pupils who were at the time attending on a full-time basis a secondary school were exempted from the said decision, provided they satisfied the Minister that the continuation of their studies necessitated their non-enlistment at the time. In effect, he was exempted from military service until the completion of his studies. He could, by no means, be considered as being a member of the National Guard falling within the first category of persons. Private enemy individuals do not become prisoners of war upon capture by the armed forces. (See the Manual of Military Law, Part III, the Law of War on Land, London, Her Majesty's Stationery Office, 1958, paragraph 127).

The force, however, of the argument of counsel for the applicant, was thrown on Article 117 which is the last Article in section I of Part IV of the Third Schedule. The general title of Part IV is "Termination of Captivity". This part is divided into three sections, each one with a sub-title. That of Section I is "Direct Repatriation and Accommodation in Neutral Countries", whereas Section II in which Articles 118 and 191 are to be found, has the sub-title "Release and Repatriation of Prisoners of War at the Close of Hostilities". Article 117 reads:-

> " No repatriated person may be employed on active military service".

It was urged, that "repatriated person" includes any person that falls in the hands of the enemy and who is at any stage repatriated, either during or at the close of hostilities, that is to say, whether repatriated under Articles 109–117 of Section I, or under Articles 118 and 119 of Section II. Article 109 is the first one of Section I and casts an obligation to parties to the conflict to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war after having cared for them until they are fit to travel in accordance with the first paragraph of Article 110. Of course, no sick or injured prisoner of war who is eligible for repatriation under the first paragraph of this Article may be repatriated against his will during hostilities.

Furthermore, under the same Article, parties to the conflict may, in addition, conclude agreements with a view to the direct repatriation or interment in a neutral country of able-bodied prisoners of war who have undergone at long period of captivity.

It is obvious that Section I of Part IV of the Convention sets out in eight Articles the obligations and the procedure for the repatriation or placement or accommodation in neutral countries of two categories of prisoners of war, namely, the seriously wounded and seriously sick ones, and the able-bodied prisoners of war who have undergone a long period of captivity. It applies only to prisoners of war, that is to say to persons that fall within any of the categories enumerated in Article 4.A of the same Schedule to the Convention and the non-employment of such repatriated persons on active military service, refers to them and to no other category of prisoners or detainees, unless in the agreement for the exchange of such other persons, there is a specific condition to that effect, which, as already indicated, did not exist in the present case.

Article 117 relates to the preceding Articles of the same section and cannot be taken to govern also the Articles to be found in the following section dealing with the release and repatriation of prisoners of war at the close of hostilities. As pointed out in the Manual of Military Law (*supra*) paragraph 262,

> " This article repeats the provisions of the 1929 Convention, Article 74, which was considered to apply only to prisoners who were repatriated sick or wounded and not to exchanges by agreements made outside the Convention. This would also seem to be the proper scope of Article 117. With regard to those who are 'exchanged', see paragraph 249, it will be normal for the agreement providing for the exchange to set out the limits of their future employment during the war. If nothing is provided on this point they would seem to be available for 'active military service' ".

And in order to complete the picture, paragraph 249, reads:-

> " ..... A condition is often made that the men exchanged shall not participate as soldiers in the war—in fact they are parolled".

Furthermore, as rightly pointed out by counsel for the respondent, the words "repatriated person" in Article 117, refer to the prisoners of war whose captivity is terminated upon

repatriation and, therefore, they cease being prisoners of war and become repatriated persons. Hence, the non-use of the words "repatriated prisoners of war". They had to be referred to either as repatriated ex-prisoners of war, or as more properly and appropriately used in Article 117, repatriated persons, as they regain their ordinary personality and leave behind them, upon repatriation, their prisoner-of-war status. In fact, in the Greek text, only the participle "repatriated" is used as the word "person" in the Greek language, would be superfluous.

In the light of my aforesaid conclusion, the present recourse should fail. However, even if the applicant had succeeded to bring himself within the categories of Article 4 and entitled to the benefit of Article 117, still, it appears, though I do not have to decide this point, that he might not be exempt from all forms of military service. The phrase "active military service" to be found in Article 117, is not defined in the Conventions. As stated in the Commentary to this Article in the Manual of Military Law (*supra*), paragraph 262,

> " ..... It is difficult to give a precise meaning to this expression which may cover all the manifold forms of military activity in a modern army. Any form of combatant activity is clearly ruled out. Administrative services and staff work in forward areas are probably prohibited but such services and work in rear areas and home commands, and medical services in all areas, would, it is thought, be legitimate".

In conclusion, I would like to say that Articles 118 and 119 which deal with release and repatriation of prisoners of war at the close of hostilities do not carry the case of the applicant any further, there being no similar limitation corresponding to the one of Article 117. Rightly so, as the prisoner of war status cannot deprive the prisoner of war's own State of his future services, as in the case of repatriation under section I, the hostilities continue and parties to conflicts are legitimately concerned not to strengthen the enemy through repatriations, whereas in the case of repatriation at the close of hostilities, States cannot be deprived for ever of the use of their own nationals, merely because in a previous conflict they had been taken prisoners of war.

The threats of execution in case of recapture made to the applicant by the Turkish Authorities during his captivity, cannot change the legal position.

For all the above reasons, the present recourse fails but I make no order as to costs.

Application dismissed.
No order as to costs.