15η 'Ιανουαρίου, 1979

(Α. ΛΟΙΖΟΥ, Δ.)

ΕΠΙ ΤΟΙΣ ΑΦΟΡΩΣΙ ΤΟ ΑΡΘΡΟΝ 146 ΤΟΥ ΣΥΝΤΑΓΜΑΤΟΣ

ΓΕΩΡΓΙΟΣ ΑΡΜΕΝΗΣ ΔΙΑ ΤΟΥ ΠΑΤΡΟΣ ΤΟΥ ΝΙΚΟΥ ΑΡΜΕΝΗ ΩΣ ΦΥΣΙΚΟΥ ΚΗΔΕΜΟΝΟΣ ΚΑΙ ΠΛΗΣΙΕΣΤΕΡΟΥ ΦΙΛΟΥ ΤΟΥ,

Αἰτητὴς,

κατὰ

ΤΗΣ ΚΥΠΡΙΑΚΗΣ ΔΗΜΟΚΡΑΤΙΑΣ ΔΙΑ ΤΟΥ ΥΠΟΥΡΓΟΥ ΑΜΥΝΗΣ,

Καθ' οὗ ἡ αἴτησις.

(*Ὑπόθεσις ὑπ' ἀρ.* 393/78).

'Εθνικὴ Φρουρὰ–'Ο περὶ τῆς 'Εθνικῆς Φρουρᾶς (Τροποποιητικὸς) Νόμος τοῦ 1978 (*'Αρ.* 22/78)–«*Πολίτης τῆς Δημοκρατίας*» *ὡς ὁρίζεται εἰς τὸ ἄρθρον* 2(*β*) *τοῦ Νόμου–Πρόσωπον γεννηθὲν ἐν Κύπρῳ κατὰ τὸ* 1961–*'Εκ πατρὸς ἀλλοδαποῦ καὶ μητρὸς Κυπρίας–Δὲν ἐμπίπτει εἰς τὸν ὡς ἄνω ὁρισμὸν καὶ δὲν δύναται νὰ θεωρῆται κατὰ νόμον στρατεύσιμος.*

Νομοθετικαὶ Διατάξεις–'Ερμηνεία–Διατάξεις περιοριστικαὶ τῆς ἐλευθερίας τοῦ ἀτόμου–Δέον ὅπως ἑρμηνεύωνται αὐστηρῶς–'Ερμηνεία τοῦ ἄρ. 2(*β*) *τοῦ περὶ τῆς 'Εθνικῆς Φρουρᾶς (Τροποποιητικοῦ) Νόμου,* 1978, (*'Αρ.* 22/78).

'Ο πατὴρ τοῦ αἰτητοῦ εἶναι "Ελλην ὑπήκοος κάτοχος 'Ελληνικοῦ διαβατηρίου, γεννηθεὶς εἰς Ραχτάδες, Κερκύρας, τὴν 17ην 'Οκτωβρίου, 1933, ἐκ γονέων 'Ελλήνων ὑπηκόων καὶ κατοίκων Ραχτάδων. 'Ενυμφέφθη τὴν 8ην 'Οκτωβρίου, 1960, εἰς Λεμεσὸν τὴν Κυπρίαν 'Ιάνθην Κώστα Παφίτη, ἀπὸ δὲ τῆς 13ης Μαΐου, 1961, διαμένει συνεχῶς μετὰ τῆς οἰκογενείας του εἰς Κύπρον, κατόπιν ἀδείας παραμονῆς ἥτις ἀνανεώνετο τακτικῶς μέχρι τῆς 22ας 'Ιουνίου, 1967, ὅτε ἐχορηγήθη εἰς αὐτὸν ἄδεια μονίμου διαμονῆς.

'Ο αἰτητὴς ἐγεννήθη εἰς Λεμεσὸν τὴν 13ην 'Οκτωβρίου, 1961, καθ' ὃν χρόνον οἱ γονεῖς του εἶχον συνεχῶς τὴν συνήθη διαμονὴν

Editor's note: An English translation of this judgment appears at pp. 48–55 *post.*

των εἰς Λεμεσὸν. Κατὰ τὸ ἔτος 1974 ὑπέβαλεν αἴτησιν εἰς τὸν ''Επαρχον Λεμεσσοῦ πρὸς ἔκδοσιν Κυπριακοῦ διαβατηρίου, ἀλλὰ ἡ αἴτησις αὕτη ἀπερρίφθη καθ' ὅτι οὗτος δὲν ἠδύνατο νὰ θεωρηθῇ πολίτης τῆς Δημοκρατίας.

''Οταν ὁ αἰτητὴς ἐκλήθη ὅπως ἐγγραφῇ εἰς τὴν 'Εθνικὴν Φρουρὰν ὁ δικηγόρος του ἔγραψε πρὸς τὸν 'Υπουργὸν 'Εσωτερικῶν ὅτι ὁ αἰτητὴς δὲν «ὑπόκειται εἰς ὑπηρεσίαν εἰς τὴν 'Εθνικὴν φρουράν», καθ' ὅτι, μεταξὺ ἄλλων, δὲν ἦτο πολίτης τῆς Δημοκρατίας. Τὸ 'Υπουργεῖον 'Εσωτερικῶν ἀπήντησεν ὅτι «διὰ τοὺς σκοποὺς τῶν περὶ 'Εθνικῆς φρουρᾶς Νόμων τοῦ 1964 ἕως 1978, ὅπου ὁ ὅρος 'Πολίτης τῆς Δημοκρατίας' ἔχει τὴν ἔννοιαν ἥτις ἀποδίδεται εἰς αὐτὸν δυνάμει τοῦ ἄρθρου 2(β)* τοῦ Περὶ 'Εθνικῆς Φρουρᾶς Τροποποιητικοῦ Νόμου 'Αρ. 22 τοῦ 1978 ὁ κος Γεώργιος 'Αρμένης (αἰτητὴς) θεωρεῖται στρατεύσιμος.»

''Οθεν ἡ παροῦσα προσφυγή:

'Ο αἰτητὴς ἰσχυρίσθη ὅτι ἡ προαναφερθεῖσα νομοθετικὴ διάταξις καὶ εἰδικώτερον ἡ παράγραφος (β) τοῦ ἄρθρου 2 περιλαμβάνει μόνον πρόσωπα Κυπριακῆς καταγωγῆς ἐξ ἀρρενογονίας καὶ ἐπομένως ἡ καταγωγὴ δὲν δύναται νὰ διαχωρισθῇ ἐκ τοῦ τόπου γεννήσεως ἢ τῆς συνήθους διαμονῆς τῶν γονέων.

'Ο συνήγορος τῆς Δημοκρατίας ἀφοῦ συνεφώνησε** μὲ τὸν ὡς ἄνω ἰσχυρισμὸν ἐπαρουσίασε γνωμοδότησιν*** τοῦ Γενικοῦ Εἰσαγγελέως, δοθεῖσαν εἰς ἄλλην περίπτωσιν, εἰς τὴν ὁποίαν ἑρμηνεύεται τὸ ἄρθρον 2(β) τοῦ Νόμου 22/78 καὶ τὴν ὁποίαν γνωμοδότησιν υἱοθέτησε πλήρως ὡς ἔχουσαν ἐφαρμογὴν εἰς τὰ γεγονότα τῆς παρούσης ὑποθέσεως.

Τὸ Δικαστήριον ἔκρινεν ὅτι:

(1) 'Η παράγραφος (β) τοῦ ἄρθρου 2(β) τοῦ Νόμου 22/78 δέον ὅπως ἀναγιγνώσκεται ὁμοῦ μετὰ τοῦ δευτέρου μέρους τοῦ ὁρισμοῦ, ἤτοι τῆς φράσεως ''περιλαμβάνει πρόσωπον Κυπριακῆς καταγωγῆς ἐξ ἀρρενογονίας, καθ' ὅτι ἡ φράσις αὕτη θὰ ἔμενε ἄνευ σημασίας ἐὰν δὲν ἀναγιγνώσκεται ὁμοῦ μετὰ τῆς παραγράφου (β) μετὰ τῆς ὁποίας συνδέεται διὰ τῆς λέξεως ''ἤτοι''. 'Ο ὡς ἄνω ὁρισμὸς λοιπὸν τοῦ πολίτου τῆς Δημοκρατίας, διὰ τοὺς σκοποὺς τῶν Περὶ 'Εθνικῆς Φρουρᾶς Νόμων, σημαίνει ἀφ' ἑνὸς μὲν ''πολίτην τῆς Δημοκρατίας'' ὡς ὁ ὅρος αὐτὸς καθορίζεται εἰς τοὺς σχετικοὺς Περὶ 'Ιθαγενείας Νόμους καὶ περιπλέον

* 'Ιδε σελ. 45 κατωτέρω.

** Καίτοι ὑπῆρχε σύμπτωσις ἀπόψεων ἐν τούτοις ἐναπόκειτο εἰς τὸ δικαστήριον νὰ κρίνῃ τὴν νομιμότητα ἢ μὴ τῆς ὑπὸ ἐξέτασιν διοικητικῆς πράξεως (ἴδε σελ. 48 κατωτέρω).

*** 'Ιδε σελίδας 45–47 κατωτέρω.

περιλαμβάνει καὶ πᾶν ἄλλον πρόσωπον Κυπριακῆς καταγωγῆς ἐξ ἀρρενογονίας ὅμως, τὸ ὁποῖον περιπλέον ἐγεννήθη ἐν Κύπρῳ κατὰ ἢ μετὰ τὴν 5ην Νοεμβρίου, 1914, καὶ καθ' ὃν χρόνον οἱ γονεῖς αὐτοῦ διέμενον συνήθως ἐν Κύπρῳ. Εἰς τὴν προκειμένην περίπτωσιν δὲν ὑπάρχει ἰσχυρισμὸς ὅτι ὁ αἰτητὴς εἶναι πολίτης τῆς Δημοκρατίας συμφώνως τῶν Περὶ 'Ιθαγενείας Νόμων ἢ τοῦ παραρτήματος (Δ) τῆς Συνθήκης 'Εγκαθιδρύσεως καὶ δὲν δύναται νὰ θεωρηθῇ, ὡς ἡ ἐπίδικος ἀπόφασις, ὅτι ἐμπίπτει εἰς τὸν ὡς ἄνω ὁρισμὸν τοῦ ἄρθρου 2(β) τοῦ Περὶ 'Εθνικῆς Φρουρᾶς Τροποποιητικοῦ Νόμου, τοῦ 1978, ἀριθμὸς 22/78 καὶ εἰδικώτερον εἰς τὸ δεύτερον σκέλος τοῦ ὁρισμοῦ τούτου καθ' ὅτι ἐλλείπει εἰς τὴν προκειμένην περίπτωσιν τὸ ἀπαραίτητο στοιχεῖο τῆς ἀρρενογονίας. (Τὸ δικαστήριον συνεφώνησε πλήρως μὲ τὸ συμπέρασμα καὶ τὸ σκεπτικὸν τῆς γνωμοδοτήσεως τοῦ Γενικοῦ Εἰσαγγελέως, ἡ ὁποία παρατίθεται εἰς τὰς σελίδας 45–47 *κατωτέρω*).

(2) 'Η ἑρμηνεία αὕτη συνάδει καὶ πρὸς τὸ γράμμα τῆς ἐν λόγῳ νομοθετικῆς διατάξεως, ἀλλὰ καὶ πρὸς τὴν νομικὴν ἀρχὴν ὅτι διατάξεις περιοριστικαὶ τῆς ἐλευθερίας τοῦ ἀτόμου καὶ εἰς ἃς περιπτώσεις εἶναι ἐπιτρεπταὶ ὑπὸ τοῦ Συντάγματος ἢ τῶν Νόμων, δέον ὅπως ἑρμηνεύωνται αὐστηρῶς.

(3) "Οθεν διὰ τοὺς λόγους οὓς ἐξέθεσα ἡ ἐπίδικος πρᾶξις ἀκυροῦται καὶ ὁ αἰτητὴς δὲν δύναται νὰ θεωρῆται ὡς ἐμπίπτων εἰς τὸν ὁρισμὸν τοῦ "πολίτου τῆς Δημοκρατίας" ὡς ὁρίζεται εἰς τὸ ἄρθρον 2 τῶν Περὶ 'Εθνικῆς Φρουρᾶς Νόμων, καὶ δὲν δύναται νὰ θεωρῆται κατὰ νόμον στρατεύσιμος.

'Επίδικος πρᾶξις ἀκυροῦται.

Προσφυγή.

Προσφυγὴ κατὰ τῆς ἀποφάσεως τοῦ καθ' οὗ ἡ αἴτησις διὰ τῆς ὁποίας ὁ αἰτητὴς ἐθεωρήθη ὡς πολίτης τῆς Δημοκρατίας καὶ/ἢ στρατεύσιμος.

P. Μιχαηλίδης, διὰ τὸν αἰτητήν.

P. Γαβριηλίδης, Δικηγόρος τῆς Δημοκρατίας διὰ τὸν καθ' οὗ ἡ αἴτησις.

Α. ΛΟΙΖΟΥ Δ. Διὰ τῆς παρούσης προσφυγῆς ὁ αἰτητὴς ζητεῖ δήλωσιν τοῦ Δικαστηρίου ὅτι ἡ ἀπόφασις τοῦ καθ' οὗ ἡ αἴτησις ὡς ἐκοινοποιήθη εἰς αὐτὸν δι' ἐπιστολῆς ἡμερομηνίας 25ης Αὐγούστου, 1978, (Τεκμήριον 3), ἤτοι, ὅτι ὁ αἰτητὴς θεωρεῖται πολίτης τῆς Δημοκρατίας καὶ/ἢ στρατεύσιμος εἶναι ἐσφαλμένη καὶ ἄκυρος

καὶ ἐλήφθη καθ' ὑπέρβασιν ἐξουσίας καὶ κατόπιν κακῆς ἑρμηνείας καὶ/ἢ ἐκτιμήσεως τοῦ Νόμου καὶ τῶν γεγονότων.

Τὰ γεγονότα τῆς ὑποθέσεως διὰ τὰ ὁποῖα καὶ δὲν ὑπάρχει ἀμφισβήτησις ἔχουν ὡς ἀκολούθως:

'Ο πατὴρ τοῦ αἰτητοῦ εἶναι Ἕλλην ὑπήκοος κάτοχος τοῦ ὑπ' ἀριθμὸν Σ.Ο. 77938 'Ελληνικοῦ διαβατηρίου, γεννηθεὶς εἰς Ραχτάδες, Κερκύρας, τὴν 17ην 'Οκτωβρίου, 1933, ἐκ γονέων 'Ελλήνων ὑπηκόων καὶ κατοίκων Ραχτάδων. 'Ο πατὴρ τοῦ αἰτητοῦ ἐνυμφέφθη τὴν 8ην 'Οκτωβρίου, 1960, εἰς Λεμεσὸν τὴν Κυπρίαν 'Ιάνθην Κώστα Παφίτη, ἀπὸ δὲ τῆς 13ης Μαΐου, 1961, διαμένει συνεχῶς μετὰ τῆς οἰκογενείας του εἰς Κύπρον, κατόπιν ἀδείας παραμονῆς ἥτις ἀνανεώνετο τακτικῶς μέχρι τῆς 22ας 'Ιουνίου, 1967, ὅτε ἐχορηγήθη εἰς αὐτὸν ἄδεια μονίμου διαμονῆς.

'Ο αἰτητὴς ἐγεννήθη εἰς Λεμεσὸν τὴν 13ην 'Οκτωβρίου, 1961, καθ' ὃν χρόνον οἱ γονεῖς του, ὡς ἀναφέρεται εἰς τὸ Τεκμήριον 3, "εἶχον συνεχῶς τὴν συνήθη διαμονὴν των εἰς Λεμεσὸν (Κύπρον)". Συμπληρωματικῶς πρὸς τὰ ὡς ἄνω γεγονότα δέον ὅπως ἀναφερθῆ ὅτι κατὰ τὸ ἔτος 1974 ὁ αἰτητὴς ὑπέβαλεν αἴτησιν εἰς τὸν Ἔπαρχον Λεμεσοῦ πρὸς ἔκδοσιν Κυπριακοῦ διαβατηρίου, ἀλλὰ ἡ αἴτησις αὕτη ἀπερρίφθη καθ' ὅτι οὗτος δὲν ἠδύνατο νὰ θεωρηθῆ πολίτης τῆς Δημοκρατίας.

'Η προσβαλλομένη ἀπόφασις ὡς διατυποῦται εἰς τὴν τελευταίαν παράγραφον τοῦ Τεκμηρίου 3 ἔχει ὡς ἀκολούθως:

> " 'Εν ὄψει τῶν ὡς ἄνω διὰ τοὺς σκοποὺς τῶν περὶ 'Εθνικῆς Φρουρᾶς Νόμων τοῦ 1964 ἕως 1978, ὅπου ὁ ὅρος 'Πολίτης τῆς Δημοκρατίας' ἔχει τὴν ἔννοιαν ἥτις ἀποδίδεται εἰς αὐτὸν δυνάμει τοῦ ἄρθρου 2(β) τοῦ Περὶ 'Εθνικῆς Φρουρᾶς Τροποποιητικοῦ Νόμου 'Αρ. 22 τοῦ 1978 ὁ κος Γεώργιος 'Αρμένης θεωρεῖται στρατεύσιμος."

" Πολίτης τῆς Δημοκρατίας" ὁρίζεται εἰς τὸ ἄρθρον 2, τῶν Περὶ 'Εθνικῆς Φρουρᾶς Νόμων τοῦ 1964 ἕως 1978, ὡς ἐτροποποιήθησαν διὰ τοῦ ἄρθρου 2 τοῦ Περὶ 'Εθνικῆς Φρουρᾶς (Τροποποιητικοῦ) Νόμου τοῦ 1978, (ἀριθμ. 22/78), ὡς ἀκολούθως:

> " 'πολίτης τῆς Δημοκρατίας' σημαίνει πολίτην τῆς Δημοκρατίας καὶ περιλαμβάνει πρόσωπον Κυπριακῆς καταγωγῆς ἐξ ἀρρενογονίας, ἤτοι–
>
> (α) πρόσωπον, τὸ ὁποῖον κατέστη Βρεττανὸς ὑπήκοος

δυνάμει τῶν περὶ Προσαρτήσεως τῆς Κύπρου Διαταγμάτων ἐν Συμβουλίῳ τοῦ 1914 ἕως 1943· ἢ

(β) πρόσωπον, τὸ ὁποῖον ἐγεννήθη ἐν Κύπρῳ κατὰ ἢ μετὰ τὴν 5ην Νοεμβρίου, 1914, καθ' ὃν χρόνον οἱ γονεῖς αὐτοῦ διέμενον συνήθως ἐν Κύπρῳ· ἢ

(γ) ἐξώγαμον ἢ νόθον τέκνον τοῦ ὁποίου ἡ μήτηρ κατεῖχε κατὰ τὸν χρόνον τῆς γεννήσεως αὐτοῦ τὰ προσόντα τὰ ἀναφερόμενα ἐν τῇ ἄνω παραγράφῳ (α) ἢ (β) τοῦ παρόντος ὁρισμοῦ· ἢ

(δ) πρόσωπον καταγόμενον ἐξ ἀρρενογονίας ἐκ προσώπου οἷον ἀναφέρεται ἐν τῇ ἄνω παραγράφῳ (α) ἢ (β) ἢ (γ) τοῦ παρόντος ὁρισμοῦ."

'Αποτελεῖ βάσιν τῆς ὑποθέσεως τοῦ αἰτητοῦ ὅτι ἡ προαναφερθεῖσα νομοθετικὴ διάταξις καὶ εἰδικώτερον ἡ παράγραφος (β) τοῦ ἄρθρου 2 περιλαμβάνει μόνον πρόσωπα Κυπριακῆς καταγωγῆς ἐξ ἀρρενογονίας καὶ ἐπομένως ἡ καταγωγὴ δὲν δύναται νὰ διαχωρισθῇ ἐκ τοῦ τόπου γεννήσεως ἢ τῆς συνήθους διαμονῆς τῶν γονέων.

'Επὶ τοῦ προκειμένου ὁ συνήγορος τῆς Δημοκρατίας ἐπαρουσίασε γνωμοδότησιν τοῦ Γενικοῦ Εἰσαγγελέως (Τεκμήριον 4), δοθεῖσαν εἰς ἄλλην περίπτωσιν, εἰς τὴν ὁποίαν ἑρμηνεύεται τὸ ἄρθρον 2(β) τοῦ Νόμου 22/78 καὶ τὴν ὁποίαν γνωμοδότησιν υἱοθέτησε πλήρως ὡς ἔχουσαν ἐφαρμογὴν εἰς τὰ γεγονότα τῆς παρούσης ὑποθέσεως. Τὸ τεθὲν ζήτημα ὡς καὶ εἰς τὴν προκειμένην περίπτωσιν

"ἐὰν πρόσωπον τὸ ὁποῖον δὲν εἶναι πολίτης τῆς Δημοκρατίας δυνάμει τῶν διατάξεων τοῦ Παραρτήματος Δ τῆς Συνθήκης 'Εγκαθιδρύσεως καὶ τὸ ὁποῖον ἐγεννήθη ἐν Κύπρῳ κατὰ τὸ 1961 ἐκ πατρὸς ἀλλοδαποῦ καὶ μητρὸς Κυπρίας ὑπέχει στρατιωτικὴν ὑποχρέωσιν δυνάμει τῶν περὶ τῆς 'Εθνικῆς Φρουρᾶς Νόμων τοῦ 1964 ἕως 1978 ὡς πρόσωπον 'Κυπριακῆς καταγωγῆς ἐξ ἀρρενογονίας ἤτοι πρόσωπον τὸ ὁποῖον ἐγεννήθη ἐν Κύπρῳ κατὰ ἢ μετὰ τὴν 5ην Νοεμβρίου τοῦ 1914, καθ' ὃν χρόνον οἱ γονεῖς αὐτοῦ διέμενον συνήθως ἐν Κύπρῳ' (δυνάμει τοῦ ὁρισμοῦ 'πολίτης τῆς Δημοκρατίας' ὡς οὗτος ἐκτίθεται εἰς τὸ ἄρθρον 2(β) τοῦ Νόμου 27 τοῦ 1978).

'Η ἀπάντησις εἶναι ἀρνητική.

2. 'Υποχρέωσιν πρὸς ὑπηρεσίαν ἐν τῇ Δυνάμει δυνάμει

τῶν περὶ Ἐθνικῆς Φρουρᾶς Νόμων 1964 ἕως 1977, (ἤτοι πρὸ τῆς τροποποιήσεως αὐτῶν διὰ τοῦ Νόμου 22 τοῦ 1978) ὑπεῖχον μόνον οἱ πολῖται τῆς Δημοκρατίας (ἄρθρον 4(1)). Δὲν ὑφίστατο ὁρισμὸς τοῦ ὅρου 'πολίτης τῆς Δημοκρατίας' καθ' ὅτι ὁ ὅρος οὗτος ἦτο ἀρκετὰ σαφὴς.

Διὰ τοῦ ἄρθρον 2(β) τοῦ Νόμου 22 τοῦ 1978 προσετέθη ὁρισμὸς τοῦ ὅρου 'πολίτης τῆς Δημοκρατίας' διὰ τοῦ ὁποίου ὁ ὅρος οὗτος διευρύνθη ὥστε νὰ περιλαμβάνῃ καὶ 'πᾶν πρόσωπον Κυπριακῆς καταγωγῆς ἐξ ἀρρενογονίας'. Ἀλλὰ δὲν ὁρίζεται σαφῶς ποῖον πρόσωπον θεωρεῖται ὡς 'πρόσωπον Κυπριακῆς καταγωγῆς' ὡς γίνεται εἰς τὸ ἄρθρον 4.2 τοῦ Παραρτήματος Δ τῆς Συνθήκης Ἐγκαθιδρύσεως ἔνθα ὁρίζεται ὅτι 'πρόσωπον Κυπριακῆς καταγωγῆς σημαίνει πρόσωπον τὸ ὁποῖον ἦτο κατὰ τὴν 5ην Νοεμβρίου, 1914, Ὀθωμανὸς ὑπήκοος συνήθως διαμένων ἐν τῇ Νήσῳ τῆς Κύπρου ἢ τὸ ὁποῖον κατάγεται ἐξ ἀρρενογονίας παρὰ τοιούτου προσώπου."

Κατόπιν ἀναφορᾶς εἰς τὴν σχετικὴν Νομοθετικὴν Διάταξιν ὁ γενικὸς Εἰσαγγελεὺς συνεχίζει:

"3. Ἡ διάταξις αὕτη δὲν εἶναι διόλου σαφής. Προφανῶς ἐλήφθη ἐκ τῆς παραγράφου 2 τοῦ Ἄρθρου 2 τοῦ Παραρτήματος Δ ἀλλ' ἐκεῖ εἰσήχθη διὰ τελείως διαφορετικὸν σκοπόν. Ἦτο διὰ νὰ καθορίσῃ ποῖα πρόσωπα ἐθεωροῦντο ὅτι ἀπέκτησαν τὴν Κυπριακὴν ἰθαγένειαν δυνάμει τοῦ Παραρτήματος Δ ἐνῷ εἰς τὴν προκειμένην περίπτωσιν ἐσκοπεῖτο νὰ καθορισθῇ ποῖον πρόσωπον ἐθεωρεῖτο ὡς Κυπριακῆς καταγωγῆς διὰ τοὺς σκοποὺς τῶν περὶ Ἐθνικῆς Φρουρᾶς Νόμων.

Ἐρωτᾶται συνεπῶς εἰς ποῖον πρόσωπον ἀφοροῦν οἱ παράγραφοι (α) ἕως (δ) τοῦ περὶ οὗ πρόκειται ὁρισμοῦ· εἰς τὸ περὶ οὗ πρόκειται πρόσωπον ἢ εἰς τὸν γονέα αὐτοῦ καὶ δὴ τὸν πατέρα, καθ' ὅσον εἶναι ἡ ἐξ ἀρρενογονίας καταγωγὴ ἡ ὁποία λαμβάνεται ὑπ' ὄψιν. Ὅπως ἐτόνισα καὶ προηγουμένως εἰς τὴν σύγχυσιν ἡ ὁποία ἐπικρατεῖ εἰς τὴν ἄνω διάταξιν δὲν δύναται νὰ δοθῇ σαφὴς καὶ ἀναμφίβολος ἀπάντησις.

Ἐὰν ἡ διάταξις ἀφορᾶ εἰς τὸ περὶ οὗ πρόκειται πρόσωπον τότε ἡ διάταξις τῆς παραγράφου (γ) ἀντικρούεται πρὸς τὴν διάταξιν τῆς ἐξ ἀρρενογονίας καταγωγῆς τοῦ προσώπου καθ' ὅσον λαμβάνεται ὑπ' ὄψιν ἡ ἐκ τῆς μητρὸς καταγωγή. Ἐξ ἄλλου ἡ διάταξις τῆς παραγράφου (α) ἡ ἀφορῶσα εἰς πρόσωπον τὸ ὁποῖον κατέστη Βρεττανὸς ὑπήκοος δυνάμει

τῶν περὶ Προσαρτήσεως τῆς Κύπρου Διαταγμάτων ἐν Συμβουλίῳ τοῦ 1914 ἕως 1943 ἐκ τῶν πραγμάτων καθίσταται ὑπερβαλλόντως δύσκολον ἂν μὴ ἀδύνατον νὰ ἐφαρμοσθῇ εἰς στρατευσίμους μὲ βάσιν τὰ σημερινὰ (τοῦ 1978) κριτήρια.

Τὸ αὐτὸ ἐφαρμόζεται καὶ διὰ τὴν παράγραφον (β) ἡ ὁποία ἀφορᾷ εἰς 'πρόσωπον τὸ ὁποῖον ἐγεννήθη ἐν Κύπρῳ μετὰ τὴν 5ην Νοεμβρίου τοῦ 1914 καθ' ὃν χρόνον οἱ γονεῖς του διέμενον συνήθως ἐν Κύπρῳ'. 'Η παράγραφος αὕτη δὲν δύναται νὰ ληφθῇ αὐτὴ καθ' ἑαυτὴν καὶ ἀνεξαρτήτως τῆς διατάξεως 'περὶ τῆς Κυπριακῆς καταγωγῆς ἐξ ἀρρενογονίας' καθ' ὅσον ἐν τοιαύτῃ περιπτώσει θὰ περιελάμβανε καὶ ὅλους τοὺς ἀλλοδαποὺς οἱ ὁποῖοι ἐγεννήθησαν ἐν Κύπρῳ καθ' ὃν χρόνον οἱ γονεῖς των συνήθως διέμενον ἐν αὐτῇ, πρᾶγμα τὸ ὁποῖον δὲν ἦτο ὁ σκοπὸς τοῦ νομοθέτου. Τὸ πρόσωπον τοῦτο ἐὰν ἐγεννήθη ἐν Κύπρῳ μετὰ τὴν 5 Νοεμβρίου 1914 θὰ ἀπέκτα τὴν Κυπριακὴν ἰθαγένειαν ἐφ' ὅσον οἱ γονεῖς του εἶχον τὴν συνήθη αὐτῶν διαμονὴν καθ' οἱονδήποτε χρόνον πρὸ τῆς ἡμερομηνίας ἐνάρξεως ἰσχύος τοῦ Παραρτήματος Δ τῆς Συνθήκης 'Εγκαθιδρύσεως, ἐν Κύπρῳ.

Συνεπῶς δέον νὰ θεωρηθῇ ὅτι τοὐλάχιστον αἱ παράγραφοι (α) καὶ (β) τοῦ ὁρισμοῦ ἀπεσκόπουν νὰ καθορίσουν τὰς περιπτώσεις τῆς 'Κυπριακῆς καταγωγῆς ἐξ ἀρρενογονίας' τοῦ στρατευσίμου καὶ δέον νὰ θεωρηθῶσι ὅτι ἀφοροῦν αὗται εἰς τὸν πατέρα αὐτοῦ.

4. Τὸ περὶ οὗ πρόκειται πρόσωπον συνεπῶς δὲν ὑπέχει στρατιωτικὴν ὑποχρέωσιν."

Συμφωνῶ πλήρως μὲ τὸ συμπέρασμα καὶ τὸ σκεπτικὸν τῆς ὡς ἄνω γνωματεύσεως ἡ ὁποία ἔχει ἐφαρμογὴν καὶ εἰς τὴν ὑπὸ ἐξέτασιν περίπτωσιν.

'Η παράγραφος (β) τοῦ ἄρθρου 2(β) τοῦ Νόμου 22/78, ὡς ἄνωθεν ἐξετέθη, δέον ὅπως ἀναγιγνώσκεται ὁμοῦ μετὰ τοῦ δευτέρου μέρους τοῦ ὁρισμοῦ, ἤτοι τῆς φράσεως "περιλαμβάνει πρόσωπον Κυπριακῆς καταγωγῆς ἐξ ἀρρενογονίας", καθ' ὅτι ἡ φράσις αὕτη θὰ ἔμενε ἄνευ σημασίας ἐὰν δὲν ἀναγιγνώσκεται ὁμοῦ μετὰ τῆς παραγράφου (β) μετὰ τῆς ὁποίας συνδέεται διὰ τῆς λέξεως "ἤτοι". *'Ο ὡς ἄνω ὁρισμὸς λοιπὸν τοῦ πολίτου τῆς Δημοκρατίας, διὰ τοὺς* σκοποὺς τῶν Περὶ 'Εθνικῆς Φρουρᾶς Νόμων, σημαίνει ἀφ' ἑνὸς μὲν "πολίτην τῆς Δημοκρατίας" ὡς ὁ ὅρος αὐτὸς καθορίζεται εἰς τοὺς σχετικοὺς Περὶ 'Ιθαγενείας Νόμους καὶ περιπλέον περιλαμβάνει καὶ πᾶν ἄλλον πρόσωπον Κυπριακῆς καταγωγῆς ἐξ ἀρρενογονίας

ὅμως, τὸ ὁποῖον περιπλέον ἐγεννήθη ἐν Κύπρῳ κατὰ ἢ μετὰ τὴν 5ην Νοεμβρίου, 1974, καὶ καθ' ὃν χρόνον οἱ γονεῖς αὐτοῦ διέμενον συνήθως ἐν Κύπρῳ. Εἰς τὴν προκειμένην περίπτωσιν δὲν ὑπάρχει ἰσχυρισμὸς ὅτι ὁ αἰτητὴς εἶναι πολίτης τῆς Δημοκρατίας συμφώνως τῶν Περὶ 'Ιθαγενείας Νόμων ἢ τοῦ παραρτήματος (Δ) τῆς Συνθήκης 'Εγκαθιδρύσεως καὶ δὲν δύναται νὰ θεωρηθῇ, ὡς ἡ ἐπίδικος ἀπόφασις ὅτι ἐμπίπτει εἰς τὸν ὡς ἄνω ὁρισμὸν τοῦ ἄρθρου 2(β) τοῦ Περὶ 'Εθνικῆς Φρουρᾶς Τροποποιητικοῦ Νόμου, τοῦ 1978, ἀριθμὸς 22/78 καὶ εἰδικώτερον εἰς τὸ δεύτερον σκέλος τοῦ ὁρισμοῦ τούτου καθ' ὅτι ἐλλείπει εἰς τὴν προκειμένην περίπτωσιν τὸ ἀπαραίτητο στοιχεῖο τῆς ἀρρενογονίας.

'Η ἑρμηνεία αὕτη συνάδει καὶ πρὸς τὸ γράμμα τῆς ἐν λόγῳ νομοθετικῆς διατάξεως, ἀλλὰ καὶ πρὸς τὴν νομικὴν ἀρχὴν ὅτι διατάξεις περιοριστικαὶ τῆς ἐλευθερίας τοῦ ἀτόμου καὶ εἰς ἃς περιπτώσεις εἶναι ἐπιτρεπταὶ ὑπὸ τοῦ Συντάγματος ἢ τῶν Νόμων, δέον ὅπως ἑρμηνεύωνται αὐστηρῶς.

Καίτοι ὑπῆρξεν εἰς τὴν προκειμένην περίπτωσιν σύμπτωσις ἀπόψεων, ἐν τούτοις ἐναπόκειται εἰς τὸ Δικαστήριον νὰ κρίνῃ τὴν νομιμότητα ἢ μὴ τῆς ὑπὸ ἐξέτασιν διοικητικῆς πράξεως, καθ' ὅτι μία διοικητικὴ πρᾶξις ἰσχύει μέχρις οὗ ἀνακληθῇ, καταργηθῇ ρητῶς, ἢ δι' ἐκδόσεως ἀντιθέτου πράξεως, ἢ ἀκυρωθῇ, ἤ, εἰς ἐξαιρετικὰς περιπτώσεις, ἀποδυναμωθῇ, ἢ καταστῇ ἡ ἐφαρμογὴ αὐτῆς παράλογος, ἢ περιττὴ λόγῳ ἐξωτερικῆς ἀντικειμενικῆς μεταβολῆς τῶν συνθηκῶν. 'Εφ' ὅσον λοιπὸν οὐδὲν τοιοῦτον τι συνέβη, ἡ αἰτουμένη ἀκύρωσις τῆς ὑπὸ ἐξέτασιν διοικητικῆς πράξεως εἶναι ἔργον τοῦ Δικαστηρίου αὐτοῦ ἐνασκοῦντος τὰς ἐξουσίας τὰς ὁποίας περιβέβληται διὰ τοῦ ἄρθρου 146 τοῦ Συντάγματος.

"Οθεν διὰ τοὺς λόγους οὓς ἐξέθεσα ἡ ἐπίδικος πρᾶξις ἀκυροῦται καὶ ὁ αἰτητὴς δὲν δύναται νὰ θεωρῆται ὡς ἐμπίπτων εἰς τὸν ὁρισμὸν τοῦ "πολίτου τῆς Δημοκρατίας" ὡς ὁρίζεται εἰς τὸ ἄρθρον 2 τῶν Περὶ 'Εθνικῆς Φρουρᾶς Νόμων, καὶ δὲν δύναται νὰ θεωρῆται κατὰ νόμον στρατεύσιμος.

Οὐδὲν διάταγμα δίδεται ὡς πρὸς τὰ ἔξοδα.

'Επίδικος πρᾶξις ἀκυροῦται.

This is an English translation of the judgment in Greek appearing at pp. 41–48 *ante*.

National Guard—National Guard (Amendment) Law, 1978 (*Law* 22/78)—"*Citizen of the Republic*" *as defined by section* 2(b) *of the Law—Person born in Cyprus in* 1961—*His father an alien*

and his mother a Cypriot—Does not fall within the above definition and he cannot be considered as a conscript.

Statutes—Construction—Statutes affecting the liberty of the subject—Should be strictly construed—Construction of section 2(b) of the National Guard (Amendment) Law, 1978 (Law 22/78).

The applicant's father is a Greek citizen and holder of a Greek passport; he was born at Rahtades Corfu on the 17th October, 1933 and his parents were Greek citizens and residents of Rahtades. On the 8th October, 1960 he got married to a Cypriot and since the 13th May, 1961 he continuously resided with his family in Cyprus, on being granted a residence permit, renewed regularly until the 22nd June, 1967 when a permanent residence permit was granted to him.

The applicant was born at Limassol on the 13th October, 1961, at a time when his parents had continuously their ordinary residence at Limassol. In 1974 he applied to the District Officer Limassol for the issue of a Cyprus passport to him, but his application was turned down as he could not be considered as a citizen of the Republic.

When applicant was called to enlist in the National Guard his counsel wrote to the Minister of Interior that the applicant had no obligation to serve in the National Guard because, *inter alia*, he was not a citizen of the Republic. In reply the Minister informed applicant's counsel that for the purposes of the National Guard Laws, 1964 to 1978, where the term 'citizen of the Republic' has the meaning ascribed to it by virtue of section 2(b)* of the National Guard (Amendment) Law No. 22 of 1978 the applicant is considered to be a conscript.

Hence the present recourse:

Counsel for the applicant contended that section 2(b) of the National Guard (Amendment) Law, 1978 (Law 22/78) and particularly paragraph (b) thereof includes only persons of Cypriot origin descended in the male line and therefore the origin cannot be divorced from the place of birth or the ordinary place of residence of the parents.

* Quoted at p. 52 *post*.

Counsel of the Republic agreed* with the above contention; and produced an opinion** of the Attorney-General given in another case, where section 2(b) of Law 22/78 was interpreted, which he fully adopted as applicable to the facts of this case.

Held, (1) that paragraph (b) of section 2(b) of Law 22/78 should be read together with the second part of the definition, that is the phrase "includes every person of Cypriot origin descended in the male line", because this phrase would have been rendered meaningless if not read together with paragraph (b) with which it is joined by the words "that is"; that, thus, the above definition of citizen of the Republic, for the purposes of the National Guard Laws, means, on the one hand "citizen of the Republic" as this term is defined in the relevant Citizenship Laws and in addition it includes every other person of Cypriot origin but descended in the male line which, moreover, was born in Cyprus on or after the 5th November, 1914 at a time when his parents were ordinarily resident in Cyprus; that in the instant case there is no allegation that the applicant is a citizen of the Republic under the Citizenship Laws or Annex D to the Treaty of Establishment and he cannot be treated, as was done by the *sub judice* decision, that he falls within the above definition of section 2(b) of the National Guard (Amendment) Law, 1978 (Law 22/78) and particularly within the second leg thereof because there is lacking the necessary element of descent in the male line. (Opinion of the Attorney-General quoted at pp. 52–54 *post* adopted).

(2) That the above construction is not only consonant with the letter of the said legislative provision but also with the principle that provisions affecting the liberty of the subject, even in cases permitted by the Constitution or the Laws, should be strictly construed; that, therefore, the *sub judice* decision is annulled and the applicant cannot be considered as falling within the definition of "citizen of the Republic" as defined by section 2 of the National Guard Laws, and he cannot be considered as a conscript according to Law.

Sub judice decision annulled.

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* In spite of the above consensus the Court proceeded to consider the legality or not of the *sub judice* administrative act (see p. 55 *post*).

** Quoted in full at pp. 52–54 *post*.

Recourse.

Recourse against the decision of the respondent to the effect that the applicant is considered a citizen of the Republic and/or a conscript.

R. Michaelides, for the applicant.

R. Gavrielides, Counsel of the Republic, for the respondent.

Cur. adv. vult.

A. LOIZOU J. read the following judgment: By this recourse the applicant seeks a declaration of the Court that the decision of the respondent as communicated to him by letter dated 25th August, 1978 (*exhibit* 3), to the effect that the applicant is considered a citizen of the Republic and/or a conscript is erroneous and *null* and *void* and was taken in excess of powers and upon a wrong construction and/or consideration of the Law and the facts.

The facts of the case which are undisputed are as follows:

The applicant's father is a Greek citizen and holder of Greek passport S.O.77938 having been born at Rahtades Corfu, on the 17th October, 1933, from Greek citizen parents and residents of Rahtades. On the 8th October, 1960 applicant's father married a Cypriot, Ianthi Costa Paphitis, and since the 13th May, 1961, he continuously stayed with his family in Cyprus, on being granted a residence permit renewed regularly until the 22nd June, 1967, when a permanent residence permit was granted to him.

The applicant was born at Limassol on the 13th October, 1961, at a time when his parents, as stated in *exhibit* 3, "had continuously their ordinary residence at Limassol (Cyprus)". In addition to the above facts it should be mentioned that in 1974 applicant submitted an application to the District Officer Limassol for the issue of a Cyprus passport to him, but this application was turned down as he could not be considered citizen of the Republic.

The *sub judice* decision as formulated in the last paragraph of *exhibit* 3 reads as follows:-

> "In view of the above for the purposes of the National Guard Laws 1964 to 1978, where the term 'citizen of the Republic' has the meaning ascribed to it by virtue of section

2(b) of the National Guard (Amendment) Law No. 22 of 1978 Mr. Georghios Armenis is considered to be a conscript".

"Citizen of the Republic" is defined by section 2 of the National Guard Laws 1964 to 1978, as amended by section 2 of the National Guard (Amendment) Law, 1978 (Law No. 22/78), as follows:

" 'Citizen of the Republic' means citizen of the Republic and includes a person of Cypriot origin descended in the male line, that is:-

"(a) a person who has become a British subject under the provisions of the Cyprus (Annexation) Orders in Council 1914–1943; or

(b) a person born in Cyprus on or after the 5th November, 1914 at a time when his parents were ordinarily residing in Cyprus; or

(c) an illegitimate child whose mother, at the time of his birth, possessed the qualifications referred to in paragraphs (a) or (b) of this definition; or

(d) a person descended in the male line from a person referred to in paragraphs (a) or (b) or (c) of this definition".

It is the case for the applicant that the aforementioned legislative provision and particularly paragraph (b) of section 2 includes only persons of Cypriot origin descended in the male line and therefore the origin cannot be divorced from the place of birth or the ordinary residence of the parents.

In this connection Counsel of the Republic produced an opinion of the Attorney-General (*exhibit* 4), given in another case, in which section 2(b) of Law 22/78 is interpreted, which he fully adopted as applicable to the facts of this case. The question for consideration in that case as well as in this case was:

"Whether a person who is not a citizen of the Republic by virtue of the provisions of Annex D to the Treaty of Establishment and who was born in Cyprus in 1961 from an alien father and a Cypriot mother has an obligation to serve in the National Guard under the National Guard

Laws 1964 to 1978 as a person of Cypriot origin descended in the male line that is a person who was born in Cyprus on or abourt the 5th November 1914 at a time when his parents were ordinarily residing in Cyprus (under the definition 'citizen of the Republic' as same is set out in section 2(b) of Law 27 of 1978).

The answer is a negative one.

2. Only the citizens of the Republic had an obligation for service in the National Guard under the National Guard Laws 1964 to 1977, (that is prior to their amendment by Law 22 of 1978) (section 4(1)). There was no definition of the term 'citizen of the Republic' because this term was quite clear.

By means of section 2(b) of Law 22 of 1978 there was added the definition of the term 'citizen of the Republic' by means of which this term was widened so as to include also 'every person of Cypriot origin descended in the male line'. But it is not clearly defined as to which person is considered as 'a person of Cypriot origin' as it is done by section 4.2 of Annex D to the Treaty of Establishment where it is stated that 'a person of Cypriot origin means a person who was, on the 5th November, 1914, an ottoman subject ordinarily resident in the Island of Cyprus or who is descended in the male lime from such a person' ".

After referring to the relevant legislative provision the Attorney-General continues:

"3. This provision is not at all clear. It was apparently taken from paragraph 2 of section 2 of Annex D but there it was introduced for a completely different purpose. It was aimed at determining which persons acquired Cypriot citizenship under Annex D whilst in the case in hand it was aimed at determining which person was considered of Cypriot origin for the purpose of the National Guard Laws.

The question is therefore posed to which person paras. (a) to (d) of the said definition refer; to the said person or to his parent and specifically his father, because it is the male line descent that is taken into consideration. As I also stated above there cannot be given a clear and un-

disputed reply to the confusion prevailing in the above provision.

If the provision refers to the said person then the provisions of para. (c) run contrary to the provision of descent in the *male line* of the person because the descent in the female line is taken into consideration. On the other hand the provision of para. (a), referring to a person who became a british subject by virtue of the Cyprus (Annexation) Orders in Council 1914 to 1943, is from the nature of things exceedingly difficult, if not impossible, to be applied to conscripts on the basis of present day (1978) criteria.

The same applies to para. (b) which refers to a 'person born in Cyprus after the 5th November 1914 at a time when his parents ordinarily resided in Cyprus'. This paragraph cannot be taken by itself and notwithstanding the provision 'for Cypriot origin descended in the male line' because in such a case it would have also included all aliens who were born in Cyprus at a time when their parents were ordinarily residing in Cyprus, something that was not intended by the legislature. This person if born in Cyprus after the 5th November 1914 would have acquired Cypriot citizenship since his parents were ordinarily residing in Cyprus at any time prior to the coming into operation of Annex D to the treaty of Establishment.

Therefore it should be taken that at least paras. (a) and (b) of the definition aimed at determining the instances of 'Cypriot origin descended in the male line' of the conscript and should be taken as referring to his father.

4. The said person, therefore, has no obligation to serve in the National Guard."

I fully agree with the conclusion and reasoning of the above opinion which is also applicable to the case in hand.

Paragraph (b) of section 2(b) of Law 22/78 as set out above, should be read together with the second part of the definition, that is the phrase "includes every person of Cypriot origin descended in the male line", because this phrase would have been rendered meaningless if not read together with paragraph (b) with which it is joined by the words "that is". Thus the

above definition of citizen of the Republic, for the purposes of the National Guard Laws, means, on the one hand "citizen of the Republic" as this term is defined in the relevant Citizenship Laws and in addition it includes every other person of Cypriot origin but descended in the male line which, moreover, was born in Cyprus on or after the 5th November, 1914 at a time when his parents were ordinarily resident in Cyprus. In the instant case there is no allegation that the applicant is a citizen of the Republic under the Citizenship Laws or Annex D to the Treaty of Establishment and he cannot be treated, as was done by the *sub judice* decision, that he falls within the above definition of section 2(b) of the National Guard (Amendment) Law, 1978 (Law 22/78) and particularly within the second leg thereof because there is lacking the necessary element of descent in the male line.

This construction is not only consonant with the letter of the said legislative provision but also with the principle that provisions affecting the liberty of the subject, even in cases permitted by the Constitution or the Laws, should be strictly construed.

Though in the case in hand there was consensus of opinion, it is upto the Court to consider the legality or not of the *sub judice* administrative act, because an administrative act is valid until revoked, expressly repealed, or by the issuing of an act to the contrary, or cancelled, or, in exceptional cases, loses its force or its implementation is rendered unreasonable or superfluous due to the external objective change of circumstances. Since therefore nothing of the sort happened the annulment of the *sub judice* administrative act is the task of this Court in the exercise of its powers under Article 146 of the Constitution.

Therefore, for the reasons stated above the *sub judice* decision is annulled and the applicant cannot be considered as falling within the definition of "citizen of the Republic" as defined by section 2 of the National Guard Laws, and he cannot be considered as a conscript according to Law.

No order as to costs.

Sub judice decision annulled.
No order as to costs.