

1981 March 11

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

LOIZOS M. LOIZOU,

*Applicant,*

v.

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

*Respondent.*

(Case No. 457/79).

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*Constitutional Law—Constitutionality of legislation—Section 2(b) of the National Guard (Amendment) Law, 1978 (Law 22/78)—Unconstitutional as offending Article 198 of the Constitution and Annex “D” to the Treaty of Establishment.*

- 5 *National Guard—Military service—Citizen of the Republic—British subject—Liability to serve in the National Guard—Section 2(b) of the National Guard (Amendment) Law, 1978 (Law 22/78) imposing such a liability on persons who are not citizens of the Republic, but have descended in the male line from persons of*  
10 *Cyprus origin—Unconstitutional as offending Article 198 of the Constitution and Annex “D” to the Treaty of Establishment.*

15 The applicant was a national of the United Kingdom, was born in London on the 2nd March, 1962 and was holding a British passport. His father was born in Cyprus in 1927 and he left for England by virtue of his British passport before  
20 the Independence of Cyprus and at the time of applicant's birth he was residing in England with his wife. Following the enactment of section 2 of the National Guard (Amendment) Law, 1978 (Law 22/78) applicant was considered as liable for service in the National Guard, and having been instructed by respondent to enlist in the National Guard he did so on July 14, 1979; and challenged his enlistment by means of this recourse.

*Held*, that section 2(b) of the National Guard (Amendment) Law, 1978 (Law 22/78) under which the applicant was called for military service is contrary to the provisions of Article 198 of the Constitution and Annex "D" to the Treaty of Establishment, which has been incorporated in Article 198 and the Republic of Cyprus Citizenship Law 1967 (Law 43/67); that in consequence the military conscription imposed upon the applicant and his detention in the National Guard is contrary to the Constitution; that, therefore, the applicant is entitled to the declarations sought in his present recourse and such declarations are made accordingly (*Pieri v. Republic*, (1979) 3 C.L.R. 391, *Drousiotis v. Republic* (1980) 3 C.L.R. 563 and *Georghiou and Others v. Republic* (1980) 3 C.L.R. 585 adopted).

*Declarations accordingly.*

Cases referred to:

*Pieris v. Republic* (1979) 3 C.L.R. 391;

*Drousiotis v. Republic* (1980) 3 C.L.R. 563;

*Georghiou and Others v. Republic* (1980) 3 C.L.R. 585.

#### Recourse.

Recourse against the refusal of the respondent to exempt applicant from his liability to serve in the National Guard.

*P. Schizas*, for the applicant.

*K. Michaelides*, for the respondent.

*Cur. adv. vult.*

SAVVIDES J. read the following judgment. The applicant in this recourse claims for—

- (a) A declaration of the Court that the enlistment of the applicant in the National Guard by the respondent is contrary to law and the Constitution.
- (b) A declaration that the continuing detention of the applicant in the National Guard has always been and will, till his release, be void, illegal and unconstitutional.
- (c) That the applicant is not and has never been subject to military conscription.
- (d) A declaration that the applicant is entitled to be released from the National Guard.

On 15.8.79 an order was published in the Cyprus Gazette whereby a class of persons was invited to enlist in the National Guard, including the class of the applicant.

5 The applicant is a national of the United Kingdom and was born in London on the 2nd March, 1962 and is the holder of a British passport. His father was born in Pedhoulas on the 2nd June, 1927 and he left for England by virtue of his British passport before the Independence of Cyprus and at the time of applicant's birth he was residing in England with his wife. Whilst  
10 applicant was a student of the Gymnasium he was ordered by the Police to attend the Recruiting Centre of the National Guard where he was asked to fill in a form for enlistment in the National Guard and he was ordered to attend the National Guard for enlistment in July, 1979. The applicant by virtue of the provisions of the said order and the instructions given to him, he  
15 enlisted in the National Guard on the 14th July, 1979.

The legal grounds on which the application is based as set out in the recourse, are as follows:

(1) The order published in the Cyprus Gazette dated  
20 18.5.1979 under Notification No. 524 whereby the applicant was called to enlist in the National Guard is, as far as the applicant is concerned, contrary to the Constitution of Cyprus and Annex D of the Constitution and is void and without any effect.

25 (2) That the applicant was ordered to enlist in the National Guard without his free will and he is detained there without his will and there is no legal justification for such service as the applicant is not a citizen of the Republic and not subject to military service.

30 (3) The continuing detention of the applicant in the National Guard, his submission to the discipline of the Force and the deprivation of his liberty, the restriction in his movements, the restriction to carry on a profession and the interference with his private life, are collectively and separately for so long  
35 as they continue, a continuing violation of the Constitution, and in particular, of Articles 10(1), 11(1)(2), 13(1), 15(1)(2) and 25(1) and as a result thereof, the Supreme Court by virtue of Article 35 is the competent organ to safeguard the said liber-

ties of the applicant which are guaranteed by the Constitution and to direct his immediate release.

(4) The applicant is not a citizen of the Republic and he has no obligation by the National Guard Law, as amended, nor by any other law to enlist or serve in the National Guard. 5

The application was opposed on the following grounds:

(1) That the applicant does not satisfy the provisions of Article 146(2) of the Constitution, in that he has no legitimate interest, in view of the fact that he accepted the decision without any reservation. 10

(2) That the decision is lawful and is based on the National Guard Laws, 1964-1969.

The facts set out in support of the opposition, are to the effect that the applicant on his application, he volunteered to enlist in the National Guard together with Class 1979 B and as a result, he was asked to sign an application form for enlistment which he filled in and submitted to the National Guard. 15

Counsel for applicant in arguing his case, submitted, in addition to the legal grounds set out in the application and in reply to the legal grounds set out in the opposition, that the applicant was a minor and in consequence he was not in a position to bind himself and any documents which he signed were thrust upon him and he had to sign them in full ignorance of his legal position. 20

Three witnesses gave evidence in this case for the applicant, including the applicant himself. In his evidence the applicant related as to the circumstances leading to his enlistment. He said that he was informed by his mother that the Police were looking for him and as a result he visited the Central Police Station in Limassol where he was asked to give particulars about himself for enlistment in the National Guard and that he was told to enlist at the next enlistment of recruits which was in July, 1979. Following such instructions, on the 10th July he attended the Recruit Centre in Limassol, where he was asked to sign a document which had already been filled in, that he was enlisting as a volunteer. 25 30 35

The other witness was the applicant's father whose evidence

is to the effect that he had left Cyprus by virtue of a British passport on 13.10.1959 and that he was living in England till 18.2.1963 when he returned to Cyprus. He gave particulars about the applicant's birth in England and that the applicant  
5 is the holder of a British passport. The mother of the applicant gave also evidence as witness No. 3, to the effect that during the school-year 1979 the Police of their quarter called at their house and asked information about applicant and asked her to send him to the Police Station to give the necessary particulars  
10 concerning his enlistment in the National Guard and she, as a result, asked the applicant, after returning from school on that day, to go to the Police Station for such purpose.

In arguing the case before the Court, counsel for the applicant contended that the applicant relies mainly on two grounds:  
15 The first one is that being a person of a foreign nationality, he cannot be forced to consent to serve in the National Guard and he could not be subject to the National Guard Law which is applicable only to citizens of the Republic, as expressly stated in the Law. He further argued that the applicant at  
20 the material time being only 17 years of age, was an infant and subject to the custody of his father under the Guardianship of Infants and Prodigals Law, Cap. 277 and he could not enter into an agreement which is a prejudicial one, without the consent of his guardian.

25 Counsel for the respondent in arguing the case for the respondent, submitted that the question of consent and age was not material in this case, as any person over the age of 17 is bound to do his military service, under the respective orders issued under the National Guard Laws. Therefore, the question of  
30 free consent does not come into play in the present case, because once the applicant was under the law liable to do his military service, he had to do so irrespective of the existence of consent or not. The issue was, therefore, restricted as to whether the applicant due to his British nationality was subject to military  
35 service, under the provisions of Law 20/64 as amended by Law 22/78.

Counsel for respondent argued that the *Pieris* case on which applicant sought to rely (*Pieris v. The Republic* (1979) 3 C.L.R. p. 391), was wrongly decided, as Law 22/78 does not intend to  
40 bestow Cyprus citizenship on the applicant but was only exten-

ding obligation for service in the National Guard of certain persons whose origin in the male line was from Cypriot parents. Counsel submitted that in the present case there are two misconceptions. The first misconception is that Law 22/78 is a Law of Citizenship, whereas such Law is only a law to regulate the obligation of certain persons to serve in the National Guard and the second misconception that it incorporates provisions which are contrary to Annex 'D' of the Constitution. Counsel contended that such Law does not incorporate provisions contrary to Annex 'D' but only incorporates provisions additional to those in Annex 'D' which are not in contradiction to the provisions of Annex 'D'. He further submitted that there is no provision in the Constitution as to who is obliged to do his military service in Cyprus and there is no such provision in the Treaty of Establishment; the only provision that exists in the Constitution, is provision against forced or compulsory labour under Article 10(2) of the Constitution. The definition of "forced" or "compulsory labour" does not include, under Article 10(3)(b) of the Constitution, any service of a military character. Furthermore, under Article 129(1) of the Constitution, provision is made for the maintenance of an army which, though limited in number, may, under Article 129(2), be extended by compulsory military service which can be imposed by common agreement of the President and the Vice-President of the Republic. Now, by the Law of Necessity, the right of the Cyprus Government to enact National Guard Laws without the concurrence of the Vice-President cannot be disputed and was never disputed. Therefore, the Constitution itself gives right to the Government of Cyprus to make a National Guard Law.

Dealing with the provisions of the National Guard Law 20/64, he agreed that under section 4 there is provision to the effect that only citizens of the Republic are bound to do their military service but there was no definition in the said law, as to who were to be deemed citizens of the Republic for the purposes of such law and the enactment of Law 22/78 for the first time defined, in a more concrete way, the persons who were obliged to do their military service which, read in conjunction with section 4, could only be understood that all persons set out therein by the amended law were bound to military conscription without bestowing upon them the citizenship of Cyprus for the purposes of the Constitution. Though disagreeing with

the decision in *Pieris* case he submitted that *Pieris* case is distinguishable, in view of the fact that the parents of the applicant in that case had emigrated to Pakistan for a great number of years and the question was that *Pieris* lived there for a considerable number of years and then he came to Cyprus.

In concluding, he said that the applicant in any case falls within the category of alien Cypriots under section 2 of Law 52/69 entitled to acquire property in Cyprus which is an advantage bestowed on him as against all other aliens and that he was entitled to be a Cypriot citizen had he registered himself at the Cyprus Consulate within two years. He still, upon application, can acquire the Cyprus citizenship. So, the case of the applicant is not the case of an ordinary alien but of a person who is a descendant of a Cypriot citizen who happened to be born abroad who lived all the time here with the exception of the short period he was in England, and who could enjoy the privileges of an alien Cypriot something which citizens of other nationalities could not enjoy. In view of this privileged situation of the applicant this State thought fit that this category of persons had also to do their military service in the State where they reside permanently and enjoy the advantages and benefits granted to them under the Law. He concluded that even under the Public International Law, under certain circumstances, aliens are liable to do their military service in the country where they reside and the protection of which they enjoy.

It is not in dispute that the applicant is a British subject, holder of a British passport and his birth was not registered in the appropriate way as provided by section 4(2)(b) of the Republic of Cyprus Citizenship Law (Law 43/67) within two years from his birth.

In view of the fact that the question of consent has not been insisted upon by either party in the course of their argument as depriving the applicant from a legitimate interest in this case and the case was argued on the question of eligibility of the applicant to serve in the National Guard, I find it unnecessary to deal with the question of consent in the present case.

The issue as to whether a foreign national falling within the provision of section 2(b) of the National Guard (Amendment) Law, 1978 (Law 22/78) is bound to serve in the National Guard and whether the said provision is contrary to the Constitution,

has been considered in the case of *Pieri v. The Republic (supra)*, where it was held that such provision is contrary to Article 198 of the Constitution and Annex 'D' which was incorporated in Article 198 and the Republic of Cyprus Citizenship Law, 1967 (Law 43/67). 5

The same view was also expressed by me in the case of *Drousiotis v. The Republic* (1980) 3 C.L.R. 563 and *Georghiou and others v. The Republic* (1980) 3 C.L.R. 585.

I find it unnecessary to repeat once more the exposition of the law concerning the acquisition of citizenship and the position of aliens under the Public International Law in so far as military conscription is concerned and the respective provisions in our Constitution and legislation touching these matters, as I have dealt with them at length in *Drousiotis v. The Republic (supra)* which exposition and reasons for reaching such decision, are adopted mutatis mutandis for the purposes of the present case and should be deemed to form part of this judgment. 10 15

In the result, I find that section 2(b) of the National Guard (Amendment) Law, 1978 (Law 22/78) under which the applicant was called for military service is contrary to the provisions of Article 198 of the Constitution and Annex 'D' which has been incorporated in Article 198 and the Republic of Cyprus Citizenship Law, 1967 (Law 43/67) and in consequence the military conscription imposed upon the applicant and his detention in the National Guard is contrary to the Constitution and in consequence the applicant is entitled to the declarations sought in his present recourse and I make such declarations accordingly. 20 25

In the circumstances of the present case, I make no order for costs. 30

*Sub judice decision annulled. No order as to costs.*