1982 November 13

[TRIANTAFYLLIDES, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

MARINOS PIERI,

Applicant,

v.

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

Respondent.

(*Case No.* 279/82).

Administrative Law—Administrative acts or decisions—Executory act—Only an executory act can be made the subject of a recourse—A confirmatory act is not executory—Call-up for service in the National Guard—No recourse against such call within the time prescribed by Article 146.3 *of the Constitution—Fact that there was later granted a deferment of enlistment did not deprive original call of its executory character—Subsequent call-up confirmatory and informative acts—And cannot be made the subject of a recourse—Whether fact that failure to comply with such call-up may entail criminal responsibility renders such call-up an executory act.*

Res judicata—Judgment in a recourse for annulment—Creates a res judicata as regards the validity of the particular act challenged by the recourse.

The applicant was first called up for Military Service, by virtue of the provisions of section 2 of the National Guard (Amendment) Law, 1978 (Law 22/78) and he challenged his call-up by means of a recourse. In a first instance judgment of this Court it was held that he was not bound to do military service because section 2 of Law 22/78 was unconstitutional. No appeal was filed by the Republic against such judgment and the applicant, who had in the meantime served for four months in the ranks of the National Guard, was demobilized.

Subsequently, on 2nd June 1981, a Full Bench of the Supreme Court, in allowing appeals of the Republic against first instance judgments of another Judge of the Court in recourses of applicants other than the applicant in the present recourse, held that section 2 of Law 22/78 was not unconstitutionally or otherwise invalidly enacted (see *The Republic of Cyprus v. Droushiotis* (1981) 3 C.L.R. 623).

As a result of the judgment in the *Droushiotis* case, supra, instructions were given by the appropriate authorities for the re-enlistment, in order to complete the periods of their military service, of all those, including the applicant who was called-up for military service on the 19th October 1981.

After some correspondence between the respondent Minister and counsel for the applicant his re-enlistment was deferred "for the last time" up to 30th June 1982.

Eventually, in spite of further representations which were made by counsel for the applicant, the respondent Minister persisted in his view that the applicant was bound to re-enlist in the National Guard and applicant's counsel was informed accordingly by a letter dated 21st June 1982. Also, on 16th June 1982 the applicant was called up once again and was instructed to enlist on 14th July 1982.

Upon a recourse by the applicant against his call-up for military service which was filed on 8.7.72 counsel for the respondent contended that the only executory act in the present case is the call-up dated 19th October 1981 and that the subsequent letter to applicants' counsel dated 21st June, 1982 and the further call-up of the 16th June, 1982 are acts of merely confirmatory or informative nature and cannot be challenged by means of the recourse under Article 146 of the Constitution.

Held, that only an executory act or decision can be made the subject matter of an administrative recourse under Article 146; that a confirmatory or informative act is not executory; that the call-up of 19th October 1981 is, indeed, an act of executory nature in respect of which, however, the present recourse is out of time, under Article 146.3 of the Constitution, because it was filed only on 8th July 1982; that the fact that, there was later granted a deferment of the enlistment of the applicant did not deprive the call-up of 19th October 1981 of its executory character, because such deferment merely

postponed the date on which the applicant had to comply with such call-up; that the letter to counsel for the applicant dated 21st June 1982 did not convey a new executory decision, and so, it is only confirmatory and informative, reiterating the adherence of the administration to its already adopted stand; that likewise, the call-up of 16th June 1982, is, also, of a confirmatory nature and the mere fact that failure to comply with such call-up may entail criminal responsibility on the part of the applicant does not render it, in the circumstances of this case, an executory act, because his criminal responsibility stems from the fact that he had refused to enlist as he had been required to do by the previous call-up of 19th October 1981; thus the present recourse could not be made, under Article 146 of the Constitution, in respect of either the contents of the aforesaid letter of 21st June 1982, or the call-up of 16th June 1982.

Held, further, that a final judgment of an administrative Court creates a res judicata as regards the validity of the particular act challenged by the recourse; that the judgment in the earlier successful recourse of the applicant created a res judicata only as regards the particular administrative act which was challenged in that case; that, however, after the legal basis of such judgment ceased to be operative in view of the judgment on appeal by a Full Bench of this Court in the *Droushiotis* case it was open to the appropriate authorities to call upon the applicant to enlist once again and such call-up was new administrative action justified by the effect of the relevant legislation as elucidated in the *Droushiotis* case.

Application dismissed.

Cases referred to:

Pieri v. Republic (1979) 3 C.L.R. 91;

Republic v. Droushiotis (1981) 3 C.L.R. 623;

Pieri v. Republic (1978) 3 C.L.R. 356 at pp.363, 364;

Dr. G. N. Marangos Ltd. v. Municipality of Famagusta (1979) 3 C.L.R. 73 at pp. 76, 77;

Poulias v. Republic (1982) 3 C.L.R. 165 at pp. 172, 173.

Recourse.

Recourse against the decision of the respondent whereby the applicant was required to re-enlist in the National Guard for completion of the period of his military service.

L. N. Clerides, for the applicant.

M. Florentzos, Counsel of the Republic, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment. By means of the amended, by consent, motion for relief in the present recourse the applicant seeks, in effect, the annulment of the call-up by means of which he was required to re-enlist in the National Guard for completion of the period of his military service.

The salient facts of this case are as follows:

The applicant was born on 3rd January 1961 in what was then East Pakistan and where his parents were then living. The applicant is the holder of a British passport.

His father, Andreas Pieris, was born in Cyprus on 28th April 1929 and at that time his parents were ordinarily residing in Cyprus.

Ever since 1971 the applicant and his family have been residing in Cyprus.

From a certificate of the Migration Officer, dated 11th July 1978, it appears that, in accordance with the provisions of the Republic of Cyprus Citizenship Law, 1967 (Law 43/67) and of Annex D to the Treaty of Establishment of the Republic of Cyprus, the applicant is not considered to be a citizen of the Republic of Cyprus.

The applicant was called up for enlistment in the National Guard in order to do his military service because by virtue of section 2 of the National Guard (Amendment) Law, 1978 (Law 22/78) he was treated, for the purposes of the National Guard legislation, as a "citizen" of the Republic of Cyprus, inasmuch as he is a person of Cypriot origin descended in the male line from a person born in Cyprus.

In a first instance judgment, determining on 21st March 1979 a recourse (No. 494/78) of the applicant against his call-up, a Judge of our Supreme Court (see *Pieris v. The Republic*, (1979) 3 C.L.R. 91), has held that the applicant was not bound to do military service in the National Guard because section 2 of Law 22/78, above, was unconstitutional. No appeal was filed by the Republic against such judgment and the applicant, who had in the meantime served for four months in the ranks of the National Guard, was demobilized.

Subsequently, on 2nd June 1981, a Full Bench of the Supreme Court, in allowing appeals of the Republic against first instance judgments of another Judge of the Court in recourses of applicants other than the applicant in the present recourse, held that section 2 of Law 22/78 was not unconstitutionally or otherwise invalidly enacted (see, *The Republic of Cyprus v. Droushiotis*, (1981) 3 C.L.R. 623).

As a result of the judgment in the *Droushiotis* case, supra, instructions were given by the appropriate authorities for the re-enlistment, in order to complete the periods of their military service, of all those, including the applicant, who had been demobilized as a result of the earlier judgment in the *Pieris* case, supra.

After some correspondence between the respondent Minister and counsel for the applicant, to which I need not refer in detail, and, also, subsequent to a call-up for enlistment which was sent to the applicant on 19th October 1981, his re-enlistment was deferred "for the last time" up to 30th June 1982 (see the letter of the Ministry of Defence dated 27th November 1981).

Eventually, in spite of further representations which were made by counsel for the applicant, the respondent Minister persisted in his view that the applicant was bound to re-enlist in the National Guard and applicant's counsel was informed accordingly by a letter dated 21st June 1982. Also, on 16th June 1982 the applicant was called up once again and was instructed to enlist on 14th July 1982; and I may observe, at this stage, that I find no merit in the contention of counsel for the applicant that (assuming that they could be challenged by this recourse) the decision of the respondent Minister which was communicated by means of the letter dated 21st June 1982 and the call-up of

16th June 1982 should be annulled on the ground that they suffer from lack of due reasoning; ample and adequate reasoning for both of them is to be found in the relevant administrative records which have to be read together with them.

Counsel for the respondent has submitted that the only executory act in the present case is the aforementioned call-up dated 19th October 1981 and that the subsequent letter to applicant's counsel dated 21st June 1982 and the further call-up of 16th June 1982 are acts of merely confirmatory or informative nature and cannot be challenged by means of the present recourse under Article 146 of the Constitution.

As regards the cardinal principle that only an executory act or decision can be made the subject-matter of an administrative recourse under Article 146 useful reference may be made, inter alia, to *Pieri v. The Republic*, (1978) 3 C.L.R. 356, 363, 364; also, in relation to the proposition that a confirmatory or informative act is not executory it is pertinent to refer, respectively, to *Dr. G.N. Marangos Ltd. v. The Municipality of Famagusta*, (1979) 3 C.L.R. 73, 76, 77, and *Poulias v. The Republic*, (1982) 3 C.L.R. 165, 172, 173.

In my opinion the call-up of 19th October 1981 is, indeed, an act of executory nature in respect of which, however, the present recourse is out of time, under Article 146.3 of the Constitution, because it was filed only on 8th July 1982.

The fact that, as already stated, there was later granted a deferment of the enlistment of the applicant up to 30th June 1982 did not deprive the call-up of 19th October 1981 of its executory character, because such deferment merely postponed the date on which the applicant had to comply with such call-up.

The letter to counsel of the applicant dated 21st June 1982, did not convey a new executory decision, and, so, it is only confirmatory and informative, reiterating the adherence of the administration to its already adopted stand.

Likewise, the call-up of 16th June 1982 is, also, of a confirmatory nature and the mere fact that failure to comply with such call-up may entail criminal responsibility on the part of the applicant does not render it, in the circumstances of this case, an executory act, because his criminal responsibility stems from the

fact that he had refused to enlist as he had been required to do by the previous call-up of 19th October 1981.

Thus the present recourse could not be made, under Article 146 of the Constitution, in respect of either the contents of the aforesaid letter of 21st June 1982 or the call-up of 16th June 1982; nor could it be said that there exists an omission to examine the requests of the applicant for further suspension of the date on which he had to enlist, because it is abundantly clear that from the failure to reply to any such a request there was to be implied a refusal to accede to it for reasons already known to the applicant. Consequently, this recourse has to be dismissed.

In any event, even if it could, notwithstanding all the foregoing, be found that this recourse could have been proceeded with, I should state that it cannot be held that because the Republic did not appeal against the aforesaid first instance judgment in the earlier successful recourse of the applicant (see the *Pieri* case, supra), such judgment constitutes a res judicata entitling the applicant to avoid the completion of his military service in accordance with the relevant legislative provisions the effect of which was finally expounded subsequently, on appeal, in the *Droushiotis* case, supra.

A final judgment of an administrative Court creates a res judicata as regards the validity of the particuar act challenged by a recourse (and see, in this connection, inter alia, Kyriacopoulos on Greek Administrative Law – Κυριακοπούλου Ἑλληνικὸν Διοικητικὸν Δίκαιον – 4th ed., vol. C, pp. 60, 61, 156-159, and Dendias on Administrative Law – Δενδία, Διοικητικὸν Δίκαιον – 2nd ed., vol. C., pp. 364-367).

The judgment in the earlier successful recourse of the applicant (see the *Pieri* case, supra) created a res judicata only as regards the particular administrative act which was challenged in that case. However, after the legal basis of such judgment ceased to be operative in view of the judgment on appeal by a Full Bench of this Court in the *Droushiotis* case, supra, it was open to the appropriate authorities to call upon the applicant to enlist once again and such call-up was new administrative action justified by the effect of the relevant legislation as elucidated in the *Droushiotis* case, supra, (see, in this respect, inter alia, Kyriacopoullos, supra, at p. 61, and Dendias, supra, at p. 365).

For all the above reasons the present recourse fails and has to be dismissed; but rather reluctantly, indeed, I have decided to make no order as to its costs against the applicant.

Recourse dismissed with no order as to costs.