1983 June 23

[TRIANTAFYLLIDES, P., HADJIANASTASSIOU, A. LOIZOU, LORIS, STYLIANIDES, PIKIS, JJ.]

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTER OF INTERIOR

Appellant.

v.

LEFKIOS I. IOANNIDES,

Respondent.

(*Revesional Jurisdiction Appeal No.* 301).

National Guard—Release from, due to special circumstances—Section 4(3) *and* (4) *of the National Guard Laws— Whether Minister bound to refer application for release to the advisory Committee set up by section* 4(4) *or whether it was within his discretion to do so.*

Statutes—Proviso—Function of.

The respondent, who was born on 25.11.1941 was on 6.7.1973 exempted from service in the National Guard by virtue of the provisions of s.4(3)(c) of the National Guard Law as permanently residing out of Cyprus. When the circumstances of his exemption ceased to exist, he enlisted in the National Guard on 11.7.1978 for a 12 month service. On 27.12.1978 he submitted an application to the Minister of Defence through the Commander of the National Guard praying for his release from the Force on the ground of, inter alia, special circumstances under s.9(1) of the National Guard Laws.

On 26.1.1979 he submitted another document entitled "Υπεύθυνος Δήλωσις Οικογενειακής Καταστάσεως" (Responsible Statement of Family Situation).

The facts relevant to the circumstances on which he based his such application were set out and specified in his application and the said statement. The Commander of the Force sum-

marized the facts as stated above and commented that they do not constitute special circumstances. The file was transmitted to the Minister who decided to reject the application, and his decision was communicated to the respondent by letter dated 7.2.1979.

Upon a recourse by the respondent against the rejection of his application the trial Judge decided that the Minister had a duty to refer the case for consideration and inquiry to the Advisory Committee established under s.4(4) of the Law and obtain its conclusions before taking his decision, and as the Commander of the National Guard was not the proper organ to advise the Minister on the matter, the proper procedure was not followed, the exercise of the discretion of the Minister was defective and the subject decision was annulled.

Upon appeal by the Minister the sole question for determination was whether the Minister was bound to refer similar cases to the Advisory Committee or was it within his discretion to do so or not.

The relevant statutory provisions were section 4(4) of the National Guard Law, 1964 (as introduced by means of Law 14/66) and the proviso thereto (as added by means of section 2(d) of Law 33/76))

Held, after dealing with the function of a proviso, that the proviso to section 4(4) of the Law does no more than extend the competence of the Advisory Committee in cases other than those relating to section 4(3); that the Minister has to refer any matter in relation to sub-section 4(3) to the Advisory Committee but he has no duty to refer to this Consultative body the ascertainment of facts in all other categories enumerated therein; that the Minister has a discretion to refer to the Advisory Committee for the ascertainment of the true facts of other cases; that in the present case, which is outside the ambit of section 4(3) the Minister had a discretion whether to refer it for ascertainment of the true facts to the Advisory Committee or not; that all the facts were set out in the application of 27.12.1978 and in the "responsible statement" and the report of the Commander of the Force contained no additional facts; that the ultimate decision was within the powers of the Minister who determined the application upon the factual situation placed before him

by the respondent himself; that the Minister could in Law dismiss the application; accordingly the appeal must be allowed.

Appeal allowed.

Cases referred to:

Mullins v. *Surrey Treasurer* [1880] 5 Q.B.D. 170 at p. 173;

Duncan v. *Dixon* [1890] 44 Ch. D. 211 at p. 215;

Torondo Corporation v. *Attorney-General of Canada* [1946] A.C. 32 at p. 37;

Rhondda U.D.C. v. *Taff Vale Railway Co.* [1909] A.C. 253 at p. 258;

Commissioner of Stamp Duties v. *Atwill* [1973] 1 All E.R. 576 at p. 579.

Appeal.

Appeal against the judgment of a Judge of the Supreme Court of Cyprus (Savvides, J.) given on the 9th December, 1982 (Revisional Jurisdiction Case No. 95/79)* whereby the decision of the Minister of Interior not to discharge the respondent from the National Guard was annulled.

Cl. Antoniades, Senior Counsel of the Republic, for the appellant.

L.N. Clerides, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES, P.: The judgment of the majority of the Court will be delivered by Mr. Justice Stylianides. Mr. Justice Pikis will deliver a dissenting judgment.

STYLIANIDES, J.: This appeal is directed against the judgment of a Judge of this Court whereby the decision of the Minister of the Interior not to discharge the respondent from the National Guard was annulled.

The respondent was born on 25.11.1941 at Kyperounda village and left this country in 1961. He stayed abroad from 1961 until 2.4.1978. He acquired various professional qualifications in the United Kingdom and worked in some African and Arab countries.

On 6.7.1973, by virtue of the provisions of s.4(3)(γ) of the

* Reported in (1983) 3 C.L.R. 170.

National Guard Law, he was exempted from service in the National Guard as permanently residing out of Cyprus; when the circumstances of his exemption ceased to exist, he was obliged to enlist and serve in the National Guard—(section 4(5)). He joined the National Guard on 11.7.1978 for a 12-month service, having regard to the date of his birth and the regulations in force at the time his age-group was originally called up.

The respondent on 27.12.1978 submitted an application to the Minister of Defence through the Commander of the National Guard praying for his release from the Force on the ground of, inter alia, special circumstances under s.9(1) of the National Guard Laws.

On 26.1.1979 he submitted another document entitled "Υπεύθυνος Δήλωσις Οικογενειακής Καταστάσεως" (Responsible Statement of Family Situation).

The facts relevant to the circumstances on which he based his such application were thus set out and specified in his application and the said statement. The Commander of the Force summarized the facts as stated above and commented that they do not constitute special circumstances. The file was transmitted to the Minister who decided to reject the application, and this decision was communicated to the respondent by letter dated 7.2.1979.

The learned trial Judge decided that the Minister had a duty to refer the case for consideration and inquiry to the Advisory Committee established under s.4(4) of the Law and obtain its conclusions before taking his decision, and as the Commander of the National Guard was not the proper organ to advise the Minister on the matter, the proper procedure was not followed, the exercice of the discretion of the Minister was defective and the subject decision was annulled.

The question, therefore, that poses for determination is whether the Minister is bound to refer similar cases to the Advisory Committee or is it within his discretion to do so or not. The answer rests on the interpretation of the relevant statutory provision.

Section 4 when originally enacted consisted of three sub-

sections. Subsection (3) enumerated the categories of persons exempted from the obligation of service in the National Guard. Law No. 14 of 1966 added subsection (4) which reads as follows:-

"(4) Ὁ Ὑπουργὸς ἀποφασίζει ἐπὶ παντὸς θέματος ἀναφυομένου ἐν σχέσει μὲ τὴν ἐξαίρεσιν στρατευσίμων ἐπὶ τῇ βάσει τοῦ ἐδαφίου (3).

Πρὸς τὸν σκοπὸν τοῦτον ὁ Ὑπουργὸς συνιστᾷ συμβουλευτικὴν ἐπιτροπὴν ἀποτελουμένην ἐκ τῶν ὑπ' αὐτοῦ διοριζομένων μελῶν καὶ προεδρευομένην ὑπὸ προσώπου ἔχοντος νομικὴν κατάρτησιν ὑποδεικνυομένου ὑπὸ τοῦ Ὑπουργοῦ πρὸς ἐξακρίβωσιν τῶν πραγματικῶν γεγονότων ἑκάστης περιπτώσεως καὶ ὑποβολὴν πρὸς αὐτὸν τοῦ πορίσματος τῆς ὑπὸ τῆς ἐπιτροπῆς γενομένης ἐρεύνης".

("(4) The Minister decides on any matter arising with regard to the exemption of conscripts on the basis of sub-section (3).

For this purpose the Minister sets up an advisory committee composed of members appointed by him and presided over by a person legally qualified indicated by the Minister for the ascertainment of the true facts of each case and the submission to him of the findings of the investigation carried out by the committee").

By section (2)(d) of Law No. 33 of 1976 subsection (4) was amended by the addition of a proviso that reads:-

"Νοεῖται ὅτι πᾶσα οὕτω συσταθεῖσα συμβουλευτικὴ ἐπιτροπὴ θὰ προβαίνῃ εἰς ἐξακρίβωσιν τῶν πραγματικῶν γεγονότων ἑκάστης περιπτώσεως παραπεμπομένης εἰς αὐτὴν ὑπὸ τοῦ Ὑπουργοῦ καὶ εἰς ὑποβολὴν πρὸς αὐτὸν τοῦ πορίσματος τῆς ὑπ' αὐτῆς γενομένης ἐρεύνης ἐν σχέσει πρὸς πᾶν θέμα ἐπὶ τοῦ ὁποίου ὁ Ὑπουργὸς ἀποφασίζει δυνάμει οἱασδήποτε διατάξεως τοῦ παρόντος Νόμου, ἢ οἱασδήποτε ἀποφάσεως τοῦ Ὑπουργικοῦ Συμβουλίου ἐκδοθείσης ἢ ἐκδιδομένης, ἢ οἱωνδήποτε Κανονισμῶν ἐκδοθέντων ἢ ἐκδιδομένων ἐπὶ τῇ βάσει τοῦ παρόντος Νόμου".

("Provided that every advisory committee set up shall verify the true facts of every case referred to it by the Minister and shall submit to him thereafter its findings

emerging from the inquiry into every subject entrusted to the Minister for decision under any provision of the present law, or by virtue of any decision of the Council of Ministers, issued or to be issued, or under any regulations issued or to be issued under the present law").

A true proviso is one limiting or qualifying what precedes it. A proviso excepts out of a previous enacting part of a statute something which but for the proviso would have been within the enacting part - (*Mullins v. Surrey Treasurer*, [1880] 5 Q.B.D. 170, 173). The effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the proceeding portion of the enactment, or to qualify something enacted therein, which but for the proviso would have been within it; and such a proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect - (*Duncan v. Dixon*, [1890] 44 Ch. D. 211, 215; *Toronto Corporation v. Attorney-General of Canada*, [1946] A.C. 32, 37). However, while in many cases that is the function of a proviso, it is the substance and content of the enactment, not its form, which has to be considered, and that which is expressed to be a proviso may itself add to and not merely limit or qualify that which precedes it - (*Rhondda U.D.C. v. Taff Vale Railway Co.*, [1909] A.C. 253, 258 H.L.; *Commissioner of Stamp Duties v. Atwill*, [1973] 1 All E.R. 576, 579, per Viscount Dilhorne).

In the present case the addition made by the enactment of 1976 is framed as a proviso upon the preceding part of the subsection but it is also true that though in form of a proviso, it is in substance a fresh enactment, adding to and not merely qualifying that which was before.

The Minister is invested with power to decide on any matter that springs or arises with regard to exemption from service on the basis of subsection (3). For that purpose the Minister establishes an Advisory Committee for the ascertainment of the true facts of each case and the submission of the conclusions thereof to the Minister. The "proviso", however, is differently worded and whereas the first part refers specifically to the exemptions under subsection (3) of section 4, the proviso introduced in 1976 refers to all other cases under the Law and the regulations either within the power of the Minister or the Council of Ministers.

In construing this part, we have to consider the section as a whole but also the scope of the new enactment and the intention of the maker as it emanates from the history of the Law and the language of its enacting part.

Having considered this section as a whole, the language of the first part thereof and the particular proviso, we are of the view that this "proviso" does no more than extend the competence of the Advisory Committee in cases other than those relating to subsection (3). The Minister has to refer any matter in relation to subsection (3) to the Advisory Committee but he has no duty to refer to this consultative body the ascertainment of facts in all other categories enumerated therein. The Minister has a discretion to refer to the Advisory Committee for the ascertainment of the true facts of other cases. A comparison of the language of the two parts of the section leads to the inescapable conclusion that the facts of cases falling within subsection (3) have to be ascertained by the Committee but the ascertainment of facts in all other cases has to be made by the Committee *if* they are referred to it by the Minister.

In the present case, which is outside the ambit of subsection (3), the Minister had a discretion whether to refer it for ascertainment of the true facts to the advisory Committee or not. The facts were set out in the application of 27.12.78 and in the "Responsible Statement" of the financial position and earnings of the parental family of the respondent. The report of the Commander of the Force contained no additional facts. The Minister determined the application upon the factual situation placed before him by the respondent himself.

No doubt the Minister in his discretion may, if he does not intend to act on the facts presented to him, either refer the case to the Advisory Committee for the ascertainment of the true situation or he may arrive at the true facts in any other way he may deem fit. It is obvious that in the circumstances of this case the Minister felt that there was no need to proceed further with the ascertainment of the factual situation or the verification thereof, and exercised his discretion accordingly.

The Minister, having regard to the facts set out in the documents submitted by the respondent, dismissed the application. Even if it is assumed that he relied on opinion expressed by the

Commander of the Force - something which cannot be deduced from the material before the Court - that the grounds relied upon by the respondent did not constitute special circumstances, yet this would not vitiate the sub judice decision. The ultimate decision was his and he dismissed the application which he could in law do.

For the above reasons this appeal is allowed with no order as to costs.

PIKIS J.: The interpretation of s.4(4) of the National Guard Laws 1964 - 1981 and that of its two provisos, as well as their application to the facts of the case, are the subjects upon which attention must be focused in order to decide this appeal. Section 4 in its original state, provided for exemption from the National Guard of certain categories of citizens. The law was repeatedly amended. Of direct relevance are the amendments introduced by s.2 of Law 14/66 and s.2(d) of Law 33/76. By these amendments the law was fledged in its present form, embodied in s.4(4) and the two provisos thereto. It provided machinery for the examination of applications for exemption. Responsibility for decision, whether an applicant was entitled to exemption, rested with the Minister. Also, he was invested with power to resolve any matters arising in connection with an application for exemption (ἐπὶ παντὸς θέματος ἀναφυομένου). This power was not absolute but subject to an important qualification: By the first proviso to s.4(4) the Minister was required to set up an advisory committee to be presided over by a legally qualified chairman for the verification of the true facts of each case, to be incorporated in a submission to the Minister.

The crucial issue in these proceedings is the construction of the word "ἀναφυομένου" in the context of s.4(4) of the law. Literally the word connotes something springing-up and in common parlance, a matter arising. Something in relation to a fact arises whenever its existence, significance or implications are in issue. Therefore, a matter arises whenever need calls for its ascertainment or ponderation. As to the imperative duty of the Minister to set up the aforementioned fact-finding body, there is no doubt. The proviso is cast in that perspective and the word συνιστᾶ (constitutes or sets up), rules out every doubt. To my mind, equally clear is the duty of the

Minister to refer to this consultative body the ascertainment and assessment of every fact that must be ascertained or assessed in relation to the exercise of the powers of the Minister under s.4(4). Reading the two together, i.e. s.4(4) and its first proviso, the inescapable conclusion is that the Minister is under a duty to refer to the advisory committee every factual matter, the ascertainment or assessment of which is necessary for the exercise of the Ministerial power. Where the Minister accepts the facts relied upon in the application, nothing factual arises for determination. All the Minister has to do, is to exercise his discretion in relation to the accepted facts. But whenever need arises for their ascertainment or assessment, he is dutybound to refer, in the first place, the factual issue to the advisory committee for its findings, notwithstanding the fact that they are not binding upon him.

The interpretation of the second proviso was the subject of controversy. Conflicting submissions were made with regard to its aims and accomplishments. To my comprehension it presents no special difficulties, either respecting its interpretation or its objects. It reads:

"Νοείται ότι πάσα ούτω συσταθείσα συμβουλευτική επιτροπή θά προβαίνη είς έξακρίβωσιν τών πραγματικών γεγονότων έκάστης περιπτώσεως παραπεμπομένης είς αύτήν ύπό τού 'Υπουργού καί είς ύποβολήν πρός αύτόν τού πορίσματος τής ύπ' αύτής γενομένης έρεύνης έν σχέσει πρός πάν θέμα έπί τού οποίου ό 'Υπουργός αποφασίζει δυνάμει οιασδήποτε διατάξεως τού παρόντος Νόμου, ή οιασδήποτε αποφάσεως τού 'Υπουργικού Συμβουλίου εκδοθείσης ή εκδιδομένης, ή οιωνδήποτε Κανονισμών εκδοθέντων ή εκδιδομένων έπί τή βάσει τού παρόντος Νόμου".

English Translation:

"Provided that every advisory committee set up shall verify the true facts of every case referred to it by the Minister and shall submit to him thereafter its findings emerging from the inquiry into every subject entrusted to the Minister for decision under any provision of the present law, or by virtue of any decision of the Council of Ministers, issued or to be issued, or under any regulations issued or to be issued under the present law."

Obviously the second proviso did not modify the duty of the Minister to refer to the fact-finding body the ascertainment and assessment of facts arising in connection with an application for exemption. The proviso clarified the duties of the advisory committee firstly, and expanded the duty of the Minister to refer to the committee the ascertainment of factual matters relevant to his discretion, secondly. As Mr. Clerides mentioned, it is clear on authority that a proviso may not only qualify the provisions of a section of the law that it accompanies, but may, depending on its provisions, operate in its own right as a substantive enactment - See, *Halsbury's Laws of England,* 3rd ed., Vol. 36, para.604 (p.399). This was the case here. By authority to this proviso, the Minister was required to refer to an advisory committee set up under the provisions of the first proviso to s.4(4), not only factual issues connected with applications for exemption under s.4, but also in respect of every other matter entrusted for decision to the Minister, including applications under s.9 of the law, for exemption on grounds of special circumstances. The ascertainment and assessment of facts relevant to the determination of an application for exemption for special circumstances, whenever arising in the sense of s.4(4), as earlier explained, has to be referred by the Minister to the advisory committee.

The provisions of s.4(4) and its proviso, were misapplied in this case resulting in the abortive exercise of the powers vested by the Minister, as the learned trial Judge found. My reasons follow.

The applicant applied for exemption from the National Guard for special circumstances. The facts relevant to these circumstances were specified in his application and in an authentic statement (ὑπεύθυνος δήλωσις), purporting to verify in a solemn manner the facts relied upon for exemption. The Minister had two options. He could either accept those facts and determine the application upon that factual premise or, in case of doubt as to any such facts or their import and assessment, he should refer the issue to the advisory committee. He did neither. He relied on the evaluation of the factual allegations of the applicant made by the Commander of the National Guard and, guided by that assessment, he dismissed the application.

The Commander of the National Guard, it is clear from his submission to the Minister, made, as it appears to me, a detailed assessment of the personal circumstances of the applicant and his parental family and drew conclusions therefrom. The purported evaluation of the factual allegations contained in the application of the respondent, was made without authority in law and in abuse of the powers of the advisory committee. As such, it ought to have been ignored by the Minister. Reliance in these circumstances upon an improper evaluation of the facts relevant to the application for exemption, rendered the exercise of his discretion defective and vitiated the decision itself. I am, therefore, in agreement with the learned trial Judge that the decision must be annulled. Therefore, I would dismiss the appeal.

Appeal allowed by majority.