

1985 February 23

[TRIANTAFYLIDIS, P.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

SOTERIS PAPASAVVAS,

Applicant,

v

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

Respondents

(Case No. 275/76)

5 *Constitutional Law—Separation of State Powers —Attorney-General—Not one of the three (Legislative, Executive, Judicial) State Powers —Consequently, the call for part time military service as a reservist of a Counsel of the Republic cannot offend against the principle of separation of State Powers—Such call will not interfere with the independence of the Office of the Attorney-General (Constitution, Article 112.2).*

10 *Constitutional Law— Equality —Constitution, Article 28— Calling up of a Counsel of the Republic for part time military service as a reservist, whilst other Counsel were not similarly called up—Each case depends on its facts— Complaint of unequal treatment remained unsubstantiated*

15 *Administrative Law —Due inquiry —Call for part time military service as a reservist —Appropriate authority not bound to examine on each such occasion whether the person concerned was entitled to exemption from such service.*

20 *National Guard—The National Guard Laws—Section 4(3)(f) —The call up of a person having more than three dependants for military service is not contrary to section 4(3)(f)—Such person is, however, entitled to claim exemption thereunder by a decision of the appropriate authority.*

By means of this recourse, the applicant, a Counsel of the Republic in the Office of the Attorney-General of the Republic, impugns the validity of the decision, whereby he was called up for part time military service in the National Guard as a reservist, on the following grounds, that is: (a) The placing of the applicant under military orders will result in interference with the independence of the office of the Attorney-General contrary to Article 112(2) of the Constitution and will violate the principle of "Separation of Powers", (b) Unequal treatment inasmuch as other Counsel of the Republic were not called up for such service, and (c) The applicant could not have been called up for military service, as he had more than three dependants (Section 4(3) (f) of the National Guard Laws).

It must be noted that on 20.10.79 the applicant applied for exemption to the respondent Minister on the ground that he had more than three dependants, but has not received any reply.

Held, dismissing the recourse: (1) It is clear that during his part time military service the applicant cannot be given any orders by his superiors in the National Guard regarding the performance of his duties as Counsel of the Republic. It follows that the independence of the Office of the Attorney-General will not be interfered with by reason of the sub judice act. The contention that the sub judice act results in violation of the principle of separation of the three State Power—Legislative, Executive, Judicial—is untenable, because the Attorney-General is not one of such three State Powers.

(2) There is no merit in the argument relating to unequal treatment as each case has to be examined on its own fact and no specific comparison has been made between the applicant and any other Counsel of the Republic, who has not been called up as a reservist.

(3) It would be going too far to hold that on each occasion when a reservist is called up for part time military service the appropriate authorities have to be satisfied that

he is not exempted from such service under some provision of the relevant legislation.

5 (4) The call up for military service of someone who has more than three dependants is not contrary to section 4(3) (f) of the aforesaid Laws. Such a person is entitled to claim exemption under the section by a decision of the competent organ. It is upto to the applicant to press for a decision on his application dated 20.10.1979.

10 *Recourse dismissed.*

No order as to costs.

Cases referred to:

Artemides and Another v. The Republic (1979) 3 C.L.R. 33.

Recourse.

15 Recourse against the decision of the respondents whereby applicant was called up for part time military service in the National Guard as a reservist.

A. S. Angelides, for the applicant.

K. Michaelides, for the respondents.

20 *Cur. adv. vult.*

25 TRIANTAFYLLIDES P. read the following judgment. By means of the present recourse the applicant challenges the decision of the respondents by virtue of which he was called up for part time military service in the National Guard as a reservist.

30 The applicant was at the material time a Counsel of the Republic in the Office of the Attorney-General of the Republic. He had completed his normal full time military service and had been discharged from the National Guard as a reservist.

The applicant was, then, called up for part time military service as from the 31st July 1979. As it appears from particulars filed by counsel for the respondents the appli-

cant will have to do part time military service as reservist on one Sunday every fifteen days.

Counsel for the applicant has submitted that his client cannot be placed under military orders so long as he is a Counsel of the Republic because this will result in interference with the independence of the Office of the Attorney-General, contrary to Article 112.2 of the Constitution, and will violate, also, the fundamental constitutional principle of the "Separation of Powers".

I cannot agree that by calling up the applicant to do part time military service, as aforesaid, the independence of the Office of the Attorney-General of the Republic will be interfered with, because it is abundantly clear that during his part time military service the applicant will not, and cannot, be given any orders by his superiors in the National Guard regarding the performance of his duties as Counsel of the Republic. In case such service creates any difficulties regarding the smooth functioning of the Office of the Attorney-General the matter can be taken up by the Attorney-General with the respondent Minister of Interior and Defence and I am sure appropriate arrangements can be made to avoid any such difficulties.

As the Attorney-General is not one of the three Powers of the State—Legislative, Executive and Judicial—the contention that the call up of the applicant for part time military service violates the principle of the "Separation of Powers" cannot be sustained; and, in this respect, the present case is distinguishable from that of *Artemides and another v. The Republic*, (1979) 3 C.L.R. 33, where the applicants were Judges exercising Judicial Powers.

It has been argued further that the call up of the applicant amounts to unequal treatment of the applicant contrary to Article 28 of the Constitution inasmuch as other Counsel of the Republic have not been called up for part time military service.

In my view there is no merit in this argument as each individual case has to be examined on its own facts and no specific comparison has been made, by counsel for the applicant, of the applicant with any other Counsel of the Republic who has not been called up for part time mili-

tary service as a reservist, in order to substantiate the contention that the applicant is the victim of unequal and discriminatory treatment.

5 It has been argued, also, by counsel for the applicant that he could not have been called up for part time military service because at the time he had more than three dependants and, therefore, the sub judice decision is contrary to section 4(3) (f) of the National Guard legislation.

10 As it appears from a letter dated the 20th October 1979 the applicant applied for an exemption on this ground to the respondent Minister of Interior and Defence but has not received any reply until today, apparently because in the meantime the present recourse was filed and while it has been pending the matter of the part time military service
15 of the applicant has remained in abeyance.

Conusel for the applicant has contended that before the calling up of the applicant for part time military service there ought to have been carried out an adequate inquiry into his family circumstances in order to ascertain whether
20 he had more than three dependants.

In my opinion, however, it was up to the applicant to claim exemption on the said ground, as in fact he has done, and the burden is on the applicant to satisfy the respondent Minister of Interior and Defence that he is entitled to such
25 exemption. It would be going too far to hold that on each occasion when a reservist is called up for part time military service the appropriate authorities have to be satisfied that he is not entitled to be exempted from such service under some provision of the relevant legislation.

30 It is still up to the applicant to press for a decision by the respondent Minister of Interior and Defence that he is entitled to exemption from part time military service on the ground that he has more than three dependants and if he is dissatisfied with the Minister's decision he can seek
35 redress by means of another recourse under Article 146 of the Constitution. But this Court, in determining the present recourse, cannot substitute itself in the place of the respondent Minister of Interior and Defence and decide, as an administrative organ, whether or not the applicant is to be

exempted from part time military service on the ground that he has more than three dependants.

It has to be stressed in this respect that the call up for military service of someone who has more than three dependants is not, in my opinion, in itself contrary to section 4(3) (f) of the National Guard legislation, but he is entitled to claim exemption under such section by a decision of the competent administrative organ which is the Minister of Interior and Defence.

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In the light of all the foregoing this recourse has to be dismissed; but I shall not make any order as to its costs.

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Recourse dismissed.

No order as to costs.