

1987 November 18

[DEMETRIADES J]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ANTONIS G PHILIPPOU,

*Applicant,*

v

THE REPUBLIC OF CYPRUS, THROUGH  
1 THE MINISTER OF LABOUR AND SOCIAL INSURANCE,  
2 THE DIRECTOR OF SOCIAL INSURANCE

*Respondents*

*(Case No 227/83)*

*Executory act — Social Insurance — The Social Insurance Law, 1980 (4/80), section 78 — Hierarchical recourse to the Minister — Once it is filed, the decision of the Director is suspended and ceased to be executory, until the outcome of the recourse, when it will merge in the final decision — The original decision of the Director can be challenged through the final act as forming part of it* 5

*Social Insurance — The Social Insurance Law, 1980 (4/80) — Date of birth of an insured person — The power to determine it and the mode of its exercise — Sections 76(1) (h), 76(2) and 76(3) of said law — In the light of the wording of sections 76(2) and 76(3) the conclusion is that the inquiry should be conducted strictly in accordance with the rules of natural justice — If not, the decision has to be annulled* 10

The facts of this case sufficiently appear in the judgment of the Court

*Sub judice decision annulled*  
*Costs against respondent* 15

**Recourse.**

Recourse against the decision of the respondents to dismiss applicants' application for old age pension and to determine applicant's date of birth for social insurance purposes as the 28th October, 1920 and not 1916. 20

*Chr. Melides, for the applicant.*

A. Vassiliades, for the respondent.

*Cur. adv. vult.*

5 DEMETRIADES J. read the following judgment. The present recourse turns against the decision of the respondents (1) to dismiss the applicant's application for old age pension and (2) to determine his date of birth for the purposes of social insurance as being the 28th October, 1920, instead of the year 1916 as claimed by him.

10 The facts of the case, as these appear from the relevant file of the administration which is exhibit No. 1 before me, are the following:

15 The applicant joined the Social Insurance Scheme (hereinafter called the «scheme») in 1965 as a self-employed person and he then produced a certificate of birth which was issued in the month of May of that year, in which it was stated that he was born at Kolossi village in the District of Limassol, on the 15th April, 1919. This birth certificate was issued on the strength of an entry in the Register of Births which was presumably made on the basis of an affidavit sworn by the applicant in 1958.

20 On the 30th October, 1982, the applicant applied to the Department of Social Insurance of the Ministry of Labour and Social Insurance for old age pension and in his application he stated that he was born in 1916. On receipt of his application a search was carried out and it was found that the applicant, both in his application to join the scheme, as well as in his applications to obtain a passport and an identity card, declared as his date of birth the 15th April, 1919 (see Red 9 of Exhibit No. 1 ).

30 As a result of the above, the 2nd respondent instructed the District Labour and Social Insurance Officer of Limassol, (hereinafter referred to as the «officer») to carry out an investigation regarding the date of birth of the applicant. In the course of this investigation the officer first visited the house of the applicant where he was informed that the applicant was abroad and was advised by his daughter-in-law to conduct Neophytos, one of the brothers of the applicant. The officer did so and the brother informed him that the applicant was two years older than him. According to the report submitted by the officer to the 2nd respondent regarding the date of birth of the applicant, the brother was born on the 11th October, 1918.

The officer then carried out further inquiries with the school and the church of the village where the applicant was born but they were unable to provide him with any information about the date of the birth of the applicant as no records were kept by them. Nor elders of the village could give him any information. 5

The officer then proceeded to carry out a search in the birth records kept by the District Administration of Limassol and found that three entries in the name of «Antonis» appeared as having been born of the couple Georghios Philippou and Andromachi Hadjionoufriou, the parents of the applicant. The first entry stated that the child was born in 1916. This entry was made on the strength of an affidavit sworn in 1982 by the applicant. The second entry, which showed that the child was born on the 15th April, 1919, was again made after an affidavit was sworn by the applicant. The third entry, which stated that Antonis was born on the 28th October, 1920, was a regular entry made as a matter of procedure for the registration of births. 10 15

After completing his investigation the officer submitted a report to the 2nd respondent in which, after stating his findings, he concluded by saying that in his opinion the real date of birth of the applicant was the 28th October, 1920. 20

Relying on the findings of the officer the 2nd respondent came, also, to the conclusion that the real date of birth of the applicant was the 28th October, 1920, and by his letter dated the 28th January, 1983, communicated his decision to the applicant. 25

By another letter, dated the 1st February, 1983, the 2nd respondent informed the applicant that he was not, as then, entitled to old age pension.

The applicant then appealed to the Minister of Labour and Social Insurance through his advocate in accordance with the provisions of section 78 of the Social Insurance Law, 1980 (Law 41/80). By a letter dated the 12th April, 1983, counsel for the applicant was informed that the Minister, after examining the appeal of the applicant and after taking into consideration all facts and circumstances of the case, had dismissed it. He was further informed that the correct date of birth of his client, for purposes of social insurance, remained the 28th October, 1920. 30 35

As a result of the decision of the Minister the applicant filed the present recourse.

The grounds of law, on which the recourse is based, are that-

(a) The respondents failed to carry out a due inquiry.

(b) The sub judice decision lacks reasoning.

5 (c) The sub judice decision is arbitrary and/or unlawful and/or unconstitutional.

In arguing the grounds of law, counsel for the applicant submitted that the inquiry carried out by the respondents was not the proper one in that it was insufficient in the circumstances; that the statement of the brother of the applicant as to the year of their  
10 birth was not taken into consideration or weighed properly and that there were other persons who gave information to the District Administration in the past about the matter, from whom the respondents failed to seek information. He also submitted that the Minister did not afford the applicant the opportunity of being  
15 heard.

On the ground of due reasoning counsel argued that the sub judice decision is not adequately reasoned and that the omitted reasoning is not supplemented by the material in the file.

Regarding the last ground, counsel contended that the  
20 respondents could not have taken, on the question of the date of birth of the applicant, a different decision from the one reached by the District Administration which is the proper organ to decide such a matter.

Before proceeding to deal with the issues raised in the present  
25 case I wish to deal briefly with the submission of counsel for the respondents that this recourse was filed out of time as far as prayer 2 is concerned. In his submission on this issue counsel argued that the recourse is out of time as it was filed more than 75 days from the communication of the decision of respondent No. 2 to the  
30 applicant, and further that it is not an executory administrative act.

I find this submission of counsel for the respondents as groundless. Once a hierarchical recourse is filed, the decision of the Director is suspended and ceases to be an executory administrative act until the outcome of the hierarchical recourse,  
35 when his decision will then merge in the final decision. Although the decision of the Director is no longer executory on its own, it can be challenged through the final act as forming part of it. This ground is, therefore, dismissed.

Coming now to the issues before me, the provisions of the law governing the matter are sections 76 and 78 of the Social Insurance Law, 1980 (Law 41/80)

Under para (h) of sub-section (1) of section 76 of the Law, the Director has power to determine the date of birth of an insured person in cases where there is a difference as to the correct date of his birth.

Under sub-section (2) the Director may, before reaching a decision on an issue, like the one in the present case, appoint one of the officers in the service of the Ministry of Labour and Social Insurance to carry out an inquiry into the matter in dispute and the officer, during the inquiry, may demand from any person to appear before him in order to give evidence or to produce documents that are reasonably considered to be necessary for the carrying out of the inquiry.

Sub-section (3) of section 76 of the law provides that any person who, at the discretion of the Director or of the person appointed by him by virtue of the provisions of sub-section (2), possesses any interest in a matter which calls for determination by virtue of the provisions of that section, is entitled (a) to be present and be heard during the inquiry into the matter in question and (b) to receive copy of the decision of the Director as well as the reasoning on which he based his decision.

Section 78 of the law provides that an insured person has the right to appeal against the decision of the Director or the examiner of claims.

Having in mind the wording of sub-sections (2) and (3) of section 76 of the law and, in particular, what is provided by them, namely that the Director or the officer to replace him in the inquiry to be carried out are possessed with the power to summon any person to give evidence before them, or to produce documents reasonably considered by them to be necessary for the carrying out of their inquiry and, further, that the person interested in the matter the subject of the inquiry is entitled to be present and to be heard during the carrying out of the inquiry, I have come to the conclusion that an inquiry of this nature should be conducted in such a manner that the rules of natural justice should be strictly followed and that failure to follow them renders the inquiry void

In the present case it does not appear that the procedure envisaged by the law was followed by the respondent.

As a result, I hold that the sub judice decision has to be annulled.

Order accordingly.

- 5 Respondents to pay the costs of the applicant.

*Sub judice decision  
annulled with costs in  
favour of applicant.*