[TRIANTAFYLLIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ATHANASSIOS MAKRIS,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTER OF INTERIOR,

Respondent.

(Case No. 60/68).

Military Service—National Guard—Exemption from military service—Claim for exemption based on section 4(3)(f) of the National Guard Law, 1964 (Law No. 20 of 1964) as amended by the National Guard (Amendment) (No. 3) Law, 1965 (Law No. 26 of 1965)—More than three dependants—Meaning—Discretion of the Respondent Minister exercised in an inadequate and defective manner—In that no due regard was paid to a most material consideration—Decision complained of annulled

National Guard—Exemption from service—See above.

Exemption from military service—See above.

Administrative Law—Discretion—No due regard paid to a material consideration—Therefore, the relevant power has been exercised in an inadequate and defective manner and in abuse and excess of powers—See above

Discretionary powers—Inadequate and defective manner of exercising such powers—Abuse and excess of powers—See above.

Abuse and excess of powers—See above

By this recourse under Article 146 of the Constitution the Applicant complains against a decision of the Respondent that he is not entitled to exemption from service in the National Guard

The claim of the Applicant to exemption was based on the contention that he had more than three dependants and that, thus, he was entitled to such exemption under the provisions of section 4(3)(f) of the National Guard Law, 1964, (Law No 20 of 1964), as amended by the National Guard

(Amendment) (No. 3) Law, 1965 (Law No. 26 of 1965). Those dependants were: His wife, his minor daughter, his mother, and his two sisters aged 17 and 20 respectively.

The Applicant was managing a large family agricultural estate. Applicant, his wife, his infant child, his mother and his two sisters apparently depend on the income from that estate. The District Officer of Larnaca informed the Respondent Minister by letter dated the 30th December, 1967, that apart from the potato crops of the estate the family had no other source of income and that "without the hard work of the Applicant and his guidance" his mother, wife and his elder sister would not be able to carry out "any productive work and that, therefore they could not earn alone their own living".

In rejecting the Applicant's claim for exemption the Respondent Minister based his decision, *inter alia,* on the view that the Applicant could easily be replaced by a salaried person.

Annulling the decision complained of, the Court:-

Held, (1). I have reached the conclusion that the Respondent Minister has erred in that no due regard was paid to the most material question—in view of the letter of the District Officer of Larnaca of the 30th December, 1967, *supra*—of whether or not, irrespective of the fact that a salaried person could be employed in the place of the Applicant, nevertheless the Applicant's presence and efforts on the spot were necessary for the management of the agricultural property of the family, and the direction of the work thereon, especially when there were engaged in such work only three female members of the family (*i.e.* the wife, mother and elder sister).

(2) Consequently, the relevant discretion has been exercised in an inadequate and defective manner and, therefore, the *sub judice* decision is declared null and void. The Respondent having acted in good faith there will be no order as to costs.

Sub judice decision annulled.
No order as to costs.

Cases referred to:

HadjiStephanou and *the Republic* (1966) 3 C.L.R. 289 at pp. 305-306;

Antoniou and *The Republic* (1967) 3 C.L.R. 259, *considered* and *explained.*

Recourse.

Recourse against the decision of the Respondent to the *effect that Applicant is not entitled to exemption from service* in the National Guard.

L. Clerides, for the Applicant.

K. Talarides, Senior Counsel of the Republic, for the Respondent.

Cur. adv. vult.

The following Judgment was delivered by:-

TRIANTAFYLLIDES, J.: In this case the Applicant complains against a decision of the Respondent that he is not entitled to exemption from service in the National Guard; such decision was communicated to the Applicant by letter dated the 8th February, 1968 (see *exhibit* 3).

The claim of the Applicant to exemption was based on the contention that he had more than three dependants and, that, thus, he was entitled to such exemption by virtue of the provisions of section 4(3)(f) of the National Guard Law, 1964 (Law 20/64), as amended by the National Guard (Amendment) (No. 3) Law, 1965 (Law 26/65).

In the same matter, the Applicant had filed an earlier recourse, case 110/67, which was withdrawn on the 1st July, 1967, upon Respondent declaring that he was prepared to re-examine the matter, if the Applicant would submit further and better particulars ot his claim for exemption, through the District Officer of his District, namely, Larnaca District

As a result, on the 4th July, 1967, counsel for the Applicant submitted an application for exemption (see *exhibit* 2) in which it was stated that the Applicant had four dependants, as it appeared from a certificate issued by the Village Commission of Xylophagou (see red 16 in the relevant case-file of Respondent, which is *exhibit* 4); it was stated, further, in the said application of the 4th July, 1967, that the Applicant was, also, the only protector of another sister of his, aged 20, who was unmarried, and that this fact had not been taken into account by the Village Commission when they

had certified that the Applicant had four dependants, namely, his mother (aged 59), his wife (aged 20), his daughter (aged 2), and a sister (aged 17) who is an incapacitated person.

From the letter of the Respondent, dated the 8th February, 1968, and communicating the *sub judice* decision to the Applicant (*exhibit* 3), and from the text of the decision of the Advisory Committee, recommending to the Respondent Minister the rejection of Applicant's application for exemption (see reds 26 and 27 in the file *exhibit* 4), it appears that the reasoning, on the basis of which the Applicant's application was turned down, is, in substance, as follows:

—That the Applicant's father died in November, 1965.

—That the Applicant, his wife, his infant child, his mother and his two sisters live together in a house, which is the property of his mother, and that the family has inherited from the deceased father of the Applicant 50 donums of land (out of which 30 donums are irrigable) and which are worth, in all, about £8,000; that the income from property, by way of potato crops, is about £2,000 yearly; and that the family is indebted to the extent of £1,500, due to the purchase of a tractor, and of a motor-pump for irrigation purposes.

—That the Applicant, his wife, his mother and one of his sisters work on the family land.

—That the work done, in this respect, by the Applicant, in common with the work done by the other members of the family, does not amount to maintenance by the Applicant of his mother or of his two sisters, but through the work done jointly by the Applicant, his mother and one of his sisters, each one of them is self-supporting, in accordance with his or her share in the land; and that even if it were to be found that through the work of the Applicant there is maintained the non-working sister of the Applicant, then again his dependants would be only three *i.e.* his wife, his child and his said sister.

—That, finally, taking into account all the circumstances of the matter, including the high income of the family, the Applicant could easily be replaced by a salaried person

It is common ground, on the other hand, that the District Officer of Larnaca informed the Respondent Ministry, by letter dated the 30th December, 1967, (see red 25 in the file

exhibit 4) that apart from the potato crops the family had no other source of income and that "without the hard work of the Applicant and his guidance", his mother, wife and his sister would not be able to carry out "any productive work and that, therefore, they could not earn alone their own living".

In an earlier communication, dated the 25th September, 1963, the District Officer of Larnaca had informed the Respondent Ministry that a brother of the Applicant, who was serving then in the National Guard—(but has since been discharged)—was married, with one child, that he had never shown any concern for his own or his father's family, and that many times he had refused to be of any help (see red 21 in the file *exhibit* 4).

It has been the contention of the Applicant that, in the circumstances, the Applicant ought to have been found to have more than three dependants.

In this respect reliance was place on the following observations of this Court in *HadjiStephanou* and *The Republic* (1966) 3 C.L.R. 289, at pp. 305 and 306.

"Regarding the view of the Committee that section 4(3)(f) did not entitle, in the circumstances, Applicant to exemption, I think that, in this Case, such view was fairly open to it and properly within the ambit of section 4(3)(f). By saying this I should not be misunderstood to mean that there can never be a case in which the enlistment of a person managing a large property could result in depriving of maintenance members of his family living from the income of such property, but in the present Case, bearing in mind that the father, though not fit for heavy work, is, nevertheless, in a position to supervise the property and manage it to a certain extent, and, also, bearing in mind that what will be lacking, through the enlistment of Applicant, as his contribution in the form of manual work, can be replaced by salaried help from outside, I am of the opinion that the application of section 4(3)(f) to the facts of this Case, as proposed in *exhibit* 13 was not unwarranted in the circumstances. In taking this view I have also borne in mind that the enlistment of Applicant will be only a temporary handicap for the management of the property and that even while he is serving there

may be possibilities for him to obtain leave and attend to any very urgent matter which may arise and which his father may not be in a position to handle".

Counsel for Respondent has submitted that the *sub judice* decision was properly reached, on the basis of the views of the Advisory Committee set up for the purpose, by the Respondent Minister, and that, such decision having been reached as a result of the evaluation of all relevant facts, this Court cannot substitute its own evaluation of such facts, in the place of their evaluation made by the Committee, which was entitled to disagree with the views of the District Officer of Larnaca.

It is correct that the matter in issue is to a large extent a question of fact—see *Antoniou* and *The Republic* (1967) 3 C.L.R. 259. But it is also a question of mixed law and fact because one has to apply the relevant legislation to the particular facts of the case; as it was stated in the *Antoniou* case (*supra*) "the intention of the legislator in making this provision"—s. 4(3)(f) of Law 20/64—"was to exempt from military service persons whose earnings from their work, were necessary for the maintenance of more than three dependants; necessary to, at least, a substantial extent. So that such dependants may not find themselves destitute and without the minimum necessaries of life when the conscript answers the call".

Having examined the material before the Court as a whole, I have reached the conclusion that the Advisory Committee, and the Respondent Minister who simply adopted the views of such Committee, have erred in that no due regard was paid to the most material question—in view of the aforementioned letter of the District Officer of Larnaca dated the 30th December, 1967—of whether or not, irrespective of the fact that a salaried person could be employed in the place of the Applicant, nevertheless the Applicant's presence and efforts on the spot were necessary for the management of the agricultural property of the family, and the direction of the work thereon, especially when there were engaged in such work only three female members of the family.

I am of the view that when the Advisory Committee at the end of its decision (see red 26 in the file *exhibit* 4) stated that "the Applicant could easily be replaced by a salaried person" in view, *inter alia*, "of the high income of the family", it could not have had in mind the aforesaid aspect of the management and direction of the work; otherwise I would

have expected the Advisory Committee, in the course of good and proper administration and for the sake of rendering its decision duly reasoned, to have decided expressly the question as to whether or not a salaried person could take the place of the Applicant as manager of the agricultural operations of the family property, if due regard had been paid to this aspect; also, another clear, to me, indication that the Committee did not pay due regard to such question is the fact that it has stated that the Applicant could be replaced *"easily"*, and it could never have reasonably used such a term, even if it had decided the said question against the Applicant, because there can be no doubt that the management of, and direction of the work on, a large agricultural property is a vital job entailing personal active interest and the taking of, sometimes, difficult decisions, and, therefore, the Applicant could not, in any case, be replaced "easily" in this respect.

In the light of all the above I have reached the conclusion that the relevant discretion has been exercised in an inadequate and defective manner and, therefore, the *sub judice* decision should be declared to be null and void and of no effect whatsoever, as being in abuse and excess of powers.

If it were to be found that the Applicant's role, as manager of the work on the property, is such, that his presence there cannot be properly substituted by a salaried person, then it would be up to the Advisory Committee, and the Respondent Minister, to decide, in the light of the above-quoted test in the *Antoniou* case, whether or not the mother and the sister of the Applicant, who work on the land, are to be considered as dependants of his—in addition to his wife, child and, also, probably, his incapacitated sister; and I have no doubt that when the Court, in laying down the aforesaid test in the *Antoniou* case, used (in the light of the circumstances of that case) the expression "earnings from their work", it did not mean to be taken as intending to exclude a case, such as the present one, where earnings from one's work might be found to include earnings due to management of the work on a large agricultural property.

As the Advisory Committee, and the Respondent Minister, have acted, in my opinion, in all good faith in this case, I have decided to make no order as to costs.

Sub judice decision annulled.
No order as to costs.