

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

NISHAN
ARAKIAN
AND OTHERS
v.
REPUBLIC
(MINISTRY
OF FINANCE)

NISHAN ARAKIAN AND OTHERS,

Applicants,

and

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTRY
OF FINANCE,

Respondent.

(Case No. 18/70).

Pensions and Pensioners—Government Pensioners—Recourse against refusal to pay them cost of living allowance equal to, or on the same footing as, the one paid to serving public officers—Annulment of such refusal—On the ground that such refusal violates the constitutional rights of the applicants under Articles 6 and 28.1 and 2, of the Constitution safeguarding the principle of equality (and non-discrimination) before the Law and the administration—See further infra.

Principle of equality—Articles 6 and 28, paragraphs 1 and 2, of the Constitution, the former Article being completely covered by the latter—Principle of equality before the Law and the administration—Meaning of the phrase “equal before the Law etc.” in Article 28.1 (supra)—Arbitrary and unreasonable differentiations precluded—But reasonable distinctions and classifications allowed—Denial by the Minister of Finance of the applicants’ said claim to be paid a cost of living allowance on the same footing as the one being paid to serving public officers—Held to amount to an infringement of the rights of the applicants under the aforesaid provisions of the Constitution—The distinction between pensioners and serving public officers in relation to such cost of living allowance held to be an arbitrary and unreasonable one.

“Act of Government”—Recourse under Article 146 of the Constitution—Refusal by the Minister to pay to the applicants a cost of living allowance as aforesaid—Not an “act of Government” but an administrative act subject to review by this Court on a recourse under Article 146 of the Constitution.

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Recourse under Article 146 of the Constitution—See immediately hereabove.

Equality and non-discrimination—Articles 6 and 28 of the Constitution—See supra.

Constitutional Law—Articles 6 and 28—Principle of equality before the Law and the administration—The principle against discrimination—See supra.

Cost of living allowance tied up to the retail price index—See supra.

In this most interesting case the learned Judge, applying rather generously the principle of equality, safeguarded under Articles 6 and 28 of the Constitution, held in effect that the Government pensioners are entitled to be paid a cost of living allowance on the same footing as serving Government officers.

By this recourse under Article 146 of the Constitution three Government pensioners are challenging the decision of the respondent Minister of Finance, communicated to them by letter dated December 3, 1969, whereby their claim for the payment of cost of living allowance equal to the one paid by Government to public officers in office was rejected.

The salient facts of this case are briefly as follows :

Serving Government officers are, and since June 1, 1955, have been, continuously, in receipt of a cost of living allowance tied to a retail price index compiled by the Government. On the other hand, Government pensioners on that date and at all times thereafter down to the enactment of the Increase of Pensions Law, 1968, were in receipt of one or more cost of living allowance, none of which was tied to the index. By the said Law of 1968 all the allowances payable to pensioners at the time of its enactment were consolidated with their pensions, except an allowance of 10% which has been granted to them from June 1, 1959.

All the allowances referred to—both those paid to officers and those paid to pensioners—were granted and regulated by administrative decisions fixing or regulating the rates, and defining the terms of, each grant. All that was done by legislation was the provision, before Independence by the Appropriation Law of a sum for “ Cost of Living Allowances ” and, since Independence, by the Budget Law of a sum for “ Cost of Living Allowance to Government Employees ” and another

sum for "Temporary Bonus to Pensioners"; the administration being left free to spend the sum so voted for the authorised purposes as thought by it fit.

By a letter dated November 21, 1969 (*Exhibit 1*) the applicants, through their counsel, applied to the Minister of Finance asking for the grant to them of a :

" cost of living allowance such as has been paid from time to time by the Government to serving public officers in addition to the basic pension paid to them ".

To that letter the Minister replied by his letter dated December 3, 1969 (*Exhibit 2*) whereby he refused the applicants' said request.

The case for the applicants is that, since serving officers continue to be paid a cost of living allowance tied to the retail price index, the refusal of such an allowance to them amounts to unfavourable discrimination against them and a breach of the principle of equality embodied in Articles 6 and 28.1 and 2 of the Constitution.

Counsel for the respondent as well as denying that any provision of the Constitution has been infringed, argued that the applicants must fail because " the decision conveyed by the letter of December 3, 1969 " (*Exhibit 2*) was " an act of Government " and as such outside the ambit of Article 146 of the Constitution. Counsel said that satisfaction of the applicants' request (*Exhibit 1*) required a money appropriation ; and that in turn required the enactment of a Law, which was a matter for the House of Representatives.

Rejecting this argument of counsel for the respondent and adopting the main submission of counsel for the applicants, the Court annulled the said decision of the Minister of Finance.

Article 6 of the Constitution reads as follows :—

" Subject to the express provisions of the Constitution no Law or no decision of the House of Representatives or of either of the Communal Chambers and no act or decision of any organ, authority or person in the Republic exercising executive power or an administrative function shall subject to unfavourable discrimination either of the two communities or any person as such or in his capacity as a member of a community ".

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And Article 28.1 provides :

“ 1. All are equal before the Law, the administration and justice and are entitled to equal protection and treatment ”.

Held, I. As to whether or not the sub judice decision of the Minister is an “ act of Government ” :—

(1) (a) The argument advanced by counsel for the respondent to the effect that the subject decision of the Minister of Finance is “ an act of Government ”—and as such it cannot be challenged by a recourse under Article 146 of the Constitution—overlooks the fact that the aforesaid decision is, not to the effect that there are no legally approved credits for meeting the applicants’ claim—or for that matter similar claims by other pensioners—, but simply that “ in accordance with conditions prevailing from time to time an adjustment and increase was and is made of pensions ” and that “ the existing scheme of financial assistance to pensioners was only recently improved ”, coupled with a promise that “ when conditions so require the subject of a further increase could be re-examined ”.

(b) It was, therefore, a refusal by the Minister, not to introduce legislation where legislation was required, but to extend to pensioners a treatment similar to that accorded to serving officers, which the Minister had no less power to do than he had to grant the cost of living allowance enjoyed by the latter.

(2) It follows that the act complained of was not an “ act of Government ” but one subject to review under Article 146 of the Constitution. (Cf. *Philippou v. The Republic* (1970) 3 C.L.R. 123).

Held, II. As regards the question whether the denial to the applicants of a cost of living allowance tied to the retail price index violates or not any of the provisions of the Constitution viz. Article 6 and Article 28.1 and 2, thereof :—

(1) Clearly as regards the matter complained of Articles 6 and 28.1 of the Constitution (*supra*) overlap, the former being completely covered by the latter. This is, in substance, similar to Article 14 of the Indian Constitution, and since, as pointed out by Basu in his Commentary on the Constitution of India, Vol. I, at pp. 287 and 444, that part of the Indian provision relating to “ equal protection of the Laws ” was

taken verbatim from the American Constitution, guidance as to the meaning and application of our Article 28 para. 1, may be derived from Indian and American cases.

(2) Now, as stated in *Lindsley v. Natural Carbonic Gas Co.* (1910) 220 U.S. 61, cited in Basu at p. 441,

“ Equal protection of the Laws means subjection to equal Laws applying to all in similar circumstances ”.

Then, quoting *Power Manufacturing Company v. Saunders* (1927) 274 U.S. 490, he goes on :—

“ It does not prevent a state from adjusting its legislation to differences in situation or forbid classification for that purpose but it does require that the classification be not arbitrary, but based on a ‘ real and substantial ’ difference to the subject of the particular legislation ”.

He continues with a citation from *Tigner v. Texas* (1940) 310 U.S. 141 :

“ The article does not require things which are different in fact or in Law to be treated as though they were the same ”.

and comments in the following page :

“ The reasonableness of a classification would thus depend on the purpose for which the classification is made ”.

At p. 445 he says, citing *Missouri Pacific Railway Company v. Humes* (1883) 115 U.S. 517 :—

“ A classification is *reasonable* when it is not an *arbitrary selection* but rests on ‘ *differences pertinent to the subject in respect of which classification is made* ’ ”.

(3) (a) The foregoing has been said under the heading “ Equal protection of the Laws ” (cf. also Article 14 of the Indian Constitution *supra*). But there is no doubt that Article 14 of the Indian Constitution, read together with Articles 12 and 13, “ ensures non-discrimination in State action both in the legislative and administrative spheres in the democratic Republic of India ” (see Basu, *loc. cit.* at p. 487).

(b) In Cyprus the same result is achieved by the express terms of Article 28, paragraph 1, (*supra*), which speaks of equality before “ the administration ” as well as before the Law.

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(4) (a) It follows that the question before me is whether the placing of pensioners in respect of a cost of living allowance tied to the retail price index in one class and serving public officers in another is a permissible classification in accordance with the above principles or not.

(b) Both serving public officers and government pensioners are persons who are legally entitled to a monthly payment from the Government for services to it. In my judgment the fact that in one case the services were rendered in the past while in the other they are being rendered in the present is not relevant to the question of the grant of such an allowance.

(c) In respect of such grant two considerations, and two only, are relevant : First, both payments are made in discharge of a legal obligation ; secondly, both serving public officers and government pensioners are entitled to expect that the product of their labour should not be whittled away through an increase in the cost of living. Indeed, the consequences of such an increase are more serious after an officer's retirement from the public service than they would be if he were still in the service, because while on pension he is nearer the subsistence level than he was before.

(5) (a) It follows that the applicants' complaint that their rights under paragraph 1 of Article 28 of the Constitution (*supra*) had been infringed is a valid one.

(b) It would have been equally valid if the cost of living allowance to officers had been expressly granted by statute and no provision had been made in that or any other statute for payment of a similar allowance to pensioners. In such a case the Court would have read that statute as if it had contained an exception intended to exclude pensioners and would have declared that exception inoperative as being contrary to the provisions of the Constitution referred to above (*see*, for instance the decision of the Greek Council of State in Case No. 2080/1950).

(c) However, the violation of the Constitution in this case having been committed by an administrative act, all I have to do is to declare that act null and void, which I accordingly do.

The respondent to pay £30 costs to the applicants.

Sub judice decision annulled. Order for costs as aforesaid.

Cases referred to :

Philippou v. The Republic (1970) 3 C.L.R. 123 ;

Lindsley v. Natural Carbonic Gas Co. (1910) 220 U.S. 61 ;

Power Manufacturing Company v. Saunders (1927) 274 U.S. 490 ;

Tigner v. Texas (1940) 310 U.S. 141 ;

Missouri Pacific Railway Company v. Humes (1883) 115 U.S. 517 ;

Decision of the Greek Council of State in Case No. 2080/1950.

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Recourse.

Recourse against the decision of the respondent rejecting applicants' claim for the payment to them of cost of living allowance equal to the one paid by the Government to public officers in office.

L. Clerides, for the applicants.

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

Cur. adv. vult.

The following judgment* was delivered by :—

STAVRINIDES, J. : By this application three Government pensioners are seeking :

- (1) " a declaration...that the decision of the respondent, communicated to (them) by letter dated December 3, 1969, whereby their claim for the payment of cost of living allowance equal to the one paid by Government to public officers in office was rejected is null and void and of no effect whatsoever.
- (2) A declaration ... that the omission of respondent to accept (their) claim for the payment to them of cost of living allowance equal to the one paid to public officers in office ought not to have been made and that such omission ought to be performed."

The following facts appear from " Notes " annexed to the opposition. Serving Government officers (hereafter " officers ") are, and since June 1, 1955, have been, continuously, in receipt of a cost of living allowance tied to a retail price index compiled by the Government. Government pensioners (hereafter " pensioners "), on the other

* For final decision on appeal see (1972) 11 J.S.C. 1539 to be reported in due course in (1972) 3 C.L.R.

hand, on that date and at all times thereafter down to the enactment of the Increase of Pensions Law, 1968, were in receipt of one or more cost of living allowances, none of which was tied to the index. By the Increase of Pensions Law, 1968, all the allowances payable to pensioners at the time of its enactment were consolidated with their pensions, except an allowance of 10% which had been granted to them from June 1, 1959 ; and by the 1968 Law that allowance also was so consolidated.

All the allowances referred to—both those paid to officers and those paid to pensioners—were granted and regulated by administrative decisions fixing or regulating the rates, and defining the terms of, each grant. All that was done by legislation was the provision, before independence, by the Appropriation Law of a sum for “ Cost of Living Allowances ” and, since independence, by the Budget Law of a sum for “ Cost of Living Allowance to Government Employees ” and another sum for “ Temporary Bonus to Pensioners ” ; the administration being left free to spend the sum so voted for the authorised purposes as thought by it fit.

By a letter dated November 21, 1969 (*exhibit 1*), the applicants, through their counsel, applied to the Minister of Finance asking for the grant to them of a

“ cost of living allowance such as has been paid from time to time by the Government to serving public officers in addition to the basic pension paid to them.”

To that letter the Minister replied by one dated December 3, 1969 (*exhibit 2*). Clearly *exhibit 1* was a request for the grant to the applicants of a cost of living allowance at the same rate as that at which such an allowance was then, and would from time to time be, paid to serving officers ; and it is not disputed that *exhibit 2* is a refusal of that request, so that it is unnecessary to quote it here.

The case for the applicants is that since serving officers continue to be paid a cost of living allowance tied to the retail price index (hereafter “ the index ”) the refusal of such an allowance to them amounts to unfavourable discrimination against them and a breach of the principle of equality embodied in Article 6 and Article 28, paras. 1 and 2 of the Constitution. In any case, they say, since at the date when the Constitution came into force pensioners were being paid a cost of living allowance (though not one tied to the index) *exhibit 2* violated rights vested in, and guaranteed to, them by Article 192, para. 1, of the Constitution. Counsel for the respondent as well as denying that any

provision of the Constitution has been infringed, argued that the application must fail because “ the decision conveyed by the letter of December 3, 1969 ” (*exhibit 2*), was “ an act of Government ”. He said that satisfaction of the applicants’ request (*exhibit 1*) required a money appropriation ; and that in turn required the enactment of a Law, which was a matter for the House of Representatives. This argument in my view overlooks the fact that the decision complained of is, not to the effect that there are no legally approved credits for meeting the applicants’ claim—or for that matter similar claims by other pensioners—, but simply that “ in accordance with conditions prevailing from time to time an adjustment and increase was and is made of pensions ” and that “ the existing scheme of financial assistance to pensioners was only recently improved ”, coupled with a promise that “ when conditions so require the subject of a further increase could be re-examined ”. It was, therefore, a refusal by the Minister, not to introduce legislation where legislation was required, but to extend to pensioners a treatment similar to that accorded to serving officers, which the Minister had no less power to do than he had to grant the cost of living allowance enjoyed by the latter. It follows that the act complained of was not an act of Government but one subject to review under Article 146 of the Constitution. (Cp. *Philippou v. Republic* (1970) 3 C.L.R. 123).

The question then is whether the denial to the applicants of a cost of living allowance tied to the index violates or not any of the provisions of the Constitution on which they have relied.

Article 6 of the Constitution is as follows :

“ Subject to the express provisions of the Constitution no Law or no decision of the House of Representatives or of either of the Communal Chambers and no act or decision of any organ, authority or person in the Republic exercising executive power or an administrative function shall subject to unfavourable discrimination either of the two communities or any person as such or in his capacity as a member of a community ;”

and para. 1 of Article 28 reads :

“ All are equal before the Law, the administration and justice and are entitled to equal protection and treatment.”

Clearly as regards the matter complained of the quoted provisions overlap, the former being completely covered by the

latter. This is, in substance, similar to Article 14 of the Indian Constitution, and since, as pointed out by Basu in his Commentary on the Constitution of India at pp. 287 and 444, that part of the Indian provision relating to "equal protection of the laws" was taken verbatim from the American Constitution, guidance as to the meaning and application of Article 28, para. 1, may be derived from Indian and American cases. Now as stated in *Lindsley v. Natural Carbonic Gas Co.* (1910) 220 U.S. 61, cited in Basu at p. 441,

"Equal protection of the laws means subjection to equal laws applying to all in similar circumstances."

Then, quoting *Power Manufacturing Company v. Saunders* (1927) 274 U.S. 490, he goes on :

"It does not prevent a state from adjusting its legislation to differences in situation or forbid classification for that purpose but it does require that the classification be not arbitrary, but based on a 'real and substantial difference to the subject of the particular legislation'."

He continues with a citation from *Tigner v. Texas* (1940) 310 U.S. 141 :

"The article does not require things which are different in fact or in law to be treated as though they were the same"

and continues :

"The reasonableness of a classification would thus depend on the *purpose* for which the classification is made."

At p. 445 he says, citing *Missouri Pacific Railway Co. v. Humes* (1883) 115 U.S. 517 :

"A classification is *reasonable* when it is not an *arbitrary selection* but rests on '*differences pertinent to the subject in respect of which classification is made*'."

The foregoing has been said under the heading "Equal Protection of the Laws" ; but, as Basu says at p. 487,

"Under (the Indian) Constitution executive or administrative acts are included by the express provision of Art. 12 which defines a 'State' as including not only the legislature but also the executive and other 'authorities'. This is further made clear by defining 'law' in Art. 13 as including, among other things, any 'order' or 'notification', so that even executive orders or notifications must not infringe Art. 14. This trilogy

of articles thus ensures non-discrimination in State action both in the legislative and administrative spheres in the democratic Republic of India."

In this country the same result is achieved by the express terms of Article 28, para. 1 which speaks of equality before "the administration" as well as before the law.

It follows that the question before me is whether the placing of pensioners in respect of a cost of living allowance tied to the index in one class and officers in another is a permissible classification in accordance with the above principles or not. Both officers and pensioners are persons who are entitled to a monthly payment from the Government for services to it. In my judgment the fact that in one case the services were rendered in the past while in the other they are being rendered in the present is not relevant to the question of the grant of such an allowance. In respect of such a grant two considerations, and two only, are relevant : First, both payments are made in discharge of a legal obligation ; secondly, both officers and pensioners are entitled to expect that the product of their labour should not be whittled away through an increase in the cost of living. Indeed, the consequences of such an increase are more serious after an officer's retirement from the public service than they would be if he were still in the service, because while on pension he is nearer subsistence level than he was before. It follows that the applicants' complaint that their rights under para. 1 of Article 28 of the Constitution had been infringed is a valid one. It would have been equally valid if the cost of living allowance to officers had been expressly granted by statute and no provision had been made in that or any other statute for payment of a similar allowance to pensioners. In such a case the Court would have read that statute as if it had contained an exception intended to exclude pensioners and would have declared that exception inoperative as being contrary to the provision of the Constitution just referred to : See, for instance, the Greek Council of State decision in Case 2080 of 1950. However, the violation of the Constitution in this case having been committed by an administrative act, all I have to do is to declare that act null and void, which I accordingly do.

In view of this result it is unnecessary to go into the argument based on Article 192.

The respondent to pay the applicants £30 costs.

Sub judice decision annulled ; order for costs as aforesaid.