[A. LOIZOU, J.]

1973
Jan. 20
—
EVAGORAS PITSILLIDES
v.
REPUBLIC (MINISTER OF INTERIOR AND ANOTHER)

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

EVAGORAS PITSILLIDES,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTER OF INTERIOR AND ANOTHER,

Respondents.

(Case No. 137/72).

Administrative acts or decisions which alone can be made the subject of a recourse—Article 146.1 of the Constitution—Legal advice from the office of the Attorney-General on legal points arising from an application of the applicant to the Council of Ministers for exemption from military service—Which was not acted upon by the respondents but came to the knowledge of the applicant—Such legal advice is not an act or decision of an organ or authority or person exercising executive or administrative authority in the sense of paragraph 1 of Article 146 (supra)*—Consequently a recourse against such alleged decision is not maintainable.*

Attorney-General—Legal advice—Not an executory administrative act—Therefore, a recourse does not lie against such legal advice—See supra.

International Protocol of Hague of the 12th April, 1930 relating to military obligations and exemptions therefrom in certain cases of double nationality—Article 1—Principles governing exemption from military service under the said Article.

Protocol of Hague of April 12, 1930—A self-executory Treaty—Republic of Cyprus bound thereby—Protocol not superseded by the National Guard Laws 1964 - 1969.

Nationality—Double nationality—Military service—Exemptions—Protocol of Hague of April 12, 1930, Article 1—See supra.

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The applicant is a citizen of Cyprus and also a citizen of the United States of America, residing permanently in the United States of America since 1963. By his recourse he seeks a declaration that the alleged decision to the effect that he is not exempted from liability for service in the National Guard is null and void, *inter alia*, on the ground that the said decision is contrary to Article 1 of the Protocol of Hague of the 12th April, 1930. Article 1 reads as follows:

> "A person possessing two or more nationalities who habitually resides in one of the countries whose nationality he possesses and who is in fact most closely connected with that country, shall be exempt from all military obligations in the other country or countries."

On a preliminary point raised by the respondents, the learned Judge of the Supreme Court dismissed this recourse on the sole ground that the so called "decision" challenged thereby cannot be made the subject of a recourse under Article 146 of the Constitution; and the learned Judge :-

Held, (1). The so called "decision" attacked by the present recourse is not "the act or decision of any organ, authority or person exercising any executive or administrative authority" in the sense of paragraph 1 of Article 146 of the Constitution, but a legal advice of the Attorney-General (dated April 12, 1972) in respect of the legal points arising from the applicant's application to the Council of Ministers dated February, 1972, whereby he was seeking that he should be exempted from military service with the National Guard "in accordance with Article 1 of the Protocol of Hague dated April 12, 1930 .....".

(2) Consequently, there has been in this case no executory administrative decision which could be made the subject of a recourse under Article 146.

Recourse dismissed;
no order as to costs.

Per curiam : The Protocol of Hague was signed at Hague on the 12th April, 1930. Among its signatories were the United States of America and Great Britain and Northern Ireland signing also on behalf of all parts of the British Empire which

are not members of the League of Nations; so it was extended to Cyprus. It was confirmed by the United Kingdom on the 14th January, 1932, and the Republic of Cyprus is bound by the said Protocol by virtue of Article 8 of the Treaty of Establishment of the Republic. Furthermore, the Republic of Cyprus on the 5th March, 1970, transmitted to the Secretary General of the United Nations a Memorandum that it considers itself bound by the said Protocol and that it consents to continue being so bound.

Per curiam : The said Protocol is a Treaty which creates rights in favour of people who have double nationality. There is no dispute that it is a self-executing Treaty. The question is whether the National Guard Laws 1964 - 1969 are in conflict or they were intended to overrule the said Protocol. In my view, there is no such intention to be found in such Laws. On the contrary, the provision that citizens of the Republic who permanently reside outside Cyprus, are exempted from liability to serve, is wide enough to embrace the provisions of Article 1 of the Protocol (*supra*). Furthermore, by the proviso to section 6(1) of the National Guard Laws 1964 - 1969 the Council of Ministers may exempt any person, category or class of persons whenever reasons of public interest render the exemption indispensable. The compliance of a State to its international obligations should, in my view, be considered as a matter of public interest, sufficient to render such a case within the ambit of the said proviso.

Recourse.

Recourse against the decision of the respondents whereby applicant was not exempted from liability for service in the National Guard.

K. Talarides, for the applicant.

L. Loucaides, Senior Counsel of the Republic, for the respondents.

Cur. adv. vult.

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The following judgment was delivered by :-

A. LOIZOU, J. : The applicant by the present recourse seeks that the decision communicated to him orally on or about the 28th April, 1972 that he is not exempted from liability for service in the National Guard, be declared null and void and with no effect whatsoever.

The grounds of law on which this application is based are that the *sub judice* decision —

(a) was taken without competence;

(b) is not duly reasoned;

(c) is contrary to Article 1 of the International Protocol Relating to Military Obligations in certain cases of Double Nationality, of the 12th April, 1930 (hereinafter referred to as "the Protocol"), of Article 8 of the Treaty of Establishment of the Republic of Cyprus and Articles 32, 188 and 195 of the Constitution of Cyprus.

The facts of the case are briefly as follows :-

The applicant was born in Cyprus in the village of Pera Orinis on the 15th January, 1943. During the incidents of December, 1963 he served in the voluntary armed groups at Kaimakli and Omorphita, until February, 1964, when he left for the United States for higher studies in engineering. After completing his studies he remained there. He was called up in the armed forces of the United States, he served for two years, he reached the rank of sergeant and he was demobilized on the 12th July, 1969. He is a citizen of the United States of America and also a citizen of Cyprus. His class in Cyprus was called up for service in the National Guard on the 29th June, 1964 by an order published in the Official Gazette dated 22.6. 1964, Supplement No. 3, Notification No. 178.

On the 8th December, 1969 he returned to Cyprus as a visitor. He submitted an application to the Ministry of Interior (*exhibit* 3) whereby he claimed to be a resident of the United States, but he was exploring the possibility of finally deciding to settle in Cyprus or not, depending on whether, in view of the military service he did in the United States, he could be exempted from service in the National Guard and be placed on the

reserves. This application was refused—letter dated 28.1.1970, *exhibit* 5—as the applicant did not fall within the provisions of section 15(1)(d) of the National Guard Laws 1964 to 1969 which provides as to who may constitute the reserves of the Force.

In the meantime, on the 12th January, 1970, the applicant applied to the Director-General of the Ministry of Interior, stating that he arrived in Cyprus from U.S.A. for the purpose of visiting his family and that he intended to return to the United States shortly. As an American citizen he had done his national service with the United States and enclosed three testimonials vouching for this information. He was asked to be provided with the requisite exit permit so that he would leave the island as soon as possible for the United States.

On the 15th January, 1970, by letter, *exhibit* 2, he was informed that since for the time being he was permanently residing outside Cyprus, he was exempted from liability for service during his said residence outside Cyprus, in accordance with the provisions of section 4(3)(c) of the National Guard Laws.

The applicant then left the island for the United States on the 28th January, 1970. The applicant returned to Cyprus in November, 1971. He addressed another application to the Council of Ministers, this time, dated the 8th November, 1971 (*exhibit* 12). It is drafted again on the same lines as *exhibit* 3 and by paragraph 3 he stresses that he continues examining the case of his return and permanent settlement in Cyprus, but he faces the problem of the military service which he considers as unjust, in view of his two years' service in the United States and asks for exemption on account of special circumstances, under section 9(1) of the National Guard Laws. By a reply dated the 4th January, 1972 (*exhibit* 13) the applicant was informed that he could not be exempted under the provisions of the National Guard Laws. Reference is made to their previous letter of the 28th January, 1970 (*exhibit* 5).

On the 28th January, 1972, the applicant applied again and he was given again a negative reply on the 12th February, 1972 (*exhibit* 4), and reference was made to their previous letters of the 28th January, 1970 and

the 4th January, 1972. He was asked to present himself to the Conscription Office of the headquarters of the National Guard in Nicosia for enlistment, otherwise he would be prosecuted. He obtained, however, on the 18th January, 1972 an exit permit valid for three months, that is to say, expiring on the 17th April.

On the 25th February, 1972 he submitted an application to the Council of Ministers (*exhibit* 6). By paragraph 3 thereof, he said :-

> "I apply that in accordance with Article 1 of the Protocol of Hague dated 12.4.1930 which has been adopted by the United States of America on the 25th May, 1937 and by the Republic of Cyprus on the 27th March, 1970, in accordance with Article 169 of the Constitution, should be exempted from military service with the National Guard."

On the 16th March, 1972, Mr. Matsoukaris who is the officer responsible for the application of the National Guard Laws at the Ministry of Interior, wrote to the applicant on behalf of the Director-General a letter (*exhibit* 7) with a questionnaire that might assist them at the re-examination of the matter. The applicant replied on the 21st March, 1972 (*exhibit* 8). This application of the applicant, together with other relevant documents, was referred to the Attorney-General of the Republic for legal advice (*exhibit* 9). The matter was handled by Mr. Paschalis, in his capacity of counsel of the Republic and not as Chairman of the Advisory Committee set up by the Minister under section 4(4) of the National Guard Laws. The legal advice given on behalf of the Attorney-General dated the 12th April, 1972, was sent to the Director-General, Ministry of Interior, with communication to the Director-General, Ministry of Foreign Affairs and immigration Officer.

On the 12th April, 1972, the applicant having been informed by Mr. Paschalis of the contents of the said legal advice, went and saw personally Mr. Matsoukaris at the Ministry of Interior. On the same day he submitted a written application (*exhibit* 10) asking for an exit permit as being an American citizen and holder of American passport No. A1486745 issued in Washington on the 25th June, 1970, a permanent resident of America

since February, 1963, giving also his permanent address in America. On the same day an exit permit was given to him under section 26 of the National Guard Laws.

There is a dispute as to what orally transpired between the applicant on the one hand and Mr. Paschalis and Mr. Matsoukaris on the other hand, both of whom he repeatedly visited and inquired about his application. In view of this, evidence was heard.

The applicant stated that having received no reply until the 12th April, 1972, he went and saw Mr. Matsoukaris and obtained an exit permit. This, he did, in order to be able to leave the island, in case he received an unfavourable reply to his application for exemption.

The applicant knew that Mr. Paschalis, whom he saw repeatedly, was a counsel of the Republic and that he would be giving a legal advice on his problem. The first time, however, when Mr. Paschalis told him that on principle Mr. Matsoukaris would be giving him a reply to his application, but that in his opinion no law had been enacted on the basis of the Protocol, therefore, he could not be given exemption, was on the 25th April, subsequently changing it to the 28th of April. It was after that that he saw Mr. Matsoukaris who told him that he would not be given a written reply, because he had already obtained an exit permit and if he was given one, he would take the case before the Constitutional Court.

Costas Matsoukaris in giving evidence stated that it was on the 12th April, 1972 that the applicant called at his office and told him that he had seen on that day Mr. Paschalis who informed him that in his opinion the Treaty was not applicable in Cyprus, and in view of that he wanted an exit permit as a permanent resident of the United States which was given to him. (See *exhibit* 10).

In two days' time, that is on the 14th the advice of the Attorney-General (*exhibit* 9) reached him. As the applicant had in the meantime obtained an exit permit and he did not know whether he had left or not, he referred the matter to the Attorney-General for advice as to whether they should reply to the applicant or not.

Mr. Paschalis in his reply (*exhibit* 11) made reference to the exit permit given to the applicant and that exemption from military service was given on another basis. He also stated therein that as in the new application for exit permit, nothing was said about the previous one for exemption, he inferred that it had been abandoned. Mr. Paschalis further wrote that he supposed that the applicant had left in the meantime Cyprus or he would leave soon, and that if he asked for a reply to his old application, the matter should be placed before him, so that he would examine the question of the necessity for a reply on the basis of any new facts.

Mr. Matsoukaris asserted that he did not see the applicant after the 12th of April, but Mr. Talarides asked him sometime later why no written reply was given to the applicant and he informed him that if the applicant wanted such a reply, he would reply to him in writing as the Attorney-General had advised them to give him a written reply, if the applicant asked for such a reply.

A point has been made that in paragraph 9 of the opposition, it is stated that "the applicant having been informed orally of the outcome of his new application, *he claimed exemption as a permanent resident abroad and* by application of 12.4.1972 asked for an exit permit for settling again in America (*exhibit* 10) which was granted to him. After that, the Attorney-General advised that it is not necessary that a reply be given to his application dated 12.4.1972 (*exhibit* 11)". Mr. Matsoukaris who himself had prepared the statement of facts which went into this paragraph, explained that he expressed thereby what in fact he stated in Court, as having been transpired between him and the applicant, which is to the effect that the applicant never asked for any reply after he had learned of the contents of Mr. Paschalis's advice and applied and obtained the exit permit on the 12th of April.

The evidence of Mr. Paschalis is to the effect that the applicant called on him on several occasions before the 12th of April. As he knew that he was going to deal with the legal question about his case and seemed concerned to know if the legal point of his case had been decided, applicant called on him on the 12th of April.

He has a very good recollection of this, as it was on that day that he gave the final form to his advice. He told him that his opinion about the legal point raised was that he could not be exempted under the National Guard Laws on the basis of this Protocol. Mr. Paschalis, when asked about the practice regarding legal advice given by the office of the Attorney-General said that in some cases Ministries or other organs or authorities seek a reconsideration of the advice given from the counsel who gave it or ask for the matter to be dealt personally by the Attorney-General.

Mr. Matsoukaris questioned whether he would consider binding on him the opinion of Mr. Paschalis on the question of the Treaty, replied, "Yes, but I would act in accordance with the decision of the Minister or the Attorney-General". Mr. Matsoukaris said that counsel for the applicant communicated by phone with him and asked him about the case of his client. He explained to him the whole case, which I take it to mean in the terms that he testified before me, and upon being asked why no written reply was given to the applicant, he said that they had advice from the Attorney-General that if the applicant wanted a reply they would do so, if the applicant asked for one.

It is not in dispute that the matter never went beyond Mr. Paschalis and Mr. Matsoukaris.

On the material before me and the evidence heard, I accept that of Mr. Paschalis and Mr. Matsoukaris. I have no difficulty in this respect, as the applicant's testimony as such, is rather vague on the question whether Mr. Matsoukaris communicated to him orally any decision on his application. The applicant was concerned only to secure an exit permit on the ground that he was a permanent resident abroad, falling within the exemption of section 4(3)(c) of the Law, after he saw Mr. Paschalis on the 12th April.

On the strength of the aforesaid testimony and the other material before me, I have no difficulty in concluding that there has been no decision other than the legal advice of Mr. Paschalis, of which the applicant came to know, in the circumstances hereinabove set out.

Before proceeding to deal with the preliminary point

raised by the respondents to the effect that the *sub judice* decision is a legal advice of the Attorney-General and consequently it is not an executory act of any organ, authority or person exercising any executive or administrative authority, I consider it, in the circumstances of this case and in view of the urgency of the matter, useful to deal with the substance of the recourse, as set out in the 3rd ground of law relied upon by the applicant. I said, on the assumption, as I have not been persuaded that there has been an act or decision which could be the subject of a recourse under Article 146.1 of the Constitution, but with this point I shall be dealing in due course.

The aforesaid Protocol was signed at Hague on the 12th April, 1930. Among its signatories were the United States of America and Great Britain and Northern Ireland signing also on behalf of all parts of the British Empire which are not members of the league of nations; so it was extended to Cyprus. It was confirmed by the United Kingdom on the 14th January, 1932 and the Republic of Cyprus is bound by the said Protocol by virtue of Article 8 of the Treaty concerning the establishment of the Republic. Furthermore, the Republic of Cyprus on the 5th March, 1970 transmitted to the Secretary-General of the United Nations a Memorandum that it considers itself bound by the said Protocol and that it consents to continue being so bound.

The said Treaty creates rights in favour of people who have double nationality. There is no dispute that it is a self-executing Treaty. The question is whether the National Guard Laws 1964 - 1969 are in conflict or they were in any way intended to overrule the said Protocol. In my view, there is no such intention to be found in the said Laws. On the contrary, the provision that citizens of the Republic who permanently reside outside Cyprus, are exempted from liability to serve, is wide enough to embrace the provisions of Article 1 of the Protocol to which I shall be shortly referring. Furthermore, by the proviso to section 6(1) of the Law whereby the Council of Ministers may exempt any person, category or class of persons whenever reasons of public interest render the exemption indispensable. The compliance of a State to its international obligations should, in my view, be con-

sidered as a matter of public interest, sufficient to render such a case within the ambit of this proviso.

Article 1 of the Protocol reads as follows :-

> "A person possessing two or more nationalities who habitually resides in one of the countries whose nationality he possesses and who is in fact most closely connected with that country, shall be exempt from all military obligations in the other country or countries.
>
> This exemption may involve the loss of the nationality of the other country or countries."

It is clear from the wording of the Article that the exemption from military service in the other country or countries, whose nationality a person possesses, exists so long as he habitually resides in one of the countries whose nationality he possesses and with which country he is in fact most closely connected. If this qualification is lost, then the exemption is lost with it. In other words, if a person who is habitually resident in one country and with which he is closely connected decides to leave that country and go and reside habitually in the other country whose nationality he possesses, he is liable to military service in the second country, because he no longer habitually resides and is in fact most closely connected with the former country. He cannot be considered as habitually residing and simultaneously be closely connected with two countries in the sense that these terms are used in Article 1 of the Protocol.

In the present case the applicant has been considered as habitually residing in the United States of America and as no argument has been advanced, I have no reason to question the fact that he is most closely connected with that country on account of the permanent residence which the administration has already recognized as a fact by giving him exit permits and exemption from military service under section 4(3)(c) of the National Guard Laws, which reads as follows :-

> "4
>
> (3) There shall be exempted from the liability under sub-section (1).

(a)

(b)

citizens of the Republic permanently residing outside Cyprus.

(c) "

The applicant has all along simply explored what the decision will be as far as military service was concerned, in case he decided to settle permanently in Cyprus. I take it that if he does make up his mind and reside permanently in Cyprus, on the same criteria that he claims now to be habitually residing and most closely connected with the United States, he can be found to be habitually residing and most closely connected with Cyprus. So, in my view, he cannot be considered as possessing that status in respect of both countries simultaneously. In such a case, if he makes up his mind to settle down in Cyprus, which he has not as yet done, and habitually reside here, he must be considered as taking himself out of the benefits of the aforesaid Article 1. The applicant would have failed, therefore, on the third ground of Law relied upon by him, that is to say, the legal point that turns on the interpretation of the aforesaid Article 1.

The case, however, is decided on the first preliminary objection raised by the respondent, to the effect that there has been no decision that could be the subject of a recourse under Article 146 of the Constitution, as on the findings of fact already made, this so called "decision", is not the act or a decision of any organ, authority or person exercising any executive or administrative authority, but a legal advice of the Attorney-General in respect of the legal points arising from the application of the applicant. The facts of the case show that in view of the applicant having applied for an exit permit, the legal advice was not acted upon, but a second legal advice was sought and given to the effect that if the applicant applied for a reply, the matter should be referred again to the Attorney-General for examination afresh of the matter (the need for a reply) on the basis of any future facts, as stated by Mr. Paschalis in paragraph 3 of *exhibit* 11. I need not say anything more on this point, except repeat what Mr. Paschalis said that in many cases

administrative organs request the Attorney-General to deal with the matter afresh personally, or ask for reconsideration of the advice from the counsel in the office of the Attorney-General who gave same. Therefore, it cannot be said as having been considered by the administration as final and conclusive, as it never reached the appropriate organ for consideration as such, nor did the Minister or any administrative authority or organ attempted to act upon it. The only action taken thereon, was by the applicant himself, who hastily applied for an exit permit, taking advantage of the fact that the administration had accepted him as a permanent resident abroad.

Bearing in mind the circumstances of this case, I accept the submission that this is not a decision within the meaning of Article 146 of the Constitution, and, therefore, it could not be the subject of a recourse. In the result, the recourse fails on this ground.

I need not deal with the first and second grounds of law relied upon by the applicant, namely that of competence of the organ who took the decision or the lack of due reasoning, inasmuch as having concluded that there has been no decision, these issues of competence and due reasoning, cannot arise.

Before concluding, I would like to refer to paragraph 6 of the legal advice of Mr. Paschalis in which he states that—"when (he) joins and serves for a few months, if he applies for his release under section 9 on account of special circumstances, then *prima facie* I would say that the circumstances, that is to say that he has done a two-year service in the United States and that if released he will be a reservist by virtue of section 15, they might be considered as special circumstances, but in any event this is a subject which will be examined in due course, if the serviceman submits a relevant application."

Having gone through the facts and circumstances of this case, I have no doubt that if the occasion arises, the appropriate authority of the State will pay due regard

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to Mr. Paschalis's most fair observations.

In the result, the present recourse is dismissed, but there will be no order as to costs.

Application dismissed.
No order as to costs.