1973
Mar 31

EVRIPIDES EVLOGIMENOS

v

REPUBLIC (MINISTER OF INTERIOR AND DEFENCE)

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

EVRIPIDES EVLOGIMENOS,

Applicant,

and

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

Respondent.

(Case No 473/72).

Military Service—National Guard—Application to shorten period of service—On grounds, inter alia, *of public interest—Section 5(1) of the National Guard Laws, 1964 - 1969—Dealt with and refused by Minister of Interior —Minister not being the competent organ which is the Council of Ministers— In the absence of conferment of authority under the Statutory Functions (Conferment of Exercise) Law, 1962 (Law No. 23 of 1962) application could only be dealt with and determined by the Council of Ministers—Mere reference of the matter by the Council to the Minister does not constitute any such conferment as required under said Law*—Sub judice *refusal annulled for lack of competence.*

Administrative organ—Competence—Competence which a Law confers on a particular administrative organ cannot validly be delegated or assigned to another organ— Subject of course to the provisions of the Statutory Functions (Conferment of Excercise) Law, 1962 (Law No. 23 of 1962), supra—*It follows that the decision of the Minister of Interior refusing the application to shorten the period of military service under section 5(1) of the National Guard Laws, 1964 to 1969 has to be annulled for lack of competence—The Council of Ministers being the only competent authority in the matter under said section 5(1) and there being no conferment or delegation of such power to the Minister under the relevant statute* viz. *the Statutory Functions (Conferment*

of Exercise) Law, 1962 (Law No. 23 of 1962)—Question of such competence may be taken up by the Court acting even ex proprio motu.

Recourse under Article 146 of the Constitution—Questions of competence of administrative organs may be dealt with and determined by the Court even ex proprio motu (Yiangos HjiStefanou *v.* The Republic *(1966) 3 C.L.R. 289,* followed).

Delegation of powers—The Statutory Functions (Exercise of Competence) Law, 1962 (Law 23/62)—Principles of administrative law—See also supra.

The Court annulled for lack of competence the decision of the Minister of Interior whereby he refused the application on the part of the applicant in the present recourse to shorten his period of military service under section 5(1) of the National Guard Laws 1964 - 1969, the only authority competent to deal with the matter being under the said Laws section 5(1) the Council of Ministers, there being no conferment of such power to the Minister under the relevant said Law (The Statutory Functions (Conferment of Exercise) Law, 1962, Law No. 23 of 1962).

Cases referred to :

Yiangos HjiStephanou v. *The Republic* (1966) 3 C.L.R. 289;

Decisions of the Greek Council of State : Nos. 1516/1953 and 1590/1959;

See also Porismata Nomologias of the (Greek) Council of State (Conclusions of the Case-law of the Council of State) 1929 - 1959, p. 106

Recourse.

Recourse against the refusal of the respondent to shorten applicant's period of service in the National Guard from two years to twelve months.

K. Talarides, for the applicant.

R. Gavrielides, for the respondent.

Cur. adv. vult.

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EVRIPIDES EVLOGIMENOS
v.
REPUBLIC (MINISTER OF INTERIOR AND DEFENCE)

The following judgment was delivered by :-

A. LOIZOU, J. : The applicant by the present recourse prays for a declaration that the refusal of the respondent to shorten his period of service in the National Guard from two years to 12 months, communicated to him by letter of the Director-General of the Ministry of Interior dated the 17th October, 1972, is null and void and of no effect.

The applicant was born on the 11th March, 1949 and in accordance with the National Guard Laws 1964 - 1969 he belongs to the 1967 Class. This Class was called for enlistment on the 17th January, 1967 by decision No. 6259 of the Council of Ministers published in Supplement No. 4 to the official Gazette dated the 12th January, 1967. The Minister of Interior by order published in Supplement No. 3 to the official Gazette of the same date under Notification No. 49 prescribed the necessary arrangements of the enforcement of the said decision. At that time the applicant was in Athens, studying at the Metsovion Polytechnion. He had, as from the 3rd August, 1966, obtained an exit permit after he signed a declaration to the effect that he would go abroad for studies, but being aware of the provisions of the National Guard Laws he undertook to enlist as soon as his Class was called.

On the 5th May, 1970 he applied, through the Embassy of the Republic in Athens, to the Ministry of Interior, asking for suspension of his enlistment on the ground that he was a student. That application, however, was turned down, as such ground could not be validly relied upon for that purpose under Decision No. 6259. The applicant, however, did not return to Cyprus until the 4th August, 1971, having first completed his studies, and although he asked then to enlist in the National Guard, he was not accepted until the 20th January, 1972, which is apparently one of the two dates in each year for enlistment.

On the 16th October, 1972, the applicant applied to the Council of Ministers (*exhibit* 4) for a shortening of his period of service for 12 months, on the ground that he had incurred, through his father, debts for the purpose of completing his studies, and his financial position would

deteriorate had he continued serving in the National Guard, the allowance he received not being enough for his and his wife's upkeep. Another ground invoked in the said application was that he had an offer to manage a factory that would have been set up in Nicosia, in about January, 1973, and his service in the said factory would be for the benefit of the industry and the economy of the Island, as it would fill a gap in the Industry.

On the 18th October, 1972, the Secretary of the Council of Ministers by letter (*exhibit* 5) informed the applicant that his said application had been forwarded to the Minister of Interior for examination and any further correspondence should be addressed to the said Ministry.

In the meantime, an identical application was forwarded to the Minister of Interior, copy of which is attached to the opposition. (Schedule 4). On the 17th October, 1972, a note for the information of the Minister of Interior was made on its margin, saying that the case of the applicant does not fall in any way within the provisions of the Law or decision of the Council of Ministers and he could not be released. On the other hand, his case was not a special one, as there were many graduates with the same qualifications who fulfilled their military obligations and could be engaged (in the said post). The Minister of the Interior adopted this reasoning and on the 17th October, 1972, the applicant was informed that his application could not be acceded to (Schedule 5).

It has been argued that this is a decision of the Director-General and not the Minister of Interior himself, but I cannot accept this submission, as the Minister himself decided, having fully adopted the submission of the officer in his Ministry who, in the first place, examined the matter in question and placed all the relevant material for consideration before him.

Though the question of competence of the organ that took the decision was mainly directed against the decision as having been taken by the Director-General of the Ministry, I shall proceed to examine this ground of law of lack of competence of the administrative organ that took the adverse for the applicant decision, as if it had been formulated against the Minister of the Interior

himself and not the Director-General, because the Court can examine this question even *ex proprio motu*. (See *Yiangos Hji Stephanou* v. *The Republic* (1966) 3 C.L.R. p. 289).

Section 5(1) of the National Guard Laws 1964 - 1969 reads as follows :-

> "...Subject to the provisions of sub-section (4) every serviceman shall be under an obligation for military service, the duration of which shall be 24 months...
>
> Provided that after the lapse of one year's military service or whenever military efficiency and the needs of the country so permit, or considerations of public interest so demand, the Council of Ministers may, by decision published in the official Gazette of the Republic, shorten the period of military service to any period being not less than six months, either by age, group or part thereof or by areas or categories or in exceptional cases by persons on their application and because of special circumstances."

It is obvious that the applicant by his present application was invoking the last part of the aforesaid proviso praying for the shortening of his military service because of special circumstances.

It has been argued by learned counsel for the applicant that the *sub judice* decision could be annulled on the ground of lack of competence or jurisdiction inasmuch as it was a decision under section 5(1)(a) of the National Guard Laws and not an application for release under section 9(i) of the Law which provides that the Council of Ministers may by decision published in the official Gazette of the Republic discharge servicemen either by age, group or part thereof or by areas or categories or in exceptional cases by persons on their application and because of special circumstances.

Had it been an application under this section, no question of lack of competence would have arisen, as the Council of Ministers by Decision No. 6980 of the 15th of September, 1967, published in Supplement No. 4 to the official Gazette of the 15th September, 1967, autho-

rized the Minister of Interior to release under the provisions of the aforesaid section servicemen in exceptional circumstances for family reasons on their application. This authorization, apparently, is one that has been made by virtue of the provisions of the Statutory Functions (Conferment of Exercise) Law, 1962 (No. 23 of 1962). No such conferment of authority has been made by the Council of Ministers to the Minister of Interior in respect of its powers under section 5(1) of the Law.

Learned counsel for the respondent has argued that the Minister of Interior had competence in the matter on the ground that the applicant's application was substantially based on family reasons and in addition to the aforesaid decision, there were two other decisions of the Council of Ministers which supported his contention that there was competence in the Minister of Interior to deal with the matter, the one being Decision No. 10503, published in Supplement No. 4 to the official Gazette of the 11th June, 1971, whereby the Council of Ministers decided to shorten the service of graduates of Universities of the Class of 1958 - 1966. The other being Decision No. 9631, published in Supplement No. 4 to the official Gazette of the 30th April, 1970, by which the Council of Ministers in exercise of its powers under section 5(1) shortened the period of those who were then serving and had secured enrolment in Universities.

It was the contention of learned counsel for the respondent, who, I must say, has presented his case in an admirable manner, considering that this is one of his first cases he appeared before this Court, that the Minister did not exercise the functions conferred to the Council of Ministers by section 5(1), but simply informed the applicant that his case could not fall within any of the aforesaid decisions of the Council of Ministers. This was based on the assumption, as I have already pointed out, that the application of the applicant was substantially based on two grounds —

(1) that he is a graduate of a University, and

(2) that he has family problems and neither of the two grounds bring him within the ambit of the aforesaid two decisions.

So, being a communication of a previous decision, was not as such an act or decision of an executory nature and, therefore, could not be the subject of a recourse.

A perusal of the applicant's application reveals that the grounds invoked by applicant are not merely those two hereinabove set out, but there is a third ground, that is, the public interest that may emanate from the establishment, through his own contribution, of a new industrial unit.

The applicant was precluded from having his case determined on its merits by the organ having competence in the matter. The competence which a law confers on a certain administrative organ cannot validly be assigned to another organ. (See Decisions of the Greek Council of State 1516/53, 1590/59 and Porismata Nomologhias of the Greek Council of State 1929 - 1959, p. 106). This could only be done, if either the Law itself authorized such conferment of the exercise of the statutory functions vested in the Council of Ministers to the Minister of Interior or under the provisions of the Statutory Functions (Conferment of Exercise) Law, 1962. In the absence of such conferment, the fact that by the letter of the Secretary of the Council of Ministers, *exhibit* 5, the applicant was informed that his application was transmitted to the Minister of Interior for examination cannot be considered as a conferment of the exercise of the said statutory powers under section 5(1) of the National Guard Laws to the Minister of Interior.

For the aforesaid reasons the decision of the Minister of Interior refusing the applicant's application is hereby declared as null and void and of no effect, on the ground of lack of competence. As the application is likely to come up for re-examination by the organ having competence in the matter, I do not propose to entertain the case on the merits so that anything that may be said it will not be considered as in any way prejudicing the issues either way.

In the result, the *sub judice* decision is annulled. Respondent to pay £20 towards applicant's costs.

Sub judice decision annulled.
Order for costs as aforesaid.