IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

SPYROS A. MYRIANTHIS,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH

1. THE COUNCIL OF MINISTERS,
2. THE MINISTER OF INTERIOR AND DEFENCE,

Respondents.

(*Case No.* 14/77).

Legitimate interest—Article 146.2 of the Constitution—Acceptance, expressly or impliedly, of an act or decision of the administration, deprives the acceptor of a legitimate interest entitling him to make an administrative recourse for the annulment of such act or decision—But such acceptance should take place unreservedly and freely and not because of fear of adverse consequences—And must be expressed clearly and distinctly and by unambiguous conduct—Sub judice *decisions relating,* inter alia, *to applicant's temporary discharge from the National Guard—Applicant in a hurry to be discharged in order to continue his university studies abroad—Serious doubt whether or not applicant assented to the said decisions freely and without fear of adverse consequences for him in respect of delay of his university studies—In the circumstances he has not behaved in such a way as to divest himself of a legitimate interest entitling him to make a recourse.*

The applicant in this recourse complained, *inter alia,* against the decision of the respondent Minister as a result of which he was granted only a temporary discharge from the National Guard on December 1, 1976 and was issued with a "certificate of identity" on December 2, 1976 for the purpose of a single return journey to Greece, instead of being allowed to travel by using his passport as citizens of Cyprus normally travel, being thus free to visit practically all countries of the world.

At the beginning of the hearing of the recourse there arose the issue of whether the applicant was entitled, in view of the

provisions of Article 146.2 of the Constitution, to make this recourse, because allegedly, he has accepted the *sub judice* decisions and acted on the strength of them.

It was not in dispute that the applicant was in a hurry to be discharged from the ranks of the National Guard and to leave Cyprus in order to go to Athens where he had to continue his university studies and to sit for his next examinations in January, 1977. Counsel for the applicant contended that applicant has never accepted, expressly or impliedly, the said decisions and that, even assuming that he has done so at any stage, his acceptance was not given unreservedly and freely, but out of fear of adverse consequences for him in case he had not acted on the strength of the said two decisions.

Held, (1) that though a person who, expressly or impliedly, accepts an act or decision of the administration, is deprived, because of such acceptance, of a legitimate interest entitling him to make an administrative recourse for the annulment of such act or decision in order that the acceptance of an administrative act or decision should deprive someone of the right to challenge it by an administrative recourse for annulment such acceptance should take place unreservedly and freely and not because of fear of adverse consequences otherwise.

(2) That though the applicant was discharged and left for Athens on the strength of the *sub judice* decisions and that neither when he first came to know of them, nor at any time later, even after he had left Cyprus did he, in any way, reserve his rights in respect of them and only filed this recourse on January 17, 1977, in the light of the facts of the case (see p. 169 *post*) and the above principles of Law, this Court is in serious doubt whether or not the applicant has accepted the said decisions freely and without fear of adverse consequences for him in respect of his university studies in case he did not agree to leave the ranks of the National Guard on the strength of a temporary discharge and to travel to Athens by using a certificate of identity; and that, therefore, it cannot be held that, in the circumstances, he has behaved in such a way as to divest himself of a legitimate interest entitling himself to make this recourse, which has to proceed to be determined on its merits.

Order accordingly.

Cases referred to:

Piperis v. *Republic* (1967) 3 C.L.R. 295 at p. 298;

Ioannou and Others v. *Republic* (1968) 3 C.L.R. 146 at p. 153;

Markou v. *Republic* (1968) 3 C.L.R. 267 at p. 276;

Pericleous v. *Republic* (1971) 3 C.L.R. 141 at pp. 145, 146;

Republic v. *Pericleous* (1972) 3 C.L.R. 63;

Case Nos. 1341/1966 and 2087/1970 of the Greek Council of State.

Recourse.

Recourse against the decision of the respondents as a result of which applicant was granted only a temporary discharge from the National Guard and was issued with a "certificate of identity" for the purpose of a single return journey to Greece, instead of being allowed to travel by using his passport.

A. Anastassiades with *A. Myrianthis,* for the applicant.

A. Frangos, Senior Counsel of the Republic, for the respondents.

Cur. adv. vult.

The following interim decision was delivered by:-

TRIANTAFYLLIDES, P.: By the present recourse the applicant complains, in effect, against decisions of the respondent Minister of Interior and Defence (respondent 2) as a result of which the applicant was granted only a temporary discharge from the National Guard, on December 1, 1976 (see *exhibit A*) and was issued with a "certificate of identity" on December 2, 1976 (see *exhibit C*), for the purpose of a single return journey to Greece, instead of being allowed to travel by using his passport as citizens of Cyprus normally travel, being thus free to visit practically all countries of the world.

Furthermore, the applicant complains against a decision of the respondent Council of Ministers (respondent 1), No. 15243, taken on September 16, 1976, by means of which there were called up for service as reservists in the National Guard, immediately after the completion of the normal period of their service envisaged by the relevant legislation, those—(including the applicant)—who belong to the 1974 Β΄/ΕΣΣΟ class of conscripts.

At the beginning of the hearing of this recourse there arose the issue of whether the applicant is entitled, in view of the provisions of Article 146.2 of the Constitution, to make this recourse, in respect, in particular, of the aforementioned decisions of respondent 2, because, allegedly, he has accepted the said decisions and acted on the strength of them.

It is well established, by now, in the administrative law of Cyprus, on the basis of relevant principles which have been expounded in Greece in relation to a legislative provision there (section 48 of Law 3713/1928) which corresponds to our Article 146.2 above, that a person, who, expressly or impliedly, accepts an act or decision of the administration, is deprived, because of such acceptance, of a legitimate interest entitling him to make an administrative recourse for the annulment of such act or decision (see, *inter alia*, Πορίσματα Νομολογίας τοῦ Συμβουλίου τῆς Ἐπικρατείας, 1929-1959, pp. 260-261, *Piperis* v. *The Republic*, (1967) 3 C.L.R. 295, 298, *Ioannou and others* v. *The Republic*, (1968) 3 C.L.R. 146, 153, *Markou* v. *The Republic*, (1968) 3 C.L.R. 267, 276 and *Pericleous* v. *The Republic*, (1971) 3 C.L.R. 141, 145, 146).

It is quite clear that in order that the acceptance of an administrative act or decision should deprive someone of the right to challenge it by an administrative recourse for annulment such acceptance should take place unreservedly and freely and not because of fear of adverse consequences otherwise (see, Πορίσματα, *supra*, p. 261, Κυριακοπούλου Ἑλληνικὸν Διοικητικὸν Δίκαιον, 4th ed., vol. C, p. 124, and the *Pericleous* case, *supra*—and it may be pointed out, at this stage, that though the in the first instance decision in the *Pericleous* case was reversed on appeal in *The Republic* v. *Pericleous*, (1972) 3 C.L.R. 63, there was not disapproved of, on appeal, that part of the first instance decision which is relevant for the purposes of this Interim Decision).

It is quite useful to refer, too, to two relevant decisions of the Council of State in Greece: In case 1341/1966 it was stressed that for the assent to an administrative act or decision to be such as to deprive the person concerned of the right to make a recourse against it, it must be expressed clearly and distinctly and by unambiguous conduct

from which it is to be necessarity inferred that it was intended to assent to the administrative act or decision in question; and from the decision in case 2087/1970 it is to be derived that there must be cogent proof of such assent.

It has been strenuously contended on behalf of the applicant that he has never accepted, expressly or impliedly, the complained of decisions of respondent 2, and that, even assuming that he has done so at any stage, his acceptance was not given unreservedly and freely, but out of fear of adverse consequences for him in case he had not acted on the strength of the said two decisions.

The above contention of the applicant was refuted by counsel for the respondents; and, as there was considerable disagreement concerning relevant factual aspects of the matter, evidence was adduced both by way of affidavits and *viva voce*.

It is useful, at this stage, to refer to the following salient facts:-

While the applicant was serving as a conscript in the National Guard he filed, on November 5, 1976, a recourse (No. 265/76, see *exhibit D*), by means of which he challenged the refusal of the Council of Ministers and of the Minister of Interior and Defence to discharge him from the ranks of the National Guard. I need not refer to all the matters which were raised in those proceedings; but, it is relevant to point out that one of them was that the applicant had already been enrolled as a student of Law at Athens University and that he was the victim of unequal treatment because other conscripts of his class had already been discharged for the purpose of proceeding abroad in connection with studies at various foreign universities.

That recourse of the applicant was being heard together with other recourses of a similar nature, by other applicants; the record of the Court for the proceedings on November 17, 1976, reads as follows:-

"Κος Α. Μυριάνθης διὰ τὸν αἰτοῦντα.

Κος Ν. Χαραλάμπους διὰ τὴν Δημοκρατίαν.

Κος Χαραλάμπους: Ἔχω ἐξουσιοδοτηθῆ ὑπὸ τοῦ Ὑπουργοῦ Ἐσωτερικῶν καὶ Ἀμύνης νὰ δηλώσω ὅτι συμφώνως νεωτέρας ἀποφάσεως θὰ γίνουν αἱ ἀναγκαῖαι διευθετήσεις καὶ θὰ ληφθοῦν ἅπαντα τὰ ἀπαιτούμενα πρὸς τοῦτο μέτρα ὥστε ἅπαντες οἱ ἐθνοφρουροὶ οἵτινες ἐγένοντο δεκτοὶ εἰς πανεπιστήμια ἢ εἰς ἰσοτίμους ἀνωτάτας σχολὰς οἱωνδήποτε χωρῶν πρὸς παρακολούθησιν πανεπιστημιακῶν σπουδῶν ἀπολυθῶσιν ἄνευ ὅρων κατὰ τὴν 30ην Νοεμβρίου 1976.

Κος Μυριάνθης: Ἡ δήλωσις τοῦ κ. Χαραλάμπους ἀποτελεῖ οὐχὶ νέαν ἀπόφασιν ἀλλὰ συνέχισιν τῆς αὐθαιρεσίας καὶ παρανομίας, αἵτινες θὰ τερματισθοῦν εἰς τὴν περίπτωσιν τοῦ αἰτοῦντος τὴν 30ην Νοεμβρίου 1976.

Θὰ ἤθελα νὰ μοῦ δοθῆ χρόνος νὰ συζητήσω μὲ τὸν Ὑπουργὸν Ἐσωτερικῶν ἐὰν δύνανται νὰ γίνουν εἰδικαὶ διευθετήσεις διὰ τὸν πελάτην μου λόγῳ εἰδικῶν περιστάσεων.

Κος Χαραλάμπους: Ἐπιφυλάσσομαι νὰ ἀπαντήσω ἀργότερον εἰς τὴν δήλωσιν τοῦ κ. Μυριάνθη.

Δικαστήριον: Ἡ προσφυγὴ ἀναβάλλεται διὰ μνείαν τὴν 20ην Νοεμβρίου 1976 (9 π.μ.)".

("Mr. A. Myrianthis for the applicant.

Mr. N. Charalambous for the Republic.

Mr. Charalambous: I was authorized by the Minister of Interior and Defence to state that, according to a new decision, all necessary arrangements will be made and all the required in this respect measures will be taken so that all conscripts, who have been admitted by universities or other equivalent highest schools of any countries for university studies, will be discharged, without conditions, on November 30, 1976.

Mr. Myrianthis: The statement of Mr. Charalambous does not constitute a new decision but a continuation of the arbitrariness and illegality which will be terminated, in the case of the applicant, on November 30, 1976.

I would like to be given time to discuss with the

Minister of Interior whether special arrangements could be made for my client because of special circumstances.

Mr. Charalambous: I reserve my right to reply later on to the statement of Mr. Myrianthis.

Court: The recourse is adjourned for mention to November 20, 1976 (9 a.m.)").

Such recourse was withdrawn on November 20, 1976; the relevant Court record reads as follows:-

"Mr. A. Myrianthis for applicant.

Mr. N. Charalambous for respondents.

Mr. Charalambous: I confirm that the applicant is one of those to be discharged on November 30, 1976.

Mr. Myrianthis states that, in the circumstances, he seeks leave to withdraw this case.

Court: Case dismissed as withdrawn with applicant being at liberty to have it reinstated in case he is not discharged as stated above".

As a result of the above developments the applicant was given a temporary discharge on December 1, 1976, in the form of *exhibit A*, and a few days later he travelled to Greece on the strength of a certificate of identity, *exhibit C*.

The temporary discharge was given to the applicant by the Minister of Interior and Defence in the exercise of his powers under section 9(1) of the National Guard Law, 1964 (Law 20/64), as amended, *inter alia*, by the National Guard (Amendment) Law, 1965 (Law 26/65); such powers having been delegated to the Minister by the Council of Ministers.

It is not in dispute that the applicant was in a hurry to be discharged from the ranks of the National Guard and to leave Cyprus in order to go to Athens where he had to continue his university studies; and, actually, he had to sit for his next examinations in January 1977 (see his affidavit dated May 17, 1977).

In the temporary discharge (*exhibit A*) there were set out a number of conditions, one of which was that the applicant, either at the conclusion of his studies or in case he comes to Cyprus during the summer holidays, has to serve in the ranks of the National Guard in order to complete what is regarded, by respondent 2, as the remainder of the period of his military service.

It is correct that the applicant was discharged and left for Athens on the strength of *exhibits A and C*, above, and that neither when he first came to be in possession of them, nor at any time later, even after he had left Cyprus, did he, in any way, reserve his rights in respect of them; nor did he lodge any protest in relation to them. He, only, filed the present recourse on January 17, 1977, by means of which he seeks, among other things, the annulment of *exhibits A and C*, because he contends that he was entitled to a final discharge and to the use of his passport for purposes of travelling.

In the light of all the foregoing facts, and applying thereto the relevant principles of law to which I have already referred earlier in this Decision, I am in serious doubt, to say the least, whether or not the applicant has assented to *exhibits A and C* freely, and without fear of adverse consequences for him in respect of his university stuties in case he did not agree to leave the ranks of the National Guard on the strength of a temporary discharge (*exhibit A*) and to travel to Athens by using a certificate of identity (*exhibit C*); therefore, I cannot hold that, in the circumstances, he has behaved in such a way as to divest himself of a legitimate interest entitling him to make the present recourse, which, consequently, has now to proceed to be determined on its merits.

Order accordingly.