IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

PETROLINA LTD., AND ANOTHER,

Applicants,

and

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTER OF INTERIOR,

Respondent.

(*Application in Case No. 7/77*).

Provisional order—Rule 13 of the Supreme Constitutional Court Rules, 1962—Criteria applicable—Merits of the recourse and irreparable damage or harm either financial or moral—Recourse against refusal to exempt applicant 2 from service in the National Guard—And application for provisional order suspending enlistment pending the hearing of the recourse—No allegation that any financial loss will be suffered by applicant if the provisional order is not made—But submission that the non-making of the Order will cause applicant irreparable damage because there cannot be compensation for the loss of his personal freedom—Enlistment and service in the National Guard cannot be said to be irreparable moral damage or harm—Application refused.

National Guard—Enlistment and service in—Cannot be said to be irreparable damage or harm.

This was an application for a provisional order, under rules 13* and 18* of the Supreme Constitutional Court Rules, 1962, suspending the enlistment of applicant 2 in the National Guard pending the determination of a recourse against the refusal of the respondent to exempt him from service in the National Guard.

The main ground on which the recourse was based was that applicant 2 was, under section 4(3) (d) of Law 20/64 (as amended by Law 25/66), entitled to exemption from service

* Quoted at p. 175 *post*.

in the National Guard because he was permanently residing outside Cyprus.

Counsel for applicants has not alleged that any financial loss will be suffered by them if the provisional order is not made but he submitted that the non-making of the Order will cause applicant 2 irreparable damage because there cannot be compensation for the loss of his personal freedom.

Held, (after stating the criteria applicable in an application for a provisional order—vide pp. 179-180 post) that, in order to succeed, an applicant has to satisfy the Court that the non-making of the provisional order will cause him irreparable damage or harm either financial or moral; that once it is not alleged that the applicant will suffer any financial loss which in any case would not be irreparable his enlistment and service in the National Guard cannot be said to be irreparable moral damage or harm; that, therefore, the applicant has failed to prove the prerequisites for the making of the provisional order; and that, accordingly, his application must fail.

Application dismissed.

Cases referred to:

Georghiades (No. 1) v. *Republic* (1965) 3 C.L.R. 392;

Iordanou (No. 2) v. *Republic* (1966) 3 C.L.R. 696;

Galazi v. *Minister of Education and Others* (1967) 3 C.L.R. 577;

Papadopoulos v. *Republic* (1975) 3 C.L.R. 89.

Application for Provisional Order.

Application for Provisional Order suspending the enlistment of applicant No. 2 in the National Guard pending the determination of a recourse against the refusal of the respondent to exempt him from service in the National Guard.

L. N. Clerides, for the applicant.

R. Gavrielides, Counsel of the Republic, for the respondent.

Cur. adv. vult.

The following decision was delivered by:-

L. LOIZOU, J.: This is an application under rules 13 and 18 of the Constitutional Court Rules 1962 whereby the applicants apply for "an Order of the Supreme Court of Cyprus suspending the enlistment of the applicant No. 2 in the National Guard in July, 1977". The said rules read as follows:

"13-(1). The Court, or in proceedings under Article 146 any two Judges acting in agreement, may, at any stage of the proceedings, either *ex proprio motu* or on the application of any party, make a provisional order, not disposing of the case on its merits, if the justice of the case so requires.

(2) A provisional order made under this rule may, either on the ground of urgency or of other special circumstances, be made without notice and upon such terms as it may be deemed fit in the circumstances:

Provided that all parties affected by an order made under this paragraph shall be served forthwith with notice thereof so as to enable them to object to it and upon such an objection the Court, after hearing arguments by or on behalf of the parties concerned, may either discharge, vary or confirm such order under such terms as it may deem fit.

18. The Civil Procedure Rules in force in the Republic on the date of the making of these Rules shall apply, *mutatis mutandis,* to all proceedings before the Court so far as circumstances permit or unless other provision has been made by these Rules or unless the Court or any Judge otherwise directs".

The above rules continue in force by virtue of the proviso to s.17 of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law 33/64). Rule 13 should, of course, now be applied subject to and in conjunction with s.11 of the above law so that in the result a Judge of this Court sitting alone can deal with an application for a provisional order under the said rule 13.

Before dealing with the Application I consider it pertinent to set out briefly the history of these proceedings -

The recourse was filed by the applicants on the 10th January, 1977 and the relief applied for is:.

"1. A declaration of the Court that the act and/or decision of the respondent refusing to exempt applicant No. 2 from service in the National Guard communicated to applicants by letter dated the 4th January, 1977 should be declared *null* and *void* and of no effect whatsoever.

2. A declaration of the Court that the decision of respondent that applicant No. 2 should enlist in the National Guard on the 7.1.1977 or on any other date contained in paragraph 2 of the letter dated the 4.1.1977 communicated to applicant No. 1 on the same date should be declared *null* and *void* and of no effect whatsoever".

The grounds of law upon which the recourse is based, as set out therein, are:-

"1. Under Article 146 of the Constitution the Supreme Court has exclusive jurisdiction to declare any act and/or decision of any organ or authority of the Republic exercising executive or administrative authority as *null* and *void* and of no effect whatsoever if taken contrary to the law or the Constitution or in circumstances amounting to an abuse or excess of powers.

2. It is contended that the decision challenged in paragraph 1 of the recourse should be declared *null* and *void* and of no effect whatsoever in that:-

(a) It is not duly reasoned.

(b) It was taken contrary to the letter and spirit of s.4(3) (d) of Law 20/64 as amended by Law 25/66 in that Applicant No. 2 is in law and in fact a person falling within the ambit of that section *i.e.* a permanently residing outside Cyprus citizen of the Republic and hence entitled to exemption from service in the National Guard.

3. It is likewise contended that the decision challenged in paragraph 3 of the recourse is *null* and *void* in that:-

(a) Since the decision in paragraph 1 is *null* and *void* it follows that the decision in paragraph 2 is also *null* and *void.*

(b) In any case since applicant resides permanently in England the decision to call him for enlistment without any reasonable notice *i.e.* on the same day when he was notified contravenes the basic principle of administrative law *i.e.* that of good government χρηστὴ διοίκησις and amounts to an abuse of respondent's powers".

Simultaneously with the recourse the applicants filed an application for a provisional order "suspending the enlistment of the applicant No. 2 in the National Guard until the hearing and final determination of the present recourse".

The application was fixed for hearing on the 20th January, 1977 at 3.30 p.m. On that date counsel appeared before the Court and counsel for the respondent applied for a few days adjournment as he had not as yet received instructions from the Ministry of the Interior. Counsel for the applicants did not oppose the application for adjournment and by consent the application was fixed on the 26th January, 1977 at 9.15 a.m. On the 26th January counsel again appeared before the Court and they jointly applied for a further adjournment on the ground that steps were being taken which might lead to an out of court settlement not only of the application for a provisional order but also of the whole recourse. In the light of the above the application for adjournment was granted and the hearing of the application was adjourned to the 12th February, 1977. On that date counsel for the applicants withdrew the application for a provisional order and applied that the recourse be fixed for hearing before the end of April. The Court thereupon dismissed the application for a provisional order and fixed the recourse for hearing on the merits on the 6th April, 1977 with directions that the Opposition to the recourse, which was in arrear, be filed within fifteen days. On the 6th April Mr. Clerides again applied for an adjournment and stated in Court that there was no urgency any more as the applicant had returned to Cyprus. Counsel for the respondent did not oppose the

application for adjournment. The Court adjourned the hearing of the recourse to the 30th May, 1977 and stressed to counsel that that was the only date available before the vacations and that if for any reason the case was not heard on that day there would be no other day available. On this last date Miss Nicolaou appeared for Mr. Clerides and informed the Court that Mr. Clerides was absent in England and his return has been delayed and that she was not in a position to appear for him because the file was with Mr. Clerides in England and in any case she had not studied the case. She, therefore, had to apply for an adjournment. The application for adjournment was not opposed by counsel for the respondent and the hearing of the recourse was adjourned to the 14th September, 1977.

Then on the 1st July, 1977 the application for a provisional order under consideration was filed. It was fixed for hearing on the 11th July at 9.30 a.m. when on the application of counsel for the applicants and with the consent of counsel for the respondent it was adjourned to the 14th July on the ground that the Minister of the Interior, whose presence the parties considered necessary, was out of Cyprus. It was eventually heard on the 14th July.

The facts relied upon in support of the application are those appearing in the recourse and particularly paragraph 3(b) of the grounds of law quoted earlier on and paragraphs 2-7 of the facts in support of the recourse. These paragraphs read as follows:

"2. Applicant No. 1, in order to carry on its business and/or trade more expeditiously established in London since January, 1975 a sister company under the name Petrolina (London) Ltd as well as LEFKARITIS BROS SHIPPING CO. LTD.

3. Applicant No. 2 has been appointed as the Managing Director of both these companies and he resides permanently in London in order to manage the affairs of the aforesaid two companies.

4(a) Furthermore applicant has purchased a flat in London in which he resides permanently with his wife.

(b) Whilst in London applicant had a child born in London on the 16.10.1976.

5. Applicant has secured a working permit from

the Home Office in order to act as Managing Director of both the above companies which he manages in offices let to them in London for the purpose.

6. One of the reasons which necessitated the permanent residence of applicant and his family in London has been the increasing sphere of work by both Petrolina (London) Ltd but more so of LEFKARITIS BROS SHIPPING CO. LTD which now owns a fleet of five tankers compared with two originally.

7. The business of both companies *i.e.* Petrolina (London) Ltd and Lefkaritis Bros Shipping Co. Ltd are business falling within the provisions of s.11(3) of the National Guard Laws 1964-1976 because they are business 'necessary for the life and welfare of the people' inasmuch they deal exclusively with petroleum products, petrol, gas-oil, gasoline and other products absolutely necessary for the life of the people".

There is no quarrel between the parties as to the criteria applicable in an application of this nature. There is a line of authorities on the subject including *Georghiades (No. 1)* v. *The Republic* (1965) 3 C.L.R. p. 392, *Iordanou (No. 2)* v. *The Republic* (1966) 3 C.L.R. p. 696, *Galazi* v. *Minister of Education and Others* 3 C.L.R. p. 577 and *Papadopoulos* v. *The Republic* (1975) 3 C.L.R. 89.

Useful reference may also be made to the application for Annulment before the Council of State by Th. Tsatsos, 3rd ed., at p. 423 *et seq.* and Kyriakopoulos on Greek Administrative Law 4th ed., vol. C at p. 146 *et seq.*

It clearly appears from the above authorities that the most relevant criteria in an application of this nature are the merits of the recourse and the damage or harm, either financial or moral, that the non-making of the Order will cause to the applicant.

It follows, therefore, that the flagrant illegality of an administrative act which renders applicant's chances to succeed obvious is a strong factor in favour of the making of the provisional order applied for. But short of this the applicant has to satisfy the Court that the non-making of the Order will cause him irreparable damage or harm either financial or moral in order to succeed.

It is, however, a cardinal principle of administrative law that where on the one hand the non-making of the Order will cause damage or harm to the applicant, even irreparable, and on the other hand the making of the Order will cause serious obstacles to the proper functioning of the administration then the personal interest of the applicant has to be subjected to the general interest of the public and the provisional order should not be made.

In the present proceedings the merits of the case cannot have any decisive effect on the outcome of the application for a provisional order because on the material placed before the Court it is not possible to say either that the claim of the applicant is obviously unfounded or that his recourse is bound to be successful. Nor can it be said that the making of the Order is likely to cause any obstacles to the proper functioning of the administration.

This application, therefore, stands or falls on the question of whether the non-making of the Order will cause irreparable damage to the applicants or either of them.

It has not been alleged on behalf of the applicants that any financial loss will be suffered by them if the provisional order is not made. What learned counsel on their behalf has submitted is that the non-making of the Order will cause applicant 2 irreparable damage because there cannot be compensation for the loss of his personal freedom.

I am not prepared to subscribe to this proposition. On the contrary I am inclined to agree with the submission of learned counsel for the respondent that once it is not alleged that the applicants will suffer any financial loss which in any case would not, in my view, be irreparable, his enlistment and service in the National Guard cannot be said to be irreparable moral damage or harm.

In the light of the foregoing I must hold that the applicant has failed to prove the prerequisities for the making of the provisional order and that this application must, therefore, fail. The costs of the application will be costs in the cause.

Application for a provisional order dismissed. Costs in cause.

Application dismissed.
Costs in cause.