1976 October 23

[TRIANTAFYLLIDES, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ANDREAS SAVVA CHRISTODOULIDES,

Applicant.

v.

THE REPUBLIC OF CYPRUS, THROUGH
1. THE MINISTER OF INTERIOR AND DEFENCE,
2. THE HEADQUARTERS OF THE NATIONAL GUARD,

Respondents.

(*Case No.* 26/76).

Recourse for annulment—Abatement—Recourse against refusal to discharge from the National Guard—Applicant discharged after filing of the recourse—Recourse not abated, because during that period of time when the refusal to discharge (subject matter of the recourse)was in force applicant did suffer detriment to same extent—Subsequent belated discha ge has not erased the adverse for the applicant legal situation which was produced by the said refusal while it was still operative—Moreover applicant could only seek compensation under Article 146.6 *of the Constitution after he would obtain a judgment in these proceedings.*

Damages under Article 146.6 *of the Constitution—Can only be sought after a judgment of the Court under Article* 146.4.

On December 30, 1975, the applicant applied, through his lawyer, for his discharge from the National Guard on the ground that he had secured admission for university studies abroad. The respondents turned down his application because he had not submitted the necessary documentary evidence of his admission up to December 4, 1975. The reason for the delay in applying for his discharge was that though he had secured admission at a university in Sweden before December 4, 1975, and though he had applied for a certificate of the Ministry of Education, before December 4, 1975 regarding such admission, the certificate was not given to him in time, but only on January 10, 1976.

Counsel for the respondents conceded that, in the particular circumstances of this case, it was wrong to refuse to discharge the applicant from the National Guard for the reasons stated by the respondents; and that at the time of the filing of the present recourse on February 2, 1976, he was still being kept in military service in a manner which amounted to abuse of powers on the part of the respondents. He was discharged in March, 1976.

On the question whether, because of the eventual discharge of the applicant, this recourse, against the refusal to discharge him, has been abated:

Held, (1) that service in the National Guard when it is not voluntary or it is invalidly enforced constitutes, notwithstanding its very praiseworthy and necessary object, a restriction, to a certain degree, of the right of liberty safeguarded under Article 11 of the Constitution; and that, accordingly, this recourse cannot be treated as having been abated, because during that period of time when the refusal to discharge the applicant—which is the subject matter of the recourse—was in force, the applicant did suffer detriment to some extent. His subsequent belated discharge has not erased the adverse for the applicant legal situation which was produced by the said refusal while it was still operative (see decision of the Greek Council of State in Greece in Case No. 701/1970).

(2) That this Court is, therefore, of the view that the applicant is entitled to have this recourse determined; and that as it is common ground—and quite correctly so in the light of the particular circumstances of this case—that the initial refusal to discharge him was invalid, such refusal is hereby decl red to be *null* and *void.*

Sub judice decision annulled.

Per curiam: One of the reasons for which the applicant was entitled to pursue the present recourse up to the stage of final judgment, notwithstanding his discharge from the National Guard in the meantime, is that he could only seek compensation under Article 146.6 of the Constitution after he would obtain a judgment in these proceedings (See *Kyriakides* v. *The Republic,* 1 R.S.C.C. 66 at p. 74).

Cases referred to:

Kyriakides v. The Republic, 1 R.S.C.C. 66;

Decision of the Greek Council of State No. 701/1970.

Recourse.

Recourse against the decision of the respondents refusing applicant's application for his discharge from the National Guard on the ground that he had secured admission for University studies abroad.

Ph. Valiandis, for the applicant.

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

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment. The applicant complains against a decision communicated to him by a letter dated January 14, 1976; he was informed by means of such letter that he could not be discharged from the ranks of the National Guard on the ground that he had secured admission for university studies abroad, because he had not submitted the necessary documentary evidence of his admission up to December 4, 1975.

The applicant applied, through his lawyer, for his discharge from the National Guard on December 30, 1975. The reason for the delay on his part in applying for his discharge was that though he had secured admission at a university in Sweden before December 4, 1975, and though he had applied for a certificate of the Ministry of Education, before December 4, 1975, regarding such admission, the certificate was not given to him in time, but only on January 10, 1976, that is even after he had submitted his aforesaid application for his discharge on December 30, 1975.

During the hearing of this case counsel for the respondents has, very fairly, conceded—and I am in agreement with him—that, in the particular circumstances of the present case, it was wrong to refuse to discharge the applicant from the National Guard for the reason stated in the aforementioned letter of January 14, 1976, and that, at the time of the filing of the present recourse on February 2, 1976, he was still being kept in military service in a manner which amounted to abuse of powers on the part of the respondents. He was, in fact, discharged subsequently, in March 1976.

The question has arisen as to whether, because of the eventual discharge of the applicant, this recourse has been abated; and, in this respect, counsel for the respondents has pointed out that the academic year 1975/1976 commenced, at the foreign university in question, in November 1975, and, therefore, in

any event, the applicant who had applied on December, 30 1975, for his discharge, could not have participated in the studies for that academic year even if he had been discharged immediately.

The reason for the belated application of the applicant was, as already stated, the delay of the Ministry of Education to issue to him a necessary certificate; and, in respect of that delay the applicant has pursued successfully recourse No. 213/75.* But this is not a ground for refusing him relief in the present case, too.

Not do I agree that this recourse can be treated as having been abated even if the applicant—and I am going to assume this without so deciding, as I do not have before me sufficient material for this purpose—could not, in any event, have in some way participated beneficially in the studies for the academic year 1975/1976 at the university concerned, because, irrespective of that, the applicant has suffered detriment, to an extent which I do not have to specify, by being kept longer in military service than the law and the principles of proper administration permitted in the circumstances.

Service in the National Guard when it is not voluntary or it it is invalidly enforced constitutes, notwithstanding its very praiseworthy and necessary object, a restriction, to a certain degree, of the right of liberty safeguarded under Article 11 of the Constitution; and, therefore, this recourse cannot be treated as having been abated, because during that period of time when the refusal to discharge the applicant—which is the subject matter of the recourse—was in force, the applicant did suffer detriment to some extent. His subsequent belated discharge has not erased the adverse for the applicant legal situation which was produced by the said refusal while it was still operative (see, for example, the decision of the Council of State in Greece in case No. 701/1970).

I am, therefore, of the view that the applicant is entitled to have this recourse determined; and as it is common ground—and quite correctly so in the light of the particular circumstances of this case—that the initial refusal to discharge him was invalid, I hereby declare such refusal to be *null* and *void.*

One of the reasons for which the applicant was entitled to pursue the present recourse up to the stage of final judgment, notwithstanding his discharge from the National Guard in the

* See p. 189 in this Part *ante.*

meantime, is that he could only seek compensation under Article 146.6 of the Constitution after he would obtain a judgment in these proceedings.

Useful reference, in this respect, may be made to *Kyriakides* v. *The Republic*, 1 R.S.C.C. 66, where (at p. 74) the following are stated:-

> " Article 172 lays down the general principle that the Republic is made liable 'for any wrongful act or omission causing damage committed in the exercise or purported exercise of the duties of officers or authorities of the Republic'. It is clearly aimed at remedying the situation existing before the coming into force of the Constitution whereby the former Government of the Colony of Cyprus could not be sued in tort.
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> The principle embodied in Article 172 has been given effect, *inter alia*, in the Constitution by means of paragraph 6 of Article 146 in respect of all matters coming within the scope of such Article 146.
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> Therefore, in the opinion of this Court, in respect of all wrongful acts or omissions referred to in Article 172 and which acts or omissions come within the scope of Article 146 an action for damages lies in a civil court only under paragraph 6 of such Article, consequent upon a judgment of this Court under paragraph 4 of the same Article, and in such cases an action does not lie direct in a civil court by virtue of the provisions of Article 172."

Of course, at this stage, I am not concerned with what might possibly be the damages to which the applicant would equitably be entitled in view of the wrongful refusal of the respondents to discharge him from the National Guard; but, I should point out that all relevant considerations will have to be taken into account, including the fact that, concerning the delay to grant him the necessary certificate about his admission to a university abroad the applicant has obtained judgment in his favour in recourse No. 213/75, and, of course, he is not to be compensated twice for the same kind of detriment.

In the result this recourse succeeds; and, I order, also, that the respondents should pay to the applicant C£20 towards his costs.

Sub judice decision annulled.
Order for costs as above.