1978 February 18

[HADJIANASTASSIOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

NICOS ANDREOU,

Applicant,

v.

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

Respondent.

(*Case No.* 259/77).

National Guard—Military Service—Exemption from—On ground of more than three dependents—Section 4 (3) (*f*) *of the National Guard Law,* 1964 (*Law* 20/64) *as amended by Law* 44/65—*Application for exemption considered by Advisory Committee which misconceived the factual issue—By finding that because applicant's parents were receiving an old age pension of* £22.750 *mils monthly one of them was not a dependent of applicant—Respondent Minister adopting Committee's decision and dismissing application without giving reasons for so doing—Minister's decision based on a misconception of both the facts and law—Annulled.*

National Guard Law, 1964 (*Law* 20/64) *as amended by Law* 44/65—*Construction of the word "maintained" in section* 4 (3) (*f*) (*iii*) *of the Law.*

Administrative Law—Misconception of fact and law—Annulment of decision, dismissing application for exemption from Military Service, because it was based on misconception of both the facts and the law.

The applicant applied for exemption from the liability to serve in the National Guard on the ground that he had more than three dependents. His application was based on section 4 (3) (f)* of the National Guard Law, 1964 (Law No. 20/64) as amended by s. 2 of Law 44/65.

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* Quoted at pp. 90–91 *post.*

His application was considered by an Advisory Committee which decided* that applicant had not more than 3 three dependents because even if it could be assumed that he contributed £30 per month for the maintenance of his parents, considering that his parents were receiving £22.750 mils monthly as old age pension, one of his parents was not a dependent of the applicant; and that applicant's psychopath brother was not substantially dependent on the applicant because he was maintained at the Mental Hospital where he was kept.

Thereupon the respondent Minister dismissed applicant's application by writing thereon the word "dismissed"; hence the present recourse.

Before the Advisory Committee there was evidence that the applicant was maintaining his wife, his child, his elderly parents—his father being unable to work being a diabetic—and that he was also paying for the medical care and maintenance of his brother who was kept in the Mental Hospital; and for his expenses when he was allowed to leave the mental hospital on some occasions.

Held, (1) The word "maintained" in section 4 (3) (f) (iii) of the Law should be given a liberal interpretation as including an amount having regard to the needs of the dependents of the persons serving in the National Guard, and the amount of the maintenance should include, *inter alia*, an amount for the regular supply of food, clothing and lodging and the provision of necessaries and of the conveniences of life including medical care.

(2) The Advisory Committee have misconceived the factual issue because they were not entitled to calculate in the way they did (*i.e.* because his parents were receiving old age pension one of them was not a dependent of the applicant) particularly so when they were dealing with human beings, who were ill and elderly, and having regard to the increasing cost of living .

(3) Accordingly the decision of the Minister was based on a misconception of both the facts and the law. Having regard to the correct principles of Administrative Law and in all fairness it was necessary for the Minister not only to insert the word "dismissed" but to have given his reasons why it was thought

* See the decision at pp. 88–89 *post*.

necessary for him to reject the application of a man who put before them in a convincing manner all the facts and circumstances regarding his dependents.

The *sub-judice* decision will, therefore, be annulled.

Sub judice decision annulled.

Cases referred to:

Tsangarides and Others v. *The Republic* (1975) 8 J.S.C. 1092 at p. 1100 (to be reported in (1975) 3 C.L.R.).

Recourse.

Recourse against the refusal of the respondent to grant applicant an exemption from his obligation to serve in the National Guard under the provisions of section 4 of the National Guard Law, 1964 (Law No. 20/64) as amended by section 2 of Law 44/65.

L. Clerides, for applicant.

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

HADJIANASTASSIOU J. gave the following judgment. The question here is whether the applicant could be exempted from his obligation to serve in the National Guard under the provisions of s. 4 subsection 3 (f) of the National Guard Law, 1964 (Law No. 20/64) as amended by s. 2 of Law 44/65.

On December 12, 1976, the applicant addressed a letter to the Ministry of Interior and Defence inviting the said Ministry to grant him an exemption from his military obligations for the reasons stated therein and particularly because he was looking after more than three dependents.

On January 10, 1977, the Director-General of the Ministry of Interior and Defence, in reply, told the applicant that in accordance with the provisions of the National Guard Laws, there was no possibility to grant him an exemption because, having enquired into the facts of his case, it appeared that he did not have more than three dependents.

On September 28, 1977, the applicant, feeling aggrieved because of the refusal of the Ministry of Interior to grant him an exemption, filed the present recourse, inviting the Court to take the view that the said decision was *null* and *void* and of no legal effect whatsoever.

The applicant is a practising lawyer and a citizen of the Republic of Cyprus. He was born on March 9, 1943, and in accordance with the said letter, *prima facie* he was saying to the appropriate authority in his letter that as a question of fact he had more than three dependents.

On December 7, 1977, counsel on behalf of the respondent in his opposition claimed that the decision attacked was lawfully taken by the appropriate organ having regard to the facts and circumstances of the case, and rightly it exercised its discretionary power in refusing the said application. In the meantime, an application No. 21/77 was also made by the same applicant claiming exactly the same relief.

On May 2, 1977, when the earlier recourse was fixed for further directions, counsel for the respondent in that case agreed that it was a proper case requiring re-examination by the appropriate authority and undertook to advise for a new re-examination of that case. Apparently, in the light of counsel's advice, the respondent authority decided to examine the case afresh. The Minister of Interior and Defence, in the exercise of his discretionary powers, in accordance with section 4 of the National Guard Laws, 1964-1967, asked the Advisory Committee for a further examination of the whole matter. The said committee, before taking a decision in the matter, ordered a social investigation report which was obtained and was before the said committee in due course before taking a final decision.

On September 2, 1977, the Advisory Committee, having gone into the matter once again, reached the same conclusion as earlier and advised the Minister of the Interior and Defence that he could exercise his discretionary powers to reject the said application for exemption because in their view, the applicant did not succeed in bringing himself within the provisions of section 4 subsection 3 (f) of the said law. I, therefore, propose reading the said decision in Greek:-

" 'Η 'Επιτροπὴ ἐξετάσασα σήμερον τὴν παροῦσαν ὑπόθεσιν εὑρίσκει ὅτι τὰ γεγονότα εἶναι ὡς ἐκτίθενται ἐν τῇ ἐκθέσει τοῦ Λειτουργοῦ Εὐημερίας ἡμερομηνίας 28.6.77 καὶ ὅτι ἐπὶ τῇ βάσει τούτων δύναται νὰ στηριχθῶσι τὰ κάτωθι:-

'Επὶ τῶν γεγονότων ὁ αἰτητὴς δὲν ἔχει πέραν τῶν 3 ἐξαρτωμένων προσώπων καθ' ὅτι καὶ ἐὰν ὑποθέσωμεν ὅτι συνδρά-

μει διὰ ποσοῦ ἐκ £30 μηνιαίως διὰ τὴν διατροφὴν τῶν γονέων του, λαμβανομένου ὑπ' ὄψιν τοῦ ὅτι οἱ γονεῖς του λαμβάνουν σύνταξιν γήρατος £22,750 μίλς μηνιαίως, ὁ εἷς ἐκ τῶν γονέων δὲν εἶναι ἐξαρτώμενον πρόσωπον τοῦ αἰτητοῦ. Καὶ τοῦτο χωρὶς νὰ ληφθῇ ὑπ' ὄψιν τὸ ὅτι ὑπάρχουσιν καὶ ἕτερα τρία ἀδέλφια τοῦ αἰτητοῦ ἅτινα θὰ ὤφειλον νὰ συνεισφέρωσι ἐπίσης εἰς τὴν διατροφὴν τῶν γονέων των. "Οσον ἀφορᾶ τὸν *ψυχοπαθῆ ἀδελφόν, εἶναι φανερὸν ὅτι οὗτος δὲν εἶναι οὐσιωδῶς* ἐξαρτώμενος τοῦ αἰτητοῦ καθ' ὅτι παραμένει καὶ διατρέφεται ἐν τῷ ψυχιατρίῳ."

(" The Committee having considered this case to-day finds that the facts are as stated in the Welfare Officer's report dated 28.6.77 and that on the basis of such facts the following can be established:

On the facts the applicant has not more than three dependents because even if we assume that he contributes £30.- monthly for the maintenance of his parents, taking into consideration the fact that his parents are receiving £22.750 mils per month as old age pension, one of his parents is not a dependent of the applicant. And this without taking into consideration that the three brothers of the applicant ought to have contributed towards the maintenance of their parents. Regarding their psychopath brother, it is evident that he is not substantially a dependent of the applicant because he stays and is maintained at the mental hospital").

It appears further that on the very same *exhibit* 8, the Minister of the Interior and Defence wrote on the said *exhibit* the word "dismissed", which clearly meant that the application of the applicant was dismissed. Then, in view of that decision, the applicant again was informed by a letter dated September 8, 1977, by the Director-General of the Ministry in question, that it was not found possible to be exempted from his obligations to serve in the National Guard.

On February 18, 1978, counsel on behalf of the applicant invited the Court to take the view (a) that the applicant has brought his case within the provisions of section 4, subsection 3 of the National Guard Law (as amended) once he had more than three dependents and (b) the Minister misdirected himself relying on the advice of the said committee because wrongly the

committee accepted that even if they supposed that the applicant was paying £30 per month for his parents, and taking into account the fact that the two parents were receiving £22.750 mils pension a month, one of the two was not a dependent person on the earnings of the applicant.

Counsel further argued that on the facts and circumstances of this case, the Minister misdirected himself in taking the view that the true meaning of the section was that a person must be wholly depending on the earnings of the applicant. He further invited the Court that the true construction of the wording of the law should be that the word "dependents" does not mean wholly dependent on the earnings of the applicant because part dependency is sufficient to satisfy the provisions of the law.

I must confess that counsel on behalf of the respondent quite fairly conceded that the approach of the advisory committee, *viz.*, that if the amount of £22 is used exclusively by the one of the two parents then one should cease to be dependent on the applicant and that the applicant, therefore, does not come within the ambit of the law, was not justified, and, therefore, the decision of the Minister based on that advice was wrong in law because no such approach could be justified in law. Section 4 (1) of the National Guard Law (as amended) says that:-

"4.-(1) Τηρουμένων τῶν διατάξεων τοῦ ἐδαφίου (3) ἅπαντες οἱ πολῖται τῆς Δημοκρατίας ἀπὸ τῆς 1ης Ἰανουαρίου τοῦ ἔτους καθ' ὃ συνεπλήρωσαν τὸ δέκατον ὄγδοον τῆς ἡλικίας των μέχρι τῆς 1ης Ἰανουαρίου τοῦ ἔτους καθ' ὃ συνεπλήρωσαν τὸ πεντηκοστὸν ἔτος τῆς ἡλικίας των ὑπόκεινται εἰς τὰς διατάξεις τοῦ παρόντος Νόμου καὶ ὑπέχουν ὑποχρέωσιν ὑπηρεσίας ἐν τῇ Δυνάμει.

(2) .....

(3) Ἐξαιροῦνται τῆς ὑπὸ τοῦ ἐδαφίου (1) ὑποχρεώσεως-

.....

.....

.....

(στ) Ἅπαντες οἱ ἔχοντες κατὰ τὴν ἡμερομηνίαν τῆς κλήσεως των πρὸς ὑπηρεσίαν πλέον τῶν τριῶν ἐξαρτωμένων προσώπων:

Νοεῖται ὅτι πᾶς στρατεύσιμος ὑπηρετῶν ἐν τῇ Δυνάμει καὶ ὅστις κατὰ τὴν διάρκειαν τῆς ὑπηρεσίας του ἤθελε ἀποκτήσει πλέον τῶν τριῶν ἐξαρτωμένων προσώπων ἐξαιρεῖται περαιτέρω ὑπηρεσίας.

Διὰ τοὺς σκοποὺς τῆς παρούσης παραγράφου ὁ ὅρος "ἐξαρτώμενοι" σημαίνει –

(i) τέκνα ἔχοντα ἡλικίαν κάτω τῶν δεκαοκτὼ ἐτῶν,

(ii) σύζυγον,

(iii) ἐξώγαμα τέκνα, τέκνα ἄνω τῶν δεκαοκτὼ ἐτῶν, γονεῖς, ἀδελφοὺς καὶ ἀδελφάς, οἱ ὁποῖοι συντηροῦνται ὑπὸ τοῦ στρατευσίμου:

And in English this section reads:–

"4 (1) Subject to the provisions of sub–section (3), all citizens of the Republic shall from the first day of January of the year in which they complete the 18th year of their age and until the first of January of the year in which they complete the 15th year of their age, be subject to the provisions of this Law and liable to serve in the Force.

(2) .....

(3) There shall be exempted from the liability under sub–section (1) –

.....

(f) All persons having on the date on which they were called out for service more than three dependents:

Provided that any serviceman serving in the force who during his service acquires more than three dependents shall be exempted from further service.

For the purpose of this sub–section, the expression 'dependents' means –

(i) children under eighteen years old;

(ii) spouse;

(iii) illegitimate children, children over eighteen years old, parents, brothers and sisters, who are maintained by the serviceman."

Pausing here, I would like to make it quite clear that the legislation in question establishes not only the basic principle on which the defence of the country is founded, but also the general and obligatory service of the citizens of the Republic,

and this evidently includes any kind of personal service appropriate for the purpose of serving one's country. But as I said, in *Tsangarides and Others* v. *The Republic*, (1975) 8 J.S.C. 1092 at p. 1100:*

> " Within the frame of the general obligation for service, the legislature recognizes to each one of the conscripts rights, and offers legal means for his protection, because the relation deriving from the military service is a relation of public law, upon which the principles of the legality of the acts of the administration apply. (See A. I. Svolou, G. K. Vlahou 'The Constitution of Greece' Part I, Vol. A, page 264). The refusal and/or omission of the administration to order the termination of the military obligation is subject to recourse (C.S. 81/1951)."

With this in mind, I turn to interpret—once the term "dependents" has been interpreted by the legislature itself—the word "maintain". I have indeed tried to see whether there was any authority on the word "maintenance" and I was unable to find anything in Cyprus or among the English authorities an authority on the very point, that is, the amount of maintenance expected to be paid by the conscript in maintaining his dependents. However, I have traced some cases dealing with maintenance in divorce cases. In my view, the word "maintain" should be given a liberal interpretation as including an amount having regard to the needs of the dependents of the person serving in the National Guard, and the amount of maintenance should include *inter alia*, an amount for the regular supply of food, clothing and lodging and the provision of necessaries and of the conveniences of life including medical care.

I think it is necessary to add that there was sufficient evidence before the committee appointed by the Minister to show that the applicant had more than three dependants; and that they were trying to find ways and means to overlook the clear inference drawn from the facts before them. There was evidence indeed that the applicant was maintaining his wife, his own child, his elderly parents—his father being unable to work being a diabetic—and that he was also paying for the medical care and maintenance of his brother who was kept in the mental

* To be reported in (1975) 3 C.L.R.

hospital and for his expenses when he was allowed to leave the mental hospital on some occasions.

With this in mind, and with the greatest respect to the decision of the Committee, I find myself unable to agree because they have misconceived the factual issue, once they were not entitled to make calculations in the way they did; *viz.* that because his parents were receiving an old age pension of £22.750 per month, one of the parents was, therefore, not a dependent person on the applicant, forgetting that an amount of £22.750 cannot go very far for the needs of two elderly and ill persons. Certainly they were not entitled to calculate in the manner they did, particularly so when we are dealing with human beings, and having regard particularly to the increasing cost of living today.

Having reached this conclusion, I find that the decision of the Minister was based on a misconception of both the facts and the law. I think having regard to the particular facts of this case, it was necessary for the Minister not only to insert the word "dismissed", but in all fairness, and having regard to the correct principles of administrative law, to have given his reason why it was thought necessary for him to reject the application of a man who put before them in a convincing manner all the facts and circumstances regarding his dependents.

In my view, the applicant has succeeded both in law and factually to satisfy this Court that he brought his case within the provisions of the law referred to earlier and certainly he has succeeded in proving that he has more than three dependents.

For these reasons, the application succeeds, but in the circumstances, I am not making an order for costs against the respondents, particularly so because counsel of the Republic quite rightly in my view, conceded that that was a proper case for an exemption to be granted to the applicant.

Order accordingly, no order as to costs.

Sub judice decision annulled.
No order as to costs.