

1979 November 24

[TRIANTAFYLIDIS, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

AGAMEMNON XENOPHONTOS,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE MINISTER OF INTERIOR AND THE
COUNCIL OF MINISTERS,

Respondents.

(Case No. 326/79).

Provisional order—Rule 13 of the Supreme Constitutional Court Rules—Discretion of the Court—Principles applicable—Recourse by advocate against call for part-time military service—No flagrant illegality and no irreparable harm—Personal interest should be subjected to general public interest which requires that defence needs of the country should be served by means of part-time military service—Limited provisional order suspending operation of sub judice decision solely when such operation will prevent the applicant from appearing as an advocate in Court proceedings—In the light of present circumstances it is in the public interest that needs of the administration of justice and defence needs should be reconciled.

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After filing a recourse against a decision of the respondent to call him up for part-time military service in the National Guard the applicant, a practising advocate, sought a provisional order suspending the effect of the *sub judice* decision pending the determination of the recourse. Though the respondents had been duly served with copies of both the recourse and the application for a provisional order, they failed to appear and a provisional order was made by the Court, as applied for by the applicant, under rule 13 of the Supreme Constitutional Court Rules.

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On the question whether the provisional order should continue in force.

Held, (1) that it has not been shown to the satisfaction of this Court, in the light of the principles concerning the exercise of judicial discretion under the said rule 13, that it is proper to allow the provisional order to remain in force in the form in which it has been made; that it does not appear that the *sub* *judice* decision is flagrantly illegal; that there will not be caused to the applicant irreparable harm if the provisional order does not remain in force as made, and, in any event, his personal interest should be subjected to the general public interest, which requires that the defence needs of the country should be served by means of part-time military service such as that for which the applicant has been called up.

(2) That, therefore, the provisional order in question will be rescinded but there should be substituted in its place a limited provisional order suspending the operation of the *sub judice* decision solely when such operation will prevent the applicant from being free to appear as an advocate in Court proceedings because the participation of advocates in Court proceedings is regarded as an essential prerequisite for the administration of justice; and that since relatively peaceful conditions are prevailing at present in Cyprus, notwithstanding the fact that a large part of it is still under foreign military occupation, it is in the public interest to reconcile the needs of the administration of justice and the defence needs of the country in the manner prescribed by means of the above limited provisional order.

Application partly granted.

Cases referred to:

- Georgiades (No. 1) v. The Republic* (1965) 3 C.L.R. 392;
Kouppas v. The Republic, (1966) 3 C.L.R. 765;
Sofocleous v. The Republic (1971) 3 C.L.R. 345;
Miltiadous and Others v. The Republic (1972) 3 C.L.R. 341;
Yerasimou v. The Republic (1978) 3 C.L.R. 36;
Artemides and Another v. The Republic (1979) 3 C.L.R. 33.

Application for a provisional order.

Application for a provisional order suspending the effect of the decision of the respondents by virtue of which the applicant was called up for part-time military service in the National

Guard, pending the final determination of a recourse against the validity of such decision.

Applicant appeared in person.

M. Kyprianou, Senior Counsel of the Republic, for the respondents.

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Cur. adv. vult.

TRIANTAFYLLIDES P. read the following decision. The applicant, who is an advocate, challenges a decision to call him up for part-time military service in the National Guard.

This decision was communicated to him by means of a letter dated August 30, 1979.

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The present recourse against the said decision was filed on September 11, 1979, and on the same day the applicant sought a provisional order suspending the effect of the *sub judice* decision pending the determination of his recourse.

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On September 19, 1979, the respondents, though they had been duly served with copies of both the recourse and the application for a provisional order, failed to appear and a provisional order was made by me, as applied for by the applicant, under rule 13 of the Supreme Constitutional Court Rules; an opportunity was, however, given to the respondents to show cause why the provisional order should not continue in force.

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Thus, I have heard in this respect, today, counsel for the respondents who opposed the continuance in force of the provisional order, and I have, of course, heard, also, the applicant in support of his claim that the said order should not be disturbed.

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I have in mind the relevant principles concerning the exercise of judicial discretion, under the said rule 13, in relation to the making of provisional orders; such principles have been expounded in cases which have been cited to me by the parties, including *Georghiadis (No. 1) v. The Republic*, (1965) 3 C.L.R. 392, *Kouppas v. The Republic*, (1966) 3 C.L.R. 765, *Sofocleous v. The Republic*, (1971) 3 C.L.R. 345, *Miltiadous and others v. The Republic*, (1972) 3 C.L.R. 341, *Yerasimou v. The Republic*, (1978) 3 C.L.R. 36 and *Artemides and another v. The Republic*, (1979) 3 C.L.R. 33.

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It has not been shown to my satisfaction that, in the light of the aforesaid principles, it is proper to allow the provisional order, which I made on September 19, 1979, to remain in force in the form in which it has been made; it does not appear that
5 the administrative decision which is being challenged by the applicant is flagrantly illegal; nor will there be caused to him irreparable harm if the provisional order does not remain in force as made, and, in any event, his personal interest should be subjected to the general public interest, which requires that the
10 the defence needs of our country should be served by means of part-time military service such as that for which the applicant has been called up.

I have, therefore, decided to rescind the provisional order in question; but I am of the opinion that there should be
15 substituted in its place a limited provisional order suspending the operation of the *sub judice* decision solely when such operation will prevent the applicant from being free to appear as an advocate in Court proceedings. I have adopted this special course because I regard the participation of advocates
20 in Court proceedings as an essential prerequisite for the administration of justice, and since relatively peaceful conditions are prevailing at present in Cyprus, notwithstanding the fact that, most unfortunately, a large part of it is still under foreign military occupation, I am of the view that it is in the public
25 interest to reconcile the needs of the administration of justice and the defence needs of our country in the manner prescribed by means of the aforementioned limited provisional order.

It has been stated by the applicant that the *sub judice* decision prevents him from travelling abroad and that he intends to
30 proceed to the U.S.A. for further university studies at the University of Oregon. If the competent authorities refuse to allow him to do so, on being satisfied that the applicant is ready and about to go to the U.S.A. for the said studies, he is at liberty to apply to this Court for a modification of the limited provi-
35 sional order which I have made today and his application will, then, be, of course, examined on its merits.

Application partly granted.