1979 August 4

[HADJIANASTASSIOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

LOIZOS HAPESHIS AND OTHERS,

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTRY OF DEFENCE AND ANOTHER,

Respondents.

(*Cases Nos.* 208/75, 210/75 and 8/76).

Damages—Article 146.6 *of the Constitution—Action thereunder lies in a Civil Court consequent upon a judgment of the Supreme Court under Article* 146.4.

Actionable rights of citizens—Liability of the Republic in tort—Articles 146.6 *and* 172 *of the Constitution—Wrongful acts—How and where does an action lie.*

Recourse for annulment—Abatement—Principles applicable—Recourse against refusal to release from National Guard—Applicant released after filing of recourse—Recourse not abated because during the period of time when refusal to discharge was in force applicant suffered detriment to some extent—And he could only seek compensation under Article 146.6 *of the Constitution consequent upon judgment in these proceedings*

The applicant in recourse No. 8/76 was born on March 27, 1955 and joined the National Guard on July 20, 1973. After securing admission as a student at a University in England he applied to the respondents, on October 23, 1975, for his release from the National Guard in order to proceed abroad for his studies which were due to commence on November 12, 1975. The respondents failed to respond to his request and on January 15, 1976 he filed the above recourse complaining against their refusal to release him.

The applicant was released from the National Guard on February 18, 1976, the respondents having admitted before the Court that the act or decision not to release him was illegal. The applicant had made it clear to the respondents that failure to release him as applied would entail his losing the chance of attending the University in England for one year and that he would incur a lot of expense.

On the question (a) whether the applicant is entitled to claim compensation under Article 146.6 of the Constitution once the sub judice decision was clearly illegal and (b) whether the recourse has been abated in view of his release:

Held, (1) that after the establishment of the Republic the citizen has an actionable right for compensation, under Articles 146.6 and 172 of the Constitution, against the Republic in respect of all wrongful acts or omissions referred to in Article 172 and which come within the scope of Article 146; that an action for damages lies in a civil Court only under Article 146.6 consequent upon a judgment of this Court under Article 146.4 and that in such cases an action does not lie direct in a civil Court by virtue of Article 172.

(2) That an administrative act of limited duration which before ceasing to be effective has produced results, can be annulled even though the legal situation created by it has subsequently ceased to exist; that during the period of time when the refusal to release the applicant—which is the subject matter of this recourse—was in force the applicant did suffer detriment to some extent; that he would only seek compensation under Article 146.6 of the Constitution after he would obtain judgment in these proceedings; that, therefore, the recourse cannot be treated as having been abated; that since it has not been abated it succeeds once the refusal to release applicant was invalid; and that, accordingly, the *sub judice* decision is declared null and void.

Sub judice decision annulled.

Cases referred to:

Tsangarides and Others (No. 2) v. *The Republic* (1975) 3 C.L.R. 290;

Kyriakides v. *The Republic*, 1 R.S.C.C. 66 at p. 74;

Christodoulides v. *The Republic (Minister of Education)* (1978) 3 C.L.R. 189;

Christodoulides v. *Republic* (*Minister of Interior and Defence and Another*) (1978) 3 R.L.R. 193.

Recourse.

Recourse against the decision of the respondents refusing to release applicants from the ranks of the National Guard.

N. Pelides, for applicant in case 208/75.

R. Schizas, for applicant in case 210/75.

Ph. Valiantis for *L. Papaphilippou*, for applicant in case 8/76.

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

Cur. adv. vult.

HADJIANASTASSIOU J. read the following judgment. In these proceedings, under Article 146 of the Constitution, applicants seek to challenge the decision of the respondents who refused to release them from the ranks of the National Guard, as being null and void and of no effect whatsoever.

Because finally cases Nos. 208/75 and 210/76 were withdrawn and dismissed, I shall proceed to deal mainly with case No. 8/76 of applicant Loizos Hapeshis.

The applicant Loizos Hapeshis was born on March 27, 1955, and has joined the ranks of the National Guard on July 20, 1973. He was attached to the infantry regiment stationed at Nicosia. The applicant who wanted to study abroad, applied to the Chelsea College of Aeronautical and Automobile Engineering in England. He was admitted and registered as a student for a three years' study course. The applicant has informed the authorities, and in fact has supplied them with a copy of a letter signed by the Director of the said College, stating clearly, that the applicant had joined the College which was due to commence a full time course of instruction in Aeronautical Engineering, and that the lectures were to commence on November 12, 1975. There was a further note in the said letter making it quite clear that the applicant was bound to attend the College at least one clear week before the beginning of the course. Indeed the applicant on October 23, 1975, applied to the Army Authorities for his release from the ranks of the army, and had attached a copy of the letter in question. He also

attached a letter of the Ministry of Education confirming that he had enrolled as a student.

Unfortunately there was no reply at all by the appropriate authorities and the applicant was not released in order to attend his studies abroad, in spite of the fact that on August 28, 1975, the Full Bench of the Supreme Court issued its reserved judgment, in which it was made clear that all students who were registered in Universities abroad, irrespective of the date of such registration were entitled to be released from the ranks of the National Guard (see *Tsangarides and Others (No. 2)* v. *The Republic, (Ministry of Interior and Defence)* (1975) 3 C.L.R., 290).

The applicant feeling aggrieved because of the refusal of the appropriate authorities to release him filed the present recourse on January 15, 1976. Because of the urgency of the matter the applicant filed an application in accordance with the Rules of the Supreme Constitutional Court 1962, seeking an early date of trial. This application was supported by an affidavit of the applicant, who stated therein that the recourse was made because of the refusal of the appropriate authorities to release him from the ranks of the National Guard to which he was serving as from July 20, 1973; and that if he was not released from the ranks of the National Guard he would suffer irreparable damage once he had been admitted at the University in England, and because the lectures would have started by the following month.

The application was taken by Triantafyllides P., on January 27, 1976, and counsel appearing for the respondents agreed to file and deliver the opposition not later than the end of that month. The case was fixed for further directions on February 9, 1976, and on that date this case came before me. Counsel appearing for the respondents made this statement: "I propose filing a letter addressed by the Minister of Interior to the General (dated 6th instant, marked *exhibit* 'A'), and I regret that I did not produce the original because it is in the hands of the General. The effect is that all applicants in this case will be released from the ranks of the National Guard before the 9th instant."

Then in the light of that statement counsel for the applicants invited the Court to sign judgment in favour of the applicants,

once the recourse succeeded and to declare that the act or decision was null and void.

On the contrary, counsel for the respondents fully aware of his difficulties applied for a further adjournment of the case for a couple of days, because as he put it, there was a possibility that the army authorities would have required some time to release the applicants from the National Guard. Then the cases were adjourned to February 11, 1976, and on that date Mr. Schizas, counsel for the applicants in Case No. 210/75, made this statement in Court: "In the light of the legal advice of the Attorney–General that there were no legal reasons to file a defence by the Republic in this recourse, and in the light of the fact that the Court has granted an adjournment to enable the appropriate authority to release the applicants from the ranks of the National Guard, and because unfortunately until today no release has taken place, I submit that the Court should proceed to hear the cases and sign judgment in favour of the applicants."

Mr. Gavrielides, counsel for the respondents, invited the Court once again to take the view that because the cases were not fixed for hearing but only for mention, the cases should be adjourned once again within a week in order to enable the appropriate authorities to release those from the ranks of the National Guard who were so entitled in accordance with the relevant decision of the Council of Ministers. He further stressed and argued that there was no question of non–compliance by the administration concerned with the relevant decision of the Council of Ministers.

Because of the delay in releasing the applicants, Mr. Pelides, counsel appearing for applicants in case No. 208/75, made this statement: "I would also submit, as my learned friend did in the other case, that once there is the letter of the Minister of the Interior, which is addressed to the General requesting him to release the applicants from the ranks of the National Guard before the 9th instant, and as the General is a subordinate person to the Minister, I assume that before the Minister has written the letter to the General, the relevant officers of the Ministry have gone through the various documents of the applicants, and there is no excuse whatsoever for my learned colleague now to ask for an adjournment, even for seven days to verify the

documents of each applicant. They ought to have done that days ago when they had the time and they could have asked for any particulars that they may have needed. I think it is too late in the day to ask for such an adjournment."

In spite of the difficulties which have been created, because of the delay in releasing the applicants, I have granted a further adjournment to enable counsel to convey to the respondents that the Court was anxious to see that the applicants were released as quickly as possible, once were illegally detained in the ranks of the National Guard.

On February 18, 1976, as the record of the Court shows, Mr. Gavrielides on behalf of the respondents, informed Mr. Justice Malachtos that instructions have been given for the release of one of the applicants as from the day before, and so there was no point to pursue this recourse. Mr. Lemonaris appearing for applicant Hapeshis in case No. 8/76, applied to the Court for an adjournment for a few days in order to confirm that information with his client and consider his position. He further added that if it was true he would withdraw the recourse.

Mr. Justice Malachtos granted an adjournment of the cases, and on February 21, 1976, as it appears from the record of the Court, this statement was made before him, regarding the applicant Loizos Hapeshis by his counsel: "I have been informed that our client has been released. However, we received new instructions from our client to proceed with the case, because he has in mind to claim damages."

The case was adjourned to February 24, 1976, for mention for a date to be given by the trial Judge. On the 24th February, 1976, counsel appearing for cases Nos. 208/75 and 210/75 withdrew their recourses as their clients had been released. As it was said earlier applicant in case No. 8/76 L. Hapeshis although also released, nevertheless had chosen to proceed with the case in order to claim damages. On the same date that case came before me, and counsel for the respondents stated that he has not filed his defence, and that he needed fifteen days' time to do so. The case was fixed for hearing on May 8, 1976, but unfortunately Mr. Gavrielides did not appear. Mr. Valiantis informed the Court that Mr. Gavrielides was abroad, and that the defence has not been filed. On the application of Mr.

Valiantis the Court directed that the opposition should be filed within a period of three weeks by a different counsel and reply if any within five days.

Then the case was fixed for hearing on July 3, 1976, but again on that date both counsel requested for an adjournment, of the hearing of the case, because they both expected a judgment by Mr. Justice Triantafyllides P. In fact both counsel made a statement that they were prepared to abide by that judgment. Mr. Valiantis in applying for a further adjournment said: "In view of the fact that our client has been released and it is a question of damages only, we think that this case is no longer a case which requires urgency."

There were a number of other adjournments expecting the delivery of that judgment, and finally the case was concluded on September 20, 1977.

The remaining application, case No. 8/76, was based on the following four legal grounds: (1) That the omission and/or refusal of the respondents to release the applicant was taken in abuse and/or in excess of powers, bacause it contravened the provisions of section 5 of the National Guard Laws, (Law No. 20/64) and also the decision of the Council of Ministers No. 14498 dated December 4, 1975; (2) That the omission and/or refusal attacked is discriminatory against the applicant because other servicemen who have been enrolled at a University at the same time as the applicant have been released, whilst the applicant although enrolled on October 14, 1975, has not been released; (3) The respondents have failed to take into consideration that the applicant was serving as a reservist; and (4) The omission and/or refusal (to release) was contrary to the basic principles of Administrative Law, and/or the decision of the Supreme Court in the case of *Nicos Tsangarides* v. *The Republic of Cyprus* (1975) 3 C.L.R., 290.

Counsel for applicant Hapeshis in support of his grounds of law argued (a) that the decision and/or refusal of the appropriate authorities not to release the applicant should be declared null and void because, it was contrary to law, and the principles of administrative law; (b) that although the applicant has been released the recourse has not been abated; and (c) that the applicant once not released he is entitled to

institute legal proceedings in a Court for the recovery of damages in accordance with the provisions of Article 146.6 of the Constitution.

On the other hand, counsel for the respondents very fairly argued, in spite of the fact that no opposition has been filed, that the applicant was entitled, under Article 172 of the Constitution, to bring an action in the District Court for any wrongful act or omission causing damage to him committed in the exercise of the duties of officers or authorities of the Republic. Counsel further argued that the applicant was not entitled to claim damages in spite of the fact that the act or decision not to release him was an illegal act, because that act or decision does not constitute a civil wrong in the sense laid down in Article 172 of the Constitution.

There is no doubt, in my view, that the applicant has made it abundantly clear to the appropriate authorities that if he was not released, he would lose the chance of attending the University in england for one year and that because of that he would incur a lot of other expenses. The delay in releasing and discharging the applicant from the ranks of the National Guard was of a period of two months.

The first question which is raised in this recourse, once the act or decision of the appropriate authority admittedly is clearly an illegal act or decision, is whether the applicant is entitled to claim compensation in accordance with the provisions of Article 146.6 of the Constitution. There is no doubt, that after the establishment of the Republic of Cyprus, unlike the period prior to August 16, 1960 when the Government could not be sued in tort, the citizen now has an actionable right under Article 146.6 and Article 172 against the Republic, 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 Article 146, 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.

Article 146.1 is in these terms:

"The Supreme Constitutional Court shall have exclusive

jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, an act or omission of any organ, authority or person, exercising any executive or administrative authority is contrary to any of the provisions of this Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person."

Article 146.4 says that:

"Upon such a recourse the Court may, by its decision– (a) confirm, either in whole or in part, such decision or act or omission; or (b) declare, either in whole or in part, such decision or act to be null and void and of no effect whatsoever; or (c) declare that such omission, either in whole or in part ought not to have been made and that whatever has been omitted should have been performed."

Paragraph 6 says that:

"Any person aggrieved by any decision or act declared to be void under paragraph 4 of this Article or by any omission declared thereunder that it ought not to have been made shall be entitled, if his claim is not met to his satisfaction by the organ, authority or person concerned, to institute legal proceedings in a Court for the recovery of damages or for being granted other remedy and to recover just and equitable damages to be assessed by the Court or to be granted such other just and equitable remedy as such Court is empowered to grant."

Article 172 states that:

"The Republic shall be 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.

A law shall regulate such liability."

That a citizen in Cyprus is entitled to claim compensation against the Republic for any wrongful act or omission causing damage in the exercise of the duties of officers or authorities of the Republic, finds support in the case of *Phedias Kyriakides and the Republic (Minister of Interior)* 1 R.S.C.C. 66. Forsthoff, P., delivering the judgment of the Supreme Constitutional Court said at p. 74:

"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.

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.

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."

See also Tsatsos on Recourse for Annulment 3rd edn., p. 370, paragraph 188, on the question of abatement.

In *Andreas Savva Christodoulides* v. *The Republic of Cyprus, through the Minister of Education*, (1978) 3 C.L.R., p. 189, the Court dealing with the question as to whether or not that recourse was abated had this to say at pp. 191–192:

" As a result, however, of the refusal of the respondent to issue the requested certificate, the applicant was not discharged then from the National Guard so as to be enabled to reach Sweden in time for the commencement of the next academic year.

On January 10, 1976, and after this recourse had been served, the required certificate was issued to the applicant.

The applicant did not withdraw this recourse in view of the fact that, as has been pointed out by his counsel during these proceedings, the applicant has suffered damage due to the initial refusal of the respondent to issue to him the certificate concerned.

It has not been disputed by counsel for the respondent that the complained of initial refusal of the respondent to certify the admission of the applicant was erroneous, due to a mistake made by an official in the Ministry of Education; nor was it contended that such refusal, which did cause detriment to the applicant, could not be declared to be invalid in the present proceedings.

From the material placed before me in this case I am, indeed, satisfied that it was, initially, erroneously refused to certify the admission of the applicant by the university in question.

I have proceeded to examine, too, whether, since on January 10, 1976, the certificate requested by the applicant was actually issued, it could be said that the initial refusal of such certificate ceased to be operative and, consequently, the present recourse should be treated as having been abated: I am of the opinion that this is not so, because as has been pointed out in *Malliotis* v. *The Municipality of Nicosia*, (1965) 3 C.L.R. 75, 94, an administrative act of limited duration, which before ceasing to be effective has produced results, can be annulled even though the legal situation created by it has subsequently ceased to exist.

In this respect the present case is distinguishable from that of *Vafeades* v. *The Greek Communal Chamber*, (1966) 3 C.L.R. 197, where the recourse was treated as abated because a notice about the impending retirement of the applicant in that case was cancelled and, therefore, his recourse against such notice was deprived of its subject matter, in view of the fact that the applicant did not in fact retire on the date indicated by the notice in question, and, consequently, he was never detrimentally affected in any way.

The legal position appears to be the same in Greece, as it is to be derived from Θ. Τσάτσου 'Η Αἴτησις 'Ακυρώσεως 'Ενώπιον τοῦ Συμβουλίου 'Επικρατείας' (Th. Tsatsos on the Recourse for Annulment before the Council of State), 3rd ed., p. 370, as well as from the decisions of the Council of State in Greece in cases 215/1970 and 701/1970.

For all the foregoing reasons the refusal of the respondent Minister, which is the subject matter of this recourse, is hereby declared to be null and void and of no effect whatsoever."

In *Andreas Savva Christodoulides* v. *The Republic of Cyprus, through* (1) *The Minister of Interior and Defence*, (2) *The Headquarters of the National Guard*, (1978) 3 C.L.R. p. 193, the Court dealt once again with the question of abatement and had this to say at pp. 196-197:-

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

Finally the Court in taking the view that the recourse succeeds said:-

" 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."

Having reviewed the authorities, it emerges that once the recourse of the applicant has not been abated for the reasons given earlier in the authorities quoted, I have reached the conclusion that the recourse succeeds once the refusal to discharge the applicants from the ranks of the National Guard was invalid. The refusal, therefore, is declared null and void and of no effect whatsoever. *Sub judice* decision is annulled with costs to be assessed by the Registrar.

Sub judice decision annulled. Order for costs as above.