

1979 November 2

[TRIANTAFYLIDES, P., L. LOIZOU, MALÁCHTOS, SAVVIDES, JJ.]

NICOS IONIDES,

Appellant.

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE MINISTER OF FINANCE,

Respondent.

(*Revisional Jurisdiction Appeal No. 211*).

5 *Public Officer—Holding office immediately before the coming into
operation of the Constitution—Terms and conditions of service of,
including right to pension and gratuity, cannot be altered to his
disadvantage—Article 192 of the Constitution—Election by public
officer, by virtue of section 5 of Law 18/67, to retire at age
of 55—But express reservation of rights under the said Article
192—In view of the said reservation said election not such as to
bring into operation the provisions of regulation 19A of the
Pensions Regulations so as to grant to said officer reduced
10 pension*

15 The appellant joined the public service on January 2, 1935
and was a member of such service immediately before August
16, 1960, when the Constitution came into operation. By
virtue of the legislation in force immediately before the date of
the coming into operation of the Constitution (see section 8
of Cap. 311) the age of retirement of public officers, including
the appellant, was that of fifty-five years. By means of section
7 of Law 9/67 it was provided that the age of retirement of public
officers shall be that of sixty years but public officers could, by
20 virtue of section 5 of Law 18/67, elect not to come within the
ambit of the said section 7. On July 10, 1967, the appellant
filled in a printed form by means of which he elected, purportedly
under section 5 of Law 18/67, not to come, *inter alia*, within the
ambit of section 7 of Law 9/67; and he proceeded to add to the
25 text of the said form the following rider: "If any provision
of the above Law, which affects my interests, is contrary to the

Constitution I reserve the right to raise this matter at the appropriate time". This form was forwarded to the Accountant-General who acknowledged receipt of it without making any comment.

The appellant retired from the public service on February 1, 1969 on attaining the age of fifty-five years; and in computing the annual pension and gratuity payable to him the respondent decided to apply regulation 19(A)* of the Pensions Regulations which provides that the pensionable emoluments of an officer who has exercised a right of election under section 5 of Law 18/67 shall be reduced by six and one-quarter per centum. The appellant challenged the above decision by means of a recourse which was dismissed because the appellant had exercised his right of election under the said section 5; and hence this appeal.

Held, (1) that when regulation 19(A) speaks about an election under section 5 of Law 18/67, it means an unqualified outright exercise of the right of election and not a limited and qualified one, such as that which has taken place in the case of the appellant; that what was, in effect, done is that the appellant has exercised the right of election under section 5 in order to evade the application of the sections of Law 9/67, and of the regulations in the Schedule to such Law, which are referred to in the said section 5, but, at the same time, he reasserted his vested rights under Article 192** of the Constitution, one of which was that the terms and conditions of his service, as were applicable to him before the date of the coming into operation of the Constitution, including his right to pension and gratuity, would not be altered to his disadvantage; and that the reduction of his pension and gratuity by virtue of the operation of regulation 19(A) does constitute an alteration to his disadvantage, contrary to the provisions of paragraphs 1 and 7 of Article 192.

(2) That, therefore, there has not been, on the part of the appellant, an exercise of his right of election under section 5 of Law 18/67 which could bring into operation, in relation to him, the provisions of regulation 19(A); and that, accordingly, the decision concerning the computation of the pension and gratuity payable to him on his retirement, which has been

* Quoted in full at p. 682 *post*.

** Quoted at pp. 682-3 *post*.

challenged in the present proceedings, has to be declared to be null and void and of no effect whatsoever.

Appeal allowed.

Appeal.

5 Appeal against the judgment of a Judge of the Supreme Court of Cyprus (Stavrinides, J.) given on the 2nd June, 1979 (Revisi-
 onal Jurisdiction Case No. 105/69) whereby appellant's
 recourse, challenging the mode of the computation of his annual
 pension and gratuity, was dismissed.

10 *G. Cacoyiannis* with *A. Dikigoropoulos*, for the appellant.
S. Georghiades, Senior Counsel of the Republic, for the
 respondent.

Cur. adv. vult.

15 TRIANTAFYLIDES P.: The appellant has appealed, on July 4,
 1979, under section 11(2) of the Administration of Justice
 (Miscellaneous Provisions) Law, 1964 (Law 33/64), against
 the judgment* of a Judge of this Court, dated June 2, 1979,
 by means of which there was dismissed a recourse of the appel-
 20 lant challenging the mode of the computation of his annual
 pension and gratuity.

The appellant retired from the public service with effect from
 February 1, 1969, on having attained the age of fifty-five years;
 at the time he was holding the post of Director of the Depart-
 ment of Inland Revenue.

25 The appellant joined the public service on January 2, 1935,
 and, consequently, he was a member of such service immediately
 before August 16, 1960, when our Constitution came into opera-
 tion.

30 From the relevant correspondence, which was exchanged
 between the appellant and the Director of the Department of
 Personnel of the respondent Ministry of Finance, it emerges
 that, in computing the annual pension and gratuity payable to
 the appellant, there was applied regulation 19(A) of the Pensions
 Regulations, which are to be found in the Schedule to the
 35 Pensions Law, Cap. 311.

The said regulation came into force by virtue of section 7
 of the Pensions (Amendment) (No. 2) Law, 1967 (Law 18/67),

* Reported in (1979) 3 C.L.R. 206.

as from April 1, 1967, and it is to be found in the Schedule to the said Law 18/67; it reads as follows:-

“Pensionable 19A.-(1) For the purposes of Regulation 19, emoluments the pensionable emoluments of an officer who of certain has exercised a right of election under section 5 officers. of the Pensions (Amendment) (No. 2) Law of 1967 shall be reduced by six and one-quarter per centum. 5

(2) In this Regulation the words ‘pensionable emoluments’ mean the salary and the board or board and lodging allowances as increased under the Public Officers (Amalgamation of part of the Cost-of-Living Allowance with the Salaries) Law 1967.” 10

The learned trial Judge has found that the recourse of the appellant could not succeed because the appellant had exercised his right of election under section 5 of Law 18/67. 15

It is correct that on July 10, 1967, the appellant filled in a printed form by means of which he elected, purportedly under the provisions of section 5 of Law 18/67, not to come within the ambit of the application of the provisions of sections 3(a)(ii), 6(a), 7, 8, 10 and 12 of the Pensions (Amendment) Law, 1967 (Law 9/67) and of regulations 2(b), 2(c) and 5 in the Schedule to such Law. 20

The appellant proceeded, however, to add to the text of the said form the following rider: “Ἐὰν οἰαδήποτε πρόνοια τοῦ ὡς ἄνω Νόμου, ἣτις ἐπιηρεάζει τὰ συμφέροντά μου, ἀντίκειται πρὸς τὸ Σύνταγμα ἐπιφυλάσσομαι νὰ ἐγείρω τοῦτο ἐν καιρῷ τῷ δέοντι”. (“If any provision of the above Law, which affects my interests, is contrary to the Constitution I reserve the right to raise this matter at the appropriate time”). 25 30

The aforementioned form was forwarded by the appellant to the Accountant-General, who acknowledged receipt of it on July 28, 1967, without making any comment.

Paragraph 1 of Article 192 of the Constitution reads as follows:- 35

“1. Save where other provision is made in this Constitu-

tion any person who, immediately before the date of the coming into operation of this Constitution, holds an office in the public service shall, after that date, be entitled to the same terms and conditions of service as were applicable to him before that date and those terms and conditions shall not be altered to his disadvantage during his continuance in the public service of the Republic on or after that date.”

Also, paragraph 7 of the same Article reads as follows:—

“7. For the purposes of this Article—

- 10 (a) ‘public service’ in relation to service before the date of the coming into operation of this Constitution means service under the Government of the Colony of Cyprus and in relation to service after that date means service in a civil capacity under the Republic and includes
15 service as a member of the security forces of the Republic;
- (b) ‘terms and conditions of service’ means, subject to the necessary adaptations under the provisions of this Constitution, remuneration, leave, removal from
20 service, retirement pensions, gratuities or other like benefits.”

It is not disputed that the appellant is a person who was holding a post in the public service in the sense of paragraph 1, above, of Article 192 of the Constitution.

25 By virtue of the legislation in force immediately before the date of the coming into operation of the Constitution (see, in particular, section 8 of Cap. 311) the age of retirement of the public officers, including the appellant, was that of fifty-five years. Then, by means of section 7 of Law 9/67, section 8 of
30 Cap. 311 was replaced by a new section 8 providing that the age of retirement of public officers shall be that of sixty years.

An opportunity was, however, afforded to public officers, when electing under section 5 of Law 18/67 that certain provisions of Law 9/67, and of the Regulations set out in the Schedule thereto,
35 should not be applicable to them, to avoid, also, the application to them of the said section 7 of Law 9/67.

As has, already, been stated in this judgment, the appellant

resorted to section 5 of Law 18/67 in order to elect not to come within the ambit of the application of, *inter alia*, section 7 of Law 9/67, but he qualified the exercise of his right of election under section 5, above, by the reservation contained in the rider which he added to the relevant printed form, to the effect that if any provision of Law 9/67 which affected his interests was contrary to the Constitution, he would raise the matter at the appropriate time; and this is precisely what he has done in the present instance. 5

In our opinion the express reservation made by the appellant, as aforesaid, prevents what might, possibly, be loosely described as the exercise of his right of election under section 5 of Law 18/67 from being the exercise of such right envisaged by the provisions of regulation 19A, so that such provisions might become operative in relation to the appellant, with the consequence that his pensionable emoluments would be reduced by six and one-quarter per centum. 10 15

It is clear that the appellant exercised his right of election under section 5, above, to the extent only to which this did not conflict with his vested rights under the Constitution and, in particular, under Article 192 thereof. 20

In our view, when regulation 19A speaks about an election under section 5 of Law 18/67, it means an unqualified outright exercise of the right of election and not a limited and qualified one, such as that which has taken place in the case of the appellant; and it is to be noted that, as already mentioned earlier, the Accountant-General, in acknowledging receipt of the relevant form by means of which the appellant exercised his right of election under section 5 of Law 18/67, subject to a reservation as regards constitutionality of the provisions of Law 9/67, did not refuse to treat it as being operative only to the extent to which it had been limited by the appellant. 25 30

We are of the opinion that what was, in effect, done is that the appellant has exercised the right of election under section 5 in order to evade the application of the sections of Law 9/67, and of the regulations in the Schedule to such Law, which are referred to in the said section 5, but, at the same time, he reasserted his vested rights under Article 192 of the Constitution, one of which was that the terms and conditions of his service, as were 35

applicable to him before the date of the coming into operation of the Constitution, including his right to pension and gratuity, would not be altered to his disadvantage; and the reduction of his pension and gratuity by virtue of the operation of regulation 5 19A does constitute an alteration to his disadvantage, contrary to the provisions of paragraphs 1 and 7 of Article 192.

For all the foregoing reasons, we have reached the conclusion, as has already been mentioned in this judgment, that there has not been, on the part of the appellant, an exercise of his right of 10 election under section 5 of Law 18/67 which could bring into operation, in relation to him, the provisions of regulation 19A and, therefore, the decision concerning the computation of the pension and gratuity payable to him on his retirement, which has been challenged in the present proceedings, has to be declared 15 to be null and void and of no effect whatsoever; and it is now up to the respondent to compute, once again, such pension and gratuity without applying, in the process of doing so, regulation 19A.

In the result, this appeal is allowed and the judgment of the 20 trial Judge is set aside.

In the light of all pertinent considerations, we have decided to make no order as to the costs of the trial or of the appeal in the present case.

25

Appeal allowed.

No order as to costs.