1980 August 25

[TRIANTAFYLLIDES, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

PETER E. MICHAELIDES,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTER OF DEFENCE,

Respondent.

(*Case No.* 189/80).

Provisional Order—Rule 13 *of the Supreme Constitutional Court Rules,* 1962—*Principles applicable—Flagrant illegality of administrative act a ground for granting a provisional order even if no irreparable damage will be caused if it is not granted—Previous decision of the Court in an earlier similar case a factor indicating whether there is flagrant illegality or not—Recourse against decision calling applicant for military service and application for provisional order suspending effect of such decision—*Sub judice *decision prima facie flagrantly illegal—Applicant will suffer irreparable harm if the application is refused—Public interest in terms of defence requirements will not suffer any irreparable, or even grave harm—Application granted.*

National Guard Law, 1964 (*Law* 20/64)—*Section* 2 *as amended by section* 2 *of Law* 22/78—*Constitutionality.*

The applicant was born in England on January 20, 1962, and was a holder of a British passport; he was not a citizen of the Republic either by virtue of the provisions of Annex 'D' to the Treaty of Establishment of the Republic of Cyprus or of the provisions of the Republic of Cyprus Citizenship Law, 1967 (Law 43/67).

Under section 2 of the National Guard Law, 1964 (Law 20/64) as amended by section 2 of Law 22/78 the applicant was regarded as a "citizen" of the Republic for the purposes of military service in the National Guard, because he was descended in the male line from a citizen of Cyprus.

When he was called up for military service in the National Guard he did so without prejudice and challenged by means of a recourse the decision of the respondent to call him up for such service and has, further, applied for a provisional order, under rule 13 of the Supreme Constitutional Court Rules, suspending the effect of the said decision until the final determination of the recourse.

The above legislative provision of Law 20/64, as amended by Law 22/78, was found to be unconstitutional in *Pieri* v. *The Republic* (1979) 3 C.L.R. 91 by Malachtos J. a Judge of this Court. The respondent Minister in that case was the same Minister as the one who is the respondent in the present case and he did not appeal against the judgment in that case.

On the application for a provisional order:

Held, (1) that the flagrant illegality of an administrative act is a ground for granting a provisional order even if no irreparable damage will be caused if it is not granted and even if serious obstacles will be caused to the administration; and that a previous decision of the Court in an earlier similar case is a factor indicating whether the administrative act which is the subject matter of a later recourse is flagrantly illegal or not.

(2) That the damage to be suffered by the applicant, if the provisional order is refused, will be irreparable, in the sense that he cannot be later adequately compensated in terms of money for the extent to which his whole life in general, and his career in particular, will be prejudicially affected if he is prevented from proceeding now abroad for university studies, as he intends to do.

(3) That on the other hand, in view of the fact that at present

there are reigning peaceful conditions in the country even though a considerable part of it is still under foreign military occupation, the public interest in terms of defence requirements will not suffer any irreparable, or even grave harm, if the applicant, who is an individual in an exceptional position, is, by virtue of a provisional order as applied for, allowed to leave the ranks of the National Guard pending the determination of the recourse.

(4) That the *sub judice* decision of the respondent appears, at least prima facie, unconstitutional and that consequently such decision is flagrantly illegal (see the *Pieri* case, *supra*); and that, therefore, a provisional order suspending until the final determination of the present case, or until further order of this Court, the effect of the *sub judice* decision is hereby made.

Application granted.

Per curiam:

It is true that in the present proceedings counsel for the respondent has argued that the *Pieri* case, *supra*, was wrongly decided, but, in dealing with the application for a provisional order which is now before me, I am treating the *Pieri* case as correctly decided as I am not now sitting on appeal to review the *Pieri* case, even though I shall, of course, examine carefully any argument which has been, or will be, advanced in order to persuade me that I should not eventually follow the *Pieri* case in determining the final outcome of the present recourse.

Cases referred to:

Pieri v. *The Republic* (1979) 3 C.L.R. 91;

Sofocleous v. *The Republic* (1971) 3 C.L.R. 345;

Miltiadous v. *The Republic* (1972) 3 C.L.R. 341;

C.T.C. Consultants Ltd. v. *The Cyprus Tourism Organization* (1976) 3 C.L.R. 390;

Yerasimou v. *The Republic* (1978) 3 C.L.R. 36;

Procopiou v. *The Republic* (1979) 3 C.L.R. 686;

Papadopoullos v. *The Republic* (1975) 3 C.L.R. 89 at p. 94;

Artemides 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 respondent by virtue of which applicant was called up for military service in the National Guard, pending the final determination of a recourse against the validity of such decision.

A. Dikigoropoulos, for the applicant.

K. Michaelides with *M. Photiou*, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment. The applicant has challenged, by means of the present recourse, the decision of the respondent to call him up for military service in the National Guard and he has, also, applied for a provisional order, under rule 13 of the Supreme Constitutional Court Rules, suspending the effect of the said decision until the final determination of the recourse.

The applicant has, in the meantime, enlisted in the National Guard, pursuant to the complained of decision of the respondent, but he has done so without prejudice to his rights.

The applicant has mainly based his application for a provisional order on the contention that the *sub judice* decision is flagrantly illegal, for the following reasons:

The applicant was born in England on January 20, 1962, and is a holder of a British passport; he is not a citizen of the Republic either by virtue of the provisions of Annex 'D' to the Treaty of Establishment of the Republic of Cyprus or of the provisions of the Republic of Cyprus Citizenship Law, 1967 (Law 43/67). As, however, the father of the applicant is a citizen of Cyprus the applicant is entitled to Cypriot citizenship.

Under section 2 of the National Guard Law, 1964 (Law 20/64), as amended in this respect by section 2 of the National Guard (Amendment) Law, 1978 (Law 22/78), the applicant is regarded as a "citizen" of the Republic for the purposes of military service in the National Guard, because he is descended in the male line from a citizen of Cyprus.

The above legislative provision of Law 20/64, as amended by Law 22/78, was found to be unconstitutional in *Pieri* v. *The Republic*, (1979) 3 C.L.R. 91; the judgment in that case was delivered by a Judge of this Court, Malachtos J., sitting as a Court of first instance under section 11(2) of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law 33/64). The respondent Minister in that case was the same Minister as the one who is the respondent in the present case and he did not appeal against the judgment in that case.

On the basis of the view taken in the *Pieri* case, *supra*, as regards the unconstitutionality of the legislative provision on the strength of which the applicant in the present case has been called up for military service in the National Guard, it appears, at least prima facie, that the decision to call him up for such service is unconstitutional and that, consequently, the said decision is flagrantly illegal.

It is true that in the present proceedings counsel for the respondent has argued that the *Pieri* case, *supra*, was wrongly decided, but, in dealing with the application for a provisional order which is now before me, I am treating the *Pieri* case as correctly decided as I am not now sitting on appeal to review the *Pieri* case, even though I shall, of course, examine carefully any argument which has been, or will be, advanced in order to persuade me that I should not eventually follow the *Pieri* case in determining the final outcome of the present recourse.

The principles governing the making of a provisional order under rule 13 of the Supreme Constitutional Court Rules, and the relevant case-law, have been expounded and referred to on many past occasions, such as in *Sofocleous* v. *The Republic*, (1971) 3 C.L.R. 345, *Miltiadous* v. *The Republic*, (1972) 3 C.L.R. 341, *C.T.C. Consultants Ltd.* v. *The Cyprus Tourism Organization*, (1976) 3 C.L.R. 390, *Yerasimou* v. *The Republic*, (1978) 3 C.L.R. 36 and *Procopiou* v. *The Republic*, (1979) 3 C.L.R. 686.

In particular, in *Sofocleous*, *supra*, at p. 351, and in *Papadopoullos* v. *The Republic*, (1975) 3 C.L.R. 89, 94, it was laid down that the flagrant illegality of an administrative act is a ground for granting a provisional order even if no irreparable damage will

be caused if it is not granted and even if serious obstacles will be caused to the administration if such an order is made; and the same view has been adopted, very recently, in a decision by means of which a provisional order was made in recourse No. 213/80 (delivered on July 19, 1980, and not reported yet).

Also, as it is stated in Tsatsos on "The Recourse for Annulment before the Council of State"—Θ. Τσάτσου, "Τὸ Ἔνδικον Μέσον τῆς Αἰτήσεως Ἀκυρώσεως ἐνώπιον τοῦ Συμβουλίου τῆς Ἐπικρατείας"—2nd ed., pp. 284–285, and 3rd ed., pp. 427–428, a previous decision of the Council of State in an earlier similar case is a factor indicating whether the administrative act which is the subject matter of a later recourse is flagrantly illegal or not; and the above view of Tsatsos has been referred to with approval in the *Sofocleous* case, *supra*, at p. 351.

In the present instance I have, as already stated, above, found that the *sub judice* decision of the respondent appears to be, prima facie, flagrantly illegal.

I am, also, of the opinion that the damage to be suffered by the applicant, if I refuse to make the provisional order applied for by him, will be irreparable, in the sense that he cannot be later adequately compensated in terms of money for the extent to which his whole life in general, and his career in particular, will be prejudicially affected if he is prevented from proceeding now abroad for university studies, as the applicant intends to do if he does not have to do military service in the National Guard here until his recourse is determined.

On the other hand, in view of the fact that at present there are reigning peaceful conditions in our country even though a considerable part of it is still unfortunately under foreign military occupation, the public interest in terms of defence requirements will not suffer irreparable, or even grave harm, if the applicant, who is an individual in an exceptional position, is, by virtue of a provisional order as applied for, allowed to leave the ranks of the National Guard pending the determination of his recourse (see *Artemides* v. *The Republic*, (1979) 3 C.L.R. 33).

In the light of all the foregoing considerations I have decided

to make, in so far as the applicant is concerned, a provisional order suspending until the final determination of the present case, or until further order of this Court, the effect of the decision to call him up for military service in the National Guard.

The question of the costs of the proceedings for the provisional order shall be costs in the cause but, in any event, not against the applicant.

Application granted. Order for costs as above.