

1980 July 20

[MALACHTOS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

MARIOS G. SOTERIOU,

Applicant,

v.

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

Respondent.

(Case No. 213/80).

Provisional order—Principles applicable—Flagrant illegality—A ground for granting a provisional order even if no irreparable damage has been proved and even when serious obstacles will be caused to the administration—Call up for service in the National Guard under section 2(b) of the National Guard (Amendment) Law, 1978 (Law 22/78)—Said section 2(b) unconstitutional—Therefore call up for service flagrantly illegal—Provisional order suspending decision for call pending final determination of a recourse against such decision. 5

The applicant was a British subject and was not considered as a citizen of the Republic, either under Annex "D" of the Treaty of Establishment of the Republic of Cyprus or the Republic of Cyprus Citizenship Law, 1967 (Law 43/67). Before the enactment of section 2(b) of the National Guard (Amendment) Law, 1978 (Law 22/78) he could not be considered as a citizen of the Republic and he was not liable for service in the National Guard because under section 4 of the National Guard Laws only citizens of the Republic were liable for such service. When, after the enactment of the said section 2(b), he was considered as a conscript and was called up for service in the National Guard he challenged the validity of his call up by means of a recourse and he, also, applied for a provisional order suspending the effect of the decision to call him up, pending the final determination of the recourse. 10 15 20

On the application for a provisional order:

5 *Held*, that the flagrant illegality of an administrative act is a ground for granting a provisional order, even if no irreparable damage has been proved and even when serious obstacles will be caused to the administration; that the said section 2(b) of Law 22/78 is unconstitutional (see *Pieri v. Republic* (1979) 3 C.L.R. 91); that, therefore, the decision to call applicant for service in the National Guard is flagrantly illegal; accordingly there will be an order restraining the respondents from applying
10 the decision complained of, as far as applicant is concerned, till the final determination of this recourse.

*Application granted.**Cases referred to:*

- 15 *Pieri v. Republic* (1979) 3 C.L.R. 91;
Procopiou and Others v. Republic (1979) 3 C.L.R. 686;
Sofocleous v. Republic (1971) 3 C.L.R. 345 at p. 351.

Application for a provisional order.

20 Application for a provisional order suspending the effect of the decision of the respondents by virtue of which the applicant was called up for service in the National Guard, pending the final determination of a recourse against the validity of such decision.

J. P. Potamitis, for the applicant.*K. Michaelides*, for the respondent.

25 MALACHTOS J. gave the following judgment. In view of the extreme urgency of these proceedings I shall proceed straight away to pronounce judgment.

30 At this stage of the present proceedings the applicant applies for a provisional order suspending the effect of the decision of the respondents by virtue of which the applicant was called up for service in the National Guard, pending the final determination of a recourse against the validity of such a decision. The decision was communicated to him by means of a letter dated 12th May, 1980 by the Ministry of Interior and Defence.
35 This recourse is against the said decision.

The facts of the case, which are not disputed, appear in the body of the main application and in the correspondence

exchanged between the applicant and the respondents attached thereto.

It is clear from those documents that the applicant is a British Subject and is not considered as a citizen of the Republic either under Annex D of the Treaty of Establishment of the Republic of Cyprus or the Republic of Cyprus Citizenship Law, 1967, (Law 43/67). 5

It is common ground that before the enactment of section 2(b) of the National Guard (Amendment) Law, 1978, (Law 22/78), he could not be considered as a citizen of the Republic and he was, therefore, not liable for service in the National Guard as under section 4 of the National Guard Law only citizens of the Republic are liable for such service. Under the enactment of section 2(b) of Law 22/78, he is considered as a conscript. This section, however, has been declared unconstitutional in the case of *Marinos Pieri v. The Republic of Cyprus* (1979) 3 C.L.R. 91, which was issued by this Court and from which there was no appeal. 10 15

It is clear, therefore, that the decision of the respondents as regards the applicant to call upon him for service in the National Guard under the said section is flagrantly illegal. In the case of *Gedeon Procopiou and Others v. The Republic* (1979) 3 C.L.R. 686 the principles on which a provisional order may be issued are enumerated and all previous Case Law is referred to therein. 20 25

It has been repeatedly stated by this Court, that the flagrant illegality of an administrative act is a ground for granting a provisional order, even if no irreparable damage has been proved and even when serious obstacles will be caused to the administration. See *Sofocleous v. The Republic* (1971) 3 C.L.R. 345 at page 351. 30

I, therefore, as at present advised, hold the view that the application for a provisional order applied for should be granted, and so, there will be an Order restraining the respondents from applying the decision complained of, as far as the applicant is concerned, till the final determination of the present recourse. 35

The case is fixed for hearing on its merits on 1st September, 1980 at 9.30 a.m.

Application granted.