1982 December 11

[TRIANTAFYLLIDES, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

PAVLOS STOKKOS,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
1. THE COUNCIL OF MINISTERS,
2. MINISTER OF INTERIOR,

Respondents.

(*Case No.* 439/82).

Provisional order—Recourse against requirement to retire under the provisions of section 8 *of the Pensions Law, Cap.* 311 *(as amended) —No flagrant unconstitutionality or illegality of sub judice decision—Irreparable harm—Not an adequate reason for making a provisional order if serious harm is to be caused to the public interest which prevails over the private interest of the applicant—Requirement to resign for reasons of security—Court cannot at this interlocutory stage of the proceedings decide finally on the existence or not of such reasons—Since possibility of their existence cannot be excluded it has to be taken into account that serious harm may be caused to the public interest if provisional order applied for is made.*

Public interest—Aspect of harm to—To be examined by Court even if it had not been raised.

Practice—Revisional jurisdiction case—It is up to the Supreme Court to decide whether it will be heard by the Supreme Court directly and not by a Judge in the first instance upon an application made in this respect—Section 11(2) *of the Administration of Justice (Miscellaneous Provisions) Law,* 1964 *(Law* 33/64).

The applicant in this recourse challenged the decision of the Council of Ministers to require him to retire from the post of

Deputy Commander of Police under the provisions of section 8 of the Pensions Law, Cap. 311 (as amended by Laws 9/67 and 39/81); and, also, filed an application for a provisional order suspending the operation of the sub judice decision until the determination of the recourse. The sub judice decision was taken for reasons of security.

Counsel for the applicant mainly contended that there existed flagrant unconstitutionality and illegality militating in favour of the making of a provisional order in that the Council of Ministers possessed no competence as regards the applicant under the provisions of the Pensions legislation and that the only competent organ was the President of the Republic, in view of Articles 47(f) and 131.2 of the Constitution.

Held, that if there exists flagrant illegality then a provisional order can and ought to be made; that though there arise, for determination, very serious issues, this Court has not been satisfied on the material at present before it that there exists flagrant unconstitutionality or illegality of the sub judice decision, so as to render proper and necessary for it to grant on this ground the applied for provisional order.

Held, further, (1) that though another reason for which a provisional order might have been granted could be the need to avert irreparable harm, in this case the applicant will not suffer irreparable harm if the provisional order sought by him is refused.

(2) That even if it were to be assumed in his favour the contrary it is well settled that the irreparable harm to be suffered by an applicant if a provisional order is refused cannot be treated as an adequate reason for making such an order if serious harm is to be caused to the public interest because of the making of this order; that since applicant was required to retire from his post for reasons of security even if the existence of such reasons is disputed by the applicant at this interlocutory stage of the present proceedings, and on the basis of the material now before it, this Court cannot, and should not, decide finally whether or not such reasons did actually exist; that, therefore, as the possibility of their existence cannot be excluded it has to be taken into account that serious harm may be caused to the public interest if the applied for by the applicant provisional

order is made; that the aspect of harm to the public interest is something which would have to be examined by this Court even if it had not been raised by counsel for the respondent and in this, as in any other case of this nature, the public interest would have to prevail over the private interest of the applicant; accordingly the application for provisional order must fail.

(3) It is up to the Supreme Court to decide, under section 11(2) of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law 33/64), whether a particular case will be heard by the Full Bench directly and not by a Judge of the Court in the first instance; and it is up to Counsel to apply to the Supreme Court, in the appropriate manner, for a direction that this case should be heard directly by the Full Bench.

Application dismissed.

Cases referred to:

Prodromou v. Republic (1981) 3 C.L.R. 38 at pp. 43, 44;

Soteriou v. Republic (1981) 3 C.L.R. 70 at p. 72;

Sophocleous v. Republic (1981) 3 C.L.R. 360 at pp. 365, 366;

Orologas v. Republic (1981) 3 C.L.R. 631 at p. 634;

Aristides v. Republic (1982) 3 C.L.R. 1 at p.6;

Dekatri v. Republic (1982) 3 C.L.R. 8 at p. 11;

Frangos v. Minister of Interior (1982) 3 C.L.R. 53 at p. 57;

Katsiaouni v. Republic (1982) 3 C.L.R. 68 at p. 72;

P.O.E.D. v. Registrar of Trade Unions (1982) 3 C.L.R. 177 at p. 183;

Economides v. Republic (1982) 3 C.L.R. 837.

Application for provisional order.

Application for a provisional order, under rule 13 of the Supreme Constitutional Court Rules, suspending the operation of the sub judice decision of the Council of Ministers to require applicant to retire from the post of Deputy Commander of Police until the determination of this case or until further order of the Court.

L. Papaphilippou with *A. Spyridakis*, for the applicant.

L. Loucaides, Deputy Attorney-General of the Republic with *A. Papasavvas*, for the respondents.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment. The

applicant, by means of his present recourse, which was filed on 19th October 1982, challenges the decision of the Council of Ministers to require him to retire from the post of Deputy Commander of Police, as from the 14th October 1982, under the provisions of section 8 of the Pensions Law, Cap. 311, as amended, in particular, by section 7 of the Pensions (Amendment) Law, 1967 (Law 9/67) and by section 7 of the Pensions (Amendment) Law, 1981 (Law 39/81).

The said decision was taken by the Council of Ministers for reasons of security on 13th October 1982 (see Decision of the Council of Ministers No. 22.309) and was communicated to the applicant by means of a letter of the Minister of Interior dated 14th October 1982.

The applicant was born on 30th November 1925 and so, after he had become fifty-five years old on 30th November 1980, the aforementioned provisions of Cap. 311, as amended by Laws 9/67 and 39/81, would be applicable to him if he could be found to be otherwise within their ambit.

On the same date when the applicant filed the present recourse he filed, also, an application, under rule 13 of the Supreme Constitutional Court Rules of Court, for a provisional order suspending the operation of the sub judice decision of the Council of Ministers until the determination of this case or until further order of the Court; furthermore, by means of the same application he seeks an early trial of this case.

I have heard counsel for the parties in relation to the matter of the aforesaid interlocutory application on 2nd November 1982, 19th November 1982 and 25th November 1982, and then I reserved my judgment thereon until today.

The principles which govern the exercise of the discretionary powers of this Court under rule 13 of the Supreme Constitutional Court Rules of Court have been expounded in a number of recent decisions and I think it suffices to refer, in this respect, to *Prodromou* v. *The Republic*, (1981) 3 C.L.R. 38, 43, 44, *Soteriou* v. *The Republic*, (1981) 3 C.L.R. 70, 72, *Tikki* v. *The Republic*, (1981) 3 C.L.R. 250, 252, *Sophocleous* v. *The Republic*, (1981) 3 C.L.R. 360, 365, 366, *Orologas* v. *The Republic*, (1981) 3 C.L.R. 631, 634, *Aristides* v. *The Republic*, (1982) 3 C.L.R. 1, 6, *Dekatri*

v. *The Republic*, (1982) 3 C.L.R. 8, 11, *Frangos* v. *The Minister of Interior*, (1982) 3 C.L.R. 53, 57, *Katsiaouni* v. *The Republic*, (1982) 3 C.L.R. 68, 72 and *P.O.E.D.* v. *Registrar of Trade Unions*, (1982) 3 C.L.R. 177, 183. It is, also, useful to refer, in this connection, to a recent decision, on appeal, in *Economides* v. *The Republic* (Revisional Jurisdiction Appeal No. 261, determinded on 24.9.1982 and not reported yet).*

The relevant principles of administrative law, which are applied in Greece by the Council of State, and on the basis of which our own case-law has been moulded, are to be found in, inter alia, the textbook of Skouri on the "Temporary Protection in Disputes for Annulment" (Σκουρῆ " 'Η Προσωρινὴ Προστασία στὶς 'Ακυρωτικὲς Διαφορὲς"), 1979, p. 62 et seq.

The main argument of counsel for the applicant, in support of his application for a provisional order, is based on the ground that there exist flagrant unconstitutionality and illegality militating in favour of the making of such an order. He has submitted, in this respect, that the Council of Ministers possessed no competence as regards the applicant under the aforementioned provisions of the Pensions legislation and that the only competent organ was the President of the Republic, in view of Articles 47(f) and 131.2 of the Constitution. Counsel for the applicant has, also, argued that, in any event, the provisions introduced into the Pensions Law (Cap. 311) by means of Laws 9/67 and 39/81, were inapplicable to the case of the applicant as they interfere with vested rights of his safeguarded by Article 192 of the Constitution. Moreover, it has been contended that the decision to require the retirement of the applicant is an administrative action of disciplinary nature and that such decision was reached without the applicant having been afforded an opportunity to be heard in answer to the allegations against him on which the said decision was based.

It is well settled that if there exists flagrant illegality then a provisional order, such as the one applied for by the applicant, can and ought to be made.

I should point out, in this connection, that, though flagrant illegality renders practically always necessary the making of a provisional order, it is not, also, an indispensable prerequisite for the making of such an order. In a proper case coming

* Now reported in (1982) 3 C.L.R. 837.

within the ambit of rule 13 of the Supreme Constitutional Court Rules of Court a provisional order may be made even if there does not exist flagrant illegality of the sub judice administrative action (see, inter alia, Skouri, supra, pp. 70–71).

What is flagrant illegality is not something which is capable of an exhaustive definition; it is, however, useful to refer, in this respect, to the judgment delivered by A. Loizou J. in the *Economides* case, supra, whereby there were also, adopted relevant dicta of Pikis J. in the *Frangos* case, supra; furthermore, reference may be made to *Skouri*, supra, at pp. 67–70.

In the present instance, having given careful consideration to the lengthy and elaborate arguments advanced by counsel on both sides, I have found no difficulty in reaching the conclusion that there arise, for determination, very serious issues, but I have not been satisfied, on the material at present before me, that there exists flagrant unconstitutionality or illegality of the sub judice decision, so as to render proper and necessary for me to grant on this ground the applied for provisional order.

Another reason for which I might have granted the provisional order could be the need to avert irreparable harm which would be suffered if the provisional order is not granted. In my opinion "irreparable harm" means harm which cannot be adequately redressed under the provisions of Article 146.6 of the Constitution, and I do not think that in this case the applicant will suffer irreparable harm if the provisional order sought by him is refused. But even if I was going to assume in his favour the contrary, it is well settled that the irreparable harm to be suffered by an applicant if a provisional order is refused cannot be treated as an adequate reason for making such an order if serious harm is to be caused to the public interest because of the making of this order (see, in this respect, inter alia, the *Tikki* case, supra, as well as *Skouri*, supra, pp. 63–66).

In this instance the applicant was required to retire from his post for reasons of security.

The existence of such reasons is disputed by the applicant, but, at this interlocutory stage of the present proceedings, and on the basis of the material now before me, I cannot, and should not, decide finally whether or not such reasons did

actually exist. As, therefore, the possibility of their existence cannot be excluded I have to take into account that serious harm may be caused to the public interest if the applied for by the applicant provisional order is made; and the aspect of harm to the public interest is something which would have to be examined by this Court even if it had not been raised by counsel for the respondent (see, in this respect, *Skouri*, supra, p. 66); and in this, as in any other case of this nature, the public interest would have to prevail over the private interest of the applicant.

In the light of all the foregoing considerations I have reached the conclusion that the provisional order must be refused.

In view, however, of the nature of this case I am prepared to give it an early date of trial and I, therefore, fix it for hearing on its merits on 16th December 1982 (4.30 p.m.). At such hearing all the arguments already advanced in relation to the merits of this case will not have to be repeated and can be adopted by counsel for the parties.

In fixing this case for hearing, as above, I have not overlooked that when a related recourse of the applicant—case 490/82—by means of which he has challenged the appointment by the President of the Republic of a new Deputy Commander of Police came up before me for directions on 25th November 1982 counsel for the applicant applied that that case, in view of its nature, should be heard together with the present case, and that both of them, again in view of their nature, should be heard directly by the Full Bench of the Supreme Court; on the other hand, the Deputy Attorney-General stated that he saw no reason for such a course; and I said then that this matter would be considered in due course.

It is up to the Supreme Court to decide, under section 11(2) of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law 33/64), whether a particular case will be heard by the Full Bench directly and not by a Judge of the Court in the first instance. As, on the present occasion, counsel for the parties disagree as to what course is to be adopted in this respect, I think it is up to counsel for the applicant to apply to the Supreme Court, in the appropriate manner, for a direction that the present case and case 490/82 should be heard together

directly by the Full Bench of the Court, if he is still of that view. If such an application is filed then the hearing of this case, which has been fixed on 16th December 1982, will be adjourned sine die pending the decision of the Supreme Court on the application.

The question of the costs of this application for a provisional order is reserved and will be determined after the conclusion of the proceedings in this case as a whole.

Order accordingly.