1982 January 18

[TRIANTAFYLLIDES, P., L. LOIZOU, HADJIANASTASSIOU,
MALACHTOS AND SAVVIDES, JJ.]

PANOS RAZIS AND ANOTHER,

Appellants,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE MINISTRY OF INTERIOR,

Respondents.

(*Revisional Jurisdiction Appeal No.* 208).

Practice—Recourse for annulment—Court can examine ex proprio motu the question whether sub judice decision is an executory one or not.

Act or decision in the sense of Article 146.1 *of the Constitution—*
5 *Which can be made the subject of a recourse—Legal opinion from the office of the Attorney-General—Cannot be considered as a decision in the sense of the above Article.*

On July 4, 1977 the appellants, through their Counsel, wrote to the respondent Ministry and asked that they might be declared
10 as aliens. The respondent replied by letter dated July 15, 1977 and stated that appellants were citizens of the Republic of Cyprus. As against this reply the appellants filed on August 17, 1977 recourse No. 229/77 for a declaration that the decision of the respondent by virtue of which they were considered as
15 citizens of the Republic and as such liable to conscription was null and void. This recourse was finally withdrawn and dismissed on April 22, 1978 upon a statement being made by both Counsel that they had seen the Attorney-General of the Republic and he had agreed to a re-examination of the case. By letter
20 dated July 14, 1978 Counsel of the Republic informed Counsel for the appellants that the Attorney-General of the Republic re-examined the legal aspect of the case and was of the opinion that the decision which formed the subject matter of the said

recourse was correctly taken because his clients fell within section 2 of Annex D to the Treaty of Establishment.

After the receipt of this letter the appellants filed a recourse on August 12, 1978, the subject matter of these proceedings, for a declaration that the act and/or decision of the respondent dated July 14, 1978 by virtue of which they were considered as citizens of the Republic was null and void. The trial Judge, after examining ex proprio motu the question whether the administrative act complained of was an executory one or not, held* that it was nothing more than a legal opinion from the office of the Attorney-General which could not be considered as a decision within the meaning of Article 146 of the Constitution. Hence this appeal.

Counsel for the appellants mainly contended:

(a) That the trial Judge wrongly proceeded to examine and resolve ex proprio motu the question whether the administrative act challenged by the recourse, was an executory one or not.

(b) That even if the trial Judge had the right and/or power to resolve ex proprio motu the said question, he erroneously came to the conclusion that the act was not an executory act, once the appellants had withdrawn a previous recourse upon a distinct undertaking by the Attorney-General of the Republic to re-examine the case, and the new decision was the result of such re-examination.

Held, (1) that the trial Judge was competent to examine ex proprio motu the question whether the administrative act or decision complained of was of an executory nature or not (see *Lambrakis* v. *The Republic* (1972) 3 C.L.R. 72 at pp. 73-74).

(2) That the decision challenged is nothing more than a legal opinion from the Office of the Attorney-General of the Republic; that a legal opinion cannot be considered as a decision in the sense of Article 146 of the Constitution; accordingly the appeal must be dismissed.

Appeal dismissed.

* See (1979) 3 C.L.R. 127.

Cases referred to:

Holy See of Kitium v. *Municipal Council of Limassol*, 1 R.S.C.C. 15 at p. 21;

Lambrakis v. *The Republic* (1970) 3 C.L.R. 72 at p. 73-74;

5 *Lambrou* v. *The Republic* (1969) 3 C.L.R. 497;

Christodoulou v. *The Republic* (1967) 3 C.L.R. 691;

Vrahimi and Another v. *The Republic*, 4 R.S.C.C. 121;

Colocassides v. *The Republic* (1965) 3 C.L.R. 542;

Pieri v. *The Republic* (1978) 3 C.L.R. 356;

10 *Florides* v. *The Republic* (1979) 3 C.L.R. 37.

Appeal.

Appeal against the judgment of a Judge of the Supreme Court of Cyprus (A. Loizou, J.) given on the 14th April, 1979 (Revisional Jurisdiction Case No. 345/78) whereby appellants' 15 recourse against the decision of the respondent to consider them as citizens of the Republic and as such liable to military service was dismissed.

L.N. Clerides, for the appellants.

N. Charalambous, Senior Counsel of the Republic, for 20 the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES P.: The judgment of the Court will be delivered by Mr. Justice Hadjianastassiou.

HADJIANASTASSIOU J.: This is an appeal by the two brothers 25 Panos A. Razis and Lambros A. Razis against the judgment of a Judge of the Supreme Court, under the proviso to section 11(2) of the Administration of Justice (Miscellaneous Provisions) Law 1964, dismissing their application on the ground that they were both citizens of the Republic and as such were bound by law 30 to serve in the ranks of the National Guard.

1. *THE FACTS*:

The two appellants are twin brothers and were born in Limassol on the 19th February, 1957. Their father was born at Argostolion of Greece on 30th November, 1924, and came 35 to Cyprus on the 2nd October, 1950 and started work at Evrychou Gymnasium as a physical training school master. He was the holder of a Greek passport issued in Athens on

8th September 1950, which had expired on 23rd September, 1953. On 18th September, 1955, he got married to his present wife, a Cypriot born in Limassol on 20th October, 1935. His wife was issued with a British Cypriot passport on 10th September, 1958, and became a citizen of the Republic of Cyprus automatically on 16th August, 1960, viz., the date of the establishment of the Republic of Cyprus by virtue of section 2 of Annex D to the Treaty of Establishment.

The appellants' father remained in Cyprus and worked as a school master in various secondary schools between the years 1950 and 1960, on a temporary residence permit, for the purposes of employment, which was granted to him under the Aliens and Immigrations Laws and Regulations in force at the time. On 22nd January, 1960, the father applied for a certificate of naturalization under the British Nationality Act 1948 which was issued to him under No. 1220 on 8th June, 1960. Furthermore, he applied in 1969 under section 5(1) of Annex D to the Treaty of Establishment to be granted citizenship of the Republic of Cyprus. On 10th May, 1969, the Migration Officer informed the District Officer of Limassol through whom the aforesaid application had been submitted that before the further consideration the said applicant had to produce to the said Department a certificate of the Chairman of the Committee of the Quarter as to whether he was a permanent resident of Cyprus at any time in the period of five years immediately before the 16th August, 1960, and such certificate was forwarded by the District Officer of Limassol. The application of the father was approved and on 12th September, 1969, he was issued with a Cyprus passport. (See section 5(1) of Annex D to the Treaty of Establishment).

On 4th July, 1977, the appellants through their lawyer, having explained the circumstances of their case to the appropriate authority viz., the Ministry of Interior, inquired whether they might be declared as aliens. The matter was examined and the appropriate officer replied by a letter dated 15th July, 1977, that after consideration of the whole matter, it was ascertained that the applicants were citizens of the Republic of Cyprus. The applicants feeling aggrieved, filed recourse No. 229/77 on 17th August, 1977, and prayed for a declaration that the decision of the respondent by virtue of which they were consi-

dered as citizens of the Republic and as such liable to conscription, was null and void and of no effect whatsoever. This recourse was finally withdrawn and dismissed on 22nd April, 1978, upon a statement being made by both counsel that they had seen the Attorney-General of the Republic and that he had agreed to a re-examination of the case.

On 14th July, 1978, counsel of the Republic informed counsel for the appellants that the Attorney-General of the Republic re-examined the legal aspect of the case and was of the opinion that the decision which formed the subject-matter of the said recourse was correctly taken because his clients fell within section 2 of Annex D to the Treaty of Establishment. On 12th August, 1978, the appellants filed the recourse under appeal.

2. *PUBLIC LAW:*

Time and again it was said that the Supreme Constitutional Court has been set up as a separate administrative Court with exclusive jurisdiction, modelled on similar courts in European countries. In the past, in the absence of such a Court, such administrative jurisdiction, very limited and inadequate by modern standards as it was, was shared by ordinary courts and some executive organs, according to the particular case. Under the provisions of Article 146 of the Constitution the power to adjudicate finally in matters concerning a decision, act or omission of any organ, authority or person exercising executive or administrative authority, is now within the exclusive jurisdiction of this Court. See *Holy See of Kitium and Municipal Council, Limassol*, 1 R.S.C.C. 15 at p. 21.

There is no doubt that in the opposition counsel of the Republic made it clear that the recourse filed does not attack any administrative act. It is also true that this point has not been argued before the learned trial Judge; but it was examined by him ex proprio motu.

3. *APPEAL:*

On appeal, in a strong argument counsel complained (a) that the learned Judge wrongly proceeded to examine and resolve ex proprio motu the question whether the administrative act challenged, in the present recourse, was an executory one or

not, though respondents' counsel did not raise or press that point in his address to the trial Judge; and (b) counsel further argued that even if the trial Judge had the right and/or power to resolve ex proprio motu the said question, the trial Judge erroneously came to the conclusion that the act was not an 5 executory act, once the appellants had withdrawn a previous recourse upon a distinct undertaking by the Attorney-General of the Republic to re-examine the case, and the new decision was the result of such re-examination. That the learned Judge was competent to examine ex proprio motu the question whether 10 the administrative act or decision is of an executory nature or not has not been doubted in a number of cases. In *Nicos Lambrakis* v. *The Republic of Cyprus, through The Educational Service Committee*, (1970) 3 C.L.R. 72, Triantafyllides, J. (as he then was) said at pp. 73-74:- 15

> "Let it be made clear, however, that what is primarily before this Court for examination as to its validity, is the decision which is the subject-matter of the recourse. The parties to the recourse are of a secondary importance, in the sense that they were only heard in support or against 20 the validity of its subject-matter.
>
> In examining such validity this Court, acting under Article 146 of the Constitution, can go into certain matters, ex officio ...."

See also *Andreas Lambrou and The Republic of Cyprus, through* 25 *the Educational Service Committee*, (1969) 3 C.L.R. 497; *Annika Christodoulou and The Republic of Cyprus, through the Public Service Commission* (1967) 3 C.L.R. 691.

4. *THE CASE LAW*:

Having reached the conclusion that the learned Judge was 30 entitled to examine the matter ex proprio motu, the next question is whether the act or decision complained of is an executory administrative act. That in the present case the act or decision complained of is not an executory administrative act cannot be doubted in our view, because the certificate of the Migration 35 Officer regarding the citizenship of the appellants is not an executory act, and cannot be made the subject of a recourse under Article 146 of the Constitution finds support in a number of cases. See *Vrahimi and Another* v *The Republic*, 4 R.S.C.C.

121, and *Nicos Colocassides* v. *The Republic*, (1965) 3 C.L.R. 542. In a similar case, in *Pieri* v. *Republic*, (1978) 3 C.L.R. 356, the applicant applied to the Migration Officer for a certificate putting forward that he was not a citizen of the Republic of Cyprus. On the contrary the Migration Officer issued to him a certificate in which, inter alia, it was stated that "According to our records he is a conscript". Upon receiving this certificate the applicant filed a recourse contending that the act or decision of the Migration Officer was illegal. On the contrary, counsel for the respondent opposed the allegation of the applicant and put forward that the said certificate does not amount to an executory act and that it was wrongly attacked by a recourse. Mr. Justice Malachtos in dealing with the question, whether the said certificate is an act or decision in the sense of Article 146 of the Constitution said at p. 364:-

> "In the present case the letter of the Migration officer dated 11th July, 1977, cannot be considered as an administrative act or decision of an executory nature, as it amounts only to a legal opinion concerning the applicant and could not directly effect him".

In *Florides* v. *The Republic*, (1979) 3 C.L.R. 37, the applicant, a citizen of the Republic, was liable to enlistment in the National Guard in the ordinary course of events. He maintained that he was not so liable and he applied through his advocate to the respondent Ministry by a letter for a confirmation that he was not in law bound to serve in the National Guard being so exempted on the basis of the aforesaid provisions. Respondent replied by letter that he did not agree with the above submission of applicant's counsel. Applicant applied for a due reasoning of the refusal contained in the letter and respondent by his letter replied that applicant could not be exempted relying on the grammatical and logical interpretation of the section in question. Stavrinides, J. in dealing with the very same question raised in the previous case said at pp. 39-40:-

> "In my view the point is clearly a valid one: the respondent's letters of September 17 and October 11, 1973, (which, incidentally, were not, as they ought to have been, filed together with the application as exhibits thereto) were, in the circumstances of the case, merely 'opinions' ('gnomodotisis')....".

In the light of the authorities and in view of the fact that in the present case the decision challenged is nothing more than a legal opinion from the office of the Attorney-General, we affirm the decision of the trial Judge because in our view a legal opinion cannot be considered as a decision in the sense of Article 146 of the Constitution. 5

We, therefore, dismiss the appeal.

No order as to costs.

Appeal dismissed. No order as to costs. 10