1984 August 27

[TRIANTAFYLLIDES, P.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION.

ROBERTOS I. VRAHIMIS,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE MINISTER OF INTERIOR,

Respondent.

(Case No. 303/83).

Legitimate interest—Constitution Art. 146.2—Recourse against respondent's refusal to exempt applicant from military service under section 4(1)(c) of the National Guard Law 20/64—The fact of applicant's enlistment does not deprive the applicant of his legitimate interest because his enlistment was not voluntary.

Administrative act—The aforementioned refusal constitutes an executory act—Since in the circumstances it was reasonably open to the respondent to reach the sub judice decision the Court will not substitute its evaluation to the evaluation of the facts made by the respondent—And since it is obvious that respondent has adopted the reasoning of the advisory committee which examined the applicant's application, the sub judice decision is duly reasoned—Recourse dismissed.

The applicant, who was called for enlistment in the National Guard, was, granted deferment of his enlistment until June, 1983. In May 1982 he obtained leave to go to Greece and elsewhere in Europe. The validity of his travel documents expired on 30.9.1982. The applicant, however, failed to come back up to the 30.9.1982, but he did return in time and enlisted in the National Guard on 14.7.1983.

The applicant applied under section 4(1)(c) of the National Guard Law 20/1964 as amended for exemption from military service on the ground that he was residing in Athens with his father, who was working there as a doctor. This application was refused. The refusal was communicated to the applicant by letter dated 20.6.1983. Hence the present recourse filed on 13.7.1983, i.e. one day before his enlistment in the National Guard.

Held, dismissing the recourse (1) The fact that the applicant had not filed a recourse against a notice sent to him on 11.5.1983 calling him to enlist does not deprive the applicant from his legitimate interest to pursue this recourse. The filing of this recourse makes it clear that his enlistment in the National Guard was not voluntary and, therefore, it cannot amount to a waiver of his claim that he was not bound to do military service.

(2) The sub judice decision is executory because it determined that the applicant was not entitled to exemption from military service on the strength of a legislative provision, which the applicant had invoked.

(3) The Court will not substitute its own evaluation of relevant facts in the place of the evaluation of such facts made by an administrative organ. In the circumstances of this case it was reasonably open to the respondent to reach the sub judice decision. This decision is consistent with the notion of permanent residence as expounded in the case law.

(4) As it is obvious that the respondent adopted the reasoning of the Advisory Committee, which examined the applicant's said application, the sub judice decision is duly reasoned.

Recourse dismissed.
No order as to costs.

Cases referred to:

Semelides v. *The Republic* (1982) 3 C.L.R. 745;

Solea Car Company Ltd. v. *The Republic* (1976) 3 C.L.R. 44 and on appeal (1976) 3 C.L.R. 385;

In re Gape [1952] 1 Ch. 743.

Recourse.

Recourse against the refusal of the respondent to exempt applicant from military service in the National Guard on the ground that he was permanently residing abroad.

L. N. Clerides with *E. Vrahimis (Mrs.)*, for the applicant.

A. Vladimirou, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment. The applicant by means of the present recourse challenges, in effect, the decision of the respondent Minister of Interior not to exempt him from military service in the National Guard on the ground that he was permanently residing abroad. The said decision was communicated to the applicant by a letter of the Director-General of the Ministry of Interior dated 20th June 1983.

The exemption, under section 4(1)(c) of the National Guard legislation (Law 20/64 as amended), had been applied for by the applicant on the 8th April 1983.

At the material time the applicant was residing in Athens with his father, who was working there as a doctor.

The applicant had been called up for military service in the National Guard in January 1982, but he was granted deferment of his enlistment until June 1983 because at the time he was a student of the English School in Nicosia.

In May 1982 the applicant applied for permission to leave Cyprus in order to go to Greece and elsewhere in Europe on holiday. The applicant was granted a travel document enabling him to leave Cyprus, which was to expire on the 30th September 1982, and his passport was kept by the appropriate authorities in Cyprus.

The applicant went to Greece in July 1982 but he failed to come back up to the 30th September 1982. He returned, however, in time for enlistment in the National Guard on the 14th July 1983; and he has filed the present recourse on the 13th July 1983, that is one day prior to his enlistment.

I cannot agree with counsel for the respondent that the enlistment of the applicant on the 14th July 1983 and the fact that he had not filed a recourse against a notice calling him up to enlist, which was sent to him on the 11th May 1983, deprived him of a legitimate interest, in the sense of Article 146.2 of the Constitution, to file this recourse against the refusal of the respondent to exempt him from military service from the National Guard on the ground that he was permanently residing abroad. I am of the opinion that once the present recourse had been filed it became quite clear that the applicant was challenging the validity of the decision to call on him to enlist and, therefore, his enlistment cannot be regarded as being a voluntary act amounting to a waiver of his claim that he was not bound to do military service in the National Guard.

Nor can I accept the argument of counsel for the respondent that the sub judice decision of the respondent, which was communicated to the applicant by means of the aforementioned letter dated 20th June 1983, is not an executory decision and, therefore, it cannot be challenged by means of the present recourse. I am of the opinion that, in the circumstances of this case, the said decision is executory because it determined that the applicant was not entitled to exemption from military service on the strength of a legislative provision which he had invoked.

Regarding the merits of the present case there should be observed, first, that it is well settled that this Court cannot, in proceedings such as these, substitute its own evaluation of relevant facts in the place of the evaluation of such facts which had been made by an administrative organ (see, inter alia, in this respect, *Semelides* v. *The Republic*, (1982) 3 C.L.R. 745, 751, *Solea Car Company Ltd.* v. *The Republic*, (1976) 3 C.L.R. 44, 55, and on appeal (1976) 3 C.L.R. 385).

The respondent in dealing with the application of the applicant for exemption was advised by the Advisory Committee which was set up under the National Guard legislation. According to the advice given by such Committee the applicant could not be regarded as permanently residing in Greece because he had gone there temporarily, while being a student, in July 1982 and had remained there after he had overstayed his initially envisaged absence from Cyprus. Moreover his mother was at all material times residing and practising as an advocate in Nicosia.

I think that, in the circumstances, it was reasonably open to the respondent Minister to decide that the applicant could not be exempted from his obligation to serve in the National Guard on the ground that he was permanently residing abroad; and the respondent recorded his decision by means of a note dated 10th June 1983, which was endorsed next to the text of the advice of the Advisory Committee, which was dated 3rd June 1983.

It is, furthermore, obvious that the respondent adopted the said advice as the reasoning for his own decision not to accede to the applicant's application for exemption and, therefore, such decision is, in the circumstances, duly reasoned.

Moreover, the decision of the respondent not to treat the applicant as permanently residing abroad is consistent with the notion of permanent residence as it has been expounded in, inter alia, the case of *In re Gape*, [1952] 1 Ch. 743.

For all the foregoing reasons I find that the sub judice decision of the respondent Minister of Interior was reached in a manner which was reasonably open to him in accordance with the relevant legislative provision and, consequently, I cannot hold that it should be annulled.

In the result this recourse has to be dismissed, but I will not make any order as to its costs.

Recourse dismissed with no order as to costs.