

1984 February 9

[TRIANTAFYLLIDES, P., L. LOIZOU, HADJIANASTASSIOU, A. LOIZOU, SAVVIDES, LORIS, JJ.]

GEORGHIOS PRODROMOU,

Appellant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE MINISTRY OF EDUCATION AND THE
MINISTER OF EDUCATION,

Respondents.

(*Revisional Jurisdiction Appeal No. 328*).

Provisional order—Compliance of administration with—Provisional order suspending transfer of applicant from the Pancyprian Gymnasium to Acropolis Gymnasium pending the determination of the recourse—No disobedience with provisional order merely because by a subsequent administrative decision appellant was transferred not to Acropolis Gymnasium but to another Gymnasium. 5

Administrative Law—Recourse against transfer—Provisional order suspending transfer pending determination of the recourse—Administration complying with provisional order and applicant returning to his previous post—Effect of transfer obliterated and recourse deprived of its object. 10

The appellant, a secondary education headmaster, was transferred from the Pancyprian Gymnasium, in Nicosia, to Acropolis "B" Gymnasium, in Nicosia, as from the 1st September 1980. Against such transfer a recourse was made and on the 10th December, 1980 a provisional order was made by the Court suspending, until the determination of the recourse, the transfer of the appellant from the post of Headmaster of the Pancyprian Gymnasium to the post of headmaster of the Acropolis "B" Gymnasium. On the 1st July, 1983 appellant was informed that he was being transferred, for educational reasons, from the Pancyprian Gymnasium to the Makarios "C" Gymnasium as from the 1st September, 1983. The trial Judge dismissed his 15 20

application for an order forcing the respondents to comply with the above provisional order and hence this appeal.

Held, per Triantafyllides P., L. Loizou, Hadjianastassiou, Savvides and Loris JJ. concurring and A. Loizou J. giving a concurring judgment, that it cannot be seen how there has occurred, in the least, any disobedience with the provisional order made on the 10th December 1980 merely because by a subsequent administrative decision in 1983 the appellant was transferred, from the Pancyprian Gymnasium, not to Acropolis "B" Gymnasium, as in 1980, but to another Gymnasium, namely the Makarios "C" Gymnasium, as from the 1st September 1983; therefore, the application in question of the appellant should have been, and was rightly, dismissed.

Held, further, that prior to the date when the trial Judge dealt with the application the recourse of the appellant, had been deprived of its object because immediately after the provisional order was made on the 10th December 1980 the appellant was informed, by a letter dated 22nd December 1980, that he was transferred back from the Acropolis "B" Gymnasium to the Pancyprian Gymnasium as from the 15th December 1980, when on instructions from the Ministry of Education he actually returned to the Pancyprian Gymnasium as headmaster, and thus the effect of his transfer, which he had challenged by his said recourse, was obliterated.

Application dismissed.

Cases referred to:

Prodromou v. Republic (1981) 3 C.L.R. 38;

Sofocleous v. Republic (1971) 3 C.L.R. 345 at p. 352.

Appeal.

Appeal against the judgment of a Judge of the Supreme Court of Cyprus (Malachtos, J.) given on the 29th August, 1983 (Application in Revisional Jurisdiction Case No. 395/80)* whereby appellant's application for an order compelling the respondent to comply with an order of the Court dated 10.12.1980 suspending appellant's transfer was dismissed.

A. S. Angelides, for the appellant.

G. Constantinou (Miss), Counsel of the Republic, for the respondents.

Cur. adv. vult.

* Reported in (1983) 3 C.L.R. 990.

TRIANAFYLIDIS P. I shall deliver the judgment of this Court and my brother Judge A. Loizou, J. will give a concurring judgment setting out his own views.

By this Revisional Jurisdiction Appeal there is being challenged a decision of a Judge of this Court dismissing an application which was filed by the appellant on 31st July 1983 for an order forcing the respondents to comply with a provisional order made by the same Judge in case No. 395/80 on the 10th December 1980.

The appellant, who is a secondary education headmaster, was transferred from the Pancyprian Gymnasium, in Nicosia, to Acropolis "B" Gymnasium, in Nicosia, as from the 1st September 1980, and he was informed accordingly by means of a letter dated 16th August 1980.

Against such transfer he filed, on the 4th November 1980, a recourse under Article 146 of the Constitution (case No. 395/80) and on the 10th December 1980 the aforesaid provisional order was made, after counsel appearing for the respondents had conceded that the transfer in question of the appellant was flagrantly illegal. The provisional order, which was thus made, was framed in very clear and precise terms and it ordered the suspension, until the determination of his recourse, of the transfer of the appellant from the post of headmaster of the Pancyprian Gymnasium to the post of headmaster of the Acropolis "B" Gymnasium.

The appellant has based his contention that the said provisional order has been disobeyed on the fact that the appellant, by a letter dated 18th July 1983, was informed that he was being transferred, for educational reasons, from the Pancyprian Gymnasium to the Makarios "C" Gymnasium, in Nicosia, as from the 1st September 1983.

We cannot see how there has occurred, in the least, any disobedience with the provisional order made as aforesaid on the 10th December 1980 merely because by a subsequent administrative decision in 1983 the appellant was transferred, as aforesaid, from the Pancyprian Gymnasium, not to Acropolis "B" Gymnasium, as in 1980, but to another Gymnasium, namely the Makarios "C" Gymnasium, as from the 1st September 1983; therefore, the application in question of the appellant should have been, and was rightly, dismissed.

Moreover, we agree, too, with the view of the trial Judge that prior to the date when he dealt with such application the aforementioned recourse of the appellant, No. 395/80, had been deprived of its object because immediately after the provisional order was made on the 10th December 1980 the appellant was informed, by a letter dated 22nd December 1980, that he was transferred back from the Acropolis "B" Gymnasium to the Pancyprian Gymnasium as from the 15th December 1980, when on instructions from the Ministry of Education he actually returned to the Pancyprian Gymnasium as headmaster, and thus the effect of his transfer, which he had challenged by his said recourse, was obliterated.

Whether or not the appellant, as the applicant in case No. 395/80, is entitled to have determined the issue of whether his transfer to the Acropolis "B" Gymnasium, which is challenged in such case, should be annulled in so far only as it relates to the period from the 1st September 1980 to the 15th December 1980 is a matter which is not before us in these proceedings and if the appellant wishes to pursue it he may apply to the trial Judge to fix this case accordingly so that he may decide on that issue.

For the foregoing reasons this appeal is dismissed, but with no order as to its costs.

A. LOIZOU J.: I also agree that this appeal should be dismissed. The judgment just delivered by the President of the Court contains all the necessary factual background upon which I can base my reasons for agreeing to that result and I am grateful to him for making my task easier.

The provisional order made by the learned trial Judge on the 10th December, 1980 (reported as *Prodromou v. The Republic* (1981) 3 C.L.R. p.38), was as follows:-

"From the facts which have been placed before me it is apparent that there exists flagrant illegality in the instant case and according to the principles which have been set out hereinabove the provisional order applied for will be made. I would, therefore, make a provisional order ordering the suspension of the transfer of the applicant from the post of Headmaster of the Pancyprian Gymnasium Nicosia to the

post of Headmaster of the B' Gymnasium Acropolis Nicosia until the final determination of the recourse".

The facts he mentions to have been placed before him included a lengthy statement made by counsel for the respondents admitting, - and indeed giving reasons for that, - that the sub judge decision in that recourse, which was the one dated the 16th August, 1980, was flagrantly illegal. In fact the appellant as an applicant in the recourse challenged the validity of that decision and by his application for a provisional order he sought an "Interlocutory and/or provisional order ordering the suspension of the transfer of the applicant from the post of Headmaster Pancyprian Gymnasium to the post of Headmaster of the B' Gymnasium Acropolis, Nicosia, until the final determination of the application under that title and number". He asked for nothing more and nothing less and the provisional order made by the learned trial Judge corresponded to that prayer.

In arguing his present appeal, counsel for the appellant has invited us to find that the dismissal by the learned trial Judge of his application for an order for compliance with the provisional order was wrong in law inasmuch as the first leg of that order precluded the respondents from taking any decision transferring his client from the Pancyprian Gymnasium until the determination of his recourse, and not merely the suspension of the execution of the decision of the 16th August 1980.

I do not subscribe to this argument. What was suspended by the provisional order was the execution of that concrete administrative act and the provisional order made could not be considered as prohibiting the respondents from taking thereafter and in fact after having duly complied with it, another decision for the transfer of the applicant. Needless to say that any such new decision could, of course, be the subject of a new recourse and, if the appellant deemed it necessary, he could seek its suspension by an application for a provisional order to that effect.

There has been considerable argument as to whether there has been or not a revocation, as claimed by the respondents, of the decision of the 16th August 1980. I need not, however, enter into that aspect of the case as the granting of the provisional order on the ground of flagrant illegality made vain a pursuit of the merits and rendered the annulment a mere formality, which

could have been made there and then, or at some time thereafter and it is in this sense that the learned trial Judge in the present case has obviously felt and so concluded namely that that recourse, particularly in view of the immediate compliance of the administration, to the provisional order made, has remained
5 without an object.

When the principle of flagrant illegality was examined in relation to power of this Court to grant provisional orders in the case of *Sofocleous v. The Republic* (1971) 3 C.L.R. 345 I had this
10 to say at p. 352.

“In fact such a ruling on an application for a provisional order usually in the United States makes vain a pursuit of the merits. It may, therefore be said with certainty that when an administrative act is flagrantly illegal a provisional
15 order may be granted. It is, however, a ground to be approached with the utmost caution, as it may be tantamount to disposing the case on its merits, something discouraged by Rule 13 of the Supreme Constitutional Court Rules, though this rule cannot be held as divesting this
20 Court from being the watchdog of legality.”

For all the above reasons the appeal should be dismissed.

Appeal dismissed.