1965
June 26, 20

—

CLEANTHIS GEORGHIADES (No. 1) *and* THE REPUBLIC OF CYPRUS THROUGH 1. THE PUBLIC SERVICE COMMISSION, 2. THE COUNCIL OF MINISTERS

[TRIANTAFYLLIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CLEANTHIS GEORGHIADES (No. 1),

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH

1. THE PUBLIC SERVICE COMMISSION,

2. THE COUNCIL OF MINISTERS,

Respondent.

(Case No. 115/65).

Administrative Law—Public Officers—Appointments—Filling the post of Director-General, Ministry of Education—Application for a provisional order suspending the emplacement of the Interested Party in the post, until final determination of recourse—Application made under rule 13 of the Supreme Constitutional Court Rules, in force under section 17 of the Courts of Justice (Miscellaneous Provisions) Law, 1964 (No. 33 of 1964)—Consideration of circumstances, regarding the making or non-making of such order.

Supreme Court—Revisional jurisdiction—Power of granting a provisional order under rule 13 of the Supreme Constitutional Court Rules—A Judge of the Supreme Court, sitting alone, can deal with an application for a provisional order under rule 13 (supra) which rule should now be applied subject to and in conjunction with section 11 of Law 33 of 1964 (supra).

Applicant applied for a provisional order suspending the effect of one of the sub judice administrative acts, namely, the emplacement of the Interested Party in the post of Director-General of the Ministry of Education, until the final determination of the present recourse.

Held, I. As to Jurisdiction:

Rule 13 of the Supreme Constitutional Court Rules should now be applied subject to and in conjunction with section 11 of Law 33/64 with the result that a Judge of this Court, sitting alone, can deal with an application for a provisional order under the said rule 13.

II. On the merits:

(a) It is a cardinal principle of administrative law that where a provisional order is sought in an administrative recourse and where on the one hand the non-making of the order will cause damage, even irreparable, to the Applicant but on the other hand the making of such an order will cause serious obstacles to the proper functioning of the administration then the personal interest of the Applicant has to be subjected to the general interest of the public and the provisional order should not be granted. It goes without saying that where the non-making of the provisional order will not cause to an Applicant irreparable damage such an order will not be made, in any case, on the strength of the application made by Applicant for the purpose.

(b) On the material before me I am not satisfied that the non-making of the provisional order applied for will cause irreparable damage to the Applicant in this Case.

(c) On whether there is in law a possibility, in this Case, of making a limited provisional order:

There is not in law a possibility, in this particular Case, of making a limited provisional order restraining the Interested Party from exercising certain of the duties of his post and in particular those relating to the supervision of the educational services.

Order: The application for a provisional order is hereby dismissed. But in view of the nature of the Case, I think it should be given every priority and that it should be determined as soon as practically possible.
Costs in cause.

Order in terms

Application for a Provisional Order.

Application for a provisional order suspending the effect of one of the sub-judice administrative acts, namely the emplacement of the Interested Party, in the post of Director-General of the Ministry of Education, pending the final determination of the recourse for annulment of the appointment to the said post.

L.N. Clerides with A. Triantafyllides, for the applicant.

K.C. Talarides, Counsel of the Republic, for the *respondent.*

The following Decision was given by:—

TRIANTAFYLLIDES, J.: In this Case the Applicant applies for a provisional order suspending the effect of one of the sub-judice administrative acts, namely, the emplacement as from the 1st July, 1965, of the Interested Party, Mr. P. Adamides, in the post of Director-General of the Ministry of Education. This provisional order is sought with effect until the final determination of this Case.

Applicant has sworn an affidavit dated 25th June, 1965, in which he states (at paragraph 7) that if the Interested Party "is allowed to be emplaced to the post of Director-General now there will result irreparable loss and damage to me and to the education generally in that my functions and duties will be exercised illegally by the Interested Party and there will be a *fait accompli* whereas if things remain as they are no hardship will be suffered by any one....."

This application for a provisional order has been made under rule 13 of the Supreme Constitutional Court Rules which continue in force under section 17 of the Courts of Justice (Miscellaneous Provisions) Law, 1964 (Law 33/64).

The first issue which I have to examine, although it was not raised by either party, is my competence as Judge of the Supreme Court, sitting alone, to deal with such an application for a provisional order under the said rule 13.

Under such rule the power of granting a provisional order was given, in addition to the Court as a whole, to two Judges of the Supreme Constitutional Court acting in agreement.

The said Supreme Constitutional Court Rules which continue in force by virtue of section 17 of Law 33/64 should of course be deemed to continue in force subject to the express provisions of such Law; as under section 11 of the said Law the revisional jurisdiction of the Supreme Court (including recourses under Article 146) is exercisable by a Judge sitting alone so that such a Judge may dispose on the merits of a recourse, such as the present one, I am of the opinion that rule 13 of the Supreme Constitutional Court Rules should now be applied subject to and in conjunction with section 11 of Law 33/64 with the result that a Judge of this Court,

sitting alone, can deal with an application for a provisional order under the said rule 13. Making a provisional order in an administrative recourse is a matter on which there has not yet developed in Cyprus the necessary jurisprudence. Such jurisprudence, however, exists in other countries where competences analogous to our own under Article 146 exist and, therefore, it is of great guidance value for this Court.

I have particularly in mind the relevant jurisprudence in Greece as set out *inter alia* in "Recourse for Annulment before the Council of State" by Tsatsos, 2nd Edition, p. 281 et. seq. Counsel for Respondent has referred me to the French jurisprudence in the matter. It cannot be said that such jurisprudence is basically different from the Greek one, but as the Greek Council's of State competence for annulment is closely similar to our own under Article 146 I have chosen to be guided by the Greek jurisprudence in preference to the French one on points where they might be found to differ.

There is no doubt that serious questions, mainly questions of law, arise for determination in the present Case. So, this is not a Case where the claim of Applicant is so obviously unfounded as to lead the Court to the conclusion that it is not proper in any case to grant the provisional order applied for. But it is not either a case where the claim of Applicant is clearly bound to succeed; had it been so this could have been a factor militating strongly in favour of the making of the provisional order. The merits of the Case, therefore, cannot have a decisive effect on the outcome of the application for a provisional order.

It is a cardinal principle of administrative law that where a provisional order is sought in an administrative recourse and where on the one hand the non-making of the order will cause damage, even irreparable, to the Applicant but on the other hand the making of such an order will cause serious obstacles to the proper functioning of the administration then the personal interest of the Applicant has to be subjected to the general interest of the public and the provisional order should not be granted. It goes without saying that where the non-making of the provisional order will not cause to an Applicant irreparable damage such an order will not be made, in any case, on the strength of the application made by Applicant for the purpose.

On the material before me I am not satisfied that the non-making of the provisional order applied for will cause irreparable damage to the Applicant in this Case.

The irreparable harm to be alleged by an Applicant might be either financial or moral. No question of Applicant suffering financial harm which would be irreparable arises in this Case.

As regards moral harm it is true that Applicant may suffer such a harm if the provisional order is not granted, by having his official standing in the eyes of the teaching world somewhat minimized through the coming into the picture of the Interested Party in his capacity as Director-General of the Ministry of Education, a capacity much more directly affecting the educational services than the previous capacity of the Interested Party as Administrative Officer of the Greek Communal Chamber.

I do not regard, however, such moral harm as irreparable especially if the period until the determination of the recourse —assuming always that it is going to be successful—is not allowed to be a long one.

For the above reasons I have reached the conclusion that I cannot grant the provisional order applied for on the ground of anticipated irreparable harm to Applicant.

One of Applicant's main arguments has been that if the emplacement of the Interested Party in the post of Director-General of the Ministry is allowed to take place at this time of the year when a lot of activity goes on in preparation for the ensuing school year—and that such preparatory activity is normally to take place does not seem to be disputed—there will result interference with the competence till now exercised by the Applicant himself alone, with the consequence that there will arise friction and confusion to the detriment of proper administration and of public interest in general.

In Greece an Applicant applying for a provisional order in an administrative recourse can only allege irreparable harm to himself and cannot allege harm to anybody else or the public interest.

Our rule 13, however, seems to take account of the public interest to a certain important extent and seems to entrust a

duty in this respect to the Court because it authorizes the Court to grant a provisional order *ex proprio motu* in addition to authorizing it to grant such an order on the application of either party. In my opinion the expression "if the justice of the case so requires", which is the measure of the exercise of the discretion under rule 13, necessitates consideration of the extent to which the public interest is affected by the sub-judice matter, both because of the nature of a public law administrative recourse and of the fact that the Court is authorized to act *ex proprio motu*. In this respect our rule 13 is wider than the corresponding provision in Greece (section 57 of Law 3713 as codified in 1961) which enables the granting of a provisional order only on an application by a party affected.

In this Case there is no doubt, in my mind, that the making of the order applied for in toto will result in serious interference with the proper functioning of the Ministry of Education to the detriment of public interest. The Minister of Education has requested the Public Service Commission on the 1st June, 1965, soon after the relevant schemes of service were approved, to proceed to fill the post of Director-General of the Ministry as soon as possible so that the proper functioning of the Ministry might be ensured. Even if he had not done so I would still have thought that, in the absence of any proof to the contrary, the continued vacancy in the post of the Director-General of a Ministry, especially a newly set up Ministry, would cause considerable difficulty in the functioning of such Ministry with consequent injury to the interests of proper administration.

In view of this, I would have decided to refuse the provisional order, as applied for, even if Applicant were to suffer irreparable damage through the non-making thereof.

But it is possible, while refusing to make a provisional order suspending in toto the effect of the act or decision which is in issue, to make a provisional order suspending in part the effect of such an act or decision provided that this is properly required in the circumstances of the particular Case and it is possible in the light of the nature of the act or decision concerned. Is this necessary or possible in this Case?

The scheme of service for the post of Director of Education in which the Applicant will be emplaced as from the 1st July, 1965, includes, among the duties of such post, general super-

vision and control of the educational services of the Ministry.

The scheme of service for the post of Director-General of such Ministry in which the Interested Party will be emplaced as from the 1st July, 1965, includes among the duties of such a post the general supervision of the departments or services of the Ministry—including of course the educational services of such Ministry. Such a general supervision is to be carried out in accordance with the instructions of the Minister of Education and always subject to the relevant competence of the Minister being reserved.

It will be seen *prima facie*—and we cannot at this stage go more fully into the question of the exact effect of the relevant schemes of service as this is a matter to be determined at the end of the recourse itself— that it is possible for the view to be taken, even if though it may not eventually prevail, that there do exist concurrent and co-extensive supervisory powers of the Director-General of the Ministry and of the Director of Education over the educational services under the Ministry. If such a view is taken, and it is quite probable that it may be taken in view of the rather vague way in which the relevant schemes of service are drafted, there may well result uncertainty, friction and administrative confusion.

Taking into account the fact that the Ministry of Education is now still in the process of being set up and organized and taking into account the admittedly vital significance of the current period of the year in view of the preparatory activity for the ensuing school-year, I am of the opinion that severe harm to the interests of proper administration and consequently of education and the public interest in general may be caused in certain respects if such uncertainty, friction and administrative confusion are allowed to prevail.

The possible overlapping of the duties of the post concerned and the consequent friction may of course eventually be averted through the interpretation to be given to the relevant schemes of service, in the light of all proper considerations, at the stage of the final determination of this recourse.

It is, therefore, to the public interest to avoid any uncertainty, friction, or administrative confusion while this recourse is pending, until the matter be finally regulated on the determination thereof.

I have considered whether it is proper, therefore, to make

such a provisional order as to limit the sphere of duties of the Interested Party, pending the determination of this recourse, and I have also considered whether it is possible to do so in view of the nature of the matter.

That it would be proper, for the duties of the Interested Party, in his capacity as the Director-General of the Ministry, to be limited, pending the determination of this recourse, so as to prevent him from carrying out, even under the instructions of the Minister of Education, any general supervision of the educational services of the Ministry, I have no doubt at all. This would ensure that there would be no possibility, till then, of the duties of the Director-General and of the Applicant, as Director of Education, overlapping and would thus prevent any uncertainty, friction or administrative confusion while the relevant matters are sub judice and undetermined.

Unfortunately, however, I am of the opinion that there is not in law a possibility, in this particular Case, of making a limited provisional order restraining the Interested Party from exercising certain of the duties of his post and in particular those relating to the supervision of the educational services.

A partial suspension of the effect of a sub-judice act is possible only if such act is divisible in law or if it can be separated into chronological stages.

In the present Case these prerequisites for the making of a provisional order of a limited extent, as indicated above, do not exist because once the emplacement of the Interested Party is not to be suspended in toto and is to be allowed to take effect as from the 1st July, 1965, this Court has no competence to go behind such emplacement and direct that the Interested Party should not perform certain of the duties concerned. The act of the emplacement is indivisible.

It is to be borne in mind, however, that the general supervision of the services under the Ministry and particularly the educational services, with which we are dealing in this Case, is a duty which, according to the scheme of service for the post of Director-General, can only be carried out on instructions of the Minister of Education.

I have decided, therefore, that, though I cannot make a provisional order in this matter, I should, in the interests of

justice of this Case and of proper administration, draw the attention of the Minister of Education that it is most desirable, for the reasons already mentioned, that the Interested Party should not be instructed or allowed to carry out any general supervision of educational services of the Ministry, pending the final determination of these proceedings. I trust that the Minister of Education would certainly not wish any friction or administrative confusion to ensue, as a result of the emplacement of the Applicant and the Interested Party in their respective posts, while the matter is before the Court, and I am also certain that once the attention of the Minister has been specifically drawn to this matter he will take all proper steps to see that the position is regulated *pro tempore* accordingly.

The person primarily responsible for the supervision of the educational services functioning under the Ministry of Education is the Minister of Education himself and it is hoped that, in the light of what has been stated in this Decision, he will see fit to carry out such supervision directly without delegating such power to the Interested Party, until these proceedings have been concluded.

For the reasons given in this Decision the application for a provisional order is hereby dismissed.

But in view of the nature of the Case, I think it should be given every priority, and that it should be determined as soon as practically possible.

Regarding costs, they should be costs in cause.

Application for a provisional order dismissed.
Costs in cause.