[VASSILIADES, P. TRIANTAFYLLIDES, JOSEPHIDES, STAVRINIDES, HADJIANASTASSIOU, J.J.]

CHRISTODOULOS NISSIS (No. 2)

Appellant,

and

THE REPUBLIC OF CYPRUS, THROUGH THE PUBLIC SERVICE COMMISSION

Respondent.

(*Revisional Jurisdiction Appeal No.* 32)

Appeal—Revisional jurisdiction appeal—New ground not raised before the trial Court—Approach of an appellate court to such a ground—Governed by principles applicable on civil appeals—New ground not allowed to be raised on appeal in the circumstances of the present case—The Civil Procedure Rules, order 35, *on civil appeals applicable mutatis mutandis to revisional jurisdiction appeals—Rule* 2 *of the Supreme Court (Revisional jurisdiction)Appeal Rules,* 1964—*Aforesaid new ground not amounting merely to a new question of law based upon facts admitted or clearly proved before the trial Court—In which case the new plea might properly be entertained.*

Administrative Law—Abuse or excess of powers as a generic ground for annulling administrative acts or decisions under Article 146 *of the Constitution—But the existence of abuse or excess of powers of a particular nature has to be established to the satisfaction of the trial Court—The onus always resting on the Applicant.*

Abuse or excess of powers—See above.

Practice—Appeal—Revisional jurisdiction appeal—New ground not raised before the trial Judge—See above under Appeal.

This is an appeal against the Judgment of a Judge of this Court, sitting alone in the exercise of the Court's original revisional jurisdiction, in a recourse made under Article 146 of the Constitution and whereby the Appellant had challenged the validity of promotions made to the post of Forest Ranger on the 21st July, 1966. His recourse was dismissed. The Appellant now appeals on the strength of one single new ground, which was not raised at all before the trial Court, namely, that two of those who were promoted were close relatives of Mr. G. Seraphim, the Head of the Department concerned, who

was present, and made recommendations as to the promotions in question, at the relevant meeting of the Respondent Public Service Commission of the 21st July, 1966. The said relationship was within the knowledge of the Appellant and his advocate at the time of the trial; and yet the matter was not raised before the trial Judge.

Under rule 2 of the Supreme Court (Revisional Jurisdiction) Appeal Rules, 1964, the provisions of Order 35 of the Civil Procedure Rules—governing civil appeals—are applicable, *mutatis mutandis*, to an appeal such as the present one. Dismissing the appeal, the Court:

Held,(1). The proper approach of an appellate court to a ground raised for the first time on a civil appeal has been laid down by Lord Herschell in the *Tasmania* [1890] 15 A.C. 223, at p. 225. In accordance with Lord Herschell's view—repeatedly upheld, see e.g. *Karunaratne* v. *Ferdinandus* [1902] A.C. 405—we have reached the conclusion that in the circumstances the Appellant cannot be allowed to raise on appeal the new ground of the alleged relationship of his Head of Department to two of the persons promoted to the post concerned. Similar principles are applicable to appeals in Greece from decisions of first instance administrative Courts to the Council of State (see conclusions from the jurisprudence of the Greek Council of State 1929–1959 pp. 292–293).

(2) In the present case the new—and only—ground of appeal relied upon by the Appellant does not amount, merely, to a question of law based upon facts admitted or clearly proved before the trial Court; in which case such a new plea might properly be entertained (see relevant dicta in *Connecticut Fire Insurance Company* v. *Kavanagh* [1892] A.C. 473, and *Warehousing and Forwarding Co. of East Africa Ltd.* v. *Jafferali and Sons Ltd.* [1964] A.C. 1).

(3) It was argued by counsel for the Appellant that the issue of abuse of powers has been, all along, before the trial Court, and that the new ground raised on appeal is part, really, of such issue. We take the view that abuse or excess of powers is a generic reason enabling a Court exercising revisional jurisdiction, under Article 146 of the Constitution, to annul an administrative act or decision, but the existence of abuse of powers, or of excess of powers of a *particular nature* has to be established

to the satisfaction of the trial Court; and the onus always rests, in each case, on the Applicant.

Appeal dismissed. No order as to the costs of the appeal.

Cases referred to:

The Tasmania [1890] 15 A.C. 223, at p. 225 per Lord Herschell, *applied;*

Karunaratne v. *Ferdinandus* [1902] A.C. 405;

Connecticut Fire Insurance Company v. *Kavanagh* [1892] A.C. 473;

Warehousing and Forwarding Co. of East Africa Ltd. v. *Jafferali and Sons Ltd.* [1964] A.C. 1;

Conclusions from the Jurisprudence of the Greek Council of State 1929–1959 pp. 292–293.

Appeal.

Appeal from the judgment of a Judge of the Supreme Court of Cyprus (Loizou J.) given on the 17th August, 1967 (Case No. 280/66) whereby Appellant's recourse against the decision of the Respondent Public Service Commission not to promote him to the post of Forest Ranger was dismissed.

L. Clerides, for the Appellant.

S. Georghiades, Counsel of the Republic, for the Respondent.

VASSILIADES, P.: The decision of the Court will be delivered by Mr. Justice Triantafyllides.

TRIANTAFYLLIDES, J.: This is an appeal against the judgment* of a Judge of this Court, sitting alone in the exercise of the Court's original revisional jurisdiction, in recourse No. 280/66, made under Article 146 of the Constitution.

By means of such recourse the Appellant had challenged the validity of promotions made to the post of Forest Ranger by the Respondent Public Service Commission, on the 21st July, 1966. His recourse was dismissed after a full hearing.

He now appeals to us on the strength of one single new ground, which was not raised at all before the trial Court, namely, that

*Reported in this Part at p. 473 *ante.*

two of those who were promoted were close relatives of Mr. G. Seraphim, the Head of the Department concerned, who was present, and made recommendations as to the promotions in question, at the meeting of the Commission of the 21st July, 1966; it is contended that such recommendations were undoubtedly a material factor duly relied upon by the Commission.

The Court has, first, heard counsel on the preliminary issue of whether or not the aforementioned ground can be raised now on appeal for the first time.

No material of any kind was placed before the trial Court establishing the alleged close relationship of Mr. Seraphim to two of those who were promoted; even, at this stage, on the face of the notice of appeal, the degree of such relationship is not clear.

Counsel for the Appellant, acting very fairly, has informed the Court that the said relationship was within the knowledge of the Appellant, and of the advocate who appeared on his behalf, at the time of the trial; and yet the matter was not raised before the trial Court.

Under rule 2 of the Supreme Court (Revisional Jurisdiction) Appeal Rules, 1964, the provisions of Order 35 of the Civil Procedure Rules—governing civil appeals—are applicable, *mutatis mutandis,* to an appeal such as the present one.

As the corresponding provisions in England are closely similar to our own, it is useful to bear in mind how the proper approach of an appellate tribunal to a ground raised for the first time on a civil appeal has been laid down by Lord Herschell in *The Tasmania* [1890] 15 A.C. 223, at p. 225:

> "My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them.
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> It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an Appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen

at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box".

Lord Herschell's view was repeatedly upheld, as correct, in subsequent jurisprudence (see, for example, *Karunaratne* v. *Ferdinandus* [1902] A.C. 405).

In line with the foregoing, it has been held that if it is only a question of law which is raised for the first time before an appellate Court, and this is done upon facts either admitted or proved beyond controversy after full investigation, then such a plea may properly be entertained (see relevant dicta in *Connecticut Fire Insurance Company* v. *Kavanagh*, [1892] A.C. 473, and *Warehousing & Forwarding Co. of East Africa Ltd.* v. *Jafferali & Sons Ltd.* [1964] A.C. 1).

Similar principles are applicable to appeals, in Greece, from decisions of first instance administrative courts to the Council of State (see Conclusions from the Jurisprudence of the Greek Council of State 1929–1959 pp. 292–293).

In the present case the new—and only—ground of appeal relied upon by the Appellant does not amount, merely, to a question of law based upon facts admitted, or clearly proved, before the trial Court.

It has been argued by counsel for the Appellant that the issue of abuse of powers has been, all along, before the trial Court, and that the new ground raised on appeal is part, really, of such issue. We take the view that abuse or excess of powers is a generic reason enabling a Court exercising revisional jurisdiction, under Article 146, to annul an administrative act or decision, but the existence of abuse of powers, or of excess of powers, *of a particular nature* has to be established to the satisfaction of the trial Court; and the onus always rests, in each case, on the Applicant.

What was contended, in this respect, by the Appellant, before the trial Court, was that the Respondent Commission disregarded wrongfully the seniority of the Appellant, as well as his superior experience and merits, that it arbitrarily bypassed him in favour of other candidates, and that Appellant's superiors, in making confident al reports on him, were prejudiced against him, in view of persona friction with him. But, it has never been even suggested, at the trial, that Mr. Seraphim, the Head of

the Department, had in any way influenced the Commission, prejudicially, against the Appellant, by recommending to the Commission two candidates who were closely related to him. Abuse or excess of powers of the nature now sought to be alleged on appeal was not, at all, put forward at the trial of the case.

In the circumstances we have reached the view that the Appellant cannot be allowed to raise on appeal the ground of the alleged relationship of his Head of Department to two of the persons promoted to the post concerned.

For this reason—and as such ground is the sole ground of appeal—we find that this appeal cannot be allowed to proceed and it is dismissed accordingly.

There shall be no order as to the costs of the appeal.

Appeal dismissed. No order as to the costs of the appeal.