IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

COSTAS CHRISTOU,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH THE PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 81/68).

Public officers—Promotions—Alleged misconception—Not established—Public Service Commission—Discretion—Commission's discretion in effecting promotions (or appointments) of persons duly qualified under the relevant scheme of service—Will not be interfered with by the Court if properly exercised—The Court will not substitute its own discretion for that of the Commission—No abuse of power established in the instant case.

Evidence—Minutes of the Public Service Commission's meetings—Statements in minutes as to what members said—Admissibility of oral evidence as to what was actually said or meant.

Public Service—See above.

Public Service Commission—Minutes—Oral evidence to explain, or complete the picture of, the Commission's minutes—Discretion of the Commission in effecting promotions (or appointments)—See above.

Minutes—Minutes of meetings of the Public Service Commission—Oral evidence as to what members actually said or meant—See above.

Promotions—See above.

Appointments—See above.

This is a recourse for the annulment of the appointment by way of promotion of the appointee (Mr. Constantinou) to the post of Superintendent of Prisons in preference to, and instead of, the Applicant Mr. Christou.

It was argued on behalf of the Applicant that the Respondent Commission acted in abuse of power in that by selecting

the said appointee "failed in its paramount duty of selecting the best candidate available for the post". In this connection it was said on behalf of the Applicant that "two members of the Commission *viz.* Mr. Louca and Mr. Protestos cast their votes (in favour of the appointee) under a misconception of fact". The relevant minutes of the Commission's meeting of February 8, 1968, were put in as *Exhibit* 1, and so far as relevant to the misconception point are quoted *post* in the Judgment.

This alleged misconception is based:

(1) As regards Mr. Louca *(supra)* on the sentence: "Mr. Y. Louca preferred Constantinou *(the appointee)* to *Christou (the Applicant)*, having regard to Mr. Antoniou's statement "(*Note:* that was the statement of the Senior Superintendent of Prisons, *post* in the Judgment).

(2) As regards Mr. Protestos *(supra)* on the sentence: "Mr. D. Protestos, although believing that Mr. Christou *(the Applicant)* is better, could not see how Mr. Constantinou's *(the appointee's)* secondment could be terminated". (*Note:* the said appointee was Assistant Superintendent of Prisons but held the subject post on secondment since August 1, 1964).

That being so, it was argued on behalf of the Applicant that Mr. Louca voted under the misconception that the said recommendation of Mr. Antoniou (the Senior Superintendent of Prisons) disposed of the matter,—and that Mr. Protestos voted under the misconception that it was not possible to terminate Mr. Constantinou's (the appointee's) aforesaid secondment.

Mr. Protestos was called by the Respondent as a witness for the purpose, partly, of testifying "as to what he actually meant by what he had recorded in the minutes *Exhibit* 1, *supra*, as having said". Counsel for the Applicant objected to the admission of such evidence citing *Georghiades (No. 2)* and *The Republic*, (1965) 3 C.L.R. 473, at pp. 478 to 479 and p. 481, and *Arkatitis (No. 1)* and *The Republic*, (1967) 3 C.L.R. 29 at pp. 31–32.

Overruling that objection and dismissing the recourse the Court:—

Held, I. As to the issue of admissibility of Mr. Protestos's evidence supra:-

(1) Having given the matter the best consideration that I could during a break, I concluded that the evidence (Protestos's *supra*) was admissible and ruled accordingly, and the full consideration that I have been able to give this matter since has confirmed me in that conclusion.

(2) In *Georghiades'* case *(supra)*, a question having arisen as to the meaning of two phrases used in the minutes of a meeting of the Public Service Commission at which that body took a decision, the subject of the proceedings in that case, it was proposed "to produce in evidence" on behalf of the Respondent a document in the form of "a statement adopted by the Commission interpreting and clarifying" that decision. Admission of the document was refused, but this was simply on the ground that the proposed "evidence" would not be on oath, nor would the Applicant have the opportunity of testing it by cross-examination; in fact such evidence was not "even an affidavit in which case any party could have requested to cross-examine the affiant". Indeed the learned Judge went on to express the view that evidence "by the appropriate procedure", by which he clearly meant sworn oral evidence as to what was meant by the phrases in question, was admissible (*Georghiades'* case *supra* at pp. 480–481 the learned Judge citing *Papapetrou* and *The Republic*, 2 R.S.C.C. 61; *Theodossiou* and *The Republic*, 2 R.S.C.C. 44; *Saruhan* and *The Republic*, 2 R.S.C.C. 133).

(3) On the other hand, no valid distinction, as regards admissibility, can be drawn between the matter objected to in the *Arkatitis'* case, *supra* (and admitted in evidence) and to Mr. Protestos's evidence in the present case as to what he had in fact said at the Commission's said meeting of the 8th February, 1968; and accordingly that case provides a precedent for the admission of Mr. Protestos's evidence.

Held, II. As to merits:

(1) Mr. Protestos's evidence before me has not been disputed; minutes of a meeting do not necessarily convey accurately what actually passed at the meeting; and the evidence is both inherently credible and consistent with the minutes. Accordingly I accept it as true. This being so, the point that Mr. Protestos voted for the appointee under a misconception fails.

(2) I now come to the sentence on the basis of which

misconception is atributed to Mr. Louca *(supra)*. No evidence has been adduced in connection with that. Does it warrant the interpretation put on it by counsel for the Applicant? "Having regard" to one consideration does not necessarily, or even probably imply the exclusion of any other consideration; therefore counsel's interpretation of the sentence in question *(supra)* involves an arbitrary interpolation. It follows that the Applicant failed to establish any misconception on Mr. Louca's part either.

(3) No other reason for saying that the Commission acted in abuse of power has been put forward. Accordingly this passage from the Judgment of the former Supreme Constitutional Court in *Christou* and *The Republic*, 4 R.S.C.C. 1, at p. 6 is applicable:

"The Court has laid down more than once that where a person appointed to a post is duly qualified under the relevant scheme of service this Court will not, on the issue of suitability, substitute its own discretion for that of the Commission provided that the Commission's discretion has been properly exercised; in other words, the mere fact that the Court, had it been in the position of the Commission might possibly not have selected for appointment the same candidates as the Commission, is not in itself sufficient ground for the Court to interfere with the decision of the Commission".

Recourse dismissed without costs.

Cases referred to:

Arkatitis (No. 1) and *The Republic*, (1967) 3 C.L.R. 29 at p. 31;

Georghiades (No. 2) and *The Republic*, (1965) 3 C.L.R. 473, at pp. 478, 479, 480 and 481;

Alexandros Christou and *The Republic*, 4 R.S.C.C. 1 at p. 6 *applied.*

Recourse.

Recourse against the decision of the Respondent Public Service Commission to promote the Interested Party, Aristides Constantinou, to the post of Superintendent of Prisons in preference and instead of the Applicant.

L. Clerides, for the Applicant.

K. Talarides, Senior Counsel of the Republic, for the Respondent.

Cur. adv. vult.

The following Judgment* was delivered by:-

STAVRINIDES, J.: This is an application for the annulment of an appointment by way of promotion to the post of Superintendent of Prisons. The post is a first entry and promotion post and was advertised in the Official Gazette of the Republic on August 18, 1967, under Notification No. 1613. The Applicant applied for the post within the time allowed by the advertisement. The Public Service Commission (hereafter "the Commission") on November 22, of that year interviewed a number of candidates including the Applicant and Mr. Aristides Constantinou, the successful candidate (hereafter "the appointee"). The appointment was made on February 8 last. At the time of the advertisement and the appointment the Applicant was Assistant Headmaster, Reform School, while the appointee was Assistant Superintendent of Prisons but held the subject post on secondment since August 1, 1964.

An English translation of the scheme of service relating to the subject post was put in (*exh.* 2), but since it is not quite accurate I must give my own:

"2. Duties and responsiblities of person to be appointed:

Performs such duties as are laid down in the legislation and regulations relating to prisons. If authorized by the Public Service Commission deputizes for the Senior Superintendent of Prisons. Is responsible for such work as may be assigned to in any particular section of the prisons. Generally assists in the administration of the prisons, the discipline and training of the staff, and the discipline, welfare, employment, reformation and training of the prisoners. Is responsible for the control and discipline of the subordinate staff and the prisoners. Any other duties which may be assigned to him.

3. Qualifications:

(a)(i) A suitable University degree or diploma (e.g. in Social Science, Psychology) or other equivalent qualification or special training in Prison Administration and administrative ability and experience; or

* For final decision on appeal see (1969) 4 J.S.C. 597 to be published in due course in (1969) 3 C.L.R

(ii) a good general education not below the standard of a leaving certificate of a five-year secondary school long and satisfactory service under the Government and wide administrative experience;

(b) a very good knowledge of the legislation and regulations relating to prisons and of Criminal Law and Procedure. A good knowledge of English. Knowledge of Turkish in the case of a Greek candidate and of Greek in the case of Turkish candidate will be considered an advantage;

(c) unblemished character, strong personality and stability of temperament. Initiative, ability to command and maintain discipline and experience in the handling of men."

The appointee, having been served with notice of the proceedings, attended on the first day of the hearing, stated that he was content to leave the defence of his interests to counsel who was opposing the application on behalf of the Republic and took no part in the proceedings.

Two grounds were relied upon on the face of the application to the court, *viz.* that (a) the appointee "did not fulfil the qualifications in the scheme of service" and (b) that the Commission "acted in abuse of power in that by selecting" him it "failed in its paramount duty of selecting the best candidate available for the post" (para. 9 of the statement of facts in the application). In view of a written statement of the appointee's qualifications filed by counsel for the Respondent at the hearing (*exh.* 3) ground (a) was abandoned. With regard to ground (b), it was said on behalf of the Applicant that "two members of the Commission, *viz.* Mr. Y. Louca and Mr. D. Protestos cast their votes (in favour of the appointee) under a misconception of fact". The minutes of the Commission's meeting of February 8, 1968 (at which the subject decision was taken), relating to the subject appointment were put in (*exh.* 1), and, so far as relevant to the misconception point, read:

"Mr. Antoniou (the Senior Superintendent of Prisons) stated that candidate Aristides Constantinou, Assistant Superintendent, on secondment to the post of Superintendent of Prisons since August 1, 1964, may not be excellent in all respects but since his secondment he has carried out the duties attaching to the post very

satisfactorily. Another candidate, namely C. Christou, was in Mr. Antoniou's view specialized in juvenile deliquency as his experience was in the Reform School and could not have knowledge of the treatment of adult convicts.

After discussion, Mr. D. Theocharis stated that he considered Mr. Constantinou better than Mr. Christou. Mr. Y. Louca preferred Constantinou to Christou, having regard to Mr. Antoniou's statement. Mr. D. Protestos, although believing that Mr. Christou is better, could not see how Mr. Constantinou's secondment could be terminated. The Chairman and Mr. Lapas felt that Mr. Christou with his training, his long experience at the Reform School and his general knowledge of the treatment of offenders as demonstrated very clearly during the interview was on the whole the best. Mr. Christou proved to be a person of strong character and with his qualities and education he would have made an ideal Superintendent of Prisons; he would bring in new ideas of treatment of offenders with very good results. Mr. A. Constantinou is an old man having had no special education; he is of ill-health and belongs to the old school with obsolete and useless ideas for the treatment of prisoners. The fact that he had been seconded to the post cannot carry weight as at the time the secondment was made taking into consideration the existing staff only and no outsiders.

The Commission after voting decided by majority of 3 to 2 (the Chairman and one member preferring Mr. Christou) that Mr. A. Constantinou be appointed substantively to the post of Superintendent of Prisons with effect from March 1, 1968."

The misconception point is based, as regards Mr. Louca, on the sentence "Mr. Y. Louca preferred Constantinou to Christou, having regard to Mr. Antoniou's statement", and as regards Mr. Protestos on the sentence next following that. Mr. Louca is said to have voted for the appointee in the belief that "the recommendation of Mr. Antoniou disposed of the matter," in the appointee's favour "so that it was unnecessary for him to weigh the respective merits of the candidates in the light of all the information available to the Commission"; and Mr. Protestos to have voted for the appointee in the belief that the latter "should be appointed

although he (Mr. Protestos) thought that the Applicant was a better candidate, because he (Mr. Protestos) could not see how Mr. Constantinou's appointment could be determined". Mr. Protestos was called as a witness for the purpose, partly, of testifying "as to what he actually meant by what he has recorded in *exhibit* 1 as having said". Mr. Clerides objected to the admission of such evidence, citing *Georghiades* (*No.* 2) v. *Republic,* (1965) 3 C.L.R. 473, at pp. 478–479 and 481 and *Arkatitis* (*No.* 1) v. *Republic,* (1967) 3 C.L.R. 29 at pp. 31–32. Having given the matter the best consideration that I could during a break, I concluded that the evidence was admissible and ruled accordingly, and the full consideration that I have been able to give this matter since has confirmed me in that conclusion.

Mr. Protestos's evidence is short, and it is convenient to quote it in full. On his chief examination it is as follows:

> "A member of the Public Service Commission. I attended the meeting at which the appointment of (the appointee) was decided. It is true that I was more favourably impressed by Mr. Christou than by Mr. Constantinou. It was evident that the former was more educated. However, having in mind that Mr. Constantinou was being recommended by his superior, Mr. O. Antoniou, in writing and also to the oral statement made by Mr. Antoniou to the Commission, to the effect that during his four years of service as Superintendent of Prisons Mr. Constantinou had done well, I said 'I cannot see how I can terminate the secondment of a man who had been tried for four years and done well and vote for Mr. Christou, who appeared here to be better, but the other candidate is one who has been tested in this post'."

In cross-examination it reads:

> "Mr. Antoniou did say that Mr. Constantinou 'may not be excellent in all respects, but since his secondment has carried out the duties attaching to the post very satisfactorily'."

There was no re-examination. It will be noted that counsel for the Applicant did not dispute any part of Mr. Protestos's evidence in chief, and cross-examination related solely to what Mr. Antoniou had said at the meeting.

Now in *Georghiades* v. *Republic*, a question having arisen in first instance before Triantafyllides, J., as to the meaning of two phrases used in the minutes of a meeting of the Commision at which that body took a decision the subject of the proceedings in that case, it was proposed "to produce in evidence" on behalf of the Respondent a document in the form of "a statement adopted by the Commission interpreting and clarifying" that decision. Admission of the document was refused, but this was simply on the ground that the proposed "evidence" would not be on oath, nor would the Applicant have the opportunity of testing it by cross-examination; and in fact the "evidence" would not be "even an affidavit (in which case any party could had (sic, a clerical error for 'have') requested to cross-examine the affiant)". Indeed the learned judge went on to express the view that evidence "by the appropriate procedure", by which he clearly meant sworn oral evidence as to what was meant by the phrases in question, was admissible. He said, at pp. 480–81:

> "In the past in more than one case (vide e.g. *Papapetrou* and *The Republic*, 2 R.S.C.C. 61, *Theodossiou* and *The Republic*, 2 R.S.C.C. 44, *Saruhan* and *The Republic*, 2 R.S.C.C. 133) evidence by members of the Public Service Commission concerning the action taken or the decisions reached in particular matters has been received for the purpose of completing the picture of such action or decisions of the Commission, where, in the opinion of the court, such picture was not sufficiently complete of the basis only of the written records; such evidence has been received mainly for the purpose of ascertaining the elements which did really influence the exercise of the discretionary competence of the Commission, when it was not possible to be certain about, or to deduce, such elements on the basis only of the relevant records. Thus, a rule of evidence peculiar to this kind of proceedings, has evolved which I think is most necessary for the proper determination thereof.
>
> Whenever, however, such evidence has been received it has always been received under oath and subject to cross-examination and I certainly do not think that it would be at all proper to depart from such procedure and allow in evidence by way of a statement such as *exhibit* 'A', which is not even an affidavit (in which

case any party could had requested to cross-examine the affiant).

The production, therefore, of the statement, *exhibit* 'A' for identification, is disallowed.

There remains to examine the question whether or not sworn evidence may be adduced instead.

In my opinion, the decision concerned, *exhibit* 13, does not, as recorded, provide a complete picture. We are not told, in particular, what were the qualifications which the Commission found that they were not possessed by the interested party, in relation to the post of Director-General, nor are we told on what grounds the Commission felt bound under s. 16(1) of Law 12 of 1965 to appoint, nevertheless, the said interested party to such post.

I think, therefore, that it is permissible for counsel for Respondent to adduce, by means of the proper procedure, evidence concerning the aforesaid lacunae in the record of the decision of the Commission, *exhibit* 13. At this stage the court is not ordering that evidence be adduced in relation to the two aforementioned lacunae in the relevant record of the Commission; it is only permitting it to be adduced if desired. Whether or not it will find it necessary to order that such evidence should be adduced, is a matter to be decided later in the light of the eventual relevancy of the said lacunae to the outcome of these proceedings."

In *Arkatitis (No. 1)* v. *Republic, (supra)* also a decision in first instance, counsel for the Respondent called as a witness Mr. I. Stathis, the Auditor-General, who had attended a meeting of the Commission at which the decision there in question was taken, and put to him this question. "Did you express before the Commission any views about the comparative merits of the candidates?" Objection to the question was taken by counsel for the Applicant, and Triantafyllides, J., after quoting the minutes of the meeting, said at p. 31:

"It is clear, from a mere perusal of the above set out minutes of the Commission, that they are not a verbatim record of the relevant proceedings at the Commission's meeting of the December 6, 1965. It is equally clear,

on the other hand, that Mr. Stathis was present at the said meeting; and he has, already, given evidence that he expressed, at the time, his views regarding the Applicants and the interested party.

In view of these I am of the opinion that the question of counsel for Respondent, which has been objected to by counsel for Applicants, is a proper one, as tending to complete the picture by placing before the court all the material on the basis of which the Commission has reached its *sub judice* decision."

In my Judgment no valid distinction, as regards admissibility, can be drawn between the matter objected to in the latter case and Mr. Protestos's evidence as to what he had in fact said at the Commission's meeting of February 8 last and accordingly that case provides a precedent for the admission of Mr. Protestos's evidence.

It follows that I must proceed to consider the effect, if any, of that evidence. And first, is it acceptable? It has not been disputed; minutes of a meeting do not necessarily convey accurately what actually passed at the meeting; and the evidence is both inherently credible and consistent with the minutes. Accordingly I accept it as true. This being so, the point that Mr. Protestos voted for the appointee under a misconception fails.

I now come to the sentence on the basis of which misconception is attributed to Mr. Louca. No evidence has been adduced in connection with that. Does it warrant the interpretation put on it by counsel for the Applicant? "Having regard" to one consideration does not necessarily, or even probably, imply the exclusion of any other consideration; therefore the interpretation in question involves an arbitrary interpolation. It follows that the Applicant has failed to establish any misconception on Mr. Louca's part either.

No other reason for saying that the Commission "acted in abuse of power" has been put forward. Accordingly this passage from the Judgment of the former Supreme Constitutional Court in *Alexandros Christou* v. *Republic*, 4 R.S.C. C. 1, at p. 6 is applicable:

"The court has laid down more than once that where a person appointed to a post is duly qualified under the relevant scheme of service this court will not, on

the issue of suitability, substitute its own discretion for that of the Commission provided that the Commission's discretion has been properly exercised; in other words, the mere fact that the court, had it been in the position of the Commission, might possibly not have selected for appointment the same candidates as the Commission, is not in itself sufficient ground for the court to interfere with the decision of the Commission."

For the reasons given the application fails. However, in all the circumstances I think I may properly spare the Applicant an order for payment of the Respondent's costs.

Application dismissed without costs.