1970
Sept. 7
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DIONYSSIOS NICOLAOU
v.
REPUBLIC
(PUBLIC OFFICERS REINSTATEMENT COUNCIL)

[STAVRINIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

DIONYSSIOS NICOLAOU,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH THE PUBLIC OFFICERS REINSTATEMENT COUNCIL,

Respondent.

(*Case No.* 59/68).

Administrative Law—Administrative act or decision—Nullity—Lack of due enquiry—Lack of due reasoning—Misdirection as to the kind of evidence required—Decision of the Public Officers Reinstatement Council, established under the Public Officers Reinstatement Law 1961*—Refusal of Council to reinstate the Applicant, a former public officer who applied for such reinstatement under the said Law—Refusal annulled for absence of due enquiry, through the failure of the Respondent Council to give the Applicant a chance of being personally heard and calling witnesses—Also, for lack of due reasoning through a material ambiguity therein—And, further for a material misdirection through the view taken by the Council of the kind of evidence required for the proper evaluation and determination of the relevant facts.*

Reasoning—Due reasoning of administrative decisions—Defective reasoning through a material ambiguity therein—See also supra.

Enquiry—Lack of due enquiry—Principle of due enquiry as distinct from the principle of the "rights of defence"—Principles aforesaid are partly coincident but not co-extensive—See also supra *under Administrative Law.*

Ambiguity—Vitiating the reasoning behind the administrative decision concerned—See also supra *under Administrative Law.*

Administrative acts or decisions—Due reasoning—Ambiguous reasoning—Due enquiry—Misdirection of the administrative authority in determining or evaluating facts—See supra passim.

Misdirection—As to the kind of evidence required for the proper evaluation and determination by the Respondent Council of the relevant facts—Proper ground of annulment of the decision taken under such misdirection—See also supra *under Administrative Law*

Public Officers Reinstatement Law, 1961—See supra *under Administrative Law*

The Applicant, a former Police Officer, applied for reinstatement in the service under the Public Officers Reinstatement Law, 1961, to the Council thereby established. The Council having rejected his application, the Applicant instituted this recourse seeking to annul that decision Annulling the aforesaid decision whereby the Respondent Council refused to reinstate the Applicant in the service as applied for, the Court –

Held, I As to the principle of "due enquiry" as distinct from the principle or doctrine known in the French Administrative Law as "rights of defence"

(1) It is common ground that the decision complained of was taken without the Applicant being given the opportunity of being heard by the Council or adducing evidence before it In my view this amounts to lack of due enquiry which is fatal to the subject decision, as distinct from the doctrine known in the French administrative law as "rights of defence", which doctrine, I agree with counsel for the Republic, does not apply to a case of this kind The two principles i.e the principle of "the rights of defence" and that of "due enquiry" are only partly coincident, but not co-extensive

(2) On the whole, I am of opinion that under the latter principle the Council should have given the Applicant a chance of being personally heard and calling witnesses and that its failure to do so is a ground of annulment (Principles laid down in *Nicolaou and The Republic* (1967) 3 C.L.R. 308 at p. 313 and in *Constantinou and The Republic* (1966) 3 C L.R 793, at pp. 799–800 *followed*)

Held, II As to the issue of defective reasoning due to ambiguity:

(1) The Respondent Council in stating that it was "convinced that Applicant's activities did not amount to a direct or indirect

participation in the liberation struggle" is making an ambiguous statement: Was it so convinced because it did not accept the version of the facts relied upon by the Applicant (which be it noted stood uncontradicted) or because, although it accepted them, it considered that they did not disclose such participation?

(2) This obviously is a material ambiguity; and if any authority is required for the proposition that such an ambiguity entails annulment it could be found in the Conclusions from the Jurisprudence (Case Law) of the Council of State 1929–1959 pp. 186–187, where cases are cited for the following proposition: "An act is not (duly) reasoned, the reasoning of which is so vague that its judicial review is impossible, or does not state the facts on which the administration's determination was based..... or is so vague and general as not to admit of its easy supplementation from other materials in the file..... An expression forming vaguely a conclusion of the administration is not (due) reasoning....."

Held, III. As to the misdirection regarding the evidence required:

(1) It appears that the Respondent Council thought that direct evidence of knowledge by the former Colonial Government of the Applicant's participation in the "Liberation struggle" was as a matter of law or reason required, and the Applicant's case rested on circumstantial evidence. That view constitutes a material misdirection.

(3) The determination and evaluation of the facts relevant to an administrative decision is a matter for the administrative authority; but that, of course, is subject to the proviso that the authority has not misdirected itself. If it has, its decision cannot stand any more than that of a Court of law based on a similar misdirection.

Sub judice decision annulled with £30 *costs.*

Cases referred to:

Nicolaou and The Republic (1967) 3 C.L.R. 308 at p. 313 *followed;*

Constantinou and The Republic (1966) 3 C.L.R. 793, at pp. 799–800 *followed;*

Decisions of the Greek Council of State cited in Conclusions from the Jurisprudence (Case Law) of the (Greek) Council of State 1929–1959, pp. 186–187.

Recourse.

Recourse against the decision of the Respondent to the effect that the Applicant is not an entitled officer under the provisions of the Dismissed Public Officers Reinstatement Law 1961 (Law 48/61).

E. Lemonaris for *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.: In April, 1956, the Applicant was serving in the Cyprus Police Force with the rank of sergeant. He had been serving in it for 30 years and was 51 years of age. By a letter dated the 13th of that month he was required to retire under s. 8(1) of the Pensions Law (now Cap. 311) with effect from August 1 of that year. He retired compulsorily under that provision, although, at his request, the retirement date was advanced to July 1.

On December 6, 1961, he applied under the Public Officers Reinstatement Law, 1961, to the Council thereby established for reinstatement (red 1 in a Council file relating to him, *exhibit* 5). That application was refused by a letter dated September 17, 1962 (red 2 in that file), in which it was stated that the Council "came to the conclusion" that he was not "an entitled officer", without stating why. Subsequently he made an application to this Court (219/62). This was withdrawn on April 4, 1964, the Council undertaking "to re-examine" his case. A second refusal followed, which was the subject of a fresh application by him to the Court (53/66).* After a trial that refusal was annulled on two grounds, viz. (a) because it had been based on a mistaken finding that his retirement had been a voluntary one and (b) because it had been influenced by "an extraneous factor"—a decision of the Minister of the Interior refusing a petition by him for compensation "in relation to the termination of his service"

* Vide (1967) 3 C.L.R. 308.

based on the view "that such termination was not due to political reasons" (*Nicolaou* v. *Republic* (1967) 3 C.L.R. 308 at p. 313.

After the annulment the Council again took a decision refusing his claim. That decision is recorded in a four-page document dated October 11, 1967 (reds 35–32 in *exhibit* 5). and he was informed of the refusal by a letter dated December 15 of that year (*exhibit* 1). He now seeks to annul that decision (hereafter "the subject decision").

It is common ground that the subject decision was taken without the Applicant being given an opportunity of being heard by the Council or adducing evidence before it, and Mr. Clerides for him argued that that was fatal to the subject decision. In support of that argument he cited a passage from the judgment in the application 53/66, at p. 313, and two from the judgment in *Constantinou* v. *Republic*, (1966) 3 C.L.R. 793, at pp. 799–800. Mr. Talarides for the Respondent, on the other hand, referred to textbooks on French administrative law with a view to showing that the doctrine known in that law as "rights of the defence" does not apply to a case of this kind. That it does not is clear; but the principle of the passages cited by Mr. Clerides is not that of "the rights of the defence" but that of "due inquiry". The two principles are only partly coincident, not coextensive, and without overlooking the material that the Council had before it I think, on the whole, that under the latter principle it should have given the Applicant a chance of being personally heard and calling witnesses and that its failure to do so is a ground of annulment. However, I need not labour this point, because in my opinion the subject decision must be annulled for lack of due reasoning.

The decision is in English, and para. 6 of it reads:

> " In the present case, the members do not disbelieve that Applicant must have been a sympathizer of EOKA but are at the same time convinced that Applicant's activities did not amount to a direct or indirect participation in the Liberation Struggle and the then Government had neither formed such a view in respect of Applicant nor suspected him that he did so."

If the Applicant's case as to his activities during the Struggle, as stated in a document (reds 13–11 in *exhibit* 5) that he had

sent to the Council following the withdrawal of the application 219/62, is accepted, then he did establish "direct or indirect participation" in it. Therefore the Council in stating that it was "convinced that Applicant's activities did not amount to a direct or indirect participation in the Liberation Struggle" is making an ambiguous statement: Was it so convinced because it did not accept the version of the facts relied upon by the Applicant (which, be it noted, stood uncontradicted) or because, although it accepted them, it considered that they did not disclose such participation? This obviously is a material ambiguity; and if any authority were required for the proposition that such an ambiguity entails annulment it could be found in the Conclusions from the Case Law of the Council of State, pp. 186, 187, where cases are cited for the following propositions:

> " An act is not (duly) reasoned, the reasoning of which is so vague that its judicial review is impossible, or does not state the facts on which the administration's determination was based..... or is so vague and general as not to admit of its easy supplementation from other materials in the file..... An expression forming vaguely a conclusion of the administration is not (due) reasoning.....".

Then para. 7 of the subject decision reads:

> " The Council have considered the statement made at the Court by the Applicant as well as those by the witnesses Ahmet Hikmet & Andreas Avgousti. Nothing new or additional has transpired from those statements to prove beyond doubt that Applicant's retirement was contrary to the procedure and practice adopted by the then Government in cases where that Government in exercising (sic for 'exercised') its option, under s. 8(1) of the Pensions Law—i.e. *in requiring* an officer to retire from the service of Cyprus *at any time* after he has attained the age of 50 years. Further, nothing has been proved that the then Government in exercising that option had been guided to do so by suspicious or factual evidence to the effect that Applicant was required to retire for exclusive political reasons. That civil servants run the risk of dismissal or detention, or punishment for their nationalistic beliefs and activities, had not escaped the attention of the Council. The Law, however, was not and is not to be contrued to reinstate those officers who for either health reasons,

family reasons, or professional short-comings, or justified or unjustified grievances or some advices succeeded their retirement from the service."

As to the second sentence, it may be noted in passing that "proof beyond doubt" (or, for that matter, beyond *reasonable* doubt) that the Applicant's "retirement was contrary to the procedure and practice followed by the then Government....." was not necessary; but I make nothing of this, because on the whole of the subject decision it does not appear to have influenced its conclusion. However, from the words in the next sentence "nothing has been proved" it appears that the Council thought that direct evidence of knowledge by "the then Government" of the Applicant's participation in the Struggle was, as a matter of law or reason, necessary. Since direct evidence was not either in law or reason required, and the Applicant's case rested on circumstantial evidence, that view constituted a material misdirection. One comes across the proposition that the determination and evaluation of the facts relevant to an administrative decision is a matter for the administrative authority charged with the responsibility of taking that decision; but that, of course, is subject to the proviso that the authority has not misdirected itself. If it has, its decision cannot stand any more than that of a Court of law based on a similar misdirection.

In view of the foregoing what the Council must do is not merely to take up the subject decision and rectify its reasoning but to consider the Applicant's case afresh after giving him an opportunity of being heard and calling witnesses.

For the above reasons the subject decision is annulled. The Respondent to pay the Applicant £30 costs.

Sub judice decision annulled.
Order for costs as above.