1972
Mar. 13

IOANNIS CONSTANTINOU

v.

REPUBLIC (CHAIRMAN OF THE COUNCIL FOR THE REINSTATEMENT OF *DISMISSED* CIVIL SERVANTS)

[A. Loizou, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

IOANNIS CONSTANTINOU,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH THE CHAIRMAN OF THE COUNCIL FOR THE REINSTATEMENT OF DISMISSED CIVIL SERVANTS,

Respondent.

(Case No. 288/70).

Res Judicata—*Duty of the administration to comply with decisions of the Administrative Court—Principles applicable—When there exists violation of* res judicata—Sub judice *decision annulled because of such failure on the part of the respondent Council to comply with a previous annulling decision of the Administrative Court.*

Administrative Court—Decision—Res judicata— *See* supra.

Public Officers—Reinstatement of dismissed public officers—Council of Reinstatement of Dismissed Public Officers—The Dismissed Public Officers Reinstatement Law, 1961 (Law No. 48 of 1961).

Council of Reinstatement of Dismissed Public Officers—Law No. 48 of 1961—Council entitled to hear evidence in the absence of officer concerned and his counsel—Section 3(2) of said Law (supra).

Entitled officers—Dismissed Public Officers—Reinstatement—Law No. 48 of 1961—See supra; *cf* infra.

Construction of statutes—Meaning of the phrase "retired compulsorily" («ἀναγκαστικῶς ἀφυπηρετήσας») *in paragraph (c) of the definition of "entitled officer" in*

the definition section 2 of said Law No. 48 of 1961.

Administrative decisions—Decisions of the Administrative Court—Apart from any consideration regarding res judicata, *the rule is that the administrative organ in arriving at a different assessment than the one made by the annulling Judge has to give specific reasons, mentioning specifically in its decision the grounds on account of which such organ arrived at such different assessment—Otherwise its decision would have to be annulled for lack of proper reasoning.*

Reasoning of administrative decisions—See immediately hereabove.

Words and Phrases—"Compulsorily retired" («ἀναγκαστικῶς ἀφυπηρετήσας») *in paragraph (c) of the definition of "entitled officer"* («δικαιοῦχος ὑπάλληλος») *in the definition section 2 of the aforesaid Law No. 48 of 1961.*

Public officers who for "political reasons" have, *inter alia,* "retired compulsorily" from the service during the colonial rule in Cyprus are entitled to claim their reinstatement in the service under the provisions of the Dismissed Public Officers Reinstatement Law, 1961 (Law No. 48 of 1961), the appropriate organ to entertain and determine the relevant applications being the respondent Council.

The said Council having repeatedly refused to reinstate the applicant (who was claiming such reinstatement under the said Law No. 48 of 1961, *supra*) he filed a number of recourses the two last ones being recourse No. 58/1968 and the present one. Mr. Justice Hadjianastassiou dealing with the said recourse No. 58/1968, delivered judgment on April 19, 1969, annulling the respondent Council's decision of December 1967, whereby they have refused to reinstate the applicant in the service as claimed (see this judgment in (1969) 3 C.L.R. 190). In the present case, the Council, after reconsidering the matter in the light of the aforesaid Judgment of Mr. Justice Hadjianastassiou *(supra),* refused again to reinstate the applicant on the broad ground that his resignation or retirement from the service during the colonial rule (August 1955) was a voluntary one which does not come

within the ambit of compulsory retirement for political reasons within the relevant provisions of the said Law No. 48 of 1961.

It is against this last decision of the respondent Council (taken some time in July, 1970) that the applicant filed his present recourse. The learned Judge in the instant case (Mr. Justice A. Loizou) held that the *sub judice* refusal of the Council had to be annulled because it offends against the rule of *res judicata* in that it plainly contradicts a finding of fact made by the learned Judge in his aforesaid judgment of April 19, 1969, in the previous recourse No. 58/1968 *(supra),* to the effect that on the uncontradicted evidence of Police Officer C. E. the reasonable conclusion is that the applicant did take an active participation in the liberation struggle and that, therefore, his resignation from the service in August 1955 cannot be said to amount to a voluntary or normal retirement, the applicant having been forced to retire due to political reasons *i.e.* the applicant having, thus, "compulsorily retired" due to such reasons as aforesaid within the provisions of the statute (Law No. 48/1961, *supra*).

It must be noted that the *sub judice* decision was annulled for an alternative reason *i.e.* lack of due reasoning *(infra).*

Held, (1) (a) It is clear that in reconsidering the case of the applicant on July 30, 1970, the respondent Council had before them no factual circumstances which had not been placed before the annulling Judge in recourse No. 58/1968 *(supra).* But it is well settled principle of administrative law that :

> "The issue of a similar in context act constitutes violation of the *res judicata* for the judgment of the Council of State. The annulling decision of the Council of State does not, however, amount to *res judicata* preventing the issue of an identical act, so long as this act is reached after a repetition of the procedure, a new inquiry into the case and assessment of evidential matter not taken into consideration at the original annulled act, or when there, generally exists a new fact which did not come to the attention of the

annulling judge".

(See Conclusions of Jurisprudence of the Council of State, 1929-1959, p. 281 and the decisions therein mentioned. See also p. 282 of the same textbook and Decisions of the Council of State No. 2309/1967 and 729/1957). The same approach to the problem of *res judicata* and the duty of the administration to comply with the decisions of the administrative court can be found in Dendias' Administrative Law, 2nd ed. 1965, Vol. III, p. 367, and Vegleris "The Compliance of the Administration to the decisions of the Council of State" 1934, at p. 38.

(b) For the aforesaid reason the *sub judice* decision should be annulled.

(2) Alternatively :

Even if I were, however, to arrive at the conclusion that all the component elements of *res judicata* did not exist, I would again have to annul the *sub judice* decision; this is so because a judgment though not amounting to *res judicata,* in view of the absence of the conditions and prerequisites for that purpose, nevertheless it should exercise decisive influence on the decision of the administrative organ which in arriving at a different assessment has to give specific reasons for its decision mentioning therein the grounds on account of which it arrived at such different assessment. Such decision not being so specifically reasoned amounts to a decision reached on insufficient reasoning and has, therefore, to be annulled on that ground (see Conclusions of Jurisprudence etc. *supra,* p. 188 and Decision of the Council of State No. 134/1948).

(3) *Regarding the true construction of the words "compulsorily retired" in the definition section 2 of the aforesaid Law No. 48/1961 :*

I was invited not to accept the interpretation of

those words which had been given to it by Triantafyllides, J. in the case *Constantinou* v. *The Republic* (1966) 3 C.L.R. 793, at p. 799 (and which was adopted by Mr. Justice *Hadjianastassiou in Constantinou v. The Republic* (1969) 3 C.L.R. 190 at pp. 207-208), which interpretation was to the effect that the notion of compulsory retirement as used in the aforesaid definition section of Law No. 48/1961, was not intended to be understood only in the narrow technical sense of section 8 of the Pensions Law, Cap. 311. I have not been persuaded that I should find myself in disagreement with the extensive meaning given to the words "retired compulsorily" («ἀναγκαστικῶς ἀφυπηρετήσας») in the aforesaid judgments.

Sub judice decision annulled.

Cases referred to :

Constantinou v. *The Republic* (1966) 3 C.L.R. 793, at pp. 798-799;

Constantinou v. *The Republic* (1969) 3 C.L.R. 190, at pp. 207-208;

HjiLouka v. *The Republic* (1969) 3 C.L.R 570;

HadjiPetris v. *The Republic* (1968) 3 C.L.R. 702;

Decisions of the (Greek) Council of State : Nos. 2309/1967, 729/1957, 136/1948.

Recourse.

Recourse against the refusal of the respondent to reinstate the applicant as an entitled officer under the provisions of the Dismissed Public Officers Reinstatement Law, 1961 (Law 48/61).

L. Clerides, for the applicant.

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

Cur. adv. vult.

The following judgment was delivered by :-

A. LOIZOU, J. : By this recourse the applicant challenges the validity of the decision of the respondent council, communicated to him by letter dated 10th September, 1970, *(exhibit 5)*, whereby his application for reinstatement as an entitled officer, under the provisions of the Dismissed Public Officers Reinstatement Law 1961, (Law 48/61) was refused by the respondent.

The applicant was born in 1908 and enlisted in the Cyprus Police Force in 1927. On the 20th August, 1955, he tendered "his resignation as from the 31st December, 1955, according to the Pensions Law" the reason for that given therein was excessive fatigue due to hardships suffered during his long service, as a result of which he was unable to perform his duties without difficulty. He was at the time stationed at Ypsonas village Police station and Mr. Hasapis, the Superintendent of the Limassol Police Division, wrote a minute on the application for the benefit of the Commissioner of Police that the applicant had received a threatening letter a month earlier not to hoist the Union Jack at the Police Station, that he was a good Policeman but the then prevailing situation had broken his nerve.

On the 31st August, 1955, his application was granted with all benefits that had accrued until then, his retirement taking effect as from the 31st December, 1955. He was as from the 12th September, 1955 on sick leave and from the 13th October, 1955, on leave prior to retirement.

The first application for reinstatement under the aforesaid law was submitted on the 7th December, 1961, *(exhibit 1)*, giving therein the grounds upon which he was forced to retire. On the 25th May, 1962, the applicant sent a second letter to the respondent adding another ground. Upon the refusal of respondent to reinstate him he filed his first recourse No. 223/62 *(exhibit 6)* to be withdrawn on April 10, 1965, upon the undertaking of counsel for the respondent that applicant's case would be re-examined. On the 1st May, 1965, applicant's counsel sent to the respondent a letter

(exhibit 3) giving the grounds which led him to his resignation. On the 14th January, 1966, the applicant was called before the respondent. On the 28th January, 1966, his application was refused and he filed recourse No. 28/66, tried and determined by Triantafyllides, J., *(exhibit 7)* and the judgment is reported in the (1966) 3 C.L.R. 793. The ground of annulment of that decision as given in the said judgment is at pages 798—799 :

"On the material before me I am satisfied that the applicant decided to retire because of the very difficult situation in which he found himself due to his connection with the Liberation Struggle, and that his was not a case of normal retirement. In the circumstances, I am of the opinion that the respondent, in dismissing applicant's claim for reinstatement, was labouring under a basic misconception of fact: It decided the claim of applicant out of, and contrary to, its correct context and divorced from its true background. As a result this Court has no alternative, but to annul the *sub judice* decision of respondent, as having been taken contrary to law *viz.* the basic principles of Administrative Law (see *Morsis* and *The Republic* (1965) 3 C.L.R. p. 1 and *PEO* and *Board of Films Censors* (1965) 3 C.L.R. 27) and in abuse and in excess of powers, through a defective exercise of respondent's relevant discretion.

By deciding this recourse in this manner I am not to be taken as deciding, also, whether the circumstances of applicant's retirement entitle him to be treated as an 'entitled officer', i.e. whether they are such as to amount to a compulsory retirement in the sense of the relevant definition in section 2 of Law 48/61. The application of the legislation in question to the facts of each particular case is a matter, in the first instance, for the respondent, and this Court will not proceed to do so in this Case, at this stage. It is for the respondent to reconsider the matter, in its proper context, and decide whether or not, in the circumstances, the applicant is an 'entitled officer' and also whether or not the applicant retired exclusively for 'political

reasons', in the sense of Law 48/61; I am leaving these issues entirely open."

There being some delay in re-examining the applicant's case by the respondent, recourse No. 102/67 was filed, *(exhibit 8)* to be withdrawn again on a statement that the case had been re-examined and their decision would be soon communicated to him. On the 15th December, 1967, he was in fact informed that the decision was that he was not an 'entitled officer' within the provisions of Law 48/61. In February 1968 the applicant filed recourse No. 58/68 *(exhibit 9)* which was tried and determined by Hadjianastassiou, J. (The judgment is reported in (1969) 3 C.L.R. 190). That decision was also annulled on the ground of misconception of facts. In his judgment Hadjianastassiou, J. deals extensively with the facts of the case and the reasoned decision of the Council, dated 11th October, 1967, quoting the relevant passages therefrom and at pages 207—208 of the report says :

"I would like to reiterate once again what has been said in a number of cases that the evaluation of the evidence remains the province of the Council and that the Court in reviewing the determination of the Council would not interfere if there was any evidence on which the Council could reasonably have come to the conclusion which they did. If, on the other hand, there was no evidence upon which they could reasonably have arrived at that conclusion or they have misconceived the effect of the facts before them or they have misdirected themselves on the question of law, then their decision can be reviewed by this Court.

Having had the advantage of perusing carefully all the material before me and after having reviewed the determination of the Council I have reached the view that it was acting under a misconception of the real facts, that the activities of the applicant did not amount to a direct or indirect participation in the liberation struggle; and that there was no clear evidence that the then government had neither formed such a view nor suspected the applicant and

that pressure was brought upon the applicant to retire.

As it has been already said, the applicant, who was until that time a good policeman, had decided to retire because of the very difficult situation in which he found himself due to his connection with the liberation struggle. He was not only a sympathiser, but he has gone much further in order to help the struggle against the Colonial Government; furthermore, there is the undisputed evidence to that effect and, therefore, his retirement cannot by any standards be described as being a normal retirement. The mere fact that the applicant, having taken the advice of his immediate superior, has retired with benefits, does not in any way retract from the fact that had it not been for the political events prevailing at that time, he would not have thought of retiring from the service.

I would like to add, that it must not be lost sight of the fact, that the evidence of Mr. Costas Efstathiou remains before the council and this Court unchallenged. In my view, the evidence of this officer who was also an active member of EOKA, supports the reasonable conclusion that the applicant took an active participation in the liberation struggle..."

The respondent thereafter re-examined the applicant's case at its meeting of the 17th and 30th July, 1970. Relevant, however, are the minutes of the 30th July, *(exhibit 4)*, which show how the whole matter was approached. They contain also the decision of the respondent council. At that meeting present were, *inter alia*, the applicant, Costas Efstathiou who appears to be a key witness in the case, and applicant's advocate. At the commencement of the meeting the Chairman mentioned that the purpose for which Mr. Efstathiou was called was to testify before the council in relation to the case of the applicant for reinstatement and that this was so decided at the meeting of the council of the 17th July, 1970. Counsel for the applicant asked that both the applicant and himself be present while Mr.

Efstathiou was giving evidence. When, however, they were informed by the Chairman of the Council that they wished to see Mr. Efstathiou alone, which was consonant with the practice and procedure followed by the council right from the date of its formation and that there was no particular reason for changing that procedure so far followed, counsel for the applicant objected by saying that that decision was unacceptable as violating in a "scandalous way the Constitution and the rules of natural justice". The applicant, his counsel and Mr. Efstathiou then withdrew. Shortly afterwards Mr. Efstathiou returned and said the following:

> "It has been said by the advocate that another action was filed which is pending before the District Court Nicosia in which I shall be called to give evidence, consequently I cannot testify before the council, and I have neither to add to nor detract from what I stated to the Supreme Court on the 21st April, 1966, regarding Case 28/66."

As it is further stated in the said minutes, the council then proceeded to re-examine the case in the light of the decision of the Supreme Court of the 19th April, 1969. Case 58/68, copy of which had previously been circulated among the members and had been studied by each one of them separately, and in the light of the material in the relevant file, including the evidence given before the Court. From such re-examination they arrived at the conclusion regarding the true facts of the case. To put it shortly they did not accept the evidence of Costas Efstathiou and the applicant and again rejected applicant's application. Their reasoned decision is concluded by the following:

> "In the result and after careful examination of all the material before us, we have no doubt that as a matter of fact applicant retired voluntarily from the Police Service and that this case does not come within the provisions of Law 48/61, and in consequence our decision as communicated to him by our letter of the 15th December, 1967, still holds good."

It was the contention of learned counsel for the applicant

that in the light of the facts hereinabove set out there was a failure to hold a proper inquiry. The principles governing the duties of administrative organs, regarding the holding of a proper inquiry before arriving at a decision, have been considered and expounded in a number of decisions. I find the cases of *HjiLoukas* v. *The Republic* (1969) 3 C.L.R. 570, *HadjiPetris* v. *The Republic* (1968) 3 C.L.R. 702, as well as the second *Constantinou* case, *supra*, as being very relevant to this issue. The position may be summed up in this way. By section 3(2) of Law 48/61 "the council regulates its procedure..." In the absence, therefore, of legislative provision, there is no need to allow an applicant to be present, nor is it necessary to afford him an opportunity to question witnesses who are to be heard by an administrative organ at the applicant's request; nor is it obligatory to allow the appearance of an advocate there being no specific provision to that effect. The present case was not one of a disciplinary nature, or where the administrative decision to be reached would assume the character of a sanction and have a sufficiently adverse effect on the position of the individual; or, that it was destined to punish or reprimand the attitude or conduct of the applicant. In concluding the consideration of this argument it is useful to point out that Mr. Efstathiou, the witness to be heard, was proposed by the applicant and was not expected to depose against him. In the light of the above I have no difficulty in arriving at the conclusion that this ground of law should fail.

It was further contended by the applicant that the decision of the respondent was contrary to the provisions of Law 48/61 and the previous decisions of the Supreme Court. I take this to mean that there has been non-compliance with a judicial decision, which amounts to a violation of law in substance, a judicial decision being law as far as the parties are concerned. I have already referred to the grounds of annulment given by Hadjianastassiou J. There was therein a finding that the *sub judice* decision annulled by him was found to have been based on non-existing facts, and hence the misconception of fact given as a ground of annulment. That judgment had not been appealed from and, therefore, should for all intents and purposes be considered

as between the parties as final and conclusive.

It was further urged by counsel for the applicant that irrespective of the binding effect of the judgment of Hadjianastassiou J. the respondent council in re-examining the applicant's case should have referred to the findings of the Supreme Court and given reasons for disregarding same. On the other hand, it was argued by learned counsel for the respondent that it was open for the respondent to proceed at the re-examination with its own assessment of the facts. It was also said that two exhibits, namely *exhibits 1 and 2*—the first and second letter of applicant for reinstatement—attached to the opposition could not have been before the trial Court in Case No. 58/68. This uncertainty was apparently brought about by the fact that files which were exhibits in recourse No. 58/68 had been returned to the respondent council and were by oversight not produced as exhibits together with the file of the recourse. As this was very material for the determination of the present recourse, it was directed that the case be re-opened in order to ascertain whether or not that was so.

On the 1st March, 1972, the relevant file was produced, *(exhibit A)*, by counsel for the respondent, which was *exhibit 13* in recourse No. 58/68; the two letters, *exhibits 1 and 2*, were found therein which shows that they were also before the trial Court at the hearing of the said recourse, and there is nothing to suggest that they did not come to his attention. I was also invited not to accept the interpretation of 'retired compulsorily' in Law 48/61 which had been given to it by Triantafyllides J. in the 1966 *Constantinou* judgment, *(supra)* at p. 799—800, and which interpretation was also adopted by Hadjianastassiou, J. in the 1969 *Constantinou* judgment *(supra)* at p. 206 which interpretation was to the effect that the notion of compulsory retirement, as used in paragraph (c) of the relevant definition of the said Law, was not intended to be understood only in the narrow technical sense of section 8 of the Pensions Law, Cap. 311. I have not been persuaded that I should find myself in disagreement with this meaning given to the words 'retired compulsorily' in the aforesaid judgments.

It is clear, therefore, from the above that in reconsidering the case of the applicant on the 30th July, 1970, there were no factual circumstances which had not been placed before the annulling judge. It is a well settled principle of administrative law that :-

> "The issue of a similar in context act constitutes violation of the *res judicata* for the judgment of the Council of State. The annulling decision of the Council of State does not, however, amount to *res judicata* preventing the issue of an identical act, so long as this act is reached after a repetition of the procedure, a new inquiry into the case and assessment of evidential matter, not taken into consideration at the original annulled act, or when there, generally, exists a new fact which did not come to the attention of the annulling judge."

See Conclusions of Jurisprudence of the Council of State, 1929—1959, p. 281 and the decisions therein mentioned. See also p. 282 of the same textbook and Decisions 2309/67 and 729/57.

The same approach to the problem of *res judicata* and the duty of the administration to comply with the decisions of the administrative court can be found in Dendias' Administrative Law, 2nd Ed. 1965, Vol. III, p. 367; and, Vegleri 'The compliance of the Administration to the Decisions of the Council of State', 1934 edition, p. 38, where it is stated that :-

> "If, finally, all the factual and legal grounds which were capable of affording the reasoning for the action of the administration came under consideration by the Council of State and they were considered illegal, and, in this way all the possible prerequisites of the administrative act were exhausted, the result of the annulment must be considered as absolute, preventing the administration to proceed to a similar action or compelling it to perform an act which it unjustifiably refuses to carry out."

For the aforesaid reason, therefore, the *sub judice* decision should be annulled.

Even if I were, however, to arrive at the conclusion that all the component elements of *res judicata* did not exist and, therefore, that ground of annulment should fail, I would again have to annul the *sub judice* decision; this is so because a judgment, though not amounting to *res judicata*, in view of the absence of the conditions and prerequisites for that purpose, nevertheless it should exercise decisive influence on the decision of the administrative organ which in arriving at a different assessment has to reason specifically its decision mentioning therein the grounds on account of which it arrived at such different assessment. Such decision not being so specifically reasoned, itself amounts to a decision reached on insufficient reasoning, which in the case of acts of administrative discretion is a ground of annulment for violation of Law in substance, and the *sub judice* decision was not so reasoned. (See Conclusions of Jurisprudence, *supra,* p. 188 and Decision 136/48).

For all the above reasons the *sub judice* decision is hereby annulled. Respondent to pay £15 towards applicant's costs.

Sub judice decision annulled; order for costs as above.