

1973
May 12

[HADJIANASTASSIOU, J.]
IN THE MATTER OF ARTICLE 146 OF THE
CONSTITUTION

DAMIANOS K.
DAMIANOU

DAMIANOS K. DAMIANOU,

v.

Applicant,

REPUBLIC
(MINISTER OF
INTERIOR
AND ANOTHER)

and

THE REPUBLIC OF CYPRUS, THROUGH
THE MINISTER OF INTERIOR AND ANOTHER,

Respondents.

(Case No. 408/71).

Public Officers—Transfer—Police constable—Disciplinary transfer as distinct from a transfer made for the benefit and the exigencies of the service—Rule applicable in case of doubt—Transfer must be treated as of a disciplinary nature in order to afford the officer concerned the safeguards and opportunities provided for disciplinary sanctions—In the circumstances of this case, however, there is no doubt that the transfer complained of must be treated as disciplinary—It has, therefore, to be annulled through failure to afford applicant a hearing and because, also, it was arrived at through a procedure contrary to the Police (Discipline) Regulations 1958 - 1968 and to Article 12 of the Constitution.

Transfer of a public officer—Disciplinary transfer—To be distinguished from transfer made for the benefit and the exigencies of the service—See supra.

By this recourse the applicant, a police officer, challenges the validity of his transfer from Nicosia to Kyrenia. He alleges that under the guise of a transfer for the needs of the service, his transfer, viewed in the light of all the circumstances, was in essence a disciplinary sanction and was, therefore, defective, once he had not been afforded an opportunity to be heard. He relied on the case of *Kalisperas and The Republic*, 3 R.S.C.C. 146; and on *Pilatsis v. The Republic* (1968) 3 C.L.R. 707, at pp. 713 - 714.

The learned Judge of the Supreme Court who tried this recourse under Article 146 of the Constitution, accepted appli-

cant's contention and annulled the decision complained of in this case. After reviewing the facts, the learned Judge :-

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Held, (1). In the light of the circumstances of this case, it seems to me that this is one of the classic cases of disciplinary transfer and not a transfer which was made for the benefit and the exigencies of the police force. It is abundantly clear in my view from the material on record that it is a transfer intended to be a disciplinary punishment for the conduct of the applicant.

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(2) That being so, the *sub judice* decision must be annulled because the applicant was not afforded the opportunity to be heard regarding his said transfer; and because it was arrived at through a procedure contrary to the Police (Discipline) Regulations and Article 12 of the Constitution.

Sub judice decision annulled.

Cases referred to :

Kalisperas and The Republic, 3 R.S.C.C. 146;

Pilatsis v. The Republic (1968) 3 C.L.R. 707, at pp. 712 - 714;

Carayiannis v. The Republic (1969) 3 C.L.R. 341;

Pierides v. The Republic (1969) 3 C.L.R. 274, at p. 283;

Haros and The Republic, 4 R.S.C.C. 39, at p. 43;

Markoullides and The Republic, 3 R.S.C.C. 30.

Recourse.

Recourse against the validity of the decision of the respondents to transfer applicant from Nicosia to Kyrenia.

M. Christofides, for the applicant.

L. Loucaides, Senior Counsel of the Republic,
for the respondents.

Cur. adv. vult.

The following judgment was delivered by :-

HADJIANASTASSIOU, J. : In these proceedings under Article 146 of the Constitution, the applicant seeks to

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challenge the validity of the decision or act of the respondents to transfer him from Nicosia to Kyrenia as being null and void and of no effect whatsoever.

The facts are simple: The applicant was enlisted in the police force of Cyprus on April 12, 1965, under the provisions of Regulation 7 of the Police (General) Regulations 1958, and was posted at the police training school at Strovolos to attend the basic course. Later on he was transferred to the police headquarters. He is married with two young children, the first one being a boy, two years of age, and at the material time he was suffering with bronchitis, and the second a female aged four was attending a nursery school at Strovolos. His wife is holding a permanent post with CYTA and is bound to work on Sundays and holidays.

On May 22, 1969, the Chief of Police wrote to the Commander of the Auxiliary Police Force asking him to prepare a report as to whether the applicant is considered suitable to be emplaced to the permanent post of a police constable. (See blue 106 in his personal record).

On May 26, Mr. Michaelides, the Senior Commander of the Auxiliary Force, after recommending the applicant to be emplaced in a permanent post to the auxiliary branch of the force, in reply said that the applicant since his transfer to the auxiliary branch of the force on March 18, 1968, had not committed any disciplinary offences and had exhibited zeal and devotion to his duties. It appears that in the light of this recommendation the appointment of the applicant was confirmed by the Chief of Police on June 16, 1969; (see blue 107).

On February 12, 1970, Mr. Michaelides again addressed a letter to the Deputy Chief of Police regarding the applicant and at paragraphs 2, 3 and 4 had this to say :-

“(2) His conduct in the auxiliary force is not the proper one as ought to have been and on several occasions I called him before me. Many times I have advised him and made remarks to him about his unbecoming conduct, but without any results.

(3) Very often and without being sick, he visits the hospital where he obtains a sick leave with the

result that he becomes a burden to his other colleagues.

(4) His further remaining in the auxiliary force is considered detrimental and I recommend his immediate transfer without any replacement because he is considered entirely unsuitable for the serious duties of the auxiliary force."

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Then a note follows apparently in the handwriting of the Deputy Chief of Police on February 13, which is to the effect that the applicant should be transferred immediately to the police force of Nicosia. (See blue 112).

There is no doubt that the applicant was granted sick leave on a number of days and a medical board consisting of two doctors was convened on July 7, 1970 and found him to be suffering from cold. Furthermore, the board legalized the period of sick leave granted to the applicant for over 42 days including the 5th July, 1970. (See blues 118 and 119).

On February 20, 1971, Mr. Tsingis, a senior police officer of Paphos Gate, in preparing a personal report for the applicant, wrote to the effect that he did not show analogous interest in his work nor the proper respect towards his superiors, and that he had the habit of reporting sick often. He concluded that in those conditions the increment was not recommended for a period of one year. Then a note appears in the handwriting of Mr. Mezos, a senior commander of Nicosia police force to the effect that he agreed with the proposition of the reporting officer; (see blue 149).

On March 3, 1971, the Deputy Chief of Police wrote to the applicant (through the Commander of Nicosia Police) and in paragraph 2 of the said letter he had this to say :-

"Because of the report against you, I propose to withhold your increment for a period of one year and you are called within a period of 10 days after receiving this letter, to prepare a report in writing putting forward the reasons why I should not proceed with such an act." (See blue 150).

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On March 23, 1971, Mr. Mezos, the divisional officer, gave notice of interdiction to the applicant under Regulation 23 of the Police (Discipline) Regulations, 1958, interdicting him from duty w.e.f. March 23, 1971, pending an inquiry into an offence contrary to s. 46(a) of Cap. 154, i.e. that on March 2, 1971, he insulted the President of the Republic (see blue 152).

On March 27, 1971, Mr. Lambrou, a senior police officer, wrote to the Chief of Police informing him that his letter dated February 3, 1971, addressed to the applicant was served on him on March 8, and that the period of 10 days had elapsed without the applicant preparing a report: (see blue 155).

On April 7, the Deputy Chief of Police was writing to the Director-General of the Ministry of Interior informing him that the applicant was interdicted and was granted half of his pay as from March 23, 1971 and that he proposed to proceed disciplinarily against him because he insulted the President of the Republic: (see blue 157).

On April 27, 1971, the applicant (having pleaded not guilty earlier) was tried by a presiding officer and after a long hearing the applicant who was defended by counsel, was found guilty on two charges of discreditable conduct contrary to Regulations 7 and 18 of the Police (Discipline) Regulations 1958 - 1968, and was sentenced to pay a fine of 10 days pay on each count. (See blues 219 and 220).

Then a few days after the applicant was found guilty of the charges referred to earlier, the Deputy Chief of Police wrote to the Commander of Nicosia on September 10, 1971, that in the light of the last conviction of the applicant he intended to recommend his dismissal and requested him to place before him his own views whether he agreed with that suggestion and to put before him a detailed report. (See blue 221).

On September 13, the Deputy Chief of Police addressed a new letter to the Commander of Nicosia Police regarding the applicant informing him that because a fine of over 2 days pay was imposed on him, he (the Deputy Chief of Police), ordered that the only good conduct allowance be forfeited as from September 1, 1971, in

accordance with Regulation 23(2)(v) of the Police (General) Regulations 1958 - 1971. Furthermore, he added in that letter that the applicant would be entitled to reclaim the forfeited allowance after a period of one year of good conduct as provided by Regulation 23(3)(a) of the said Regulations. (See blue 222).

A few days later, on September 22, Mr. Mezos, the Senior Police Commander for the whole of Nicosia, in reply to the letter of the Chief of Police of September 10, 1971, after referring to the 7 previous convictions of the applicant, had this, *inter alia*, to say in paragraph 4 :-

“For these reasons, and in view of the heavy disciplinary record of the police constable, as well as his whole conduct and his appearance, it is evident that this man lacks a police conscience. In addition, needless to say, he does not show the appropriate interest in his work which is far from being satisfactory.”

And in paragraph 5 Mr. Mezos agreed that the applicant should be dismissed from the ranks of the police force. Then a note appears dated September 27, apparently in the handwriting of the Chief of Police to the effect that the allowance of the applicant for the whole period of interdiction be forfeited and that he be transferred forthwith to another district. (See blue 223).

On September 27, 1971, as it appears from a document *exhibit* 1, a certain police officer whose name I cannot read, wrote on behalf of the Chief of Police informing the applicant that he was transferred from Nicosia to Kyrenia. In accordance with paragraph 4 of the opposition, the Chief of Police in deciding to effect the said transfer had exercised his powers under ss. 7 and 17(3) of the Police Law Cap. 285 and Regulation 3 of the Police (General) Regulations 1958; and also in accordance with the Force Standing Order No. 1 which was issued in compliance with Regulation 47 of the said Regulations. Paragraph 2 of the said order is in these terms :-

“All cases of transfer are considered on their merits, and all aspects, including possible inconvenience to members of the Force and their families, are taken into account and carefully weighed against

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the interests of the Force which must come first at all times. When a transfer is ordered there must be no demur."

On the same date, the Chief of Police in reply to the Commander regarding the dismissal of the applicant, said in paragraphs 2, 3 & 4 of his letter :-

"(2) Dismissal from the force is, under the circumstances very difficult if not impossible. This could have been achieved only by his conviction at the recent disciplinary case against him.

(3) The order under which he was interdicted as from 23.3.71 is cancelled as from 27.9.71, but the allowance kept during his interdiction is forfeited.

(4) To be transferred to Kyrenia as from 27.9.71."

On September 29, 1969, the applicant feeling aggrieved because of the decision to transfer him to Kyrenia, visited the Chief of Police and requested him to cancel his transfer. The Chief of Police pointed out to him that it was impossible to cancel his decision, but that he would be prepared to grant him a few days leave of absence to arrange his personal matters. On October 9, 1971, the applicant, feeling aggrieved once again, filed the present application which was based on five grounds of law.

On November 13, 1971, counsel on behalf of the respondents filed an opposition to the effect that the said decision was taken lawfully after taking into consideration the interest of the police service and all relevant matters.

During the hearing of this recourse, counsel, after abandoning grounds 1 and 2 of the points of law, in arguing ground 3, had contended (a) that the decision complained of to transfer the applicant was taken contrary to s. 17(3) of the Police Law, Cap. 285, which gives the right to transfer the applicant only to the Chief of Police; (b) that the Chief of Police in effecting that transfer has exercised his discretionary powers in a defective manner, because he has not taken into consideration the family reasons of the applicant. He relies on the authority of *Carayiannis v. The Republic* (1969) 3 C.L.R. 341, and (c) that the said transfer, in view of the contents of the letter (*exhibit 2*) was of a disciplinary nature and was, therefore, defective once the applicant had not been

afforded a chance to be heard. He relies on the case of *Kalisperas* and *The Republic*, 3 R.S.C.C. 146; and also on *Pilatsis v. The Republic* (1968) 3 C.L.R. 707 at p. 712.

Regarding the police force members (who are not members of the public service of the Republic) it has been already shown that appointments, enlistments, and discharge of the members of the said force are governed by the provisions of the Police Law, Cap. 285 (as amended by Laws 26/59; 19/60; 21/64; 29/66; 59/66; and 53/68). The exercise of disciplinary control over the members of the police force is regulated by the provisions of the Police (Discipline) Regulations 1958 - 1968 and these regulations should now be construed and applied in accordance with the principles of natural justice, which are made applicable to offences in general by virtue of Article 12 of the Constitution. The question posed is : What are the principles regarding the transfer of a police officer.

It has been said judicially in a number of cases that except for an adverse transfer, every other transfer amounts to a simple administrative measure, which is presumed to have been taken in the interest of the exigencies of the service. The decision, therefore, of the administration concerning the reasons dictating the transfer, is not subject to the control of the annulling judge unless there exists an improper use of the discretionary power or a misconception of facts. See *Pierides v. The Republic* (P.S.C.) (1969) 3 C.L.R. 274, at p. 283.

There is no doubt, of course, that public servants and police constables who enter into the service of the Government finally find themselves voluntarily bound by the rules and regulations which enable the appropriate organ to impose disciplinary punishment on an officer who was found guilty of a disciplinary offence. Indeed, the disciplinary power is the main measure in the hands of the State to succeed its purpose of keeping an efficient functioning service and in a manner compatible with the duties of their post.

In *Kalisperas* and *The Republic of Cyprus (Public Service Commission and Another)*, 3 R.S.C.C. 146, the Court dealing with the question of transfer, had this to say at pp. 151 - 152 :-

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“It should be made clear that it is not as a rule required in the case of a transfer of a public officer that such officer should be given an opportunity to be heard by the Commission. As, however, a transfer may also be a means of exercising disciplinary control, in the sense of paragraph 1 of Article 125, it is necessary in the case of such a transfer to give an opportunity to the officer concerned to be heard in accordance with the principles expounded in Case No. 33/61 *.

Since under Article 125 the power to make all transfers of public officers, including disciplinary transfers is vested in one and the same authority, *i.e.* the Public Service Commission, it is essential that strict attention should be paid in ensuring that disciplinary transfers are to be kept and treated as distinct from all other transfers in view of the necessity for applying the appropriate procedure in the case of disciplinary matters.

It is, of course, possible for transfers to be made, in varying degrees, both for reasons of misconduct and other reasons at the same time. In such cases it may not always be easy to draw the line between disciplinary and other transfers. The test to be applied in such cases is to ascertain the essential nature and predominant purpose of the particular transfer. In case of doubt whether a transfer is disciplinary or not then such doubt ought to be resolved by treating the transfer in question as being disciplinary in order to afford the public officer concerned the safeguards ensured to him through the appropriate procedure applicable to disciplinary matters. Such a course is to be adopted both by the Commission and by this Court when dealing, within their respective competences, with particular transfers. There should be left no room for speculation when the application of the principles of natural justice is at stake.

* *Andreas Antoniou Markoullides, Larnaca, and The Republic (Public Service Commission)*, 3 R.S.C.C. letter E p. 31.

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In the light of all the circumstances of this case, the Court is of the opinion that, to put it at its lowest, there has arisen such a considerable element of doubt as to the essential nature and predominant purpose of the transfer in question as to lead the Court to the conclusion that, in accordance with the above principle, such transfer ought to be treated as a disciplinary transfer."

In *Pilatsis v. The Republic (Minister of Education and Another)* (1968) 3 C.L.R. 707, Mr. Justice Loizou, dealing with the question of transfer and relying and adopting the principle formulated in the *Kalisperas* case (*supra*), had this to say at p. 713 :-

"It seems to me that in the light of all the circumstances this is clearly a disciplinary transfer disguised as a transfer on educational grounds mainly because, due to the unwillingness of vital witnesses to testify, there was no evidence to support disciplinary measures against the applicant. But in any case, whichever way one looks at the case, it cannot in my view be said that the question whether the transfer was disciplinary or not can in any way be considered to be free from doubt and that, therefore, it should be treated as disciplinary."

Later on, he concluded in these terms at pp. 713 - 714 :-

"In view of the foregoing, it is, to my mind, quite clear that the decision to transfer the applicant was arrived at through a procedure which denied the applicant the minimum rights safeguarded by Article 12 of the Constitution, the provisions of which have been held to be applicable to offences in general (see *Haros and The Republic*, 4 R.S.C.C. p. 39 at p. 44), and which was contrary to the rules of natural justice and has to be declared to be null and void and of no effect whatsoever."

In *Haros and The Republic (Minister of the Interior)*, 4 R.S.C.C. 39, the Court had this to say at p. 43 :-

"The Court is of the opinion that the proceedings under the aforesaid Regulations whether in the first instance, on review or on appeal, amount to the exercise of executive or administrative authority, in

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the sense of Article 146, and that, therefore, this Court has competence in the matter. The Court has reached this conclusion because, *inter alia*, under the order of things established by our Constitution disciplinary control in the public law domain is treated as an executive matter and not as judicial matter, as is clearly shown by the closely analogous case of disciplinary control over public officers which, by operation of Article 125, is entrusted to the Public Service Commission, an executive organ.”

Later on, the Court had this to say at p. 44 :-

“Concerning the allegation that the provisions of regulation 20 are contrary to the rules of natural justice the Court is of the opinion that the said rules, which also under Article 12 are made applicable to offences in general, should be adhered to in all cases of disciplinary control in the domain of public law (vide *Andreas A. Markoullides and The Republic (Public Service Commission)*, 3 R.S.C.C. p. 30 at p. 35, *Nicos Kalisperas and The Republic (Public Service Commission & Another)*, 3 R.S.C.C. p. 146 at p. 151, and that, therefore, the provisions of regulation 20 should be applied subject to the aforesaid rules.

In view of the foregoing, it follows that the decision on appeal of the Commander, which was made without hearing the applicant, was arrived at through a procedure contrary to the said rules, and has, therefore, to be declared to be null and void and of no effect whatsoever.”

Reverting once again to the facts of this case, which I have narrated at length, it seems to me that this is one of the classic cases of disciplinary transfer and not a transfer which was made or taken for the benefit and the exigencies of the police force as counsel for the respondents had submitted earlier. It is abundantly clear in my view that from the contents of the correspondence between the Chief of Police and his senior commanders, because of the disciplinary record of the applicant as well as of his habit of reporting sick often, everyone in hierarchy wanted the applicant to be out of the force. (See blues 220 and 223). Needless to add that the Chief of Police,

finding himself in that mood (understandably perhaps) particularly after the applicant was found guilty of insulting the President of the Republic, he decided after reading also the letter of Mr. Mezos of September 22, to impose a further punishment on the applicant by forfeiting the allowance of the applicant for the whole period of his interdiction and at the same time to transfer him to another town. (See blue 223).

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In my view, therefore, in the light of all the circumstances of this case, I have no doubt at all that the Chief of Police in taking a decision to transfer the applicant to another town was doing it to express his disapproval of the conduct of the applicant, but at the same time, it is clear to me that the said transfer was intended to be in the nature of a disciplinary punishment. That this is so I find further support in the letter written by the Chief of Police to the Commander of the district of Nicosia, that once it was found impossible to dismiss the applicant from the ranks of the police force, the least he could do was to impose on the applicant the disciplinary punishment of transferring him away from Nicosia. (See blue 224).

For the reasons I have tried to explain and directing myself with all those judicial pronouncements quoted earlier in this judgment, I find myself in agreement with counsel for the applicant that the decision or act of the Chief of Police, in the particular circumstances of this case was in the nature of a disciplinary offence and was taken without affording the applicant a hearing regarding his transfer, and because it was arrived at through a procedure contrary to the Police (Discipline) Regulations, and of Article 12 of our Constitution, I would, therefore, declare that the said decision or act is to be null and void and of no effect whatsoever.

Do you claim costs Mr. Charalambous?

Mr. Charalambous : Yes, Your Honour, in the absence of my senior I have no further instructions and, therefore, I am bound to ask for the costs.

COURT : Order accordingly, with £20 costs in favour of the applicant because of the many adjournments which were made by consent of both parties.

*Sub judice decision annulled.
Order for costs as above.*