1978 January 16

[HADJIANASTASSIOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

DEMETRIOS PAPAXENOPOULOS,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE PUBLIC SERVICE COMMISSION,

Respondent.

(*Case No.* 217/73).

Public Service Law, 1967 (*Law* 33/67) *section* 44 (3)—*Provisions thereof directory and not mandatory.*

Statutes—Construction—Whether provisions of a statute are mandatory or directory—Principles applicable.

The applicant in this recourse challenged the validity of the promotion of the interested party to the post of Principal Clerk. When the Commission met to make the *sub judice* promotion, in the presence of the Director of the Department of Personnel, in his capacity as " Head of Department", the Director stated that he was "not in a position to make any specific recommendations because all candidates were by necessity scattered all over Cyprus". The Commission then proceeded to make the *sub judice* promotion without having specific recommendations from the Head of Department.

Section 44 (3) of the Public Service Law, 1967 (Law 33 of 1967) provides:

> " In making a promotion, the Commission shall have due regard to the annual confidential reports on the candidates and to the recommendations made in this respect by the Head of Department in which the vacancy exists".

Thus, the sole question for consideration in this recourse was whether the provisions of the said section 44 (3) are mandatory or directory.

Held, (1) no universal rule can be laid down for determining whether provisions are mandatory or directory; in each case the intention of the legislature must be ascertained by looking at the whole scope of the statute and, in particular, at the importance of the provision in question in relation to the general object to be secured.

(2) The practice has been to construe provisions as no more than directory, if they relate to the performance of a public duty, and the case is such that to hold *null* and *void* acts done in neglect of them would work serious general inconvenience, or injustice, to persons who have no control over those entrusted with the duty, without at the same time promoting the main object of the legislature. (See Halsbury's Laws of England, 3rd ed. Vol. 36 pp. 435–436).

(3) Looking at the scope of the Public Service Law, 1967 and in particular at the importance of the provisions of s. 44 (3) I find that the object to be secured was the protection of the rights of the public officers in selecting and promoting the best candidate. Reading, also, the wording of the official text in Greek of the said provision I have no difficulty to reach the conclusion that the requirement as to the recommendations by the Head of Department is not mandatory but only directory. (pp. 14–17 of the judgment *post*).

Application dismissed.

Cases referred to:

Sewell v. *Burdick* [1884] 10 App. Cas. (H.L.) at p. 105;

Howard v. *Bodington* [1877] 2 P.D. 203 at p. 210;

Liverpool Borough Bank v. *Turner* [1860] 2 De G. F. & J. 502 at p. 507;

Vita Food Products Inc. v. *Unus Shipping Co.* [1939] 1 All E.R. 513 at pp. 520, 521;

Pope v. *Clarke* [1953] 2 All E.R. 704 at pp. 705–706;

Fredco Estates Ltd. v. *Bryant* [1961] 1 All E.R. 34;

The Queen v. *London County Justices and London County Council* [1893] 2 Q.B. 476 at p. 479;

Odysseas Georghiou v. *The Republic* (1977) 9–10 J.S.C. 1476 (to be reported (1976) 3 C.L.R.);

Evangelou v. *The Republic* (1965) 3 C.L.R. 292 at p. 299;

Decision No. 635/1950 *of the Greek Council of State.*

Recourse.

Recourse against the decision of the respondent Public Service Commission to promote the interested party to the post of Principal Clerk, General Clerical Staff, in preference and instead of the applicant.

L. Clerides, for the applicant.

R. Gavrielides, Counsel of the Republic, for the respondent.

Cur. adv. vult.

HADJIANASTASSIOU J., read the following judgment. In these proceedings, under Article 146 of the Constitution, the applicant, Mr. Demetrios Papaxenopoulos, of Nicosia, seeks to challenge the act and or decision of the Public Service Commission in promoting the interested party, Mr. Harilaos Iacovides, to the post of Principal Clerk in preference and instead of him, which was published in the official gazette of the Republic dated June 1, 1973, under notification No. 997, claiming that it was *null* and *void* and of no legal effect whatsoever.

The applicant has joined the public service since September 1, 1940, and has been working in the various branches of the service. On February 15, 1951, he was promoted to the post of Clerk, 2nd grade, having undergone successfully the required examinations. On April 1, 1966, the applicant received a further promotion and he became a Clerk, 1st grade, a post which he continues to hold until today. It appears further that the applicant has remained in the service for a period of 20 years in the general clerical staff and although he was expecting to be promoted, he was informed that the interested party was preferred. On February 10 and March 21, 1973, the Director-General of the Ministry of Finance by two letters addressed to the Commission, informed the Chairman that the Minister of Finance had approved, *inter alia*, the filling of four vacancies in the post of Principal Clerk in the general clerical staff and requested him to take the necessary steps for their filling. In fact the Commission at its meeting of February 24, 1973, decided that the filling of those vacancies would be considered on April 3, 1973, and requested the Director of the Department of Personnel to attend that meeting.

According to the relevant scheme of service, the post of Principal Clerk is a promotion post from the lower post of

Clerk, 1st grade, and one of the requirements was that candidates should have passed the examinations in General Orders, Financial Instructions and Stores Regulations before they would be considered as being eligible for promotion.

On April 3, 1973, the Commission at its meeting in the presence of the Director of the Department of Personnel considered "thoroughly the merits, qualifications, seniority and experience of all Clerks, 1st grade, as reflected in their personal files and their annual confidential reports". The Commission, having in mind the observations made by the Director attending the said meeting that "he was not in a position to make any specific recommendations because all candidates were by necessity scattered all over Cyprus", took into consideration all the facts appertaining to each one of the candidates and, having given proper weight to their merits, qualifications, seniority, service and experience, as well as to their suitability for promotion to the said post, as shown in their personal files and in their annual confidential reports, proceeded to discuss the merits of each candidate with the head of the department.

With all this in mind and having discussed these matters with the Director of the Department, the Commission came to the conclusion, and the Director agreed, that the following candidates *viz.*, Charilaos Iacovides, Nicos Loizou, Burougr A. Armadouni, John Christofides and Nicos Miltiades, were considered on the whole the best and they were promoted to the permanent post of Principal Clerk with effect as from May 1, 1973.

As I said earlier, the applicant, feeling aggrieved against the decision of the Commission, filed the present recourse, which was based on two legal points. On September 18, 1977, counsel on behalf of the Republic filed the opposition, alleging that the decision complained of was properly and lawfully taken, having taken into consideration all the relevant facts and circumstances of each candidate. Furthermore, in the facts supporting the notice of opposition, it was alleged in paragraph 7, that the criterion of seniority was certainly taken into consideration along with other criteria, and that the Public Service Commission using its discretionary powers, followed the provisions of s. 44 of Law 33/67 "that the claims of officers to promotion shall be considered on the basis of merits, qualifications and seniority."

Finally, it was said in para. 8, that in spite of the fact that seniority was the gist of this recourse, even if the interested party's seniority was erroneously reckoned from the date of his emplacement by the Commission to the post of Clerk, 1st grade, with effect from February 1, 1966, again the interested party was senior to the applicant who had been promoted to that post with effect from April 1, 1966.

Although the recourse was fixed for hearing on March 18, 1974, counsel on behalf of the applicant stated that he intended to raise a new point of law—which arose from the minutes of the Commission dated April 3, 1973—*viz.*, that the Commission reached their decision upon a defective exercise of their discretion in not having before them any recommendations from the head of the department, as required by the provisions of s.44 (3) of Law 33/67.

Counsel further argued that in those circumstances, it was necessary to ask for an adjournment to enable the other side to consider that point because if he was successful, it would dispose of the whole recourse. As it was quite proper, counsel appearing for the Republic did not raise an objection and inevitably the case had to be adjourned to a new date. On April 4, 1974, counsel on behalf of the respondent made a statement that having discussed that point with the Attorney-General of the Republic, he was now ready to proceed with the hearing of the case, when finally the legal point raised would be presented in writing in Court.

The case was fixed once again for hearing, but on that date at the request of applicant's counsel—his colleague for the other side having raised no objection—the case had to be adjourned once again because there was a possibility that the applicant would have been promoted to a new vacant post. Although the expected results of these promotions did not materialise at the time originally suggested by counsel for the applicant, this case dragged on for the reasons stated on record, and finally the case was heard on June 29, 1976.

In spite of the fact that the new legal point was not made in writing earlier, counsel contended that the decision taken by the Commission on April 3, 1973, was contrary to s. 44 (3) of the Public Service Law, 1967 (Law 33/67) because the absence

of a recommendation by the head of department, constituted a breach of sub-section (3) of section 44. Furthermore, counsel argued that from the wording of that section the recommendation of the head of the department was mandatory because the object of its enactment was intended to make sure that the Commission in carrying out its duty, in promoting candidates, should not exercise that function in abstracto but on the basis of material which the legislature in their wisdom has clearly laid down in that section, *viz.*, that the Commission should look at the annual confidential reports and shall have due regard to the recommendations made by the head of the department, because this was intended to protect the rights of the public officers, and that the absence of a recommendation by the head of the department violated the provisions of s. 44 (3) of Law 33/67.

With regard to this point, *viz.*, whether a statute is mandatory or permissive, counsel relied on 36 Halsbury's Laws of England, 3rd edition, p. 434 para. 656.

On the contrary, counsel on behalf of the respondent contended that the Commission, according to the provisions of the Law, may take the views of the head of the department, before taking a final decision in promoting some of the candidates in preference to others, but in the particular facts of this case he argued, and in view of the fact that all the officers concerned were scattered all over Cyprus, the Director was unable to express a view, and therefore, the failure of doing so—once a valid reason existed—entitled the Commission to proceed to carry out its functions by taking into consideration all the other material before it, which appears in the personal files and confidential reports. Had it been otherwise, counsel went on to argue, the appropriate organ would have been unable to carry out effectively their functions under the law, and in that case the Commission had to evaluate the suitability for promotion of the candidates concerned. Having done so and once the head of the department also agreed to the result reached by the Commission, the provisions of the section itself were satisfied and there was nothing more which the Commission could do in compliance with that section.

Having considered carefully the contentions of both counsel, I now turn to s. 44 (3) which lays down that "no officer shall

be promoted to another office unless (a) a vacancy exists in that office; (b) possesses the qualifications laid down in the schemes of service for that office; (c) has not been reported upon in the last two annual confidential reports as unsuitable for promotion; (d) has not been punished during the preceding two years for any disciplinary offence of a serious nature"; sub-section 3 says that "in making a promotion, the Commission shall have due regard to the annual confidential reports on the candidates and to the recommendations made in this respect by the Head of Department in which the vacancy exists".

The question posed is whether in the absence of such recommendations by the Head of the Department, the decision itself is nullified as being contrary to the provisions of the said law. It has been said regarding the interpretation question that it is the province of the legislature to enact statutes, and of the Courts to construe the statutes which the legislature has enacted. Since the interpretation of the Law is a matter for the Courts, the Courts are not bound by an expression of Parliament's opinion, expressed in or to be inferred from a statute, as to what the law is (*Sewell* v. *Burdick*, [1884] 10 App. Cas. 74, H.L., at p. 105), as distinct from a positive enactment itself creating or declaring law, although, where a statute is ambiguous, such statements of opinion may be considered.

In the case in hand, this Court has been invited to interpret only the provisions of s. 44 (3). It is equally true that where a statute requires an act to be done within a particular time or in a particular manner, the question arises whether the validity of the act is affected by a failure to comply with what is prescribed. If it appears that Parliament intended disobedience to render the act invalid, the provision in question is described as "mandatory", "absolute", "imperative" or "obligatory"; if, on the other hand, compliance was not intended to govern the validity of what is done, the provision is said to be "directory". (See 36, Halsbury's Laws of England, 3rd edn., p. 434, paragraph 656).

It appears from the trend of the authorities, and particularly from the language found in some of the reports that the term "mandatory" has been used as synonymous with "directory". (See *Howard* v. *Bodington*, [1877] 2 P.D. 203, at p. 210 per Lord Penzance); *Liverpool Borough Bank* v. *Turner*, [1860] 2 De

G.F. & J. 502, at p. 507, where the question was said by Lord Campbell, L.C., to be whether a mandatory provision was "directory" or "obligatory"; see also *Vita Food Products Inc.* v. *Unus Shipping Co.* [1939] 1 All E.R. 513, at pp. 520, 521. From the trend of these authorities it appears that acts have frequently been held valid notwithstanding a total failure to comply with what is prescribed, and the foregoing proposition would seem to amount to no more than an inaccurate description of the overall position where a provision laying down a number of requirements is held to be "mandatory" to some and "directory" as to the rest. In *Pope* v. *Clarke*, [1953] 2 All E.R. 704, Lord Goddard, C.J., in dealing with the same question raised earlier, said at pp. 705–706:–

> " In my opinion, the principle we have to bear in mind here is that there is a distinction between the construction to be placed on provisions of a statute which are mandatory and provisions which are merely directory. In that connection I may quote a passage from Maxwell on Interpretation of Statutes, 10th edn., p. 376:–
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> 'It has been said that no rule can be laid down for determining whether the command (of the statute) is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may, perhaps, be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by considerations of convenience and justice (*R.* v. *Ingall* (2) 2 Q.B.D. 208, per Lush J.), and, when that result would involve general inconvenience or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the legislature. The whole scope and purpose of the statute under consideration must be regarded. The general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially'".

From the trend of the authorities, of course, no universal rule can be laid down for determining whether provisions are

mandatory or directory; in each case the intention of the legislature must be ascertained by looking at the whole scope of the statute and, in particular, at the importance of the provision in question in relation to the general object to be secured. (See *Fredco Estates Ltd.* v. *Bryant*, [1961] 1 All E.R. 34, and also *The Queen* v. *London County Justices and London County Council*, [1893] 2 Q.B. 476, at p. 479).

In that connection, I think I may also quote a passage from Halsbury's Laws of England, 3rd edn., Vol. 36 at pp. 435–436:-

> " ..... and it has been observed that the practice has been to construe provisions as no more than directory, if they relate to the performance of a public duty, and the case is such that to hold *null* and *void* acts done in neglect of them would work serious general inconvenience, or injustice, to persons who have no control over those entrusted with the duty, without at the same time promoting the main object of the legislature. The practice is illustrated by many decisions relating to the performance of public functions out of time, and by many relating to the failure of public officers to comply with formal requirements."

With this in mind, looking at the scope of Law 33/67, and in particular at the importance of the provisions of sub-section (3) of section 44, I think I find myself in agreement with counsel for the applicant that the object to be secured was the protection of the rights of the public officers in selecting and promoting the best candidate; nevertheless, I have reached the conclusion that from the wording of that sub-s. (3), the requirement in my view, as to the recommendations by the head of department —in which the vacancy exists—is not mandatory, but only directory, for the reasons I have given earlier. But even if there was any doubt as to whether such requirements were mandatory or not, reading the wording from the official text in Greek, one would have no difficulty at all to see that it is not mandatory as in making a promotion, the Commission is required to pay "due regard" only to the annual confidential reports concerning the candidates before it, and to the recommendations made in this respect by the head of the department; once it is not bound—in the absence of a recommendation by the head of the personnel, in my view the decision is not *null*

and void: See *Odysseas Georghiou* v. *The Republic*, (Revisional Jurisdiction Appeal No. 160 not yet reported*).

It is, of course, correct to state that it is within the powers of the Commission in trying to select the most suitable candidate to weigh together all relevant considerations, and it may attribute more significance to one factor than to another in the course of making up its mind, provided that it exercises properly its relevant discretion: See Case No. 635/1950—a decision of the Greek Council of State. With this in mind, it has been stated that this Court will not interfere when it clearly appears that it was reasonably open to the Commission to select one or more candidates in preference and instead of another for promotion: See *Evangelou* v. *The Republic*, (1965) 3 C.L.R. 292 at p. 299.

It should be added that counsel in support of his legal proposition tried to show that the Commission accepted that the recommendations of the head of the department were mandatory. But with respect, once I decided that point earlier, his argument does not carry the case any further, because the Commission could not have properly attached any weight—irrespective of whether the director agreed or not, once the director, for reasons stated earlier, was not in a position to make specific recommendations. He did not make any recommendations because he was not aware, or he could not have had sufficient personal knowledge regarding the quality of the work of all candidates, and as I said earlier, what was said had nothing to do with the legal proposition put forward on this point, once the rest of the legal grounds have been abandoned.

For the reasons I have tried to advance, I would dismiss this recourse, but in these circumstances, I am not making an order for costs. Order accordingly.

Application dismissed.
No order as to costs.

* See (1977) 9-10 J.S.C. 1476 (to be reported in (1976) 3 C.L.R.)