1982 August 31

[HADJIANASTASSIOU, LORIS AND PIKIS, JJ.]

CHARILAOS FRANGOULIDES,
Appellant-Plaintiff,

v.

THE REPUBLIC OF CYPRUS THROUGH
THE ATTORNEY-GENERAL OF THE REPUBLIC,
Respondents-Defendants.

(*Civil Appeal No.* 6321).

Damages under Article 146.6 *of the Constitution—Right to—Principles applicable—Annulment of an administrative act does not automatically confer a right to compensation—The only right that vests in a party aggrieved by an erroneous decision of the administration in the domain of public law is to demand the eradication of the administrative act and every act arising therefrom—Above right is independent from any other cause of action—Primarily it entitles the injured party to recover damage not remediable by proper administrative action—Public Officer's successful recourse against his non-promotion—Administration reconsidering the matter but wrongfully amending schemes of service and disqualifying officer as candidate—Successful recourse against new decision—But before delivery of judgment in second recourse officer incurring expenses to acquire qualifications envisaged by new schemes of service—Following second annulment administration reconsidering the matter and eradicating both the act complained of and its consequences—Notwithstanding eradication officer sustained damages which consisted of the above expenses—And are recoverable under Article* 146.6 *of the Constitution.*

Practice—Damages—Not assessed by trial Court—Material on record insufficient to enable Court of Appeal assess damages—Case remitted to trial Court for assessment of damages.

The appellant, a welfare officer, was on 1.1.1958 promoted on a temporary basis to the post of Senior Welfare Officer. On 23.1.1963 the Public Service Commission filled three posts

of Senior Welfare Officer in the permanent establishment. As the applicant was not one of the appointees he challeged the decision of the Commission by a recourse, under Article 146.1 of the Constitution and his recourse was upheld and the relevant decision set aside by a judgment of the Supreme Court delivered in 1966. In accordance with well settled principles of administrative law, the administration had a duty to examine the matter afresh on the basis of the legal and factual background subsisting on 24.1.1963. Instead of so proceeding, a new scheme of service was introduced, altering the above background to the extent that candidates were required to possess qualifications other than those envisaged by the scheme of service in force in 1963. As a result applicant was essentially disqualified as a candidate and when the Commission filled the posts in question in 1967 it decided to appoint candidates other than the applicant. A second recourse followed which was sustained on 22.12.1975, the Court holding that the administration had no right to alter the legal or factual substratum and was under a duty to discharge its task by reference to the facts, as defined in 1963. The matter was considered afresh on 22.4.1977 by the Commission on the basis of the data existing in 1963. In the meantime, before the outcome of the second recourse was made known to him, the applicant chose to endeavour to acquire the qualifications envisaged by the new schemes of service and having secured a scholarship he pursued post-graduate studies between the years 1970–1972. Before the trial Court appellant testified that the scholarship was not enough to cover all his expenses and that as a result, he has incurred expenditure of about £1,000 for the funding of his studies. On his return in 1972 he was promoted to Senior Welfare Officer in circumstances that were not probed into at the trial.

Following the decision given at the end of 1975, annulling the administrative act of 1967, the appellant filed an action for damages under Article 146.6 of the Constitution. The District Court dismissed the action on the ground that the appellant failed to make out a valid case or prove any damage recoverable under Article 146.6. The trial Court referred to the duty of the administration to abide by the decision of an administrative Court, set the annulled act aside and eradicate all consequences flowing therefrom. According to the trial Court the Commis-

sion discharged their duty by reconsidering the matter on 22 4 1977

Upon appeal by the plaintiff

Held, (1) that the annulment of an administrative act does not automatically confer a right to compensation, not even where material damage was manifestly established and the susceptibility of such damage to precise calculation, that the only right that vests in a party, aggrieved by an erroneous decision of the administration in the domain of public law, is, in the first place, to demand the eradication of the administrative act and every act arising therefrom; that the cause of action conferred by Article 146.6 of the Constitution, is a cause sui generis in the sense that it bears no relationship to a common law action for damages or, in fact, to any other cause of action known to the law, that the right under the said Article 146 6 primarily entitles the injured party to recover damage not remediable by proper administrative action, that if the proper administrative action is not taken the remedy is to go to the administrative Court again; and that if this step notwithstanding the injured party is left to shoulder damages then he has a right to recover them from the Republic.

(2) That though it appears that the administration eradicated both the act complained of and its consequences, to the extent it laid within its powers, by setting aside the decision complained of, and reconsidering the matter on 22 4 1977, the appellant sustained damage notwithstanding the eradication of the administrative act because he incurred expenses in pursuing higher studies for the purpose of acquiring the qualifications that were wrongly required as a condition precedent for his promotion, that such damage subsisted despite the removal of the unlawful administrative act, constituting a species of damage recoverable under Article 146.6 of the Constitution, that damage resulted directly from the wrongful administrative act, the annulment of which entitles the appellant to its recovery; that as the trial Court never focused its attention on this aspect of the case, and made no attempt to evaluate the evidence on the subject, or assess the damage to which the appellant may be entitled and that as the material on record is insufficient to enable this Court to reach a safe conclusion as to the damage suffered, there is no alternative but to direct that the case be

remitted back to the trial Court for a consideration of this single issue.

Appeal allowed. Case remitted to trial Court for consideration of issue of damages.

Cases referred to:

Marcou and Another v. *Republic* (1968) 3 C.L.R. 166;

Christophides v. *Attorney-General* (1981) 1 C.L.R. 80;

Tsakkistos v. *Attorney-General* (1969) 1 C.L.R. 355;

Attorney-General v. *Marcoulides and Another* (1966) 1 C.L.R. 242;

Dunlop v. *Woollahra MC* [1981] 1 All E.R. 1202 (P.C.);

Hapeshis v. *Republic* (1979) 3 C.L.R. 550;

Kyriakides v. *Republic*, 3 R.S.C.C. 13;

Ouzounian v. *Republic* (1966) 3 C.L.R. 553.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (Stylianides, P.D.C. and Fr. Nicolaides, D.J.) dated the 29th August, 1981 (Action No. 2894/77) whereby his action for damages under Article 146.6 of the Constitution as a result of the acts and/or omissions of the defendants which were declared null and void by Recourses Nos. 75/63 and 64/68 was dismissed.

Appellant appeared in person.

N. Charalambous, Senior Counsel of the Republic, for the respondents.

Cur. adv. vult.

HADJIANASTASSIOU J.: The judgment of the Court will be delivered by Pikis, J.

PIKIS J.: Charilaos Frangoulides was appointed in the Public Service on 8th October, 1951. Apparently he had a quick rise, being promoted to a welfare officer in 1955 and to senior welfare officer on 1.1.1958 albeit on a temporary basis. And he was looking forward to a successful career. But it was not to be. A series of wrongful administrative acts put a stop to his advancement. His claim to promotion to the established post of senior welfare officer was, on at least two occasions,

rejected as a result of decisions of the Public Service Commission, subsequently declared null by the Supreme Court, in the exercise of its revisional jurisdiction. The length of time taken for the ventilation of his complaints before the Court left the applicant remediless to a degree before the wrongful administrative acts, aggravating his feelings of injustice. The aphorism "justice delayed is justice denied", can be validly invoked here.

The present appeal was prosecuted shortly before the retirement of the applicant, scheduled for 31.8.1982. Retirement, of course, does not render non justiciable a grievance sustained while in active service, especially complaints with a lasting effect on the fortunes of the applicant.

THE BACKGROUND TO THE CASE: Somewhat detailed reference to the background facts, particularly the erroneous administrative acts and their consequences, is essential in order to appreciate the issues in dispute. A civil action for damages under Article 146.6 of the Constitution was raised before the Nicosia District Court after the nullification by the Supreme Court of the second of the two administrative acts, directly affecting the appellant. But first, we must go back to 1963 when the claim of the applicant for promotion to the established post of senior welfare officer was turned down.

On 23.1.1963 the Public Service Commission purported to fill three posts of senior welfare officer in the permanent establishment. The applicant was not among the appointees. He filed a recourse, challenging the decision (No. 75/63). The application was upheld by a judgment of the Full Bench delivered in 1966, and the relevant decision was set aside. In accordance with well settled principles of administrative law, it became thereupon the duty of the administration to examine the matter afresh, on the basis of the legal and factual background subsisting on 24.1.1963. Instead of proceeding thus, a new scheme of service was introduced, altering the aforementioned background to the extent that candidates were required to possess qualifications other than those envisaged by the scheme of service in force in 1963. As a result, the applicant was essentially disqualified as a candidate. The Public Service Commission proceeded to fill two posts, appointing candidates other than the applicant. A second

recourse followed (No. 64/68). The recourse was sustained but as the facts show, it took years for the Court to adjudicate upon the matter. The decision was given on 22.12.1975. It was held that the administration had no right to alter the legal or factual substratum and was under a duty to discharge its task by reference to the facts, as defined in 1963.

In the meantime, before the outcome of the recourse was made known, the applicant was confronted with an agonizing dilemma: Should he endeavour to acquire the qualifications envisaged by the new schemes of service, or should he content himself with awaiting the outcome of the decision of the Court? He chose the former course, and one could not reasonably blame him for that. The assumption by a citizen, that the administration acts within the path of the law, is one that may be reasonably entertained by a citizen. So, he secured a scholarship and pursued post-graduate studies between the years 1970-72, striving to acquire, it seems, the qualifications necessary for promotion. Before the trial Court, the appellant testified that the scholarship was not enough to cover all his expenses and that, as a result, he incurred expenditure of about £1,000.— for the funding of his studies. On his return in 1972, he was promoted to senior welfare officer in circumstances that were not probed into at the trial. Meanwhile, some of his colleagues, who were junior to him in the service, ascended a number of steps in the ladder of the establishment. Following the decision given at the end of 1975, annulling the administrative act of 1967, the appellant filed, as indicated, an action for damages, under Article 146.6 of the Constitution, Civil Action No 2894/77 —Nicosia District Court filed on 7.6.1977. The statement of claim, delivered about a month later, is, it must be said, clouded with ambiguity, both with regard to the remedies sought and the damage claimed; nor was he required to furnish particulars, a course that might shed further light on the issues in dispute. The Full District Court of Nicosia dismissed the action on 29.8.1981 on the ground that the appellant failed to make out a valid case or prove any damage recoverable under Article 146.6. In a well reasoned judgment, the trial Court makes reference to the duty of the administration to abide by the decision of an administrative court and expatiates on the extent of the obligation. Very appropriately it is stressed that it is the duty of the administration, following the annulment

of an administrative act, to set the act aside and eradicate all consequences flowing therefrom. This duty is discharged by restoring the status quo ante, that is the state of affairs that subsisted in law and fact, at the time the wrongful decision was taken. In their judgment, the Public Service Commission discharged this duty by reconsidering the matter afresh on 22.4.1977 on the basis of the data that ought to guide it; we must presume that these data were those existing in 1963, a fact that illustrates the grave situation created by a series of erroneous acts.

The trial Court did not, however, direct its attention to an important aspect of the case. The fact that appellant incurred considerable expense in order to acquire qualifications that were found to be unnecessary. The decision of the Public Service Commission of 22.4.1977, could not remedy this situation. It can be safely infered that the expense was incurred directly as a result of the successfully impugned administrative act and the failure of the administration to act in accordance with sound principles of administrative law. One cannot properly be unduly critical of this omission of the trial Court, considering the inarticulate way in which the case was presented and argued before it, depriving the trial Court of the necessary assistance for the proper determination of the case.

The appellant argued in person the appeal before us; he was noticeably overwhelmed by a sense of injustice to a degree that it made it difficult for him to render any real assistance to the Court. It is to the credit of learned counsel for the Republic that he took pains to help us in our task, making extensive reference to the juridical basis of a claim for damages under Article 146.6 of the Constitution

THE RIGHT TO DAMAGES UNDER ARTICLE 146.6 *OF THE CONSTITUTION*:

The annulment of an administrative act does not automatically confer a right to compensation; not even where material damage was manifestly established and the susceptibility of such damage to precise calculation. (See, *Compliance of the Administration with Decisions of the Council of State, by Vegleris*—1934, p. 74). The only right that vests in a party, aggrieved by an erroneous decision of the administration in the domain of public law,

is, in the first place, to demand the eradication of the administrative act and every act arising therefrom. The edifice of the illicit act must be demolished. The right of the citizen to the unmaking of the annulled act is co-relative to the duty of the administration to take all steps at its disposal to erase the consequences of the act. The duty of the administration is to restore the status quo ante (see *Vegleri, supra, pp.* 24–99). The Full Bench of the Supreme Court pronounced, in the case of *Georghios Markou and Another* v. *Republic* (1968) 3 C.L.R. 166, that the declaration by a court of revisional jurisdiction of an act as invalid, constitutes a directive to the administration to eradicate the illicit act and everything based thereon. The effect of judicial action in this area is to earmark the course of legality in the interests of the rule of law, helping thereby the administration to keep clear of stray paths. However, the directive goes no further. There is no jurisdiction to fetter in advance the discretion of the administration and indicate how best its discretionary powers should be exercised when they purport anew to decide the matter. Any attempt along these lines would offend the principle of separation of the judicial from the administrative functions. (See, Vegleri, supra, p. 90). It is for the administration to rule and the judiciary to control. A fusion of these powers would inevitably weaken the principle of separation of powers entrenched in our Constitution, and reduce the force of the checks and balances inherent in such a system.

The binding force of the judgment of an administrative court is constitutionally proclaimed by para. 5 of Article 146, laying down that—

> "it shall be binding on all courts and all organs or authorities in the Republic and shall be given effect to and acted upon by the organ or authority or person concerned".

The aforesaid provision casts a mandatory duty on the administration to nullify every aspect of the void administrative act, and all that flows therefrom. The obligation stops there. The decision of the Court cannot prejudge the outcome of a re-examination of the matter. Certainly, it does not impose an obligation to promote the successful party. (See, *Greek Administrative Law—Part VI, 2nd ed., by Kyriakopoulos,* p. 154). These principles received explicit approval by the

Supreme Court in *Christophides* v. *The Attorney-General* (1981) 1 C.L.R., 80. Any failure on the part of the administration to remove effectively every aspect of the administrative act declared void, gives rise to a fresh cause for review by an administrative court. (See, *Administrative Law, Vol. C, 2nd ed.*, 1965, *by Dendias*, p. 357).

The cause of action conferred by Article 146.6 of the Constitution, is a cause sui generis, in the sense that it bears no relationship to a common law action for damages or, in fact, to any other cause of action known to the law (*Costas Tsakkistos* v. *The Attorney-General* (1969) 1 C.L.R. 355). It is a right to be evaluated in the context of Article 146 and the system of review of administrative action created thereby. It is ancillary to judicial review, as a measure necessary for its effectiveness. Primarily it entitles the injured party to recover damage not remediable by proper administrative action. If the proper administrative action is not taken, the remedy is to go to the administrative court again. If this step notwithstanding the injured party is left to shoulder damages, then he has a right to recover them from the Republic. The right to damages under Article 146 is distinctly independent* from any other cause of action, as the Supreme Court held in *Attorney-General* v. *Andreas Marcoulides and Another* (1966) 1 C.L.R. 242. Not only its juridical basis but also the manner of quantifying damages is different from a common law action. The Supreme Court emphasized the equitable character of the relief as well as the damages recoverable, stressing that they are not strictly compensatory. Consequently, it is legitimate for the Court to have regard, not only to the extent of the material damage suffered, but also to the conduct of the parties and the degree to which the successful party contributed to the production of the wrongful administrative act. In the case of *Marcoulides*, supra, the Supreme Court derived guidance, inter alia, from French case law, establishing that the conduct of the parties and their blameworthiness, if any, is of crucial importance to the determination of the quantum of the damages.

* At common law, there is no right to damages from an act of a public authority that is merely null and void. Only a positively illegal or an act forbidden by law can give rise, in appropriate circumstances, to an action for damages —*Dunlop* v. *Woollahra MC* [1981] 1 All E.R. 1202 (PC).

The facts in the cases of *Tsakkistos* and *Marcoulides* illustrate the circumstances under which damage may be recovered and the height of it. In the first case, damages were awarded to a teacher who was wrongfully dismissed, to compensate him for the period during which he remained out of the service, scaled down to the extent necessary to compensate him for what he actually lost and no more. Whereas in the second, the damages awarded to an employee of the Electricity Authority of Cyprus were reduced to take account of his unreasonable stand found to have been conducive to the production of the wrongful administrative act.

In *Hapeshis* v. *The Republic* (1979) 3 C.L.R. 550, Hadjianastassiou, J., laid stress on the public law character of the liability of the Republic under Article 146.6, a feature that is equally prominent under Article 172 of the Constitution. The public law character of the liability is crucial for a proper understanding of the liability of the State under, both, Article 146.6 and Article 172 of the Constitution. Stassinopoulos, in his work on the Civil Liability of the State, makes a highly interesting and revealing study of European history on the subject of State liability (pp. 12, 13, 14, 15, 16, 17, 18, 19, 26 87-91 and p. 111). The learned author concludes that the liability of the State for wrongful administrative acts is a species of liability in the domain of public law, designed to ensure the supremacy of the law, and bar arbitrariness on the part of State officials. It must not be either assimilated or related to any species of liability in the field of private law. Stassinopoulos depicts the recognition of State liability in this area as a salutary step forward in the process of democracy. With this approach, we find ourselves in complete agreement.

The remedies under Article 146.1 and Article 146.6 are mutually exclusive. One cannot simultaneously pursue an action for administrative review and an action for damage allegedly arising from the same administrative act. (See, *Kyriakides* v. *The Republic*, 3 R.S.C.C. 13; *Hagop Ouzounian* v. *The Republic* (1966) 3 C.L.R. 553—a judgment of Triantafyllides, J., as he then was). The annulment of the administrative act complained of, is a prerequisite to the valid pursuit of an action for damages under Article 146.6. Any other approach would invariably undermine the exclusive jurisdiction

of the Supreme Court to take cognizance of complaints directed against the legality of administrative acts.

APPLICATION OF THE PRINCIPLES—REFERRED TO ABOVE—TO THE FACTS OF THE CASE:

In evaluating the claim of the appellant for damages, it is impermissible, as indicated, to act on the assumption that appellant would be promoted on any date prior to 1972 when he was promoted. Such assumption is only warranted when promotion would be automatic by process of the law and not the result of the exercise of discretionary powers by the appointing authority. From the evidence before the trial Court, it appears that the administration eradicated, both the act complained of and its consequences, to the extent it laid within its powers, by setting aside the decision complained of, and reconsidering the matter on 22.4.1977. Complaints voiced in these proceedings, that the decision of 22.4.1977 is erroneous and that the way the Public Service Commission went about to discharge its task is fraught with irregularities, cannot be gone into in these proceedings. For the reasons given, only a court exercising revisional jurisdiction can review that matter.

The pertinent question is whether the appellant sustained damage notwithstanding the eradication of the administrative act. In our judgment, the answer is in the affirmative with regard to the expense incurred by the appellant in pursuing higher studies for the purpose of acquiring the qualifications that were wrongly required as a condition precedent for the promotion of the appellant. Such damage subsisted despite the removal of the unlawful administrative act, constituting a species of damage recoverable under Article 146.6 of the Constitution. Damage resulted directly from the wrongful administrative act, the annulment of which entitles the appellant to its recovery. The trial Court never focused its attention on this aspect of the case, and made no attempt to evaluate the evidence on the subject, or assess the damage to which appellant may be entitled. The evidence of the appellant is that he suffered damage of about £1,000.—. His testimony on the subject is not very explicit nor was it probed into in cross-examination. The material on record is insufficient to enable us to reach a safe conclusion as to the damage suffered, especially in the absence of evaluation of the relevant evidence by the

trial Court. Confronted as we are with this situation, there is no alternative but to direct that the case be remitted back to the District Court for a consideration of this single issue, that is, the damage to which the appellant is entitled, in consequence of the fact that he felt obliged to pursue higher studies in order to acquire the qualifications wrongly envisaged by the schemes of service as a prerequisite for his promotion. The parties will be at liberty to amend the pleadings, if they so wish, so as to define their position on the subject of such damage with a greater precision. We order accordingly.

The appellant is entitled to 50% of the costs on appeal. The costs incurred for the trial of the case will be costs in the cause.

HADJIANASTASSIOU J.: As I find myself in full agreement with this judgment, I do not propose to write a judgment of my own.

LORIS J.: I fully agree and I have nothing to add.

Appeal allowed. Retrial ordered. Order for costs as above.