

1981 December 23

[HADJIANASTASSIOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

NIKI CHRISTODOULIDOU-KATSIAOUNI,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE MINISTRY OF EDUCATION AND ANOTHER,

Respondents.

(Case No. 281/81).

Provisional Order—Jurisdiction—Judge of the Supreme Court sitting alone can make a provisional order for the second time in the same recourse—Rule 13 of the Supreme Constitutional Court Rules, 1962—Which remained in force by virtue of section 17 of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law 33/64) should be applied subject to and in conjunction with section 11 of this Law.

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Provisional order—Personal interest—Public interest—Where non-making of the order will cause damage, even irreparable, to the applicant but making of such order will cause serious obstacles to the proper functioning of the administration personal interest of applicant has to be subjected to general interest of the Public—Transfer of Public Officer serving abroad to Cyprus—Suspended for a period of time—Application for further suspension on ground that Officer's son suffering from serious disease—Son can receive medical treatment in Cyprus—Provisional order suspending transfer for the second time refused in the interest of the service.

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The applicant, an officer of the Ministry of Education on secondment to the Ministry of Foreign Affairs, serving as a Cultural Officer at the Cyprus Embassy in Athens, was on August 7, 1981 asked to return to the Ministry of Education from where she had been seconded. She challenged the validity of this decision by means of a recourse; and upon applying for a provi-

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sional order, under rule 13 of the Supreme Constitutional Court Rules, 1962, for the suspension of its effect pending the determination of the recourse the Court made* a provisional order staying the decision complained of until the 5th December, 1981:

On 26.11.1981 she filed another application for the suspension of the effect of the sub judge decision which was based mainly on the ground that her son was suffering from a serious disease and had to stay in Athens for treatment.

10 Counsel for the respondents raised the question whether a Judge of this Court sitting alone had competence to deal with an application for a provisional order under the above rule 13** for the second time.

15 *Held*, (1) that the Supreme Constitutional Court Rules, 1962 which continue in force by virtue of section 17 of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law 33/64) should be deemed to continue in force subject to the express provisions of this Law; that since under section
20 11 of this Law the revisional jurisdiction of the Supreme Court (including recourses under Article 146) is exercisable by a Judge sitting alone so that such Judge may dispose on the merits of a recourse such as the present one, rule 13 should now be applied subject to and in conjunction with section 11 of Law 33/64 with the result that a Judge of this Court sitting alone
25 for the second time can deal with an application for a new provisional order under the said rule 13.

(2) That where a provisional order is sought in an administrative recourse and where on the one hand the non-making of the order will cause damage, even irreparable, to the applicant
30 but on the other hand the making of such an order will cause serious obstacles to the proper functioning of the administration then the personal interest of the applicant has to be subjected to the general interest of the public and the provisional order

* See (1981) 3 C.L.R. 390.

** Rule 13, so far as relevant, reads as follows:

"13(1) The Court, or in proceedings under Article 146 any two Judges acting in agreement, may, at any stage of the proceedings, either ex proprio motu or on the application of any party, make a provisional order, not disposing of the case on its merits, if the justice of the case so requires".

should not be granted; that in the light of the fact that the son of the applicant has been suffering for some time and because he can receive medical attention also in Cyprus, this Court cannot in the interest of the service grant a new provisional order; accordingly the application for a provisional order should be dismissed. 5

Application dismissed.

Cases referred to:

- Georghiades (No. 1) v. The Republic* (1965) 3 C.L.R. 392;
Iordanou (No. 3) v. The Republic (1966) 3 C.L.R. 705; 10
Iordanou (No. 2) v. The Republic (1966) 3 C.L.R. 696;
Artemiou (No. 2) v. The Republic (1966) 3 C.L.R. 562.

Application for a provisional order.

Application for a provisional order suspending the effect of the decision of the respondents, whereby applicant was transferred to the Ministry of Education in Cyprus, pending the final determination of a recourse against the validity of the said decision. 15

L. Papaphilippou, for the applicant.

D. Papadopoulou (Mrs.), for the respondent. 20

Cur. adv. vult.

HADJIANASTASSIOU J. read the following judgment. In this case the applicant applies for the second time for a new provisional order suspending the effect of one of the sub-judice administrative acts, namely that of returning to the Ministry of Education in Cyprus and to remain as a Cultural Officer in the Embassy of Cyprus in Athens. This new provisional order is sought with effect now until the final termination of the case filed on 3rd September, 1981. Indeed the applicant in her first affidavit sworn by Christakis Christofides put forward that:- 25

“(a) No service requirement imposed the taking of the sub-judice decision or act. (b) The sub-judice act or decision strikes gravely the smooth, creative and unfettered functioning of the department presided over by the applicant in the Cyprus Embassy in Athens. (c) As I am informed and believe, the contents of the applicant’s letter dated the 17th August, 1981, (exhibit A in the recourse) is just 35

and true and is adopted for the purposes of the present affidavit. (d) The sub-judice decision or act strikes the applicant personally and her family in a way that causes to her and her family irreparable and incalculable material as well as moral damage.

The sub-judice act or decision amounts to a blow on the dignity and respect of the applicant and shakes the confidence of her colleagues and subordinates of both Ministries in her person and her abilities.

The sub-judice decision is, to the best of my knowledge and belief illegal, wrongful, vindictive, destructive, unreasonable and entirely contrary to the best interests of the service and the Ministry of Foreign Affairs and it will continuously harass the sense of justice because it reasonably gives the impression that the respondents profess injustice, vindictiveness and complete disregard for justice. As I believe it is for the public interest that the immediate suspensions of the execution of the sub-judice decision or act be ordered as it is evidently and manifestly illegal and unjustified and caused confusion in the departments of the Ministry of Foreign Affairs.

For all the above reasons I pray that for the protection of the public interest and the lawful rights of the applicant and in order to avoid irreparable damage to the best interests of the foreign service, and for the sake of rendering real and complete justice the order applied for should be granted".

Indeed in the present application counsel for the applicant produced two medical certificates which unfortunately show that the son of the applicant was suffering with a serious disease and it appears that this was known also by his parents. This second application for a provisional order has been made also under Rule 13 of the Supreme Constitutional Court Rules which reads as follows:

"13.-(1) The Court, or in proceedings under Article 146 any two Judges acting in agreement, may, at any stage of the proceedings, either ex proprio motu or on the application of any party, make a provisional order, not disposing of the case on its merits, if the justice of the case so requires.

(2) A provisional order made under this rule may, either on the ground of urgency or of other special circumstances, be made without notice and upon such terms as it may be deemed fit in the circumstances:

Provided that all parties affected by an order made under this paragraph shall be served forthwith with notice thereof so as to enable them to object to it and upon such an objection the Court, after hearing arguments by or on behalf of the parties concerned, may either discharge, vary or confirm such order under such terms as it may deem fit".

The first issue raised by counsel for the Republic Mrs. D. Papadopoulou was whether I have competence in sitting alone for the second time to deal with such an application for a provisional order under the said rule 13. There is no doubt that under rule 13, quoted earlier, the power of granting a provisional order was given in addition to the Court as a whole to two Judges in the same Court acting in agreement. It has not been doubted that the said Supreme Constitutional Court Rules which continue in force by virtue of section 17 of Law 33/64 should of course be deemed to continue in force subject to the express provisions of such Law. Indeed under section 11 of the said law the revisional jurisdiction of the Supreme Court (including recourses under Article 146) is exercisable by a Judge sitting alone so that such Judge may dispose on the merits of a recourse such as the present one. With that in mind I have reached the view that rule 13 should now be applied subject to and in conjunction with section 11 of Law 33/64 with the result that a Judge of this Court sitting alone for the second time can deal with an application for a new provisional order under the said rule 13. Indeed in reaching that conclusion I have taken guidance from the relevant jurisprudence in Greece. According to "Recourse for Annulment before the Council of State" by Tsatsos, 2nd Edition, p. 281 et. seq. this proposition finds support. See also the case of *Cleanthis Georghiades (No. 1) and The Republic of Cyprus through 1. The Public Service Commission, 2. The Council of Ministers (1965) 3 C.L.R. 392* on the issue of provisional order. In the case of *Iordanis G. Iordanou (No. 3) and The Republic of Cyprus, through The Public Service Commission (1966) 3*

C.L.R. 705, Vassiliades, J., as he then was, had this to say on this very same point:—

5 “The matter before me presents, in my opinion, no difficulty; it is fully covered both on principle and practice, by the Judgment in the previous application for a provisional order to stop this transfer. It is sufficient for me to read the following paragraphs from the Judgment of Triantafyllides, J. in that application delivered not more than 19 days earlier, that is on 1st July, 1966.

10 ‘I have carefully weighed whatever has been urged on behalf of the Applicant in support of his application for a provisional order but I have not been convinced that, if the transfer of Applicant to Omodhos is not postponed until the final determination of this recourse,
15 he will suffer irreparable damage which cannot be compensated for eventually, under the provisions of Article 146(6) in case Applicant succeeds, in the end, in this recourse’.

20 When I say today that ‘I have carefully weighed whatever has been urged on behalf of the Applicant in support of his application’, I have in mind what has been urged on his behalf this morning as well as the contents of the decision of the Council of Ministers which was put in by consent as exhibit 1. This new material, in my opinion,
25 makes no difference to the position. I go on now with the second part of the extract from the Judgment of the 1st July, which I consider just as important.

30 ‘On the other hand it does appear that this is a case where if the Applicant’s transfer is postponed, as applied for, it will cause obstacles to the proper functioning of the Administration. I am of the view, on the material at present before me, that though no doubt the taking of effect of the transfer of Applicant will involve some inconvenience for him and his
35 family—as any transfer invariably does, more or less—this is a case where his personal interest has to be subjected to the general public interest’.

What I have to add is that, in my opinion, it is of paramount

importance for the functioning of the public service that such interruptions of transfers by provisional orders should not only be subjected to the strict application of the principles enunciated in the case of *Cleanthis Georghiades (No. 1) and The Republic*, (1965) 3 C.L.R. 392, but should also be looked upon with proper regard to the disruption of good administration when public officers find it easy to arrest their transfers by means of such provisional orders. 5

The transfer of a public officer is, presumably, the result of due consideration by the responsible authorities in the Service; and I think that this Court should carefully avoid unnecessary interference with such administrative decisions in proceedings for provisional orders. I have no hesitation in coming to the conclusion that this application for a provisional order to arrest Applicant's transfer must be dismissed with costs". 10 15

See also *Iordanis G. Iordanou (No. 2) and The Republic of Cyprus, through The Public Service Commission* (1966) 3 C.L.R. 696 and *Nicos Artemou (No. 2) and The Republic of Cyprus, through The Public Service Commission* (1966) 3 C.L.R. 562. 20

Indeed it is a cardinal principle of administrative law that where a provisional order is sought in an administrative recourse and where on the one hand the non-making of the order will cause damage, even irreparable, to the applicant but on the other hand the making of such an order will cause serious obstacles to the proper functioning of the administration then the personal interest of the applicant has to be subjected to the general interest of the public and the provisional order should not be granted. 25 30

The second question which arises in this case is whether in the light of the medical certificates regarding the son of the applicant it would cause her such irreparable damage justifying the granting of a further provisional order until the final determination of this case. In my view it is regrettable but there is no doubt that counsel for the applicant quite rightly was feeling embarrassed in presenting this point and I have no doubt that he has done his best in arguing the whole problem, once he had new material in his hands. 35

Having given the matter my best consideration, and in the light of the fact that the son of the applicant has been suffering for some time and because her son can receive medical attention also in Cyprus, regretfully but fully aware of my obligations as a Judge I cannot in the interest of the service grant a new provisional order. In my view the proper and final approach in this case is for counsel for the applicant to bring to the notice of the Minister of Education this new unfortunate fact and try to see whether further time can be given to the applicant to return to Cyprus and pursue her new duties.

For the reasons I have given I have no alternative but to dismiss this second application for a provisional order. In the particular circumstances of this case I am not making an order for costs. Indeed I would express my indebtedness to both counsel appearing in the present case with such a humane touch.

Application for a provisional order dismissed.

No order as to costs.

Application dismissed. No order as to costs.

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