1982 September 24

[TRIANTAFYLLIDES, P., HADJIANASTASSIOU, A. LOIZOU, MALACHTOS, STYLIANIDES AND PIKIS, JJ.]

ANDREAS ECONOMIDES,

Appellant,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE EDUCATIONAL SERVICE COMMITTEE,

Respondent.

(Revisional Jurisdiction Appeal No. 261).

Provisional Order—Flagrant illegality—Meaning—Existence of triable issues in the recourse—Which have to be resolved at the trial—To decide these issues at this stage would be a serious interference with course of the trial and the issues under consideration by the trial Judge—Application for provisional order dismissed.

This was an appeal against the judgment of a Judge of this Court whereby appellant's application for a provisional order, suspending the operation of the decision, subject-matter of a recourse, concerning his transfer from the 4th Gymnasium of Paphos to the Dianellios School of Larnaca, was dismissed. In dismissing the application the trial Judge stated that "even though the merits of this case may be arguable in the sense that the recourse is not one that is either bound to succeed or doomed to failure no flagrant illegality has been established as would justify the granting of the Provisional Order applied for and in the absence of any other ground this application will be refused".

Held, that serious questions arise as to the status of the applicant in the Public Service; that these questions have to be properly resolved at the trial; that to decide these questions at this stage, would be a serious interference with the course of the trial and the issues presently under consideration by the learned trial Judge; accordingly the appeal must fail.

Held, further, that the expression "flagrant illegality" must

be viewed in the light of the ordinary meaning of the word "flagrant" as given in the Concise Oxford Dictionary, as "glaring, notorious, scandalous"; that the very existence of triable issues in this case precludes the existence of anything flagrant in the above sense.

Appeal dismissed.

Cases referred to:

Sophocleous v. *Republic* (1981) 3 C.L.R. 360;

Frangos and Others v. *Republic* (1982) 3 C.L.R. 53 at p. 57.

Appeal.

Appeal against the judgment of a Judge of the Supreme Court of Cyprus (L. Loizou, J.) given on the 26th January, 1982 (Revisional Jurisdiction Case No. 393/81) whereby appellant's application for a provisional order suspending the operation of the decision concerning appellant's transfer pending the final determination of a recourse against such decision, was dismissed.

A. S. Angelides, for the appellant.

E. Papadopoullou (Mrs.), for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES P.: The judgment of the Court will be delivered by Mr. Justice A. Loizou.

A. LOIZOU J.: This is an appeal from the judgment of a Judge of this Court by which he refused the application of the appellant made under rule 13 of the Supreme Constitutional Court Rules 1962, for a provisional order (a) suspending the operation of the decision, subject-matter of the recourse proper, concerning the appellant's transfer from the 4th Gymnasium of Paphos to the Dianellios School of Larnaca, till the final determination of his recourse, or (b) suspending his transfer and/or appointment and/or posting at the Dianellion Technical School until the determination of the said application.

The relevant facts as set out in the judgment of the learned trial Judge, not in dispute, are briefly the following:

The applicant served for twenty years as an Elementary school-teacher. In 1979, together with 52 other teachers, attended a special course for teachers for practical knowledge

and on the 6th October, 1980, he was posted at the 4th Gymnasium of Paphos as such a teacher for the academic year 1980-1981, after he himself had applied for such appointment to the respondent Committee.

On the 11th March, 1981, the appellant addressed a letter to the Director-General of the Ministry of Education by which he requested the termination of his secondment to the Secondary Education until the final settlement of certain disputes concerning the service of these teachers of Elementary Education who had been seconded to the Secondary Education.

The respondent Committee on the 8th September, 1981, decided the transfer of the appellant with effect from the 10th September, 1981, from the 4th Gymnasium of Paphos to Larnaca Elementary School. As stated in the relevant minutes, the respondent Committee in reaching this decision took into consideration the provisions of the Law and the Regulations and the educational needs, both generally and with regard to each school as conveyed to them by the Head of Elementary Education. He was then informed accordingly about it by letter dated the 16th September, 1981. It should be also noted that at the same meeting, the wife of the appellant who is an Elementary School Mistress was also transferred from Paphos to Larnaca but she did not challenge her transfer.

By another letter dated 14th September, 1982, the Head of Elementary Education informed the appellant that the appropriate Authority had decided under the provisions of section 39(2) of the Public Educational Service Law, 1969 (Law No. 10 of 1969); to transfer him from the Elementary School of Larnaca to the Elementary School of Ayios Lazaros with effect from the 10th September, 1981.

Following negotiations between the Secondary School Teachers Organization and the Ministry of Education, agreement was reached with regard to the aforesaid 53 Elementary School Teachers respecting their future position to the effect that they would be appointed to the Secondary Education and that their appointment would be with retrospective effect as from the 1st January, 1979. This agreement was approved by the Council of Ministers on the 14th May, 1981, by Decision No. 20363. By letter dated the 28th September, 1981, the respon-

dent Committee was then informed by the Acting Director-General of the Ministry of Education that the Ministry of Finance had approved the filling of 53 posts, corresponding to the number of teachers who had been teaching the subject of practical knowledge, in secondary schools. Thereupon at its meeting of the 29th September, 1981, the respondent Committee decided to offer permanent appointment to the teachers in question, including the appellant, with retrospective effect as from the 1st January, 1979. By the said decision the appellant was posted at the Dianellios Technical School of Larnaca.

An offer in writing in which, inter alia, it is stated that the appellant was posted to the said school at Larnaca, was made to the appellant dated the 7th November 1981, which, according to counsel for the respondent Committee, he accepted.

The appellant challenged the validity of the said posting only by this recourse and it may be mentioned here that he also filed another recourse by which he challenged his transfer from Paphos to Larnaca. In support of his application for the issue of a provisional order, the appellant relied solely on the ground of flagrant illegality and counsel for him argued before the learned trial Judge, as he did in this Court, that regulations 14 and 15 of the Technical Officers (Teaching Staff) (Appointments, Postings, Transfers, Promotions and related matters) Regulations, of 1972, published under Notification 205 in Supplement No. 3 to the Official Gazette of the 10th November, 1972, have been flagrantly violated.

The gist of the argument of the learned counsel was summed up by the learned trial Judge as follows:

> "The gist of the argument of learned counsel for the applicant was that the posting of the applicant at the Dianellios Technical School was flagrantly illegal: Firstly, on the ground that exhibit 8 which is the decision on the basis of which he was so posted speaks of a 'permanent appointment' and that, therefore, there was no question of posting him as posting is by virtue of regulation 15(1) only possible in case of first appointment on probation. Secondly, the applicant and the other 52 school teachers were already

posted in the secondary education and on their appointment or promotion with retrospective effect as from the 1st January, 1979, they were already posted in specified posts of the secondary education and there was no question of a new posting.

Lastly learned counsel argued that even assuming that such appointment and posting was possible such posting should have been made under regulation 14(1) i.e. the educational need for such posting should have been verified by the appropriate authority i.e. the Minister of Education acting usually through the Director-General of the Ministry and that nothing about this appears in either exhibit 7 or 8 (that in the letter to the respondent Committee regarding the decision of the Ministry of Finance to fill the 53 posts and the letter offering permanent appointment to the appellant)."

The learned trial Judge referred to the principles governing the granting of a provisional order as expounded in a number of authorities and referred to in *Agni Sophocleous* v. *The Republic* (1981) 3 C.L.R. p. 360, which are to the effect that the flagrant illegality of an administrative act is a ground for granting a provisional order, even in the absence of any suggestion of irreparable damage and notwithstanding serious obstacles likely to be occasioned to the running of the administrative machine. Very rightly he also pointed out that caution must be exercised especially where the granting of the order will virtually dispose of the case on its merits.

The position was also recently reviewed by Pikis J., in the case of *Frangos and others* v. *The Republic* (1982) 3 C.L.R. 53, where at p. 57 he sums up as follows with regard to what amounts to flagrant illegality. "For the Court to act the illegality must be palpably identifiable without having to probe into disputed facts;" and went on to say that "although what amounts to flagrant illegality is nowhere exhaustively defined" it appears as he said "to involve a clear violation of the procedure envisaged in the Law or unquestionable disregard of the fundamental precepts of administrative Law and that the notion did not encompass any defective exercise of discretionary powers vested in an organ of public administration".

In the present case the learned trial Judge concluded as follows:

> "Having considered carefully the arguments advanced in support of the Application I am clearly of the view, on the material before me, that even though the merits of this case may be arguable in the sense that the recourse is not one that is either bound to succeed or doomed to failure no flagrant illegality has been established as would justify the granting of the Provisional Order applied for and in the absence of any other ground this Application will be refused".

Having heard counsel for the appellant we find no ground for interfering with the decision of the trial Judge. Serious questions arise as to the status of the applicant in the Public Service and the actual position held at the time of the offer for appointment. Unless these questions are properly resolved at the trial it is difficult to say whether the procedure under sections 14 or 15 or any other section is applicable. To decide the issue at this stage would be a serious interference with the course of the trial and the issues presently under consideration by the learned trial Judge.

Moreover, regulation 14(1) provides that the postings and transfers of educational officers are made by the appropriate organ on the basis of the educational needs as verified by the appropriate Authority within the framework of which where possible, the preferences of the educational officers are taken into consideration.

Consequently the existence of a vacancy in a particular school, however such vacancy is caused, creates an educational need which can be filled by a posting or transfer, but whether the appropriate Authority has verified same or not is a factual aspect to be examined.

Finally the expression "flagrant illegality" must be viewed in the light of the ordinary meaning of the word "flagrant" as given in the Concise Oxford Dictionary, as "glaring, notorious, scandalous".

In our view the very existence of triable issues as in this case precludes the existence of anything flagrant in the above sense.

We have refrained from entering into a detailed analysis of the argument advanced as the hearing of the recourse proper has been concluded recently and judgment has been reserved and we do not want by anything that we may say in any way to prejudge the issues.

For all the above reasons the appeal is dismissed.

Appeal dismissed.