1983 October 14

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

PHOTOULLA A. LOIZIDOU,

Applicant,

v.

THE REPUBLIC OF CYPRUS AND/OR THE DIRECTOR OF THE PAEDAGOGICAL ACADEMY AND/OR THE SCHOOLMASTERS OF THE PAEDAGOGICAL ACADEMY OF CYPRUS AND/OR THE MINISTER OF EDUCATION,

Respondents.

(*Case No.* 286/83).

Paedagogical Academy of Cyprus—Enrolment of students in—Number of, fixed by decision of the Council of Ministers—Without specifying the number of students from each sex—Board of teachers of the Academy deciding to accept for enrolment students on sex criteria and not on the basis of the order of success in the examinations—In the absence of any Law or Regulation empowering the Board to decide as it did or conferring upon it any discretionary power the Board had to abide by the results of the examinations—Its decision unwarranted in law—Annulled.

Administrative Law—Administrative practice—Effect.

The applicant, who graduated the Acropolis Gymnasium in 1983, took part in the prescribed examinations for enrolment as a student in the Teachers' Section of the Paedagogical Academy ("PAC"), which were held on the 17th and 18th June, 1983. According to the results of the above examinations, she took the 90th place in line of success (282 marks). The number of students to be enrolled in the Teachers' Section of the PAC for the year 1983 was fixed by the Council of Ministers to 90, adopting in that respect the proposal made by the Ministry of Education in which the reasons for recommending such number

were explained. Neither in the said proposal nor in the decision of the Council of Ministers any specification as to the number of students from each sex was made but they both mentioned male/female students.

The Teachers Board of the PAC having met on the 29th June, 1983 to consider the results, decided to accept for enrolment in the Academy 35 male candidates instead of 21 who would have been entitled on the basis of the order of success in the examinations, thus leaving room for only 55 instead of 69 female candidates.

The applicant who was 90th in the general order of success and 69th in the order of success of females, would have been entitled to be admitted if the last candidates in the order of success were chosen without the element of sex having been taken into consideration; but as a result of the procedure followed she was excluded and hence this recourse.

Held, that since there is no special law regulating the enrolment of students in the PAC and no other law whatsoever conferring any discretionary power on the Board of PAC; and that since the relevant decision of the Council of Ministers did not purport to confer such a power, there was no discretionary power on the part of the Board of PAC to decide upon percentage on sex criteria of students to be enrolled; and that, therefore, in the absence of any law or regulation empowering the respondent to decide as it did or conferring upon it any discretionary power on the point, the respondent had to abide by the results of the examination; accordingly its decision is unwarranted by law and has to be annulled.

Held, further on the question whether there existed any established practice giving the PAC the right to keep a percentage of up to a maximum of 50 *per cent male and* 50 *per cent female students:*

(*After dealing with the effect of established administrative practice or administrative custom—vide pp.* 1092-1095 *post*).

That the respondent has not followed an established administrative practice and it cannot, therefore, rely on it in order to justify its decision.

Sub judice decision annulled.

Recourse.

Recourse against the decision of the respondents whereby they selected for enrolment in the Paedagogical Academy of Cyprus (Teachers' Section) male candidates to the exclusion of applicant who had higher marks.

A. S. Angelides, for the applicant.

R. Vrahimi (Mrs.), for the respondents.

Cur. adv. vult.

SAVVIDES J. read the following judgment. By the present recourse the applicant prays for a declaration of the Court that -

(1) The decision of the respondents published in the daily press on 2.7.1983, whereby the respondents selected for enrolment in the Paedagogical Academy of Cyprus (Teachers' Section) male candidates to the exclusion of the applicant who had higher marks than them, be declared null and void as being unlawful and unconstitutional.

(2) The decision of the respondents dated 2.7.1983 not to select the applicant and/or not to secure a place for her to study in the PAC (Teachers' Section) in spite of her grading, be declared void, unlawful and unconstitutional.

(3) The decision of the respondents to be annulled because its only criterion was sex, in contravention of the provisions of the Constitution.

The facts of the case are as follows:

The applicant, who graduated the Acropolis Gymnasium in 1983, took part in the prescribed examinations for enrolment as a student in the Teachers' Section of the Paedagogical Academy, which were held on the 17th and 18th June, 1983. According to the results of the above examinations, she took the 90th place in line of success (282 marks). The number of students to be enrolled in the Teachers' Section of the PAC for the year 1983 was fixed by the Council of Ministers to 90, adopting in that respect the proposal made by the Ministry of Education in which the reasons for recommending such number were explained (see Appendix 1 to the address of counsel for the respondents). Neither in the said proposal nor in the decision of the Council of Ministers any specification as to the number of

students from each sex is made but they both mention male/female students (see decision of the Council of Ministers No. 23/061, dated 21.4.1983 attached to the reply of counsel for the applicant as Appendix 'B').

The Teachers Board of the PAC met on the 29th June 1983 to consider the results of the examinations and to decide, on the basis of the results and the above-mentioned decision of the Council of Ministers, as to the successful candidates who were to be enrolled in the Teachers' Section. The minutes of such meeting appear as Appendix 3 to the oppostion. According to such minutes the Board considered the results of the examinations and decided that they could not apply an analogy of 50 per cent for male and 50 per cent for female students because the results of the examinations did not justify such course. It appears also in the minutes that the Headmaster had not suggested the definition of the percentage analogy in the proposal of the Ministry of Education to the Council of Ministers, in order to give the Board more flexibility in choosing the best candidates. It also appears from page 2 of the same minutes that the Board decided that the enrolment of a number of male students in the Academy was necessary for certain reasons, these being that: (a) the normal development of boys in the elementary schools will be assisted by the presence of male teaching staff; (b) the educational needs in small rural schools will be served in a better way; and (c) it helps the creation of a more constructive climate within the Academy itself. The Board also took into consideration, with regard to male candidates, that certain of them may not finally enrol in the PAC if they are accepted by some other institution of higher education, such as the Higher Technical Institute, thus making room for runners up; and in view of the fact that all male candidates not offered an enrolment in the PAC will have to enlist in the National Guard before the final enrolments in the PAC are made, no other male runners-up will be left, with the result that only female runners-up will take the place of successful candidates, male and female, who will not finally enrol.

In view of the above considerations the Board decided to accept for enrolment in the Academy 35 male candidates inssead of 21 who would have been entitled on the basis of the

order of success in the examinations, thus leaving room for only 55 instead of 69 female candidates.

The applicant was 90th in the general order of success and 69th in the order of success of females, which would have entitled her to be admitted if the last candidates in the order of success were chosen without the element of sex having been taken into consideration. It was as a result of the procedure followed, whereby the applicant was excluded, that she filed the present recourse, which is based on the following grounds of law;

"A. The decision contravenes, inter alia, the provisions of Articles 20, 6 and 28 of the Constitution.

B. The decision was taken in excess or abuse of power and is bad for misconception.

C. The decision is the result of an extraneous object, of dicriminatory treatment against the applicant and contravenes the notion of proper administration and meritoriousness.

D. The decision was taken under a procedure which is bad and in violation of the law and the vested rights of the applicant.

E. It lacks reasoning."

Counsel for applicant has argued in the course of his address that once the Board had decided to hold an examination between the candidates it was bound to abide by the results of the examination and not take into consideration other factors, not provided by law. That the Board of PAC based its decision on the misconception that the maintenance of percentages between male and female candidates is necessary, irrespective of the fact that by following such policy the standard of education will be lowered. That the assumption by the Board that enrolment for studies in the PAC should not serve the purpose of individual education but only the needs in teaching staff of schools of Elementary Education is wrong and contrary to the provisions of Article 20 of our Constitution which preserves the right of an individual to offer and receive education.

Counsel further argued that the combination of Articles

28.1 and 2 and 20 of the Constitution do not permit any discrimination to the right of education on the basis of sex. Conditions and restrictions to such right may be imposed only by law and for the purposes set out in Article 20 which does not cover the case in hand. It is the case for the applicant that any differentiation against her was arbitrary and was based on sex and is, therefore, unconstitutional. Counsel also maintained that the fixing of a percentage by the Council of Ministers is not provided by any law and that in any event the act of the PAC in so doing, is unlawful as having been taken by an incompetent organ.

Learned counsel argued lastly that there is no established practice fixing a percentage of 50 per cent male and female students since no such percentage was ever applied for any number of years. In any case established practice is accepted only if it does not contravene the law and the Constitution, which is not the case here. In any event, counsel argued no percentage has been provided in the decision of the Council of Ministers which merely fixed the number of students to be enrolled in the PAC. The decision therefore of PAC is unlawful as it was not taken in accordance with the provisions of any law and is contrary to the contents of the decision of the Council of Ministers and the provisions of Article 28 of the Constitution.

Counsel for the respondent in her address maintained that the PAC is a service of the Ministry of Education and the Minister, therefore, on the basis of sections 3(3)(a), 5 and 6 of the Competence of the Greek Communal Chamber (Transfer of Exercise) and Ministry of Education Law, 1965, (Law 12/65), is empowered to "define the general educational policy within the limits of the laws in force for submission to the Council of Ministers." This, in combination with regulation 13(a)(i) of the Regulations as to educational officers, gives the Ministry and the Minister the power to decide and define the percentage of students from each sex who are going to be enrolled in the PAC every year, having regard to the speculated future educational needs of schools. That this percentage has been fixed, since the academic year 1975 - 1976 to 50 per cent male and 50 per cent female students at the most and it is within the discretion of the Board of Teachers of the PAC to maintain the maxima of the percentage, giving reasons for its decision, which are given in full in the sub

judice decision. That this percentage has been made an established practice, the discretion being on the PAC to decide the exact number of male and female students having regard to the results of the examinations. Furthermore, she contended that the distinction between males and females was reasonable under the circumstances and, therefore, not unconstitutional.

I find myself unable to agree with the contention of counsel for the respondents regarding the discretion of the Board of Teachers of PAC to decide on the exact number of male and female students to be enrolled or upon any percentage. There is no special law regulating the enrolment of students in this institution and no other law whatsoever conferring any discretionary power on the Board of PAC. Nor does the decision of the Council of Ministers which is attached to the written reply of counsel for the applicant as Appendix 'B' purports to confer such a power, although even if it did, I would have doubted its correctness.

The decision of the Council of Ministers referred to, reads as follows:

> "Το Συμβούλιο αποφάσισε για το ακαδημαϊκό έτος 1983–84 να γίνουν δεκτοί στην Παιδαγωγική 'Ακαδημία Κύπρου 90 νέοι σπουδαστές/στριες στον κλάδο Δασκάλων και 30 νέοι σπουδαστές/στριες στον κλάδο Νηπιαγωγών".

The English translation of which is as follows:

> ("The Council decided that for the academic year 1983 - 1984 90 new male/female students be enrolled in the Paedagogical Academy of Cyprus in the Teachers' Section and 30 new male/female students in the Nursery Teachers' Section").

The contents of the above decision are very clear and need not be commented upon. It only decides the number of students, male or female, to be enrolled in the PAC for the academic year 1983 - 1984. There is no mention of any percentage on the basis of sex whatsoever. I, therefore, need not examine, at this stage, whether the fixing of a percentage based on sex by the Council of Ministers might be unlawful or unconstitutional. In Greece, the matter is regulated by law and is based on the existence of organic posts for males and females and differentiation between

sexes has been treated as not violating the provisions of the law, since such differentiation was necessary in the light of the organic posts for different sexes (see, in this respect Decision 1447/58). In the light of the above decision of the Council of Ministers, there was no discretionary power on the part of PAC to decide upon percentage based on sex criteria of students to be enrolled. If such differentiation would have been deemed necessary, it should have been defined by a competent organ vested with such power and not by an organ like PAC which was not vested with such power.

I am coming now to examine the proposition whether any established practice exists, giving the PAC the right to keep a percentage of up to a mxamum of 50 per cent male and 50 per cent female students. According to the contention of counsel for the respondents the fact that this percentage has been kept since the academic year 1975 - 1976 establishes such practice.

The number of students from each sex who were enrolled every year in the Teachers' Section of PAC, since 1959, the year of its establishment, appear in Appendices 1 and 2 attached to the opposition. Appendix 1 shows the number of students enrolled between 1959 - 1968 and Appendix 2 those enrolled from 1969 till 1983. From a mere glance at these lists it transpires that the analogy of 50 per cent was first introduced for the academic year 1975 - 1976, with 12 male and 12 female students. These numbers were fixed by the relevant decision of the Council of Ministers which is attached to the reply of counsel for the applicant as Appendix 'D3'. The same analogy was kept for the academic years 1976 - 1977 and 1977 - 1978. In 1978 - 1979 there were 8 male and 7 female students, which is a proximate analogy. In 1979 - 1980 no students were enrolled in the Teachers' Section. In 1980 - 1981, 8 male students and 17 female ones were enrolled which shows that the analogy of 50 per cent was far from being kept in that year. In 1982 - 1983, 15 male and 15 female students were enrolled which again amounts to the same analogy of 50 per cent.

The number of students to be enrolled in the PAC has always been a matter which had to be decided every particular year by the Council of Ministers which is the only appropriate organ to take such decision. The Council of Ministers, for a number of

years used also to define the percentage analogy of students from each sex. In 1983 no such percentage was defined. A matter which has to be decided upon in every particular year does not, in my opinion, give rise to an established practice if, for any reason, the decision on the matter happened to be the same for a number of years. Another thing that shows that there was no established practice is that in the years 1970 - 1971 and 1971 - 1972, the decision of the Council of Ministers was in the same terms as the present one fixing no percentages of sexes and the students were selected on the basis of a general list of successful candidates, in the order of their success, irrespective as to whether they were male or female students.

On the effect of established administrative practice or administrative custom followed for a number of years, the view expressed by the leading authors in Greece, is as follows:

"Πράγματι ἡ διοικητικὴ πρακτικὴ εἶναι δυνατὸν νὰ ἔχῃ ὡς περιεχόμενον εἴτε α) τὴν ἑρμηνείαν τοῦ νόμου εἴτε β) τὴν ἄσκησιν διακριτικῆς ἐξουσίας. Εἰς τὴν πρώτην περίπτωσιν, ἡ ἡ δοθεῖσα διὰ τῆς διοικητικῆς πρακτικῆς ἑρμηνεία τοῦ νόμου εἶναι ὀρθή, ὁπότε δέον νὰ ἐξακολουθήσῃ ἀκολουθουμένη, οὐχὶ δυνάμει ἐθίμου, ἀλλὰ δυνάμει αὐτοῦ τοῦ ἑρμηνευομένου καὶ ἐφαρμοζομένου ὀρθῶς ὑπὸ τῆς Διοικήσεως νόμου, ἢ ἀντιθέτως ἡ ἑρμηνεία εἶναι ἐσφαλμένη, ὁπότε δέον νὰ μεταβληθῇ ἔστω καὶ μετὰ μακρὸν χρόνον, ἵνα δοθῇ ἡ ὀρθὴ ἑρμηνεία, ἀδύνατον δὲ εἶναι νὰ ἐπιβληθῇ ἡ ἐσφαλμένη ἑρμηνεία καὶ νὰ καταστῇ μόνιμος, ἐπειδὴ ἠκολούθησεν αὐτὴν ἡ Διοίκησις ἐπὶ μακρὸν χρόνον.

Εἰς τὴν δευτέραν περίπτωσιν, καθ' ἣν ἡ διοικητικὴ πρακτικὴ ἔχει ὡς περιεχόμενον τὴν ἄσκησιν διακριτικῆς ἐξουσίας καθ' ὡρισμένον τρόπον ἐφ' ὡρισμένου θέματος, ἡ ἐπὶ μακρὸν χρόνον διάρκεια μιᾶς τοιαύτης διοικητικῆς πρακτικῆς εἶναι δυνατὸν νὰ ἔχῃ ὡρισμένας συνεπείας ἐν τῷ δικαίῳ τῶν διοικητικῶν πράξεων. Οὕτω π.χ. ἐὰν ἡ Διοίκησις ἐπὶ μακρὰ ἔτη χορηγῇ ὡρισμένης φύσεως ἀδείας εἰς ἄτομα ὡρισμένης κατηγορίας, δὲν δύναται, ἐγκαταλείπουσα τὴν τακτικὴν τοιαύτην αἰφνιδίως, νὰ ἀρνηθῇ ὁμοίας φύσεως ἄδειαν εἰς πρόσωπον ἀνῆκον εἰς τὴν αὐτὴν κατηγορίαν, χωρὶς νὰ αἰτιολογήσῃ τὴν ἄρνησιν ταύτην. Ἐὰν ἀναιτιολογήτως ἀρνηθῇ ἡ ἄρνησις αὕτη θὰ ἦτο ἀκυρωτέα δι' ἔλλειψιν τῆς αἰτιολο-

γίας. Ὅθεν ἡ διοικητικὴ πρακτικὴ δύναται νὰ ἀποτελέσῃ τὴν προϋπόθεσιν διὰ τὴν ἐφαρμογὴν γενικῶν τινων ἀρχῶν τοῦ δικαίου τῶν διοικητικῶν πράξεων, αἱ ὁποῖαι τείνουν ἰδίως νὰ ἐξασφαλίσουν τὴν ὀρθὴν ἄσκησιν τῆς διακριτικῆς ἐξουσίας τῶν διοικητικῶν ὀργάνων. Οὐδέποτε ὅμως ἡ διοικητικὴ πρακτικὴ δύναται ν' ἀποτελέσῃ πηγὴν τοιούτων γενικῶν ἀρχῶν.

Ἄλλωστε, ἡ διοικητικὴ πρακτικὴ δὲν δύναται νὰ δεσμεύῃ τὴν Διοίκησιν, εἰμὴ μόνον ἀπὸ τῆς ἀνωτέρω ἐκτεθείσης ἀπόψεως τῆς ὑποχρεώσεως αὐτῆς ὅπως αἰτιολογῇ τὴν μεταστροφὴν τῆς τηρηθείσης τακτικῆς αὐτῆς. Τηροῦσα τὴν ὑποχρέωσιν ταύτην, ἡ Διοίκησις δύναται νὰ ἐγκαταλείπῃ τὴν ἔστω καὶ ἐπὶ μακρὸν χρόνον τηρηθεῖσαν τακτικὴν. Τοῦτο ἐπιβάλλεται καὶ ἐκ τῆς ἀνάγκης, ὅπως ἡ διακριτικὴ ἐξουσία ἀσκῆται ἑκάστοτε ἐλευθέρως καὶ ἀδεσμεύτως ἐν ὄψει τῶν συγκεκριμένων περιπτώσεων".

("Indeed the administrative practice is possible to have as contents either a) the intrepretation of the law or b) the exercise of discretion. In the first case either the interpretation given by the administrative practice to the law is correct, in which case it should continue to be followed, not by virtue of custom, but by virtue of the said interpreted and correctly applied by the administration law, or on the contrary the interpretation is wrong, in which case it should be changed even after a long time, so as to have the correct interpretation given, but it is impossible for the wrong interpretation to be imposed and become permanent because the administration has followed it for a long time.

In the second case, in which the administrative practice has as its contents the exercise of discretion in a certain manner on a specified subject, the duration for a long time of such an administrative practice is possible to have some effects on the law of administrative acts. Thus, for example, if the administration for many years grants permits of a certain type to persons of a certain category, it cannot, by abandoning suddenly this practice, refuse a permit of the same type to a person belonging to the same category, without giving reasons for such refusal. If it refuses without due reasons, this refusal is subject to annulment for lack of due reasoning. Therefore the administrative

practice can constitute the prerequisite for the application of certain general rules of the law of administrative acts, which tend especially to secure the correct exercise of discretion by the administrative organs. But the administrative practice can never constitute a source for such general rules.

On the other hand, administrative practice cannot bind the administration, except only from the above stated view of its obligation to reason the change of the said adopted practice. By observing this obligation, the administration may abandon even the practice followed for a long time. This is also imposed by the requirement that discretion is exercised each time freely and without any unfetterly in view of the special circumstances").

(See, Stassinopoulos "Law of Administrative Acts", 1951 Edition, pp. 19, 20).

(See, also Tsatsos "Recourse for Annulment" 3rd Ed. pp. 296, 297).

In the present case, as I have already explained, no such practice has been established. But even if I had reached the conclusion that the adoption of the same percentage by the PAC for a certain number of years did create an established practice such practice was interrupted in the academic year 1980 - 1981 and thus ceased to exist as such eversince.

In Tsatsos "Application for Annulment" (supra), p. 296, we read:

"Τουναντίον ἡ διοικητικὴ συνήθεια δύναται νὰ δηλωθῇ παρὰ τῆς ἁρμοδίας ἀρχῆς, ὅτι ἐφ' ἑξῆς καὶ γενικῶς δὲν θέλει τηρηθῇ καὶ ἡ τοιαύτη προηγουμένη δήλωσις ἀρκεῖ διὰ νὰ ἀπαλλαγῇ τῆς διὰ τῆς συνηθείας ταύτης ἐπελθούσης δεσμεύσεως".

The English translation of which is:

("On the contrary, the administrative practice may be declared by the appropriate authority that from now on and in general it will not be kept and the aforesaid declaration is sufficient to release it from the obligation created by such practice").

In any event, the respondent did not even follow that percentage in the sub judice decision and it cannot therefore rely on it in order to justify its decision.

I, therefore, find that in the absence of any law or regulation empowering the respondent to decide as it did or conferring upon it any discretionary power on the point, the respondent had to abide by the results of the examination. Its decision is unwarranted by law and has to be annulled. Having concluded that the sub judice decision has to be annulled on the above grounds, I find it unnecessary to consider any other points raised.

In the result, the recourse succeeds and the sub judice decision is annulled, with no order for costs.

Sub judice decision annulled. No order as to costs.