

1983 October 29

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

GEORGHIOS MICHAELIDES,

Applicant,

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 352/83).

*Legitimate interest—Article 146.2 of the Constitution—Issue of sub
judice administrative act with consent of applicant—Whether
it deprives him of legitimate interest to attack it by means of a
recourse.*

5 *Public officers—Conditions of service—Offer of appointment stating
that applicant “will also be liable to transfer within the island”—
And that his duties will be those provided by the schemes of service
attaching to his post—Scheme of service providing that he is
10 of his conditions of service—Sub judice decision transferring him
abroad lawfully taken.*

The applicant who was already in the Government Service
was on the 15th March, 1979 offered appointment to the post
of Commercial Assistant 1st Grade in the Ministry of Commerce
and Industry. In the offer of appointment it was stated, inter
15 alia, that he will “also be liable to transfer within the Island
according to the exigencies of the service” and under the heading
“Duties” it was stated that the duties are the usual duties attach-
ing to the post of Commercial Assistant, 1st Grade “as laid
20 down in the approved scheme of service”. The scheme of
service provided, inter alia, “that he assists the Commercial
Counsellor at anyone of the Trade Centres of the Ministry of
Commerce and Industry_____”.

When the applicant came to know of a proposal by his Head of Department to the Public Service Commission for his transfer to Cologne he wrote to his Head of Department on the 27th July, 1983 and thanked him for his proposal but at the same time he raised certain matters and requested that they be taken into consideration. 5

The Public Service Commission after considering the proposal of the Head of Department and applicant's letter decided to transfer applicant to the Trade Centre of Cologne in West Germany and hence this recourse in which it was mainly contended that in accordance with his terms of service, on the basis of his appointment, he was subject to transfer only within the Republic. 10

Counsel for the respondent Commission has raised a preliminary objection that in view of the contents of his above letter of the 27th July 1983 the applicant has lost any legitimate interest having consented unreservedly to the issue of the sub judice administrative act. 15

Held, (I) on the preliminary objection:

That there does not exist a legitimate interest in order to attack an administrative act if it is issued on the application or at the request or with the consent of the applicant as well as if there is acceptance of an act which must be in any event unreserved and free and must not have taken place under the pressure of forthcoming injurious consequences for the applicant; that in the present case although the tenor of that letter was such as to convey to the respondent Commission the impression of the applicant accepting or at least not objecting to his transfer to Cologne, yet, it was couched in such terms and connected with two conditions that the submission that this is a case where there was an unreserved acceptance of the administrative act in question which would in the circumstances deprive the applicant of his legitimate interest cannot be upheld. 20 25 30

Held, (II) on the merits of the recourse:

That since by the offer of appointment the schemes of service including its part referring to the duties and responsibilities were made part of the conditions of service of the applicant; and that since Trade Centres function only overseas the decision 35

to transfer applicant was lawfully taken being himself under the conditions of his service liable to an overseas posting; accordingly the recourse should fail.

5 *Held*, further, that when the offer of appointment says "he will also be liable to transfer within the island" that does not exclude an overseas posting for the purpose of performing the duties of assisting the Commercial Counsellor at any one of the Trade Centres of the Ministry of Commerce and Industry which the Government of the Republic has or may set up abroad
10 operating as part of our diplomatic missions in other countries; and that in this way effect is given, as it ought to, to all provisions of the relevant documents.

Application dismissed.

Cases referred to:

15 *Metaforiki Eteria Ayios Antonios etc. v. Republic* (1981) 3 C.L.R. 221 at p. 235.

Recourse.

20 Recourse against the decision of the respondent to transfer applicant from the Ministry of Commerce and Industry to the Cyprus Trade Centre, Cologne.

A. S. Angelides, for the applicant.

A. Vladimirov, for the respondent.

Cur. adv. vult.

25 A. LOIZOS, J. read the following judgment. The applicant who was already in the government service was appointed by the respondent Commission on the temporary Ordinary post of Commercial Assistant, 1st Grade on the 15th March 1979. The offer to him is contained in a letter dated the 24th February 1979 which is to be found in his personal file (exhibit 1, - red 14)
30 and attached thereto were the "Conditions of service at present attaching to appointment to the temporary (Ord.) post of Commercial Assistant 1st Grade in the Ministry of Commerce and Industry." (Exhibit 1, red 13).

35 In the said document which is in cyclostyled form and filled in where appropriate it is stated inter alia under the heading "Appointments:"

He/she will also be liable to transfer within the Island according to the exigencies of the service."

And under the heading "Duties" it is stated:

"The duties are the usual duties attaching to the post of Commercial Assistant 1st Grade in the Ministry of Commerce and Industry as laid down in the approved Scheme of Service for this post."

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Upon the applicant accepting the said offer (exhibit 1, red 18 the appointment of the applicant was communicated to him by letter of the Chairman of the respondent Commission, dated 28th April 1979 (exhibit 1, red 22), "on the conditions set out in my offer No. P. 18249 of the 24th February 1979."

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In the relevant scheme of service as published in the Official Gazette of the Republic of the 2nd June 1979 under Notification 1044 and in respect of which vacancies advertised thereby the applicant submitted his application for appointment to the service - (see paragraph 6 of his application where he specifically says, "No. 1044 2nd June 1978"), there appears a note in paragraph 2 thereof under the heading "The duties and responsibilities of the officer." Which reads:

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"Those appointed will be posted originally, one at the Trade Centre Cologne, one at the Trade Centre Dubai and the others at the Ministry of Commerce and Industry.

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During the overseas service of those appointed it will be paid to them such annual allowance as would be approved by the Council of Ministers."

This note does not appear in the copy of the scheme of service, Appendix 12 attached to the Opposition but in both Schemes under the same paragraph 2 there appears in paragraph (b) thereof the following:- "Assists the Commercial Counsellor at anyone of the Trade Centres of the Ministry of Commerce and Industry in the execution of his duties."

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The salary at the time was that provided by scale 12, i.e. £1092X42-1512X48-1608.

In 1981 a new scheme of service was prepared (Appendix 13) in which the expression "Assists the Commercial Counsellor at anyone of the Trade Centres of the Ministry of Commerce and Industry in the execution of his duties" does not appear under the heading "Duties and Responsibilities" but a note was

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inserted "that the person appointed may be posted at any Trade Centre of the Ministry of Commerce and Industry abroad depending on the needs of the service." The post was renamed as Commerce and Industry Assistant 1st Grade. The salary is
5 scale A8 starting at £2272X111-3493 and rising to A9 £2821X136-3909. It is accepted that the appellant has since this revision of salaries been placed on these scales, as it appears from a letter dated 21st July 1981, exhibit 1, red 38, which the respondent Commission addressed to him and it reads.

10 "I have instructions to inform you that in accordance with the Supplementary Budget Law (No. 4) of 1980 (Law 45/80), the title of the temporary (Ord. Budg.) post of Commercial Assistant 1st Grade which you hold, has been substituted with the title 'Commerce and Industry Assistant, 1st Grade',
15 as from 1st January 1980.

2. The relevant order which has been issued under Section 3 of the Change of Titles Law, Cap. 40, has been published under number 354/80 in the first part of the Third Supplement to the Official Gazette of the Republic of the 12th
20 December 1980."

Copy of this letter was addressed to the Director-General of the Ministry of Trade and Industry, to the Auditor-General and to the Accountant-General and it is obvious that it is by virtue of this act of the respondent Commission that the applicant has
25 been placed in the new post and is receiving the salary of the new revised scale.

On the 25th July 1983, the Director-General submitted a proposal to the respondent Commission for the transfer of the applicant from Cyprus to the Trade Centre of Cologne in West
30 Germany as from 1st October 1983 (Appendix 1), in order to replace Mr. C. Lemoniatis and stated therein that "his duties will be to assist the Commercial Counsellor in Cologne". It is further said that he had been informed about his transfer one month earlier and he had not until then submitted his views and
35 that the Ministry considered that the transfer be made without any further delay. As regards his family conditions it is mentioned that he is married with two children 2 1/2 years of age.

On the 2nd August 1983 the Director-General of the said

Ministry forwarded to the respondent Commission with his comments a letter of the applicant dated 27th July 1983, (Appendix 3), with the latter's observations regarding his transfer. It is headed "George Michaelides, Commerce and Industry, Assistant 1st Grade Control and Protection of Consumers Service" and it reads: 5

"I refer to the oral communication which has been made to me regarding my intended transfer to the Trade Centre Cologne and inform you the following:

First I would like to thank you for your proposal that I serve at a Trade Centre and in particular in Cologne. I always had the desire to serve at a Trade Centre, but I hoped that this term of service of mine would be made in conjunction with my promotion to the post of Trade Counsellor. 10 15

My wife is a Civil Servant. In the case of my transfer, both my wife and my two children will accompany me provided that the Public Service interests of my wife will be safeguarded. If not, this will have as a consequence the impossibility of my wife and myself personally, to face our obligations and debts towards third persons and I confess that my service at the Trade Centre will be under pressure. 20

My children (twins, Girl/Boy) are to-day two years and eight months old. In three years they will be enrolled in Elementary Education, consequently there is a probability in three years time to ask for my return to Cyprus. 25

In spite of the fact that the aforesaid real problems will arise in the event of my transfer (as well as other secondary) yet I shall try to respond, provided that there is no other choice and given that my transfer will not become a restraining factor to my career and progress. I hope and wish that at least in the forthcoming filling of the post of Counsellor, I shall be appointed to one of the advertised vacancies so that my service at the Trade Centre will satisfy both the Service and myself. 30 35

At your disposal for further information,

With Honour,
(Signed)."

The subject decision was taken at the meeting of the respondent Commission of the 12th August 1983 at which other transfers of the Ministry of Commerce and Industry were examined. It referred in its minute of that meeting- Appendix 4, to the letter of the Director-General of the 2nd August, by which he forwarded the letter of the applicant of the 27th July herein-
5 above set out and then its minutes read:

“..... he mentioned that he always had the desire to serve as the Trade Centre Cologne, but hoped that his term of office
10 would be made in conjunction with his promotion to a higher post and provided that his transfer would be an obstacle to his career and progress. In the same letter the officer mentioned that in the case of his transfer to the Trade Centre Cologne, both his wife and his twin children
15 aged two years and eight months would follow him provided that the public service interests of his wife will be safeguarded. Otherwise it will be impossible for his wife and himself to meet their obligations and debts and his service in Cologne will be under pressure.

20 The Director-General commenting on the contents of the said letter of Michaelides mentioned in his aforementioned letter that the question of the promotion of the officer was irrelevant to his proposed transfer.

25 The Commission taking into consideration the aforesaid, decided that the question of the protection of the public service interests of the wife of Michaelides does not come within the competence of the Commission and that the question of his promotion to the post of Trade Counsellor is irrelevant to the proposed transfer. Consequently the
30 Commission, on the basis of all material before it decided to transfer Georghios Michaelides from the Central Service of the Ministry of Commerce and Industry Nicosia to the Trade Centre Cologne in West Germany as from 1st October 1983.”

35 By letter dated the 16th August, Appendix 5, the respondent Commission communicated to him their decision to transfer him from the Ministry of Commerce and Industry to the Cyprus Trade Centre Cologne as from 1st October 1983.

With regard to the safeguarding of the Civil Service interests

of his wife as well as the question of his promotion to the post of Trade Counsellor which he raised in his aforementioned letter of the 27th July, they informed him that the first question did not come within the competence of the Public Service Commission and that the second one was irrelevant to the present transfer. 5

On the 2nd September the said Director-General forwarded to the Chairman of the Public Service Commission by letter (Appendix 6), the objections of the applicant to his said transfer as contained in his letter of the 1st September (Appendix 7), in which he had raised the question that in accordance with his terms of service on the basis of his appointment he was subject to transfer only within the Republic and it was on that ground that he objected to his decided transfer and asked for its annulment or revocation and reserved thereby fully his rights. 10 15

The comments of the Director-General on the said objections appear in paragraph 2 of Appendix 6 which reads:

“The Ministry having examined the allegations of Mr. Michaelides in conjunction with the approved Schemes of Service of the Commerce and Industry Assistant 1st Grade which provide among other things that the person appointed may be posted at any Trade Centre of the Ministry of Commerce and Industry abroad depending on the needs of the service, he does not find his allegation justified and for that reason suggests the dismissal of his objection to his transfer to the Trade Centre Cologne.” 20 25

There followed a re-examination of the question of the transfer of the applicant in view of his application to that effect and the respondent Commission at its meeting of the 13th September 1983 examined the matter in its minutes of that date (Appendix 8) and it says inter alia, after referring to the objection of the applicant dated 2nd September 1983 and the views of the Director-General that:- 30

“In accordance with the material kept at the office of the Commission, Michaelides was appointed to the post of Commercial Assistant 1st Grade on the 15th March 1979. In the Scheme of Service of that post there was no provision for transfer abroad. The post was re-named to Commerce and Industry Assistant 1st Grade as from 1st January 1980. 35

5 In accordance with an advice of the Deputy Attorney-General of the Republic under No. 34(C)/61/5 dated 14th July 1981 given on a previous similar case regarding another post, the holder of a public office is bound to serve and abroad if that arises from the nature of the duties and responsibilities of the post.

10 The Commission having in mind the aforesaid legal advice as well as the nature of the duties and responsibilities of the post of Commercial Assistant 1st Grade as defined in the relevant Scheme of Service, confirmed its previous decision for the transfer of George P. Michaelides from the Headquarters of Commerce and Industry Nicosia to the Trade Centre Cologne as from 1st October 1983."

15 Counsel for the respondent Commission has raised an objection that in view of the contents of his letter of the 27th July (Appendix 3) hereinabove set out, the applicant has lost any legitimate interest having consented unreservedly to the issue of the sub judice administrative act. In support of this proposition I was referred to the case of "*Metaforiki Eteria Ayios*
20 *Antonios etc., v. The Republic* (1981) 3 C.L.R. p. 221 at p. 235 and the authorities therein cited. No one disagrees with the proposition that there does not exist a legitimate interest in order to attack an administrative act if it is issued on the application or at the request or with the consent of the applicant as well as
25 if there is acceptance of an act which must be in any event unreserved and free and must not have taken place under the pressure of forthcoming injurious consequences for the applicant.

30 In the present case, however, although the tenor of that letter was such as to convey to the respondent Commission the impression of the applicant accepting or at least not objecting to his transfer to Cologne, yet, it was couched in such terms and connected with two conditions that I cannot uphold the submission that this is a case where there was an unreserved acceptance of the administrative act in question which would in the circumstances deprive the applicant of his legitimate interest. If
35 anything, however, it disclosed the knowledge of the applicant that he was liable to an overseas posting at a Trade Centre, which situation is relevant to the examination of the case on its merits.

It is true that in the original offer of appointment to the applicant there was attached the cyclostyled document (exhibit 1, red 13) a form of general use with the essential parts filled in with typewriter and which is entitled "Conditions of service at present attaching to appointment ____" and it contains inter alia under the heading "Appointment" the words "He/She will also be liable to transfer within the Island according to the exigencies of the service", which were left intact. 5

On the other hand under the heading "Duties" it is stated "The duties are the usual duties attaching to the post of Commercial Assistant, 1st Grade, in the Ministry of Commerce and Industry as laid down in the approved scheme of service for this post. He/she may be required to perform any other duties which may be assigned to him/her. The officer will be required diligently and faithfully to perform his/her duties and to act in all respects in accordance with the instructions or directions given to him/her by the Head of his/her Department or other duly authorized officers, devoting thereto the whole of his/her time and attention and without engaging directly or indirectly in, or undertaking any private work." 10 15 20

Consequently the Scheme of Service, including of course its part referring to the duties and responsibilities of the officer was thus made part of the conditions of service of the applicant.

In the present case among the duties and responsibilities of the applicant are those set out in paragraph (b) of the Scheme of Service which provides that he "assists the Commercial Counselor at anyone of the Trade Centres of the Ministry of Commerce and Industry in the execution of his duties." 25

There is no doubt, - and the contention of counsel for the respondent Commission to that effect which has in no way been contradicted and in fact is duly supported by the contents of exhibit 2, - that Trade Centres function only overseas. Moreover the note which was inserted in the Scheme of Service as published under Notification 1044 in the Official Gazette of the 2nd June 1978, earlier referred to in this judgment that "those appointed will be posted originally one at the Trade Centre Cologne, one at the Trade Centre Dubai and the others at the Ministry of Commerce and Industry, leads one to the conclusion 30 35

that it was part of the conditions of service of the applicant at the time of his appointment that he was liable to serve also at Trade Centres abroad.

5 It should be noted that this notification speaks that "those appointed will be posted originally" which means that subsequently there might be effected changes and transfers from the Ministry to the Trade Centres and vice versa. What might on the face of it appear to be a contradiction and conflict between the Scheme of Service on the basis of which the applicant had
10 applied and the conditions contained in the first paragraph of the document attached to the offer of appointment, is in substance not contradictory inasmuch as when it says "he will also be liable to transfer within the island" that does not exclude an overseas posting for the purpose of performing the duties of
15 assisting the Commercial Counsellor at any one of the Trade Centres of the Ministry of Commerce and Industry which the Government of the Republic has or may set up abroad operating as part of our diplomatic missions in other countries. In this way effect is given, as it ought to, to all provisions of the relevant documents.
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This recourse should therefore fail as the decision to transfer the applicant was lawfully taken being himself under the conditions of his service liable to an overseas posting.

25 Having come to this conclusion I need not comment on the contents of the new Scheme of Service, (exhibit 13) which has come into existence as part of the revision of salaries that took place and which did not only bring about the renaming of the post the applicant was holding who also acquired the salary scale on which the applicant was placed and draws the advantages.

30 For all the above reasons this application is dismissed but in the circumstances I make no order as to costs.

Application dismissed. No order as to costs.