

1984 February 18

[STYLIANIDES, J]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ELLI KYRIAKIDOU,

Applicant

1.

THE REPUBLIC OF CYPRUS, THROUGH
THE MINISTRY OF FOREIGN AFFAIRS,

Respondents

(Case No 125/83)

Administrative Law—Administrative acts or decisions—Executive act—Transfer of Clerk 2nd Grade, General Clerical Staff from the Embassy in Athens to the “Maritime Office” at Piraeus—Not an internal measure of administration but an executive administrative act—Which can be made the subject of a recourse under Article 146 1 of the Constitution—Yiallourou v Republic (1976) 3 C L.R. 214 distinguished on the facts. 5

Public Officers—Transfer—Transfer of Clerk 2nd Grade General Clerical Staff from the Embassy in Athens to the “Maritime Office” at Piraeus—Transfer not involving any change of duties of the officer and may or may not involve a change in the place of her residence—Appropriate Authority to effect the transfer the Director of Public Administration and Personnel and not the Ambassador—Annulled because it was made by an organ that lacked competence—Section 48 of the Public Service Law, 1967 (Law 33/67)—Whether Law 33/67 is not applicable to civil servants serving abroad in whatever capacity—Foreign Service Laws 1960–1980 10 15

The applicant was a civil servant, Clerk 2nd Grade in the General Clerical Staff who on 11 12 1974 was transferred to the Cyprus Embassy in Athens by a decision of the Public Service Commission. She served at the Embassy until the end of January, 1983 when the Ambassador orally transferred her from the Embassy to the Consulate in Piraeus, known as “Maritime” 20

Office"; and hence this recourse which was argued on the sole ground that the Ambassador had no competence to take the sub judice decision.

5 Counsel for the respondents submitted that the transfer was not an executory administrative act but an administrative measure of internal nature that did not amount to an executory act.

10 The applicant was a member of the Public Service of the Republic and though she was transferred to the Embassy in Athens, she was not a member of the Foreign Service of the Republic as defined in sections 2 and 3 of Law 10/60. She was a member of the "interchangeable" Staff and belonged to the Department of Public Administration and Personnel of the Ministry of Finance. The sub judice transfer did not involve any change of applicant's duties and it might or might not involve a change
15 in the place of her residence.

20 *Held*, (1) that having regard to the circumstances of this case the transfer of the applicant from the Embassy in Athens to the "Maritime Office" at Piraeus is not an administrative measure—internum—but an executory administrative act; and that, therefore, it can be made the subject of a recourse under Article 146.1 of the Constitution—(*Yiallourou v. Republic* (1976) 3 C.L.R. 214 distinguished on the facts).

25 (2) That since the transfer does not involve any change of her duties and it may or may not involve a change in the place of her residence the Minister acting through the Director—General of the Ministry would be the appropriate authority to effect the transfer if no change of residence would be necessary and in the case of this applicant the Director of Public Administration and Personnel. (See section 48* of the Public Service
30 Law, 1967); that, therefore, the transfer of the applicant to the "Maritime Office" at Piraeus was beyond the competence of the Ambassador; accordingly it must be annulled because it was made by an organ that lacked competence.

35 *Held*, further, that the submission of the respondents that the Public Service Law, 1967, is not applicable to civil servants serving abroad in whatever capacity is, subject to the provisions

* Section 48 is quoted at p. 130 post.

of the Foreign Service Laws, 1960–1980, untenable.

Sub judice decision annulled.

Cases referred to:

Kolokassides v. Republic (1965) 3 C.L.R. 542;

Ioannou v. Commander of Police (1974) 3 C.L.R. 504; 5

Zivlas v. Municipality of Paphos (1975) 3 C.L.R. 349;

Serghiou v. Republic (1982) 3 C.L.R. 871;

Nedjati v. Republic, 2 R.S.C.C. 78 at p. 82;

Yiorkas v. Republic, 5 R.S.C.C. 56;

Yiallourou v. Republic (1976) 3 C.L.R. 214; 10

Papadopoulos v. Republic (1975) 3 C.L.R. 89.

Recourse.

Recourse against the decision to transfer applicant from the Cyprus Embassy in Athens to the Consulate in Piraeus known as “Maritime Office”. 15

Fr. Kyriakides, for the applicant.

S. Georghiades, Senior Counsel of the Republic, for the respondents.

Cur. adv. vult.

STYLIANIDES J. read the following judgment. The applicant 20
is a civil servant, Clerk, 2nd Grade, who on 11.12.74 was transferred to the Cyprus Embassy in Athens by a decision of the Public Service Commission. She served at the Embassy until the end of January, 1983, when the Ambassador orally transferred her from the Embassy to the Consulate in Piraeus, known as 25
“Maritime Office” (“Ναυτιλιακόν Κέντρον”).

By this recourse the applicant seeks the annulment of the said decision of the Ambassador. In her recourse a number of grounds are set out but the only ground on which this recourse was argued before the Court is that the Ambassador had 30
competence to take the sub judice decision.

Counsel for the respondents submitted that it was not an executory administrative act but an administrative measure of internal nature that does not amount to an executory act.

5 It is well settled that only an executory administrative act can be attacked by recourse. (*Kolokassides v. The Republic*, (1965) 3 C.L.R. 542; *Ioannou v. The Commander of Police*, (1974) 3 C.L.R. 504; *Zivlas v. The Municipality of Paphos*, (1975) 3 C.L.R. 349; *Serghiou v. The Republic*, (1982) 3 C.L.R. 871).
 10 Only an act or omission of the Administration which produces legal results and affects a person is amenable to the jurisdiction of this Court.

An administrative measure of internal nature does not amount to an executory act.

15 In the *Conclusions from the Jurisprudence of the Council of State in Greece, 1929-1959*, at pp. 236-237, we read:

20 “Εἰς προσβολὴν δι’ αἰτήσεως ἀκυρώσεως δὲν ὑπόκειται οἰαδήποτε πράξις ἀπορρέουσα ἐκ διοικητικοῦ ὄργανου, δρῶντος ὡς τοιούτου, ἀλλὰ μόνον αἱ ἐκτελεσθαὶ πράξεις, τοῦτέστιν ἐκεῖναι δι’ ὧν δηλοῦται βούλησις διοικητικοῦ ὄργανου, ἀποσκοποῦσα εἰς τὴν παραγωγὴν ἐνόμου ἀποτελέσματος ἐναντι τῶν διοικουμένων καὶ συνεπαγομένη τὴν ἀμεσον ἐκτέλεσιν αὐτῆς διὰ τῆς διοικητικῆς ὁδοῦ. 487/36, 32/38, 651/40, 1890/53, 1120/55. Τὸ κύριον στοιχεῖον τῆς ἐνόμου τῆς ἐκτελεστῆς πράξεως εἶναι ἡ ἀμεσον παραγωγὴ ἐνόμου ἀποτελέσματος, συνισταμένου εἰς τὴν δημιουργίαν, τροποποίησιν ἢ κατάλυσιν νομικῆς καταστάσεως, ἢτοι δικαιωμάτων καὶ ὑποχρεώσεων διοικητικοῦ χαρακτῆρος παρὰ τοῖς διοικουμένοις. 17/38, 400/48, 1828, 2040/50, 950/54”.

30 (“It is not every act emanating from an administrative organ, acting as such, that can be the subject of a recourse, but only the executory acts, that is those by means of which the will of an administrative organ is manifested, aiming at bringing about a legal consequence concerning the affected
 35 citizen and entailing its direct execution by administrative means. 487/36, 32/38, 651/40, 1890/53, 1120/55. The main element of the notion of an executory act is the direct production of a legal consequence, consisting of the creation, alteration or termination of a legal situation, namely of

rights and liabilities, of administrative nature, of the affected citizens. 17/38, 400/48, 1828, 2040/50, 950/54”).

At p.238 it is stated:-

“ββ’. Διοικητικά μέτρα έσωτερικής φύσεως.

Πάσαι αί πράξεις αί άποτελοῦσαι διοικητικά μέτρα έσωτερικής φύσεως στεροῦνται έκτελεστοῦ χαρακτήρος και άπαραδέκτως προσβάλλονται δι’ αίτήσεως άκυρώσεως: 742/29), 1461(57). Τοιαῦται είναι αί πράξεις αί αναγόμεναι εις την έσωτερικήν λειτουργίαν τῆς Διοικήσεως και οὔδεμίαν άμέσως επιφέρουσαι τροποποιήσιν εις τας ὑποχρεώσεις και τὰ δικαιώματα τῶν διοικουμένων. Οὔτω πράξις διατάσσουσα την άπλήν μετακίνησιν ὑπαλλήλου άνευ μεταβολῆς τῆς ὑπηρεσιακῆς αὐτοῦ καταστάσεως συνιστᾷ μέτρον έσωτερικής φύσεως και άπαραδέκτως προσβάλλεται δι’ αίτήσεως άκυρώσεως: 298(54)”.

(“bb. *Administrative measures of an internal nature.* All acts constituting administrature measures of an internal nature lack executory nature and are unacceptably attacked by an application for annulment: 742/29, 1461/57. As such are the acts falling within the internal functioning of the Administration and they do not cause any modification to the obligations and rights of the subject. So, an act ordering merely the movement of an employee without any change in his service status, constitutes a measure of internal nature and are unacceptably attacked by an application for annulment: 298/54”).

Two questions pose for determination:-

- (a) Is the sub judice decision an act or decision of an executory nature or merely an internal administrative measure of such a nature that is not executory and, therefore, cannot become the subject-matter of a recourse?
- (b) If it is an executory administrative act, was it taken by a competent organ?

From the early days of the establishment of the Public Service Commission under Article 125 of the Constitution the matter of “transfer” was judicially considered in *Nedjati v. The Republic*, 2 R.S.C.C. 78. At p. 82 Forsthoff, P., in delivering the judgment of the Supreme Constitutional Court said:-

5 “The Court is of the opinion, and this is not disputed, that any transfer of a public officer from one Ministry to another, or from one Department to another within the same Ministry, is a ‘transfer’ in the sense of paragraph 1 of Article 125.

10 the Court is of the opinion that any transfer of a public officer within the same Department amounts to a ‘transfer’ in the sense of paragraph 1 of Article 125 of the Constitution if, being of a permanent nature and not only a temporary arrangement -

- 15 (a) such transfer results in the performance of duties by such public officer not included in the duties laid down in the scheme of service relating to the substantive post which he is holding immediately prior to such transfer; or
- 15 (b) such transfer definitely necessitates a change of residence of such public officer.”

And at p. 83:-

20 “In the case of a transfer within one and the same Department not involving the consequences referred to in (a) or (b) above and, even if such consequences are involved, when such transfer is in the nature of a temporary arrangement, then in such a case the above-mentioned objects of paragraph 1 of Article 125 are not defeated but, on the

25 contrary, it is clearly in the public interests and dictated by reasons of practicability and physical possibility that such transfer should be effected by the Minister, Head of Department, or other responsible authority concerned.”

30 In *Yiorkas v. The Republic*, 5 R.S.C.C. 56, the applicant, a clerical assistant in the General Clerical Staff of the Public Service posted at the Ministry of Justice, was transferred by the Director of the Personnel Department - now Director of Public Administration and Personnel - to the District Office, Nicosia. The *Nedjati* case was followed. It was held that the Personnel

35 Department can be regarded as a “Department” of the officer concerned for the limited purposes of the notion of transfer “within one and the same Department”, when such officer is

not in fact actually performing his duties in the Personnel Department. On p.58 we read:-

“In view of the very nature of the interchangeable staff, which constitutes a pool from which public officers belonging to it are, on request, assigned by the Director to various Ministries and Departments according to the varying needs thereof, the Court is of the opinion that the Personnel Department must be regarded as a ‘Department’ at any rate for the limited purposes of the aforesaid notion of transfer ‘within one and the same Department’ ”.

In *Yiallourou v. The Republic*, (1976) 3 C.L.R. 214, the applicant was serving at the Foreign Press Service of the Public Information Office and was posted at the Central News Service by the Director of Public Information Office. Triantafyllides, P., held that though the change of posting of the applicant did conceivably come within the very wide notion of “transfer” of s.48 of the Civil Service Law, 1967, it was not of an executory nature, being an internal measure of Administration, in view of the fact that the applicant after her posting at the Central News Service had to perform duties specified in the relevant scheme of service and she had not to move to a building other than the one where she was working when she was posted at the Foreign Press Service as both the Foreign Press Service and the Central News Service were housed together in the main office building of the Public Information Office and this posting did not result to a change of residence of the applicant.

The applicant is a member of the Public Service of the Republic and though she was transferred to the Embassy in Athens, she is not a member of the Foreign Service of the Republic as defined in ss. 2 and 3 of Law 10/60. (See Laws 10/60, ss. 2 and 3, 35/66 and 19/80). This emerges clearly from her personal file. She is a Clerk, 2nd Grade, a member of the General Clerical Staff. Such members are “interchangeable” and unlike the officers belonging to other Departments, they usually actually do not perform their duties in the Personnel Department itself but in the Ministry or Department to which they happen to be posted for the time being. The applicant belongs to the Personnel Department of the Ministry of Finance. The fact that she was issued with a diplomatic passport and, as it was alleged, she is within the ambit of Article 1 of the Vienna Treaty for Di-

plomatic Relations ratified by Law of the Republic No. 40/68, does not change her position in the structure of the Civil Service of the Republic.

5 It is common ground that Athens and Piraeus are two adjoining cities - the capital and the second city of Greece, respectively. The "Maritime Office" is under the management of an official of the Ministry of Communications and Works but it is in substance and effect a Consulate answerable to the Embassy in Athens.

10 It was submitted by counsel for the respondents that this "Maritime Office" at Piraeus is an integral part of the Embassy. This description of the "Maritime Office" is well understandable. The services of consulates and maritime offices are under the Embassies.

15 The posting of the applicant to Piraeus is not, however, simply assignment of duties in the Embassy by the Head, the Ambassador. The Ambassador besides his other very high and responsible duties is the administrator of the Embassy. The personnel—diplomatic or clerical—has to obey his orders and
20 directions within his competence. The transfer of the applicant to the "Maritime Office" does not involve any change of her duties. As the Embassy is housed at Colonaki Quarter, in the centre of Athens, and the "Maritime Office" at Piraeus, the posting of the applicant at the "Maritime Office" may
25 or may not involve a change in the place of her residence. She has to travel to Omonia Square to get the train, travel for 34 minutes by train and then by other means reach the building of the "Maritime Office". In all it will take her more than an hour actual travelling.

30 The case of *Yiallourou*, which was invoked, is distinguished on the facts.

Having regard to the circumstances of this case I find that the transfer of the applicant from the Embassy in Athens to the "Maritime Office" at Piraeus is not an administrative measure—internum—but an executory administrative act.
35

Was the Ambassador vested with power to take the sub judice decision?

“Transfer” is now governed by s.48 of the Public Service Law, 1967 (Law No. 33/67), which embodied the judicial pronouncement in the *Nedjati* case. It reads as follows:—

“48.—(1) Subject to the provisions of sub section (2), transfers of officers shall be made by the Commission. 5

(2) Transfers of officers which do not involve a change in the offices held by them and the duties attached thereto or a change in the place of residence shall be made by the appropriate authority concerned:

Provided that in exceptional cases of urgent nature the appropriate authority concerned may make a temporary transfer involving a change in the place of residence for a period not exceeding forty-two days”. 10

“Appropriate authority”, as defined in s.2, means the President of the Republic usually acting through his Under-Secretary in respect of the Presidency, the Council of Ministers usually acting through its Secretariat, the President of the House of Representatives usually acting through the Director of the General Office of the House of Representatives in respect of that Office, a Minister usually acting through the Director-General of his Ministry in respect of his Ministry and any Department under his Ministry, or the Head of an Independent Office in respect of such Office. 15 20

Hadjianastassiou, J., in *Papadopoulos v. The Republic*, (1975) 3 C.L.R. 89, observed that the appropriate authority for effecting the transfer of the applicant from the post of Director of the District Lands Office of Nicosia to the post of Registration Officer, Central Offices, Lands & Surveys Department, a post which was interchangeable, according to the scheme of service, was the Minister acting through the Director-General of his Ministry and not the Public Service Commission or the Director of the Lands Department. 25 30

The transfer of the applicant to the “Maritime Office” at Piraeus is beyond the competence of the Ambassador. Such transfer does not involve any change of her duties and it may or may not involve a change in the place of her residence. The Minister acting through the Director-General of the Ministry would be appropriate authority to effect the transfer if no change 35

of residence would be necessary; also the Director of Public Administration and Personnel in the case of this applicant.

5 It was submitted by counsel for the respondents that the Public Service Law, 1967, is not applicable to civil servants serving abroad in whatever capacity. This submission, subject to the provisions of the Foreign Service Laws, 1960–1980, is untenable.

10 For all that I have endeavoured to explain, the transfer complained of, though made by the Ambassador in all good faith, has to be annulled because it was made by an organ that lacked competence.

The sub judice decision is annulled but in all the circumstances I make no order as to costs.

Sub judice decision annulled. No order as to costs.