1983 August 30

[TRIANTAFYLLIDES, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

EVRIPIDES GEORGHIOU,

Applicant.

v.

THE REPUBLIC OF CYPRUS, THROUGH THE PUBLIC SERVICE COMMISSION,

Respondent.

(*Cases Nos.* 333/79, 116/81).

Recourse for annulment—Abatement—Death of an applicant in a pending recourse—Consequences of—Where an existing legitimate interest vests in the heirs of applicant as their own then the recourse may be continued by the heirs, otherwise the recourse is abated—Recourse against promotion—Applicant's heir not entitled to part of the pension of the deceased, even assuming that the amount of such pension would be increased, as a result of a possibly successful outcome of the recourse—Not possessing a legitimate interest of his own entitling him to continue pursuing the recourses—Which are abated—Article 146.2 *of the Constitution.*

While these recourses, against the promotion of the interested parties to the post of Lands Officer, were pending applicant died. The Court, then, heard argument on the issue of whether or not the recourses were abated due to applicant's death.

Counsel for applicant submitted that the son of the applicant, who was born on the 20th September 1960, will be entitled, under section 10(5) of the Pensions (Amendment) Law, 1967 (Law 9/67) (as amended) to part of the pension of the applicant if he goes abroad to study; and went on to argue that the said son of the applicant, who, at all material times, was doing his military service and was trying to secure admission, after the completion of such service in July 1983, to a university in the

United States of America, is entitled to continue these recourses because if such recourses are successful and if the applicant is posthumously promoted retrospectively then the amount to be received by the son of the applicant as part of his pension will be higher than what it would be if these recourses are not successful.

Held, that in view of the requirement of interest under Article 146.2, it follows that the consequences of the death of an applicant in a pending recourse, should be as follows: Where in spite of the death there exists, in relation to the subject-matter of such recourse, an existing legitimate interest, vested in the heirs of applicant as their own, which has been directly and adversely affected, then the recourse may be continued by the heirs. If this is not so, then the recourse is abated; that on the basis of the particular circumstances of the present cases the son of the applicant would not be entitled on a proper construction and application of the relevant provisions of the pensions legislation to part of the pension of the deceased, even assuming that the amount of such pension would be increased as a result of a possibly successful outcome of these recourses; and that, therefore, the son of the applicant does not possess a legitimate interest of his own entitling him to continue pursuing the present recourses and they have, consequently, to be dismissed as abated.

Applications dismissed.

Cases referred to:

Chrysostomides v. *Greek Communal Chamber*, 1964 C.L.R. 397 at p. 402;

Kontoyiannis v. *Greek Communal Chamber* (1966) 3 C.L.R. 313 at pp. 315, 316.

Recourses.

Recourses against the decision of the respondent to promote the interested parties to the post of Land Officer in preference and instead of the applicant.

A. Xenophontos, for the applicant.

R. Gavrielides, Senior Counsel of the Republic with *G. Constantinou* (*Miss*), Counsel of the Republic, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment. By means of the present recourses the applicant applied for a declaration that the decision of the respondent Public Service Commission to promote, instead of him, the interested parties A. Kotsonis and A. Pantazis to the permanent post of Lands Officer as from the 15th May 1979 is null and void and of no effect whatsoever.

While these cases were pending the applicant died on 12th April 1982 leaving as his heirs a daughter and a son. His wife had predeceased him and his daughter, who was born on 8th July 1957, is above the age at which she could be entitled to part of the pension of the applicant.

When the Court was informed about the death of the applicant arguments were invited from counsel on the issue of whether or not the present recourses were abated due to his death.

Counsel for applicant has submitted that the son of the applicant, Georghios Georghiou, who was born on the 20th September 1960, will be entitled, under section 10(5) of the Pensions (Amendment) Law, 1967 (Law 9/67), as it has been amended by section 9 of the Pensions (Amendment) (No. 2) Law, 1981 (Law 39/81), to part of the pension of the applicant if he goes abroad to study.

Counsel for the applicant went on to argue that the said son of the applicant, who, at all material times, was doing his military service and was trying to secure admission, after the completion of such service in July 1983, to a university in the United States of America, is entitled to continue these recourses because if such recourses are successful and if the applicant is posthumously promoted retrospectively then the amount to be received by the son of the applicant as part of his pension will be higher than what it would be if these recourses are not successful.

It is useful to refer, first, to relevant case-law of this Court:

In *Chrysostomides* v. *The Greek Communal Chamber*, 1964 C.L.R. 397, the Court had this to say (at p. 402):

> "Though no express provision is to be found in Article 146 itself, under which this recourse has been made, yet, paragraph 2 of the said Article, may be usefully referred

to. It provides that '——a recourse may be made by a person whose any existing legitimate interest——is adversely and directly affected——' Thus expression is given to the basic condition precedent of the annulment jurisdiction of an administrative Court, viz., the existence of an interest of an applicant. A recourse for annulment is not an actio popularis; it requires in respect of the applicant a legitimatio ad causum. (Vide Fleiner ibid, p. 243).

In Greece, where an analogous provision such as Article 146.2 exists in the corresponding legislation (see section 48 of Law 3713/1928) the view is that the requisite interest of the applicant must subsist on the date of the hearing of a recourse as well (vide 'The Recourse for annulment before the Council of State', 2nd ed., p. 42 by Tsatsos). Such view is a reasonable consequence of the premise that a recourse for annulment is not an actio popularis. This being so, I am of the opinion that the same holds good in the case of Article 146.

In my opinion in view of the aforesaid requirement of interest under Article 146.2, it follows that the consequences of the death of an applicant in a pending recourse, such as this, should be as follows: Where in spite of the death there exists, in relation to the subject matter of such recourse, an existing legitimate interest, vested in the heirs of applicant as their own, which has been directly and adversely affected, then the recourse may be continued by the heirs. If this is not so, then the recourse is abated".

The case of *Chrysostomides*, supra, was followed and applied in the case of *Kontoyiannis* v. *The Greek Communal Chamber*, (1966) 3 C.L.R. 313, where the following were stated by the Court (at pp. 315, 316):

"The effect of the death of an Applicant in an administrative recourse has been discussed by this Court in *Chrysostomides and The Greek Communal Chamber*, (1964 C.L.R. 397).

Bearing in mind the principles expounded on that occasion, and applying them to the particular situation of the present Case, I have reached the conclusion that the heirs, or dependants, of Applicant do not possess

a legitimate interest of their own, so as to enable this recourse to proceed in their own name, or on their own behalf, after the death of Applicant, and I have, therefore, to hold that this recourse has been abated, due to the death of Applicant, and has to be dismissed accordingly.

I have reached this conclusion, bearing especially in mind that the heirs, or dependants, of Applicant are no longer entitled to the payment to them of his pension, after his death. Also, the gratuity due to Applicant has been paid to him in full and it has not been alleged that had applicant been employed for any further period this would have resulted in any increase in his gratuity or pension; and indeed from the relevant records in the personal file of Applicant, exhibit 32, it does appear that Applicant has in fact served for the period entitling him to maximum retirement benefits.

Counsel for Applicant has also submitted that if this recourse were to be decided in favour of Applicant, even after his death, then the heirs of Applicant would be entitled to the difference between his salary and his pension, for the material time. But this could only be a right to damages vesting in the estate as a result of the outcome of the recourse, and as I have already found in *Chrysostomides and The Greek Communal Chamber* (supra) such a right does not suffice to vest in the heirs a legitimate interest of their own, for the purpose of proceedings being continued in spite of the death of an Applicant".

In the light of the principles expounded in the above quoted case-law and of the particular circumstances of the present case, on the basis of which I have formed the view that the son of the applicant would not be entitled on a proper construction and application of the aforementioned and other relevant provisions of the pensions legislation to part of the pension of the deceased, even assuming that the amount of such pension would be increased as a result of a possibly successful outcome of these recourses, I have reached the conclusion that the son of the applicant does not possess a legitimate interest

of his own entitling him to continue pursuing the present recourses and they have, consequently, to be dismissed as abated.

I will not make any order as to their costs.

Recourses dismissed. No order as to costs.