1984 April 10

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

COSTAS MAKRIDES,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE COUNCIL OF MINISTERS,

Respondents.

(*Case No.* 509/83).

Judge—Disqualification—Bias—Annulment of appointment of interested party to post of Registration Officer because of the inadequacy of the inquiry into his qualifications—No findings questioning his veracity or credibility—Recourse against subsequent appointment of interested party to the same post assigned to same Judge for trial—Application by interested party that Judge should exclude himself from trying the case not based on grounds of bias, but because interested party would feel more at ease if another Judge dealt with the case—Question at issue in the second recourse a pure question of law—Trial Judge not choosing to try the case but assigned to him under the system in force—No justification for disqualifying himself from trying the case.

The applicant in this recourse challenged the validity of the decision of the Council of Ministers to appoint the interested party to the post of Registration Officer in the Sensus Department. At the directions stage Counsel for the interested party applied that the Judge should exclude or exempt himself from trying the case for the reason that he had earlier tried another recourse of the applicant directed against the decision of the Public Service Commission to appoint the interested party to the same post. In that case the Judge annulled the appointment because of the inadequacy of the inquiry into the qualifications of the interested party and the defective exercise of the discretionary powers of the Public Service Commission; and the findings

of the Judge rested on an objective view of the procedure followed. No findings were made questioning either the veracity or the credibility of the interested party or of anyone else. Counsel for the interested party stated that his application was not based on the existence of any grounds giving rise to bias; and that his submission was confined to a request on the part of his client that the Judge steps down for he would feel more at ease if another Judge dealt with the case. What was primarily at issue in this recourse was the competence of the Council of Ministers to take the sub judice decision, a pure question of law. The Judge did not choose to try the case; it was assigned to him for trial by the system of rotation in force at the Supreme Court, whereby cases are assigned to Judges in numerical order.

Held, that a Judge normally assigned for the trial of a case ought not to be excluded except in the face of grounds giving rise to bias and there was no submission of bias in this case; that after the assignment of the case to him, in the absence of grounds of law disqualifying him from sitting in the case, the Judge became the natural Judge in the cause; that there was no justification for disqualifying himself from trying the case; and that he was duty bound to try it and in exercise of this duty he will give directions for its hearing (pp. 310-311 post).

Directions accordingly.

Cases referred to:

Makrides v. Republic (1983) 3 C.L.R. 622;

Ex parte Church of Scientology of California, Law Times of 20.2.1978;

Economides and Another v. The Police (1983) 2 C.L.R. 301;

Razis and Another v. Republic (1983) 3 C.L.R. 309;

Theodorou v. Police (1971) 2 C.L.R. 245;

Vassiliades v. Vassiliades, XVIII C.L.R. 10 at p. 21;

Pieris v. Republic (1983) 3 C.L.R. 1054.

Application.

Application by the applicant for the exemption of the trial Judge from trying the recourse on the ground that he had already tried another recourse against his appointment by the Public

Service Commission to the post of Registration Officer in the Census Department.

C. Loizou, for the applicant.

N. Charalambous, Senior Counsel of the Republic, with *A. Vassiliades*, for the respondent.

K. Michaelides with *A. S. Angelides*, for the interested party.

Cur. adv. vult.

PIKIS J. read the following ruling. Costas Makrides, by his recourse, challenges the legality of the decision of the Council of Ministers taken on 13.10.83 to appoint Christodoulos Nicolaides to the post of Registration Officer in the Census Department. After exchange of pleadings, the case came up for Mention on 30.3.84 in order to give directions for the hearing. Counsel for the interested party made, at that stage, an oral application that I should exclude or exempt myself from trying the case, for the reason that I had earlier tried another recourse of the applicant directed against the decision of the Public Service Commission to appoint Christodoulos Nicolaides to the post of Registration Officer, apparently the same position to which he was later appointed by the Council of Ministers - See, *Makrides v. Republic* (1983) 3 C.L.R. 622. In that case, I annulled the appointment because of inadequacy of the enquiry into the qualifications of the interested party and, the defective exercise of the discretionary powers of the Public Service Commission. Counsel for Nicolaides suggested that certain findings I made in that recourse, might make it difficult for me to give the matter fresh consideration. Counsel acknowledged, in answer to a question of the Court, that the findings in question were not findings of credibility, either of the interested party, Makrides, or any witness. The findings were confined to the sufficiency of the enquiry into the eligibility of the interested party for appointment, in the light of the provisions of the scheme of service and, the exercise of the discretionary powers of the Public Service Commission on the material before them. My findings rested on an objective view of the procedure followed. Counsel informed the Court the appeal against my decision will be withdrawn because they take the view, as I was told, that the filling of the post in question was not within the competence of the Public Service Commission. If this is the position, they agree, it seems, with the outcome of

the first recourse, though seemingly for different reasons than those given in the judgment of the Court. In the previous proceedings, no question of competence of the Public Service Commission had been raised.

For my guidance, counsel for the interested party referred me to the outcome of an application of the "Church of Scientology" before the English Court of Appeal, resulting in a decision of Lord Denning, M.R., to exempt himself from sitting in the appeal (see, report in the Law Times on 20.2.78)*. The learned Judge expressed the view that if the litigant in the circumstances of that case would feel a little disturbed if he were to sit as a Member of the Court of Appeal, he thought it appropriate to excuse himself from participation in the case. Counsel for the applicants voiced the view that in previous litigation, Lord Denning, M.R., "had somehow taken the view that 'Scientology' was not a religion and that the 'Church' was not entitled to call itself a 'church'." Apparently, the applicants had been parties to litigation before the Master of the Rolls on eight or nine previous occasions. In the words of their counsel, his clients felt they should have a chance before some other division of the Court of Appeal. From the summary given in the Times, it is obvious none of the three Members of the Court of Appeal felt there existed grounds that justified in law the disqualification of Lord Denning. The decision of the learned Judge to step down reflected his personal reaction in the particular circumstances of that case.

Counsel for Makrides opposed the motion and invited the Court to deal with the case as every other case that comes before the Court. Nothing said in the first case, he submitted, raised any obstacles or barriers to the Court trying this case. Mr. Charalambous for the Republic, took a similar stand with Mr. Loizou and submitted there are no grounds whatever justifying my exclusion from the trial of the case. The principles on the subject of bias expounded in *Economides And Another v. The Police* (1983) 2 C.L.R. 301, rule out bias having regard to what was decided in *Makrides v. Republic* (1983) 3 C.L.R. 622. The adjudication in that case, he pointed out, was strictly confined to the enquiry then under consideration and based on the material

* *Ex parte Church of Scientology of California.*

produced before the Public Service Commission, in the first place and, the Court in the process of judicial review. On the other hand, the decision of A. Loizou J. in *Razis And Another v. Republic* (1983) 3 C.L.R. 309, clearly demonstrates there are no conceivable grounds disqualifying me from trying the present case. He added that if I elect to disqualify myself, it is entirely a matter of personal choice.

I took time to consider the application because of its importance and implications on the administration of justice. If my recollection is accurate, it is the first time I am faced with an application of the kind, although on a number of previous occasions I chose to disqualify myself from sitting in a case, because I judged it appropriate in the interests of justice. I felt no such inclination in this case having regard to the nature of the issues raised in the two proceedings and, the implications of my deliberations in the first action. Of course, that is no reason for not giving the matter the serious consideration it deserves. The question raised has, to my comprehension, two aspects. Firstly, the existence, if any, of grounds disclosing bias in law, that would automatically disqualify me, as a matter of law, from sitting in the case. Secondly, my personal reaction to the application, posing a strictly subjective question. In accordance with what was decided in *Economides*, supra, I am not incompetent from resolving the issue myself notwithstanding my personal involvement in the subject under consideration. The decision in *Economides And Another v. The Police* (1983) 2 C.L.R. 301, is definitive of what amounts to bias in law. The Court dismissed the submission that the test of bias is related to the reactions of the litigant. The reactions of a fair minded person acquainted with the facts of the case, is the yardstick to go by in determining whether a Judge should be disqualified from sitting in a case. That is a proper test of general application. However, we took pains to point out that in a sensitive area, such as that of bias, it is imprudent to lay down an unbending rule admitting of no exceptions.

In resolving questions of bias, the realities of Cyprus must not be overlooked - *Theodorou v. The Police* (1971) 2 C.L.R. 245, 258. The facts in *Economides*, supra, demonstrate that bias is a substantive question. A Judge normally assigned for the trial of a case ought not to be excluded except in the face of grounds

giving rise to bias. Therefore, the Court dismissed the submission that the Judge who gave the remand order was incapacitated from sitting in the case on account of the fact he had earlier issued similar remand orders. The nature of remand proceedings and the judicial deliberations envisaged by the law, did not objectively predispose a Judge in any way that would make it improper for him to take cognizance of a new application for the remand of the same suspect in custody. In *Vassiliades* v. *Vassiliades*, XVIII C.L.R. 10, 21, the Supreme Court drew attention to the fact that a Judge in Cyprus, because of the smallness of the place, often has, from time to time, the same parties as litigants before him. That, in itself, is not a reason for disqualifying oneself from assuming jurisdiction in the matter.

The decision in *Razis And Another* v. *Republic* (1983) 3 C.L.R. 309, is clear authority for the proposition that determination of a legal issue in the exercise of revisional jurisdiction, does not preclude the same Judge from entertaining the same or a similar legal question in a subsequent case. The learned trial Judge drew attention to the fact that "if a different view was taken, I feel there would be hardly any Judges available to try cases, as time and again the same legal issues come up for determination by the Courts". I find myself, with respect, in full agreement with the decision in *Razis* and share the view that the list of Judges available for the trial of a case would soon be exhausted if a different approach was adopted.

One of the issues raised in the present proceedings, is that of res judicata, a strictly legal question. If a matter is res judicata, as the principle is applied in administrative law, anyone Judge of the Court would be bound to apply the same principles and come to the same conclusion. (The principles relevant to res judicata were reviewed by the Full Bench of the Supreme Court in *Pieris* v. *Republic* (1983) 3 C.L.R. 1054).

Counsel for Nicolaides explicitly stated the application is not based on the existence of any grounds giving rise to bias. The submission is confined to a request on the part of his client that I step down for, he would feel more at ease if another Judge dealt with the case. "I must put down that if the submission was that a case of possible bias arises from my participation in this case, I would be bound to dismiss it as a matter of proper

application of the principles earlier referred to. No findings were made in the first case, questioning either the veracity or the credibility of Nicolaides or of anyone else for that matter. The judgment of the Court rested on an objective view of the sufficiency of the inquiry into the qualifications of the interested party and the defective exercise of the powers of the Public Service Commission in making their selection. And the case was decided by the application of the principles of administrative law in relation to the findings made with regard to the sufficiency and propriety of the inquiry. Administrative review is primarily intended to elicit and determine the legality of administrative action. As counsel for the Republic submitted, the deliberations of the Court in the first case could not conceivably give rise to bias. The issues in the two proceedings are different. What is primarily at issue in the present recourse, is the competence of the Council of Ministers to take the sub judice decision, a pure question of law. But I repeat in fairness to counsel for Nicolaides, they made it abundantly clear, no legal grounds exist disqualifying me from trying the case. There remains to decide whether I should, in view of the professed unease of Nicolaides to pursue the case before me, choose to disqualify myself in the way Lord Denning chose to excuse himself from sitting in the case of the "*Church of Scientology*".

If I felt any constraint in trying the case because of any predisposition on my part in any direction, arising from my having tried the first recourse, I would feel dutybound to step down in the interests of justice. But I feel no such predisposition. My judgment in the first action does not predispose me in any way.

I am not unmoved by the plea of a party that he would feel more comfortable to pursue his case before another Judge. If the matter ended at that, I would not hesitate to step down but that is not the whole story. To my mind, a question of principle of supreme importance is at stake: Should a Judge disqualify himself whenever a party feels that he would like to be tried by another Judge? Should I merely be swayed by my sensitivity in the matter? I think not. I have a duty to carry out. My duty is to try every case that comes before me in the ordinary span of work. I did not choose to try the case. It was assigned to me for trial by the system of rotation in force at the Supreme Court, whereby cases are assigned to Judges in

numerical order. After the assignment of the case to me in the absence of grounds in law disqualifying me from sitting in the case, I became the natural Judge in the cause, a term often used in continental law, to signify the Judge that is natural to try the case. The system practised at the Supreme Court with regard to the allocation of work, is designed to ensure an impersonal distribution of cases in the interests of the proper administration of justice. Consequently, any decision on my part to step down in that way, would upset the natural order of things in the administration of justice, a factor of no mean consequence. As I perceive my duty, in the absence of valid reasons disqualifying me from sitting in the case, to excuse myself would be an abdication of duty. An abdication of duty with visible dangers to the administration of justice. One such danger is that we would be coming close to acknowledging to a litigant a right to choose the Judge who will try him. I could neither condone such a practice nor shut off from my mind the repercussions from any such decision. It is not permissible to be merely guided by sentiment. The decision must turn on a proper appreciation of my duty. In exercising this duty, I cannot overlook there is a right of appeal from a decision of the Court in revisional jurisdiction and, that an appeal is by way of rehearing. In sum, there is no justification for disqualifying or excusing myself from trying the case. I am dutybound to try the case and in exercise of that duty, I shall give directions for its hearing.

Order accordingly.