

1984 February 15

[HADJIANASTASSIOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

LOUIZA CHR. KONTEMENIOTOU AND OTHERS,

Applicants.

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE EDUCATIONAL SERVICE COMMISSION,

Respondent.

(Cases Nos. 407/82, 409/82,
434/82, 451/82, 469/82 and
494/82).

*Administrative Law—Administrative acts or decisions—Reasoning—
Duc reasoning—Promotions in the educational service—Based,
inter alia, on the impression formed about the candidates in the
course of their personal interview which had been held two years
before the sub judice decision—Minutes of respondent Commission
containing evaluation for each of the interested parties but making
no reference to the applicants—And they do not explain why
applicants with higher grades, more qualifications and seniority
than the interested parties were not preferred—Judicial control
not possible in the absence of any reference in the reasoning
to the applicants—Sub judice promotions annulled.* 5 10

*Res judicata—Annulment of promotions in the educational service
—In reconsidering the matter respondent Commission has acted
in breach of the principle of res judicata because it has not taken
into consideration the findings of the Supreme Court on the ques-
tion of the personal interview of the candidates.* 15

*Educational Officers—Promotions—Candidate abroad for a post-
graduate course—His rights to promotion not affected.*

On the 17th May, 1982 the Supreme Court upon a recourse
by the applicants, annulled the promotion of the interested parties
to the post of Headmaster in the Elementary Education. The 20

main grounds* on which the said promotions were annulled was lack of reasoning and because the members of the Commission resorted to their own personal knowledge about the candidates for the purpose of reaching their decision. Following the annulment of the promotions the respondent Committee at its meeting of the 22nd June, 1982 reconsidered the question of the promotions and after taking into consideration inter alia, the merit, qualifications, seniority, the recommendations of the Head of Department and the impression formed in the course of the personal interviews decided to promote again the interested parties and hence this recourse. The interviews were held in January and November, 1980 i.e. more than two years before the taking of the new decision. At its above meeting of the 22nd June, 1982 the respondent Commission in its minutes cited its evaluation for each one of the interested parties individually but with regard to the applicants there was no note of the opinion of the Commission relating to their oral personal interview.

Held, (1) that the reasons for which the first decision was annulled were very substantial and the judicial pronouncement did not only rest on the absence of the requisite formalities; that, therefore, the addition of some reasons at some later stage, regarding the interested parties only, is not enough to reinstate the legality and the new decision suffers with the same illegality as the one which was declared null and void; that, in reality, it amounts to breach of the principle of *res judicata*, since it has not taken into consideration the findings of the Supreme Court on the matter of their personal interview, instead of being led by them; that the reasoning for the sub-judice decision is not the proper reasoning that is required by legislative provisions, because it does not disclose the reason behind the decision of the Committee; that, further, it does not explain why applicants with higher grades than the interested parties were disregarded or why others with higher seniority or additional qualifications were not preferred; that the absence of any reference in the reasoning to the applicants deprives the possibility of any judicial control; accordingly the sub-judice decision must be annulled.

* The grounds of annulment are quoted at pp. 63-64 post.

Held, further, that the defective reasoning covers also the case of applicant Theofilides for whom the committee has made a special reference; that the fact that Theofilides who, as the Committee admit, is superior in merits and qualifications, was for the time abroad, for a post-graduate course does not justify the decision of the Committee which is arbitrary and in breach of s. 35(2) of Law 10/69 as amended by Law 53/79, and which provides that the promotions of the educationalists are decided on the basis of their merits, qualifications and seniority. 5

Sub judice decision annulled. 10

Cases referred to:

Angelidou and Others v. Republic (1982) 3 C.L.R. 520;

Tornaris v. Republic (1983) 3 C.L.R. 1292;

Korai and Another v. C.B.C. (1973) 3 C.L.R. 546 at p. 555;

Kyriacou and Others v. Republic (1983) 3 C.L.R. 974 at pp. 986-987; 15

Nissiotou v. Republic (1983) 3 C.L.R. 974 at pp. 986-987.

Recourse.

Recourse against the decision of the respondent to promote the interested parties to the post of Headmaster, Elementary Education, in preference and instead of the applicants. 20

A.S. Angelides, for applicants in Cases Nos. 409/82, 451/82 and 494/82.

E. Odysseos with *A.S. Angelides*, for applicant in Case No. 407/82. 25

P. Angelides, for applicant in Case No. 434/82.

A. Papacharalambous, for applicant in Case No. 469/82.

R. Vrahimi (Mrs.), for respondents.

Cur. adv. vult.

HADJIANASTASSIOU J. read the following judgment. The first applicant, as well as the rest of the applicants, seek almost the same relief: (1) a declaration of the Court that the decision of the respondents which was published in the official Gazette of the Republic under notification 1971 dated 17th September, 1982, in accordance with which the interested persons were 30 35

promoted to the post of Headmaster as from the 1st January, 1981, instead of the applicant, is null and void and of no effect whatsoever; (2) a declaration of the Court that the omission of the respondent to promote the applicant to the post of Head-
 5 mistress ought not to have been made and the applicant ought to have been promoted to that post.

The present application is based on the following facts:--

- 10 (1) The applicant is a schoolmistress, and has been appointed on 1.9.1950 as Assistant Headmistress of the elementary education from 1.7.1972 till today.
- (2) The applicant claimed that she had all the necessary qualifications, merit, seniority and all the requirements for promotion to the post of Headmistress in preference and instead of the following interested parties:
 - 15 (a) Vasos Vassiliades (P. 1677)
 - (b) Kyriakos B. Tamboukaris (P. 1997)
 - (c) Andreas Protopapas (P. 2162)
 - (d) Har. Kasparis (P. 2195)
 - 20 (e) Minas Hadjicostas (P. 2622)
 - (f) Charalambos I. Mouzouris (P. 3110)
 - (g) Demitris Papadopoulos (P. 2743)
 - (h) Despo Kaim. Mbaka (P. 2674)
 - (i) Georghios Mouskos (P. 3236)
 - 25 (j) Georghios Sofianos (P. 3770)
- (3) The promotion of the interested parties to the post of Headmaster was published in the official Gazette of the Republic under No. 1802 dated 17.9.82 D.P. 1971.
- (4) The said interested parties have been promoted previously
 30 by a decision which was published in the official Gazette of the Republic dated 6.2.81 No. EE 1661 and D.P. 223. The promotion was valid as from 1.1.81.
- (5) The applicant applied to the Supreme Court in accordance with a recourse 148/82, and the said earlier promotion of

the interested persons was annulled by a decision of the Supreme Court dated 17.5.82.

- (6) The new promotion of the interested parties was made once again in spite of the decision of the Supreme Court, with retrospective effect as from 1.1.81. 5
- The present application was based on these legal points:
- (1) The sub-judice decision of the respondent was taken in contravention of the express provisions of the relevant law and the regulations made thereunder.
- (2) The sub-judice decision was taken or made in abuse of power because whereas applicant was strikingly superior to the interested parties as far as seniority, qualifications, capabilities and merit were concerned, she was not promoted and the interested parties were promoted instead. 10
- (3) The sub-judice decision was taken in contravention of the principles of good administration and/or the principles of administrative law because the respondent acted under a misconception regarding the actual merit, qualifications, capabilities and seniority of the applicant which were wrongly assessed or not assessed at all or not assessed adequately. 15 20
- (4) The sub-judice decision was taken unlawfully and unjustifiably because the respondent took into consideration factors and facts foreign to what is prescribed by the law and the regulations for the promotion of candidates and especially of applicant. 25
- (5) The sub-judice decision constitutes a manifest contravention of the rules of good administration in as much as it was given retrospective effect, from 1.1.81 when a previous decision of the respondent, with the subject matter was annulled by the Supreme Court in recourse No. 148/81, and such judgment has created a res-judicata estopping the respondent from taking the sub-judice decision based on the same, previous facts. 30

The legal points on which the applicant relies are more or less the same legal arguments and complaints as to why the rest of the applicants have not been promoted. 35

The first and main question which arises before the Court is whether there was a compliance by the administration with the judgment of the Court dated 12.5.82. The relevant extract of the said judgment reads as follows:-

5 “For the reason given in the said judgment (*Angelidou and
others v. The Republic*, (1982) 3 C.L.R. p. 520) and especially
in view of the passage in the minutes of the respondent
commission dated December 9, 1981 (exhibit 2 in the
10 present cases) regarding the manner in which members of
the commission resorted to their own personal knowledge
about the candidates before them, I have to annul all the
promotions which are challenged by the present recourse.”

The extract of the judgment delivered in *Angelidou* case
(supra) in which reference is made reads as follows:-

15 “It can be clearly derived from the contents as a whole of
the aforesaid minutes of December 9, 1981, that the personal
knowledge of members of the Commission about the
candidates was one of the criteria which were taken into
account in the course of the exercise of their discretionary
20 powers in connection with the sub judice decisions of the
Commission.

It appears to be a well established principle of administrative law which in other countries such as Greece has been eventually incorporated, too, into relevant legislation (see for example Article 101 of the Public Officers Code in Greece) that personal knowledge or information possessed by members of a collective organ, such as the Respondent Commission, about a candidate, constitutes material which can in the absence of any express statutory provision to the contrary, be lawfully taken into account for the purpose of reaching a decision about such candidate provided that if such knowledge or information is not taken into account in
25 order merely to strengthen the view formed on the basis of
other material before the said organ about the candidate
concerned, but as an independent element which is not in
accord with the said other material. It should be recorded
30 in detail so as to render feasible judicial control in this
connection.”

And at p. 529:

“In the light of all the foregoing I have, as already indicated reached the conclusion that the effect of the aforesaid minutes of December 9, 1981 on the outcome of all these recourses as regards all the promotions and acting promotions which are challenged by them is that their aforesaid contents vitiate completely in a decisive manner, the administrative process leading up to the said promotions and acting promotions, in the sense that personal knowledge of members of the commission was relied on in selecting the candidates to be promoted permanently or in an acting capacity in a mode incompatible with the aforesaid relevant principle of Administrative Law, and also in a way which is inconsistent with the proper functioning of a collective organ such as the respondent commission.”

The decision of the committee dated 22.6.82 which consists the compliance with the judgment of the Court and the sub-judice decision states amongst others the following:

“The committee re-examines the filling of the said posts under the legal status which was in existence on the 30.12.80 and on the basis of the elements which existed on that date as well as with the relevant enrolment of the Supreme Court which the Committee studied exhaustively.”

The Educational Service Committee after studying the personal files and confidential reports of all the candidates and having in mind (a) the provisions of the law and the schemes of service; (b) the recommendations of the Head of Department which were submitted on the 20.11.80 and (c) the impression formed by the Committee during the personal interview with the candidates, finds that on the basis of merit, qualifications and seniority, the recommendation of the Head of Department the service reports and the impression formed by the Committee in the course of the personal interviews, the following Assistant Headmasters are the most suitable for promotion for reasons which are stated for each one individually.

The original Greek text has as follows:-

“ Η Επιτροπή επανεξετάζει το θέμα της πληρώσεως των εν λόγω θέσεων υπό το νομικό καθεστώς που ίσχυε στις 30.12.1980 και με βάση τα στοιχεία που υπήρχαν κατά την ημερομηνία αυτή και ενόψει της σχετικής αποφάσεως του

Ανωτάτου Δικαστηρίου την οποία εμελέτησε διεξοδικά

5 Η Επιτροπή αφού εμελέτησε τους προσωπικούς και εμπι-
 στευτικούς φακέλλους όλων των υποψηφίων και έχοντας
 υπόψη (α) τις διατάξεις του Νόμου και των Σχεδίων Υπη-
 ρεσίας (β) τις συστάσεις του οικείου τμηματάρχη που είχαν
 υποβληθεί στις 20.11.1980 (σημ. 12) στο φάκελλο 365/68(2)
 (γ) την εντύπωση την οποίαν εσχημάτισε κατά τις προσω-
 πικές συνεντεύξεις με τους ενδιαφερομένους,

10 ευρίσκει ότι οι ακόλουθοι Βοηθοί Διευθυντές με βάση
 την αξία, τα προσόντα και την αρχαιότητα, τις συστάσεις
 του οικείου Τμηματάρχη, τις υπηρεσιακές εκθέσεις και την
 εντύπωση της Επιτροπής κατά τις συνεντεύξεις είναι οι
 καταλληλότεροι για προαγωγή για τους λόγους που ανα-
 φέρονται για τον καθένα ξεχωριστά”.

15 (“The Committee re-examines the subject of the filling of
 the said posts under the legal status in force on 30.12.80
 and on the basis of the particulars existing on that date
 and in view of the relative decision of the Supreme Court
 which it studied in detail

20 The committee after having studied the personal and
 confidential files of all the candidates and having in mind
 (a) the provisions of the law and the Schemes of Service
 (b) the recommendations of the Head of Department which
 had been submitted on 20.11.80 (note 12) in file 365/68(2)
 25 (c) the impression formed at the personal interviews of the
 candidates, finds that the following Assistant Headmasters
 on the basis of merit, qualifications and seniority, the re-
 commendations of the Head of Department the service
 reports and the impression formed at the interviews are the
 30 most suitable for promotion for the reasons stated for each
 one separately.”)

The names of the interested parties are mentioned below
 with the comments of the committee and the opinion derived
 from the personal interview held in January, 1980 and in No-
 35 vember, 1980, i.e. more than two years before the taking of the
 new decision.

Regarding the way by which these interviews were held and
 were evaluated by the Committee, we have the explanation which

the Committee itself gives in its minutes dated 9.5.81 which is attached on the address of Mr. E. Odysseos as exhibit C5.

The Committee states:

“As regards the matter of the impression which the members of the committee have formed during the interviews in respect of each one of the candidates, the committee confirms that such opinion or impression, which is formed not only during the interview but is also the product of the personal knowledge of each member from his long service in the public educational service as an educationalist (and this concerns the Chairman and 3 of the members) cannot be recorded in terms of numbers nor has it been recorded till now. The evaluation of this criterion is clearly subjective and is expressed by the vote of each member.”

It is reminded that the second decision of the Committee is based also on the same interview.

The opinion of the Court as regards this type of procedure has already been expressed by the President of the Supreme Court in the case of *Angelidou and others v. The Republic*, (1982) 3 C.L.R. p. 520 and has been adopted in the judgment dated 11.5.82 by which the first promotions were declared null and void.

From *Angelidou* case (supra) again I quote these observations made by Triantafyllides, P:-

“In my opinion, the performance of a candidate when he is being interviewed is an independent criterion which is not to be coloured by what is already known in advance about him by those interviewing him. Had it been otherwise it would have been to a large extent unnecessary to interview candidates about whom the majority of the members of the Commission possessed knowledge of their own due to past experiences of them.”

The reaction of the respondents after the aforementioned judgment was delivered appears in their new decision after the re-examination of the case. The respondents construed the decision of the Court and the meaning of their compliance of it as a case of simple lack of reasoning and therefore basing themselves on the same situation all they did was merely to give

a few reasons to justify their decision to re-promote the interested parties.

5 But the judgment of the Court by which the promotions were declared null and void has a deeper and more substantial meaning. It does not only deal with the lack of reasoning but also with the way by which the members of the committee formed their views and made their evaluation, which according to the judgment was done in breach of the law and the principles of Administrative Law. That is to say the reasons for which
10 the first decision was annulled were very substantial and the judicial pronouncement did not only rest on the absence of the requisite formalities. Therefore, the addition of some reasons at some later stage, regarding the interested parties only, is not enough to reinstate the legality and the new decision suffers
15 with the same illegality as the one which was declared null and void. And in reality, it amounts with breach of the principle of *res judicata*, since it has not taken into consideration the findings of the Supreme Court on the matter of their personal interview, instead of being led by them.

20 On this matter Pikis J. had this to say in his very recent judgment in *Tornaris v. The Republic*, (not yet reported)* “... If the respondents disputed this finding, the only course open to them was to challenge it by way of appeal. Certainly they had no power to disregard it on a re-evaluation of the self same material.
25 By so doing they acted in breach of their duties under Article 146.5. They deviated from the course of legality. As we stressed in *Pieris v. Republic*, (1983) 3 C.L.R. p. 1054 *res judicata* is an important doctrine of public policy that aims to inject certainty in the legal process and make fruitful the enjoyment of the rights of citizens.”
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The reasoning of the decision

The reasoning of the administrative acts has repeatedly brought before the Supreme Court which in a great number of cases has stressed the necessity of due reasoning as a precondition
35 of the judicial control.

In the case of *Elli Chr. Korai and Another v. The C.B.C.* (1973) 3 C.L.R. p. 546, this Court had the opportunity to note at page 555:

* Now reported in (1983) 3 C.L.R. 1292.

“The whole object of the rule requiring reasons to be given for administrative decisions is to enable the person concerned as well as this Court on review to ascertain in each case whether the decision is well founded in fact and in law. The reasons therefore must be stated clearly and unambiguously must be expressed in the sense in which reasonable persons affected thereby would understand them and must be stated in terms fulfilling the object of the rule.

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The mere fact of course that some doubt however little, so long as it is not merely fanciful is possible as to the meaning of the reason behind an administrative decision is sufficient to vitiate such decision”.

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And in the case of *Kyprianou and Others v. The Republic*, (1975) 3 C.L.R. p. 187, I had this to say:-

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“That clarity in the minutes of proceedings of an administrative organ is of an utmost importance it has been stated time after time and I need only repeat that lack of clarity of such minutes and records of proceedings may deprive the decision reached of due reasoning as claimed by counsel. Having gone into the decided cases it appears that mainly the requirement of keeping written records is primarily for purposes of good administration.”

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See also the judgment of Pikis, J. in case of *Nissiotou v. Republic*, (1983) 3 C.L.R. 974 at pp. 986 - 987.

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The Committee, on its second try, as appears in the minutes dated 22.6.82 after it referred to the elements which were taken into consideration, cited its evaluation for each one of the interested parties individually, and in addition for the candidates Kattirtjis and Theophilides, who had on their side the vote of the President of the Committee instead of the interested parties Mouskos and Sofianos.

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For the applicants there is not any note, neither of the opinion of the Committee during their oral personal interview.

This reasoning is not the proper reasoning that is required by legislative provisions, it does not disclose the reason behind the decision of the Committee. In fact, it does not explain why

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applicants, with higher grades than the interested parties were disregarded or why others with higher seniority or additional qualifications were not preferred.

5 And the absence of any reference to the applicants, under the circumstances, deprives the possibility of any judicial control.

The defective reasoning covers also the matter of applicant Theofilides for whom the committee has made a special reference. The fact that Theophilides who, as the Committee admit, is superior in merits and qualifications, was for the time abroad,
10 for a post-graduate course does not justify the decision of the Committee which is arbitrary and in breach of s.35(2) of Law 10/69 as amended by Law 53/79, and which provides that the promotions of the educationalists are decided on the basis of their merits, qualifications and seniority.

15 In the result, the decision is declared null and void. The respondents are adjudged to pay the costs.

Sub judice decision annulled. Respondents to pay costs of applicants.