

1986 June 28

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

ANDREAS PAVLIDES AND OTHERS.

Applicants.

v.

THE CYPRUS BROADCASTING CORPORATION.

Respondents.

(Cases Nos. 508/83, 543/84 and 595/84).

Law of necessity—Party seeking the assistance of the doctrine of necessity in order to support a law, otherwise unconstitutional, should satisfy the Court that the prerequisites for its application are satisfied—Constitution, Articles 122 and 125 and the Public Corporations (Regulation of Personnel Matters) Law 61/70—The contraventions of the Constitution by the said law justified by said doctrine. 5

Constitutional Law—Constitutionality of Laws—Principles governing the examination by the Courts of the constitutionality of laws. 10.

Scheme of Service—Nature of—Whether publication in the Official Gazette necessary—Constitution, Article 57.4.

Public Corporations—The Public Corporations (Regulation of Personnel Matters) Law 61/70, s.3—The Cyprus Broadcasting Corporation (Advisory Selection Committee) Regulations—Invalid because contrary to s. 3 they were neither approved by the Council of Ministers nor published in the Official Gazette—Sub judice promotions/appointments have to be annulled as taken under an invalid delegated legislation. 15
20

The applicant in recourse 508/83 seeks the annulment of the appointment/promotion dated 6.9.83 of the interested parties to the post of Program Officer "A" (T.V.) and

each of the applicants in recourse 543/84 and 595/84 seeks the annulment of the promotion/appointment of the interested party Andreas Doritis to the post of Program Officer "A" (TV) with effect from 17 84

5 The points of law common to the above recourses are

(a) The validity of the aforementioned regulations (b) The legal effect of the non approval of the relevant scheme of service by the Council of Ministers and of the non
10 publication in the Official Gazette, and (c) The constitutionality of the sub judice decisions which were effected by C.B.C and not by the Public Service Commission as provided by Articles 122 and 125 of the Constitution

Held, annulling the sub judice decisions (1) A law
15 which is contrary to the Constitution, cannot survive unless the party, who seeks the assistance of the doctrine of necessity satisfies the Court that the prerequisites for the application of the doctrine laid down by judicial pronouncements exist and that the measures taken were
20 necessary and they go no further than the necessity warrants

The Cyprus Broadcasting Corporation is a corporation within the ambit of Article 122 of the Constitution. However, having regard to the non existence of the
25 Public Service Commission envisaged by the Constitution and the reason for it, the need for CBC to function and the situation prevailing in the country including concentration of the Turkish Cypriot population in the occupied area the application of the doctrine of necessity
30 was necessary to fill the gap by setting up substitute mechanism for the running of essential institutions. The contraventions of the Constitution by Law 61/70 are justified by the law of necessity

(2) A scheme of service is a piece of delegated legislation, but when a decision for its approval is taken
35 by the Council of Ministers, the Council may decide that it should not be published and this is consonant with Article 57.4 of the Constitution

(3) The aforesaid Regulations are invalid, because they were not approved by the Council of Ministers and they were not published in the Official Gazette. This was contrary to the provisions of s.3 of Law 61/70. As, therefore, the sub judice decisions were based and/or taken on the basis of invalid delegated legislation, they have to be annulled. 5

Sub judice decision annulled.
No order as to costs.

Cases referred to: 10

- Attorney-General v. Ibrahim*, 1964 C.L.R. 195;
Chimonides v. Manglis (1967) 1 C.L.R. 125;
Messaritou v. C.B.C. (1972) 3 C.L.R. 100;
Theodorides v. Ploussiou (1976) 3 C.L.R. 419;
Ambrosia Oils and Margarine Industry Ltd. and Others v. Bank of Cyprus Ltd. (1983) 1 C.L.R. 55; 15
Kofteros v. E.A.C. (1985) 1 C.L.R. 394;
HjiGeorghiou v. The Cyprus Tourism Organization (1986) 3 C.L.R. 1110;
Iossif v. CY.T.A. (1970) 3 C.L.R. 225; 20
HjiGeorghiou v. The Republic (1966) 3 C.L.R. 504;
PapaPantelis v. The Republic (1966) 3 C.L.R. 515;
Police v. Hondrou and Another 3 R.S.C.C. 82;
PA.SY.DY. v. The Republic (1978) 3 C.L.R. 27;
Economides v. The Republic (1973) 3 C.L.R. 410; 25
Phani v. C.B.C. (1985) 3 C.L.R. 775;
Arsalides and Another v. CY.T.A. (1983) 3 C.L.R. 510;
Christodoulou v. The Republic, 1 R.S.C.C.1;
Spyrou and Others v. The Republic (1973) 3 C.L.R. 627;

Papaxenophontos v. The Republic (1982) 3 C.L.R. 1037;

Lefkatis v. The Republic (1985) 3 C.L.R. 1372.

Recourses.

5 Recourses against the decision of the respondents to promote the interested parties to the post of Program Officer "A" (T.V.) in preference and instead of the applicants.

N. Panayiotou, for the applicants in Cases Nos. 508/83 and 543/84.

10 *A. S. Angelides*, for applicant in Case No. 595/84.

P. Polyviou, for the respondents.

Cur. adv. vult.

15 STYLIANIDES J. read the following judgment. These three recourses were filed by two members of the staff of the Cyprus Broadcasting Corporation. They challenge the validity of decisions for promotion of other employees of the Corporation.

20 The applicant in Recourse No. 508/83 impugned the validity of the promotion/appointment to the post of Program Officer "A" (T.V.) of Michalak's Tofarides, Popi Daniel, Chryso Constantinidou, Georghios Komitis, Pavlos Pavlou and Andreas Constantinides dated 6.9.83. Interested party Georghios Komitis in the meantime passed away and the recourse against the validity of his promotion was withdrawn and dismissed.

25 The applicant in Recourses Nos. 543/84 and 595/84 seeks the annulment of the promotion/appointment of Andreas Doritis to the post of Program Officer "A" (T.V.) with effect from 1.7.84.

30 In the course of the hearing of these recourses it emerged that common points of law were raised, the determination of which disposed of the three recourses. They are:-

"1. The Cyprus Broadcasting Corporation (Advi-

sory Selection Committee) Regulations—their validity and their legal impact on the sub judice promotions:

2. Legal effect of the non-approval of the scheme of service by the Council of Ministers and the non-publication in the Official Gazette; and, 5

3. Constitutionality of the sub judice promotions as they were effected by the Board of the Corporation instead of the Public Service Commission contrary to Articles 122 and 125 of the Constitution.”

On the directions of the Court written addresses were filed by counsel of the applicants and the respondent Corporation on the aforesaid issues. 10

It was submitted by counsel for the applicants that under Articles 122 and 125 of the Constitution the promotion, inter alia, of servants of the Cyprus Broadcasting Corporation is within the exclusive competence of the Public Service Commission provided by the Constitution; that the Public Corporation (Regulation of Personnel Matters) Law, 1970 (Law No. 61 of 1970), though it was justified by the law of necessity under the circumstances prevailing at the time of its enactment, now as the prerequisites set out by the Supreme Court in *The Attorney-General v. Mustafa Ibrahim*, 1964 C.L.R. 195, do not exist and the said Law is repugnant to the Constitution, the sub judice promotions are invalid as made by an incompetent organ under an unconstitutional Law. 15 20 25

Counsel for the Corporation, on the other hand, submitted that the said prerequisites were amply satisfied both in the genesis of Law 61/70 and in its continuation in force at the present time. 30

A Law, which is contrary to the Constitution, cannot survive unless the party who supports its constitutionality satisfies the Court that the prerequisites laid down by judicial pronouncements exist and that the measures taken were necessary and they go no further than the necessity warrants—(*Attorney-General v. Mustafa Ibrahim* (supra); *Chimonides v. Manglis*, (1967) 1 C.L.R. 125; *Messaritou v. C.B.C.*, (1972) 3 C.L.R. 100; *Theodorides v. Ploussiou*, 35

(1976) 3 C.L.R. 419; *Ambrosia Oils & Margarine Industry Ltd, and Others v. Bank of Cyprus Ltd.*, (1983) 1 C.L.R. 55; *Kofteros v. Electricity Authority of Cyprus*, (1985) 1 C.L.R. 394; *Krinos I. Hji-Georghiou v. The Cyprus Tourism Organisation*, Recourse No. 217/83. unreported)*.

In *Hji-Georghiou* case I had the opportunity to deal with the constitutionality of the Cyprus Tourism Organisation Law, 1969 (Law No. 54 of 1969) whereby the Cyprus Tourism Organisation was established and empowered to appoint its servants. The Cyprus Tourism Organisation (K.O.T.) is a corporation within the ambit of the definition of Article 122 of the Constitution. What I said in that case applies with full force to the issue raised in the present case. I have to repeat myself.

The constitutionality of a law should not be examined in abstracto. The constitutionality of a law in a recourse challenging the validity of an administrative act has to be examined in order to decide the validity of such act or decision. An objection of unconstitutionality is considered only in relation to the issue of the validity of the subject-matter of the recourse and is decided solely for the purposes of the particular case—(Βλάχου—Η Έρευνα της Συνταγματικότητας των Νόμων, (1954) σελ. 106: Σγουρίτσας—Συνταγματικόν Δίκαιον, 3rd Edition, (1965). Volume “A”, p. 66).

It is upon the party who seeks the assistance of the doctrine of necessity to satisfy the Court that the prerequisites laid down by judicial pronouncements exist and that the measures taken were necessary and they go no further than the necessity warrants.

In relation to appointments and promotions in a number of cases the application of the law of necessity was judicially considered. In *Iosiff v. C.Y.T.A.*, (1970) 3 C.L.R. 225, it was held that the making of two promotions on a permanent basis and not only on a temporary basis was not justifiable by virtue of the law of necessity. In *Hji-Georghiou v. The Republic*, (1966) 3 C.L.R. 504. and

* Reported in (1986) 3 C.L.R. 1110

Papapantelis v. The Republic, (1966) 3 C.L.R. 515, the particular administrative action taken concerning public officers was said not to be justifiable, in the specific circumstances of the case on the strength of the law of necessity.

5

In the present case having regard to the non-existence of the Public Service Commission envisaged by the Constitution for so many years and the reasons for it, the need for C.B.C. to function, the situation prevailing in the country, including the concentration of the Turkish population of the country in the occupied area in the north, beyond the reach of the organs of the Republic, I am satisfied that the application of the doctrine of necessity in this case was necessary to fill the gap by setting up a substitute mechanism for the running of essential institutions.

10

15

I am satisfied that the contraventions of the Constitution by Law 61/70 are justified by the Law of necessity and, therefore, this Law continues to survive, and any act or decision taken under it, unless otherwise invalid, is unimpeachable.

20

The scheme of service is a piece of delegated legislation—(*Police v. Hondrou and Another*, 3 R.S.C.C. 82; *Pangyprios Syntechnia Dimossion Ypallilon v. Republic*. (1978) 3 C.L.R. 27). Though its publication in the Official Gazette for general information is advisable, nevertheless, when a decision for its approval is taken by the Council of Ministers, the Council may decide that it should not be published and this is consonant to the provisions of Article 57.4—(*Economides v. Republic*, (1973) 3 C.L.R. 410; *Krinos Hji-Georghiou v. The Cyprus Tourism Organisation* (supra)). The schemes of service in these cases, however, do not suffer because of non-publication but for the reason that will be explained later on in this judgment.

25

30

I turn now to the validity and the legal impact on the sub judice promotions of the Cyprus Broadcasting Corporation (Advisory Selection Committee) Regulations.

35

Another Judge of this Court issued judgment in the re-course *Anastassios Phani v. C.B.C.*, (1985) 3 C.L.R. 775,

whereby the promotion of the interested party in that case was annulled as the Advisory Selection Committee and the Regulations which established it and provided for its powers and procedure were invalid on the ground that they
5 were not approved by the Council of Ministers and not published in the Official Gazette. This was contrary to the provisions of s. 3 of the Public Corporations (Regulation of Personnel Matters) Law, 1970 (Law No. 61 of 1970),
10 which conferred on the respondent Corporation the power of appointment, promotion, transfer, etc., of its personnel.

The same issue with regard to other public corporations—CY.T.A. and E.A.C.—was determined by this Court in *Arsalides and Another v. CY.T.A.*, (1983) 3 C.L.R. 510, and in *Kofteros v. Cyprus Electricity Authority* (supra).

15 The respondent Corporation, however, appealed to the Full Bench against the decision in *Phani* case by Revisional Appeal No. 477. All counsel applied that the present cases be adjourned after the determination of this revisional appeal. The revisional appeal was on 10.3.86, in view of
20 observations made by the Members of the Bench, withdrawn by the appellant.

Counsel for the respondent Corporation yesterday made the following statement:-

25 "*Mr. Polyviou:* Your Honour, last time the cases were adjourned in view of the pendency before the Full Bench of the Supreme Court of Revisional Appeal No. 477 which pertained to the issues which figure prominently in the above three recourses. In
30 view of certain remarks from the Bench the respondent Corporation withdrew the appeal.

Having further considered the whole position, the respondent Corporation would like to submit to a declaration of annulment in all the three recourses before you. It should be stressed, Your Honour, that
35 the sub judice decisions in all three cases were reached before the recent judgments from the Supreme Court invalidating the Regulations of the Advisory Selection Committee.

For this reason. Your Honour, we take the position that there should be no order as to costs in these three recourses”.

The Regulations for the Advisory Selection Committee, its establishment and the power exercised by it and the limitations imposed by the said Regulations on the discretion of the Board in promotions are substantial. These Regulations should have been issued under the provisions of s. 3 of Law No. 61/70. Admittedly they have not received the approval of the Council of Ministers, as they were not placed before it, and they were not published in the Official Gazette of the Republic. They are invalid. 5 10

As the sub judge decisions were based and/or taken on the basis of invalid delegated legislation, they have to be annulled and be declared null and void and of no effect—(*Christodoulou v. Republic*, 1 R.S.C.C. 1; *Spyrou and Others v. Republic*, (1973) 3 C.L.R. 627; *Papaxenophontos v. Republic*, (1982) 3 C.L.R. 1037; *Arsalides* case (supra); *Kofteros* case (supra); *Lefkatis v. Republic*, (1985) 3 C.L.R. 1372). 15 20

In view of the aforesaid the sub judge decisions are hereby declared null and void and of no effect. No order as to costs.

Sub judge decisions annulled.
No order as to costs. 25