1986 October 15

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

LOIZOS PRODROMOU,

Applicant.

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 451/84).

Public Officers—Appointments—First entry and promotion post—Departmental Boards—The Public Service Law 33/67, s. 36—No need of specific appointment of Board by Council of Ministers—Sufficient if Board set up strictly in compliance with regulations (contained in circulars) approved by the Council of Ministers—Functions of said Boards, nature of.

Natural Justice—No man can be a Judge in his own cause—Rules of natural justice not applicable to purely administrative matters—Public officers—Appointments—Examinations—Functions of examiner—Nature of.

Public Officers—Appointments—First entry and promotion post—Examinations—Power to hold—Questions to be put and answers required within absolute discretion of administration—Judicial control of such discretion— Principles applicable.

Executory act—Preparatory act—Public Officers—Appointments—Examinations—Constitute a preparatory step towards the final act of selection.

The applicant was one of the candidates, who were considered by the Departmental Board set up for the pur-

pose, as eligible for appointment to the post of Commercial Officer in the Ministry of Commerce and Industry, a first entry and promotion post, but as he failed to obtain 50 or more marks in the relevant written examinations, the said Board did not call him for a personal interview and, consequently, he was not amongst those recommended by the Board to the respondent Commission for appointment.

As a result of a complaint lodged by the applicant with the Commission the latter referred his examination papers for re-examination by the same examiner. As the latter informed the Commission that he could not improve the markings, the Commission decided that the request of the applicant "could not be accepted".

The Commission further decided to call for an interview "those candidates whom the Departmental Board has recommended and whom the Commission considered as qualified".

By letter dated 14.8.84 the Commission informed applicant's advocate that as his client failed to obtain at least 50 marks "the Departmental Board did not include him among the candidates it recommended for selection to the Public Service Commission". As against this letter the applicant filed the present recourse.

Held, dismissing the recourse: (1) The arguments that the circular/regulations in accordance with which the Departmental Board had been set up violates section 36 of Law 33/67 and that the said Board was not set up by the Council of Ministers as required by the said section are without substance. The circular contains regulations approved by the Council of Ministers. There is, moreover, no merit in an argument that there ought to be a specific appointment by the Council of Ministers because provided the Board was set up in strict compliance with regulations made by the Council of Ministers it is deemed to have been established by them in accordance with the Law.

(2) There is nothing before the Court to support the argument that the Commission did not consider the recommendations of the Departmental Board as merely

advisory, but as binding on the Commission. On the contrary the Commission reached the decision after itself considering all relevant facts. There is nothing in the law precluding pre-selection by a Departmental Board in order to facilitate the task of the Commission in which the final decision rests in any event.

(3) The argument that the re-examination of the applicants' examination papers violated the rule of Natural Justice that "no man can be a Judge in his own cause" cannot be accepted because the rules of Natural Justice are not applicable to purely administrative matters. The functions of the examiner were neither judicial nor quasi judicial, but purely administrative in nature.

(4) There is no merit in the argument that the manner of making of the examination papers was erroneous in that the examiner based his markings on model answers and the applicant had not been notified of the type of answers required on him. The questions to be set and the answers required are matters within the absolute discretion of the administration and such discretion, if exercised bona fide, is not subject to judicial control. Generally the holding of an examination is a course open to the Commission as auxiliary measure towards achieving the aim of proper evaluation of the candidates.

(5) In any event the examination in question is not subject to judicial review, because it merely constitutes a preparatory step towards the final decision of selection.

Recourse dismissed.
No order as to costs.

Cases referred to:

Christoudias v. *The Republic* (1984) 3 C.L.R. 657;

Michael and Another v. *Public Service Commission* (1982) 3 C.L.R. 726;

Thalassinos v. *The Republic* (1973) 3 C.L.R. 386;

Kyriakides (No. 1) v. *The Council for Registration of Architects and Civil Engineers* (1965) 3 C.L.R. 151;

Mytidou v. *CY.T.A.* (1982) 3 C.L.R. 555;

Maratheftou and Others v. *The Republic* (1982) 3 C.L.R. 1088;

Georghiades v. *The Republic* (1970) 3 C.L.R. 257;

Bargilly v. *The Republic* (1970) 3 C.L.R. 33;

Ioannidou v. *The Republic* (1965) 3 C.L.R. 664;

Decision 2115/65 of Greek Council of State.

Recourse.

Recourse against the decision of the respondent not to call applicant for an interview as a candidate for the filling of the post of Commercial Officer in the Ministry of Commerce and Industry.

A. S. Angelides, for the applicant.

A. Papasavvas, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

A. Loizou J. read the following judgment. By the present recourse the applicant seeks a declaration of the Court that the decision of the respondent not to call the applicant for an interview as a candidate for the filling of the post of Commercial Officer in the Ministry of Commerce and Industry is null and void and of no legal effect whatsoever.

In October, 1982, the applicant applied with 153 others for the post of Commercial Officer which is a first entry and promotion post.

A Departmental Board was set up for this purpose which examined the applications and considered that only 134 out of the 154 applicants were eligible as possessing the qualifications required by the scheme of service. These 134 candidates were called to sit for written examinations but only 72, including the applicant, sat for the examinations, on the basis of the results of which 26 candidates (who had obtained at least 50 marks) were called to an in-

terview on the 22nd September 1983. The applicant was not called to an interview as he failed to obtain at least 50 marks. (See Appendix 13.)

At the said interview only 24 candidates came, 16 out of whom were selected to be recommended for promotion to the post in question.

The Departmental Board submitted its relevant report to the respondent Commission on the 12th October 1983, which was considered at the respondent's meeting of the 28th January 1984.

Meanwhile on the 31st October, 1983, the applicant was informed—in reply to his letter dated 17th August 1983—that he failed to obtain at least 50 marks in the written examinations and had therefore been precluded from attending the personal interview, in view of which he wrote on the 21st November 1983, requesting copies of his examination papers but was informed on the 30th December 1983, that as a matter of principle, it was not possible.

On the 20th February 1984, the applicant's lawyer wrote to the respondent Commission complaining about the matter (Appendix 19.)

The repondent Commission on the 30th March, 1984 referred his examination papers (Appendix 23) to the same examiner to be re-examined, who so re-examined them on the 18th April 1984 informed the respondent Commission that he could not improve on the markings he had given the applicant.

On the 26th April 1984, the respondent Commission (Appendix 25) considered the request of the applicant and decided that in the circumstances it "could not be accepted." Therefore it decided to call for an interview "those candidates whom the Departmental Board has recommended and whom the Public Service Commission itelf also considered (έκρινε) as qualified".

Subsequently, on the 14th August 1984, the respondent Commission in reply to his letters informed the applicant's

advocate that since his client failed to obtain a total of at least 50 marks, "the Departmental Board did not call him for an interview and thereafter did not include him among the candidates it recommended for selection to the Public Service Commission".

As against this letter the applicant filed the present recourse.

It has been submitted on behalf of the applicant that the present case is a case of a composite administrative act and therefore if the decision of the respondent at the preparatory stage not to call the applicant for an interview was wrong, then the whole decision was defective.

It is submitted that the Departmental Board in the present case which was set up in accordance with circular (Appendix 30), was not set up by the Council of Ministers as is required by section 36 of the Public Service Law, (Law No. 33 of 1967) and also that the said circular/regulations was not in accordance with the provisions of the aforesaid section 36.

Such argument is without substance because the aforesaid circular contains regulations approved by the Council of Ministers with effect from 1st June 1979, and was circulated to the various Government departments by letter of the Director of the Department of Personnel No. 490, dated 20th March, 1979. These regulations were subsequently amended by the Council of Ministers as per circulars Nos. 663 and 670, dated 3rd March, 1983 and 13th May, 1983 respectively.

Consequently the setting up of the Departmental Board in question was quite in order and in accordance with the provisions of section 36 of Law No. 33 of 1967. Moreover, I would consider that there can be no merit in an argument that there ought to have been a specific appointment by the Council of Ministers because provided the Departmental Board was set up in strict compliance with the regulations issued by the Council of Ministers, it is deemed to have been established by the Council of Ministers in accordance with the Law. It is obvious from the provisions of the regulations that the intention of the Council of

Ministers was not that particular individuals are to be appointed but that persons in particular posts are to constitute the Departmental Board. This argument of the applicant must therefore fail.

It was further contended on behalf of the applicant that the respondent Commission instead of treating the recommendations of the Departmental Board as merely advisory, considered them as binding and thus limited its consideration of the applicants only among those recommended, acting therefore in breach of the law.

There is nothing before me in the relevant minutes of the proceedings which support the view that the respondent Commission merely adopted the recommendations and views of the Departmental Board. To the contrary from their perusal it transpires that the respondent Commission reached its decision after itself considering all relevant facts before it. In any case there is nothing in the provisions of the law which precludes the possibility of a preselection being made by a Departmental Board in order to facilitate the task of the Public Service Commission in which the final decision rests in any event.

Relevant on this point is also what was said in the case of *Christoudias* v. *The Republic* (1984) 3 C.L.R. p. 657 at p. 662 by refereene to the case of *Michael and Another* v. *The Public Service Commission* (1982) 3 C.L.R. 726, 740-741 and at p. 663 by reference to the case of *Thalassinos* v. *The Republic* (1973) 3 C.L.R. 386, regarding section 36, which approach was also adopted by Pikis J. The relevant passage reads:

> ".... s. 36 gives statutory effect to a perfectly acceptable practice followed in other countries, such as Greece, as a proper expedient for the exercise of the power to appoint. Thus, as a matter of statutory law and proper administrative practice, neither the establishment of an advisory committee nor solicitation of its views on the suitability of candidates entails abdication of the substantive competence vested in the appointing body or divestiture of its powers (see, Conclusions from the Jurisprudence of Greek Council of State 1929-59, pp. 193-194)."

And as Pikis J., says further down in his judgment:

> "Under section 36 the recommendations of the Departmental Board are not binding on the Public Service Commission.... On the other hand they could accept them after proper review of the material before them."

The third submission of the applicant is that the examination papers of the applicant were wrongly sent to be re-examined by the same examiner who marked the papers the first time, this being in breach of the rules of natural justice, in particular that "no man can be a Judge in his own cause" ("Nemo judex in causa sua") as his reviewed decision will necessarily lack impartiality.

The general principle is that no man can be a Judge in his own cause, that is, a Judge acting in his judicial capacity or a body acting in a quasi-judicial capacity must act fairly impartially and without bias. It has been held by the Courts, however, that the rules of natural justice do not apply to functions which are purely administrative. See *Christodoulos Kyriakides (No. 1)* v. *The Council for Registration of Architects and Civil Engineers* (1965) 3 C.L.R. 151 at pp. 158-160. It was stated therein at p. 159:

> "The true nature of the Council must be borne in mind. It is a body set up to ensure, under sections 7 and 9, that persons practising a certain profession are properly qualified to do so. Its functions are not judicial or quasi-judicial; they are administrative.
>
> There can, therefore, be no question of the Council being deemed to have any dispute—to be in cause —with an applicant for a licence to practise, under Law 41/62, so that it could be alleged that the Council or its members act as judges in their own cause; therefore, the rule of natural justice relied on could

not be said to be either involved or to have been infringed."

In the case of *Mytidou* v. *CY.T.A.* (1982) 3 C.L.R. 555, though ample authority appears that where the administrative process requires action on the part of two separate organs, they must generally be distinctly different in composition, however, it goes on to state at p. 590:

> "In the Greek Administrative Law though the principle that a person cannot be a judge in his own case is well founded there are exceptions either provided by law (Cases 1051/61, 1052/61, 1211/65, 677/66, 2675/68) or by the regulation concerning the constitution of the collective organ. Furthermore, there are decisions of the Greek Council of State where the participation of the person who took the first instance decision in the collective organ which dealt with the validity of such decision, was found as not violating the above principle."

In case No. 2115/1965 of the Greek Council of State it was decided that no obligation is imposed by the general principles of administrative law on collective organs to review their decisions under a different composition from that under which they issue their decision under review.

I would consider in the present case that the functions of the examiner were neither judicial nor quasi-judicial and in the circumstances the rules of natural justice have not been infringed.

The final argument of the applicant is that the manner of marking the papers was erroneous in that the examiner based his markings on model answers which had in advance been prepared by him without the applicant having been given prior notice of what type of answers were expected of him.

I find no merit in such an argument. In the first place the manner of holding the examinations, the questions to be set and the answers required are matters within the absolute discretion of the respondent and such discretion as long as exercised bona fide—and in the present case there is no evidence that it was not so—is not subject to review. See *Marathefiou and Others* v. *Republic* (1982) 3 C.L.R. 1088 at pp. 1093-1094. And to suggest an obligation by the examining body to give prior notice of the type of answers required is, I would say a most unusual way of conducting examinations.

Generally the holding of examinations is a course properly open to the respondent Commission and is an auxiliary measure towards achieving the aim of proper evaluation of the candidates concerned (see *Georghiades* v. *Republic* (1970) 3 C.L.R. 257 at p. 264) in the discharge of its duty to select the best candidates (see *Bargilly* v. *Republic* (1970) 3 C.L.R. 33 at p. 35.)

Before concluding I should stress that I consider that in any event, the examinations in question and consequently the manner of their being conducted is a matter which is not subject to judicial review being in my opinion "only a preparatory step towards the final decision of the filling of the post concerned". See *Eleni Ioannidou* v. *Republic* (1965) 3 C.L.R. 664 where in particular at p. 669 the following was stated.

> "I have reached the conclusion that, in the circumstances of this Case, the examination in question was a preparatory step, and not a final executory act, and therefore, this recourse cannot proceed against such examination, the applicant having not challenged the eventual appointment to the post concerned; had she done so, then, in examining the validity of such appointment, any question arising in relation to the said examination and affecting the validity of the appointment could have been properly gone into."

In the circumstances I find that the decision of the respondent Commission to exclude the applicant from the

further process before it, in view of the results of his written examination was, reasonably open and within the powers conferred upon it by the law.

For the reasons stated above this recourse fails and is hereby dismissed with no order as to costs. 5

Recourse dismissed.
No order as to costs.