

1986 March 12

[TRIANTAFYLIDIS, P.]

IN THE MATTER OF ARTICLE 146 OF THE  
CONSTITUTION

SOTERIOS ARISTIDES,

*Applicant,*

v.

THE REPUBLIC OF CYPRUS THROUGH  
THE EDUCATIONAL SERVICE COMMISSION,

*Respondent.*

(Case No. 813/85).

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*Educational Officers—Transfers—The Public Educational Service Law—Section 5—Sections 39(1) and 39(3) as amended by the Public Educational Service (Amendment) Law 53/79—The Educational Officers (Teaching Staff) (Appointments, Postings, Transfers, Promotions and Related Matters) (Amendment) Regulations 1985 (hereinafter referred to as Regulations 71/85)—Reg. 23(2) of Regulations 71/85 is ultra vires Law 10/69 and, in particular, ss. 5 and 39(1)—Reg. 20(c) of the same Regulations is ultra vires the provisions of ss. 5, 39(1) and 39(3) of Law 10/69 and also, as being unreasonable.* 5 10

*Administrative Law—Absence of records stating that applicant's request was rejected—Ground for annulment.*

*Administrative Law—Reasoning of an administrative act—Reasons disclosed in the Opposition, but not in the relevant minutes—No other record containing reasons produced—Sub judice decision lacks due reasoning.* 15

*The Public Educational Service Law, 10/69, s. 4(2) as amended by Law 53/79—The Educational Service Commission—Presence of a representative of Trade Union POED at its meeting—Contrary to said section.* 20

By means of the present recourse the applicant, a Headmaster in Elementary Education, challenges the refusal of the Educational Service Commission to transfer him from Kyperounta to Limassol. The grounds of the refusal were that there had to be satisfied the claims of transfers of other Headmasters, who had priority and that there was no Headmaster in Limassol who, in accordance with reg. 20(c) of Regulation 71/85 could be transferred so as to render possible the satisfaction of the applicant's request.

Regulations 71/85 were made after the repeal and replacement of s. 39 of Law 10/69 by a new s. 39 by means of s. 3 of Law 4/85. Reg. 23(1) provides that the Commission should make transfers in order of priority determined on the basis of criteria specified therein; reg. 23(2) provides that the Commission has to give to each one of the said criteria the weight prescribed by the Council of Ministers by way of the number of units to each one of the said criteria. The relevant decisions of the Council of Ministers are: Decision 25568/6.3.85 and Decision 25911/14.6.85.

*Held*, annulling the sub judice decision: (1) The effect of the provisions of Reg. 23(2) is to deprive the Commission of a large portion of its discretionary powers under ss. 5 and 39(1) of Law 10/69 as amended in relation to transfers and to vest instead, by delegated legislation, in the Council of Ministers a decisive regulatory role relating to transfers. The Council, thus becomes an organ, which though not envisaged in this respect by Law 10/69, partakes in a decisive manner in the performance of the task of the Commission under the said sections and in a way utterly incompatible with them.

(2) The age limitation which in accordance with Reg. 20(c) of Regulations 71/85 prevents the transfers of Headmasters after the completion of their fiftieth year is so rigid as to be unreasonable. Furthermore it is a limitation of the discretionary powers of the Commission under s. 5 and 39(1) in a manner not warranted by s. 39(3). Indeed s. 39(1) should be read together with s. 39(3) and the matters envisaged by s. 39(3) can only be prescribed by *delegated legislation*, consistent with the due exercise of the discretionary powers of the Commission.

(3) In the light of the foregoing Reg. 23(2) of Regulations 71/85 is ultra vires the Law 10/69 and, in particular, ss 39(1) and 5 and Reg. 20(c) is ultra vires the same law and in particular ss. 5, 39(1), 39(3) thereof and as being unreasonable. 5

(4) Furthermore in the absence of any official record stating expressly that applicant's request was rejected the minimum requirements of proper administration have not been complied with.

(5) Moreover as the reasons for the sub judice decision are not stated in the minutes and no other administrative record was produced, the sub judice decision lacks due reasoning, notwithstanding that the reasons for it were given in the Opposition. 10

(6) Lastly the presence at the relevant meeting of the Commission of a representative of applicant's Trade Union POED is another ground for annulling the decision because such presence is contrary to s. 4(2) of Law 10/69 as amended by Law 53/79. 15

*Sub judice decision annulled.* 20  
*No order as to costs.*

#### Cases referred to:

- Savva v. The Republic* (1986) 3 C.L.R. 445;  
*Medcon Construction v. The Republic* (1968) 3 C.L.R. 535;  
*Michael v. The Republic* (1972) 3 C.L.R. 206; 25  
*Papageorghiou v. The Republic* (1984) 3 C.L.R. 1348;  
*Themistocleous v. The Republic* (1985) 3 C.L.R. 1070;  
*Kosmas v. The Electricity Authority of Cyprus* (1984) 3 C.L.R. 117;  
*Ioannou v. The Water Board of Limassol* (1984) 3 C.L.R. 728; 30  
*Markides v. The Republic* (1985) 3 C.L.R. 1393.

**Recourse.**

Recourse against the refusal of the respondent to transfer applicant from Kyperounta to Limassol.

*A.S. Angelides*, for the applicant.

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

*Cur. adv. vult.*

10        TRIANTAFYLLIDES P. read the following judgment. By the present recourse the applicant challenges, in effect, the refusal of the respondent Educational Service Commission to transfer him from Kyperounta to Limassol.

The applicant is a Headmaster in Elementary Education and his home is in Limassol.

15        During the school-years 1983/1984 and 1984/1985 he was posted at Kyperounta.

20        He applied to the respondent Commission to be transferred to Limassol from the school-year 1985/1986, and was heard in this connection by the Commission on the 3rd September 1985, when, as it appears from the relevant minutes of the Commission, there were present representatives of POED, which is the schoolteachers' trade union of which the applicant is, apparently, a member.

25        At the meeting of the respondent Commission on the 12th September 1985 there were considered the claims for transfer of educationalists such as the applicant and, though there is no direct reference to the applicant in its minutes, it can be derived from them, especially when they are read together with the earlier minutes of the 3rd September 1985, that the application of the applicant to be transferred to  
 30        Limassol was refused by the Commission.

35        As it appears from the contents of the Opposition the applicant was not transferred to Limassol because there had to be satisfied the claims for transfer of other Headmasters in Elementary Education who had priority, as regards transfer, over the applicant.

It is common ground that such priority was determined on the basis of units computed in accordance with the Educational Officers (Teaching Staff) (Appointments, Postings, Transfers, Promotions and Related Matters) (Amendment) Regulations, 1985 (see No. 71 in Part 1 of the Third Supplement to the Official Gazette of the 22nd February 1985); and these Regulations will be referred to hereinafter as Regulations 71/85. 5

It is stated, furthermore, in the Opposition that the applicant's application for transfer to Limassol was not granted because there was no Headmaster in Limassol who, in accordance with regulation 20(c) of Regulations 71/85, could be transferred so as to render possible the satisfaction of the applicant's claim for transfer to Limassol. 10

The present case was heard after the completion of the hearing of similar case No. 830/85 and as counsel for the parties in that case were the same as counsel for the parties in the present case they have adopted the arguments which they have advanced at the hearing of case No. 830/85 for the purposes of the hearing of the present case, particularly in relation to the validity of Regulations 71/85. 15 20

The said Regulations were made under the Public Educational Service Law, 1969 (Law 10/69) after section 39 of such Law was repealed and replaced by a new section 39 by means of section 3 of the Public Educational Service (Amendment) Law, 1985 (Law 4/85). 25

The said new section 39 of Law 10/69 provides, by its subsection (1), that the transfer of educationalists are made by the Educational Service Commission, and, by its subsection (3), that terms, prerequisites, criteria and the procedure in general for the making of such transfers are prescribed by Regulations. 30

By virtue of paragraph (1) of regulation 23 of Regulations 71/85 it is provided that the Educational Service Commission should make transfers in order of priority which is determined on the basis of criteria specified therein. 35

By virtue of paragraph (2) of the said regulation 23 the Commission has to give to each one of the criteria men-

tioned in paragraph (1) of such regulation the weight which is prescribed by the Council of Ministers by way of the number of units accorded to each one of the said criteria.

5 The system of units which was adopted for this purpose by the Council of Ministers is to be found in its decisions No. 25568, dated 6th March 1985, and No. 25911 dated 14th June 1985; and such system includes a mathematical formula for the joint evaluation of the various criteria.

10 Having considered the arguments advanced in relation to the validity of Regulations 71/85 I think that it suffices, for the purposes of this case, to say that I have reached the conclusion that the provisions of paragraph (2) of regulation 23 are ultra vires the Law 10/69, and, in particular, they are in conflict with sections 39(1) and 5 of such Law.

15 In my judgment in *Savva v. The Republic*, (case No. 361/83, determined on 8th March 1986, and not yet reported)\* I have referred to the case-law of this Court regarding the matter of ultra vires of delegated legislation, which can also be found to be void for unreasonableness, and I need not  
20 refer once again in this judgment to such case-law.

The main reasons for which I have found that paragraph (2) of regulation 23 is ultra vires are the following:

25 The effect of the provisions of paragraph (2) of regulation 23 is to deprive the Educational Service Commission of a large portion of its discretionary powers under sections 5 and 39(1) of Law 10/69 in relation to transfers and to vest  
30 instead, by delegated legislation in the Council of Ministers a decisive regulatory role regarding transfers of educationalists. Instead of the Commission establishing the order of priority for transfer by evaluating, through the exercise of

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\* Reported in (1986) 3 C.L.R. 445.

its own discretion, the criteria set out in paragraph (1) of regulation 23, the Council of Ministers is, by virtue of paragraph (2) of regulation 23, transposed, to a very large extent, in the place of the Commission and, thus, becomes an organ which, though not envisaged in this respect by Law 10/69, partakes in a decisive manner in the performance of the task of the Commission under sections 5 and 39(1) of Law 10/69, in a way which is utterly incompatible with the said sections 5 and 39(1). Consequently regulation 23(2) had to be found to be ultra vires the relevant provisions of Law 10/69.

If the Legislature intended to deprive the Educational Service Commission of a considerable part of its discretionary powers, and to substitute in the place of their exercise by the Commission the exercise of such powers by the Council of Ministers by virtue of regulation 23(2), this could, possibly, have been achieved by amending in express terms Law 10/69, and not by means of delegated legislation such as Regulations 71/85.

I shall deal next with the issue of the validity of regulation 20(c) of Regulations 71/85, because it was relied on expressly in the Opposition as excluding the transfer of the applicant to Limassol:

It appears that the applicant could not be transferred to Limassol because there was not in Limassol, at that time, a Headmaster in Elementary Education who had not completed his fiftieth year and who, therefore, could be transferred elsewhere, under the said regulation 20(c), in order to create a vacancy to which the applicant could be transferred to Limassol.

In my view the age limitation in regulation 20(c), which prevents transfers of Headmasters after the completion of their fiftieth year, is so rigid as to be unreasonable, with the result that regulation 20(c) has to be found to be void for unreasonableness. Furthermore, the said regulation 20(c) is, in my opinion, ultra vires the Law 10/69 as it is a limitation of the discretionary powers of the Educational Service Commission under sections 5 and 39(1) of such Law which is not warranted by subsection (3) of section

39. Because subsection (1) and subsection (3) of section 39 have to be read together and the result of doing so is that the conditions, prerequisites, criteria and procedure for transfers envisaged by the said subsection (3) can only be prescribed by delegated legislation which is consistent with the due exercise of the discretionary powers of the Commission, which has the paramount duty to transfer educationalists for the purpose of serving as best as possible the interest of education.

10 In the light of all the foregoing the complained of refusal of the respondent Commission to accede to the applicant's application for transfer has to be declared to be null and void and of no effect whatsoever since it is the result of adherence to regulations which have been found to be ultra vires, namely regulations 23(2) and 20(c) of Regulations 71/85.

Furthermore, the refusal to transfer the applicant would have to be annulled, in any event, as there does not exist any official record stating expressly that his application was rejected and, consequently, the minimum requirements of proper administration have not been complied with in this connection (see, inter alia, in this respect, *Medcon Construction v. The Republic*, (1968) 3 C.L.R. 535, 543, *Michael v. The Republic*, (1972) 3 C.L.R. 206, 210, *Papageorghiou v. The Republic*, (1984) 3 C.L.R. 1348, 1354 and *Themistocleous v. The Republic*, (1985) 3 C.L.R. 1070, 1081).

Moreover, though in the Opposition the reasons for not transferring the applicant were given, such reasons are not stated in the relevant minutes of the respondent Commission and no other administrative record has been produced before me containing any reason for not transferring the applicant. Consequently, the sub judice refusal of the respondent Commission to transfer the applicant has to be annulled for lack of due reasoning (see, inter alia, in this respect, *Kosmas v. The Electricity Authority of Cyprus*, (1984) 3 C.L.R. 117, 121, *Ioannou v. The Water Board of Limassol*, (1984) 3 C.L.R. 728, 740, 741, *Papageorghii-*



ou, supra. 1355, and *Markides v. The Republic*, (1985) 3 C.L.R. 1393, 1400).

Lastly, another reason for which I would have to annul the sub judge refusal of the respondent Commission to transfer the applicant is the fact that when he was heard by the Commission in relation to his claim for transfer there were present at the meeting of the Commission representatives of his trade union POED. I have no doubt that such representatives were there with best intentions, with the consent of both the Commission and of the applicant, but I find that their presence was excluded by the provisions of section 4(2) of Law 10/69, as amended, in this respect, by section 2 of the Public Educational Service (Amendment) Law, 1979 (Law 53/79). The meetings of the respondent Commission are not open to members of the public and in section 4(2) of Law 10/69 there is express provision about persons, other than the members of the Commission, who can be present at its meetings without a vote, and representatives of POED are not included in such persons.

The presence, therefore, at the meeting in question of representatives of POED was incompatible with section 4(2) of Law 10/69 and if the Legislature wishes to implement any existing arrangement in this respect between the Commission and POED, as a trade union, it is open to the Legislature to make express provision for this purpose by amending suitably section 4(2) of Law 10/69.

For all the foregoing reasons this recourse succeeds; but I will make no order as to its costs.

*Sub judge decision annulled.*  
*No order as to costs.*