1987 July 24

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

DEMOS VIRONOS AND OTHERS,

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE EDUCATIONAL SERVICE COMMISSION,

Respondent.

(Case No. 411/86).

Executory act — Transfers of Educational Officers — Objections duly filed under relevant regulations — Executory nature of decision suspended until determination of objection — When a final decision on the objection is taken the first decision merges into the new one.

5 *Educational Officers — Transfers — Extraordinary temporary transfers — The Educational Officers (Teaching Staff) (Appointments, Emplacements, Transfers, Promotions and Related Matters) Regulation — Reg. 25(1)(b).*

As a result of an annulment of applicants' transfers by this Court, the respondents, at their meeting of 23.4.86, reconsidered the matter and
10 decided to post the applicants in the same places by means of extraordinary temporary transfers. In doing so, they took into consideration the fact that due to the short time left until the end of the school year, any changes in the teaching staff would create serious problems in the smooth running of the schools concerned.

15 At their meeting of 16.6.86 the respondents decided to transfer applicant 1 from Limassol to Ayios Ioannis of Agros, applicant 2 from Limassol to Larnaca and applicant 3 to Anglisides, as from 1.9.86.

The applicants objected against the decision of 16.6.86, but, before determination of their objection, they filed this recourse, challenging both the
20 decision of 23.4.86 and the decision of 16.6.86.

Counsel for the respondents raised the preliminary objection that the sub judice decision is not of an executory nature.

Held, *dismissing the recourse:* (1) *The case of Kotsoni v. Educational Service Commission* (1986) 3 C.L.R. 2394 should be distinguished from this case, because there the Court found that the applicant was entitled to treat her objection as rejected. In this case, there is no indication that applicants' objections against their transfer should be determined. Once an objection was pending against the decision of 16.6.86, its executory character was suspended until a final decision is taken, in which it would then merge. 5

(2) The decision of 23.4.86, which is of an executory nature, was taken under Reg. 25(1)(b). In virtue of this regulation transfers are effected, when they are absolutely necessary in the interests of the service. In the circumstances of this case the decision of 23.4.86 was reasonably open to the respondents. 10

Recourse dismissed with costs.

Cases referred to:

Kotsoni v. Educational Service Commission (1986) 3 C.L.R. 2394. 15

Recourse.

Recourse against the decision of the respondent to transfer applicants 1 and 2 to Ayios Ioannis Agrou and Larnaca, respectively and applicant 3 to Anglisides.

A.S. Angelides, for the applicants. 20

A. Vassiliades, for the respondents.

Cur. adv. vult.

SAVVIDES J. read the following judgment. The applicants pray for a declaration of the Court that the following acts or decisions of the respondent should be declared null and void:- 25

(1) The decision to include the applicants, on the basis of Reg. 24(3) in the list of officers subject to transfer.

(2) The decision, communicated to the applicants in April, 1986, for their temporary transfer from, or non transfer to Limassol until the end of June. 30

(3) The decision dated 16.6.1986 whereby applicants 1 and 2 were transferred to Ayios Ioannis Agrou and Larnaca respectively and applicant No. 3 to Anglisides, as from 1.9.1986.

The applicants are Headmasters in the Elementary Education. By a decision taken in 1985 the respondent transferred applicants 1 and 2 from Limassol, where they were serving, to Ayios Ioannis and Pelendri respectively. It also refused to accede
5 to the request of applicant No. 3 for his transfer from Kyperounda to Limassol. The applicants challenged the above decisions by recourses, as a result of which the decisions challenged were annulled by the Supreme Court in 1986 on the ground that the regulations on which they were based were ultra vires the law
10 and unreasonable.

As a result respondent met again to consider the situation created by the annulments. At its meeting of 23.4.1986, the respondent first revoked its previous decisions and proceeded next to post the applicants again, by means of extraordinary
15 temporary transfers at the same schools on account of the needs of the service until the end of the school year, when a reconsideration of all cases was to take place.

At its meeting of 16.6.1986, the respondent decided to transfer applicant No. 1 from Limassol to Ayios Ioannis Agrou, applicant
20 No. 2 from Limassol to Larnaca and applicant No. 3 to Anglisides, as from 1.9.1986.

The applicants filed written objections to the said transfers in accordance with the regulations and the respondent heard them during personal interviews on 2.7.1986 in support of their
25 objections. Whilst the objections of the applicants were pending they filed the present recourse on 25.6.1986 challenging their aforesaid transfers.

The grounds raised in support of the recourse are that the sub judice decisions were taken by virtue of Regulations which are
30 ultra vires the law, in abuse and/or in excess of powers, in the absence of any inquiry, in violation of the principles of Administrative Law and good and proper administration and that they lack due reasoning.

By his opposition counsel for the respondent raised the preliminary objection that the sub judice decision does not amount to an executory administrative act. Subject to the above, he contended that the sub judice decision was properly taken in accordance with the law and Regulations and in the proper exercise of the discretionary powers of the respondent. 5

I shall deal first with the preliminary objection raised by counsel for the respondent. I must clarify now that there are two separate decisions which are challenged by the present recourse. The first one is that of 23.4.1986 concerning the temporary transfers of the applicants and the second one is that of 16.6.1986 by which the applicants were transferred as from 1.9.1986. 10

From the material before me it is apparent that all applicants filed objections against their second transfers which were still under consideration by the respondent Commission at the time this recourse was filed. In fact on 2.7.1987 the applicants were interviewed by the respondent and were heard in support of their objections. 15

In the case of *Thelma Kotsoni v. The Educational Service Commission* (Case No. 852/85), in which judgment was delivered on 28.11.1986, not yet reported*, I had the opportunity of dealing with the position when a decision is objected to and the matter is considered afresh by the Educational Service Commission. 20 25

The following are stated in the above case:-

«In the Conclusions from the Case Law of the Council of State in Greece (1929-1959), it is stated at pp. 241-242, that acts against which an objection is made, merge in the decision disposing of the objection and loose, as a result, their executory character. This stand was taken by the Council of State in a number of cases (see the cases referred to in the 30

** Reported in (1986) 3 C.L.R. 2394.*

Digest of Case law of the Council of State in Greece, 1961 - 1970, Vol. 1, p. 172, paragraphs 1698, 1704, 1709; also the Digest of Case Law for the years 1971-1975, Vol. 1, pp. 104, 108 and especially paragraphs 1816, 1821, 1825, 1849, 5 1852, 1853, 1864, 1867 - 1869, 1907 and 1923).

The same view has been expressed by our Courts in a number of cases: (See *Economides & Others v. Republic* (1978) 3 C.L.R. 230, at p. 235; *Mitidou v. CYTA* (1982) 3 C.L.R. 555; *Demetriou & Others v. Municipal Committee of* 10 *Lamaca* (1983) 3 C.L.R. 1315 at pp. 1321, 1322, where other cases are also mentioned; *Polyviou v. Improvement Board of Ayia Napa* (1985) 3 C.L.R. 1058 at pp. 1066-1067; *Strongiliotis, v. Improvement Board of Ayia Napa* (1985) 3 C.L.R. 1085 at p. 1090)».

15 I then proceeded, in the *Kotsoni* case, having regard to the special circumstances of the case, to treat the subsequent decision on the objection as having been challenged by the same recourse.

Counsel for the applicant sought to rely on the case of *Kotsoni* and claim that because the objections have not yet been 20 determined, the recourse against the sub judice decision could proceed.

I wish to draw a distinction between the case of *Kotsoni and the present one. In the case of Kotsoni* I found that the applicant was entitled to treat her objection as rejected, having regard to the 25 circumstances of the case; besides, she was also challenging, by her recourse, the rejection of her objection. In the present case, there was no indication that the objections had been determined. On the contrary, the applicants knew that their objections were still under consideration having regard to the fact that they had been 30 invited to an interview on their objections. The following passage from the *Kotsoni* case is also relevant:

«If an objection is made in accordance with the provisions of the relevant law against any administrative act and the time prescribed by the relevant law for determining such objection 35 (or if no time is prescribed the time provided by the

Constitution) has elapsed without any decision having been reached or communicated to the applicant, the applicant may file a recourse against the silent rejection of the objection and if after the filing of the recourse but before its hearing a decision is reached on the objection, such decision is treated as being challenged by the same recourse. (See Decisions Nos. 617, 618, 925/73).»

In the circumstances of the present case I find that the recourse of the applicants against the decision of 16.6.1986 was premature in view of the fact that their objections were to their knowledge under consideration by the respondents. The applicants should have waited till their objections were determined and then file a recourse against such final decision. Once an objection was pending the executory character of the decision objected to was suspended until a final decision was taken, in which it would then merge.

In view of the above, I find that this part of the recourse challenging the decision of 16.6.1986 should be dismissed on this ground.

The first part of the recourse challenging the decision of 23.4.1986 concerning the temporary transfers of the applicants remains, however, unaffected by the above finding and I shall proceed to examine the validity of the said decision.

It is obvious from the documents annexed to the opposition as Appendices «A» and «B» that the transfers in question were extraordinary temporary transfers. These transfers are effected under Regulation 25(1)(b) when they are considered absolutely necessary for the interests of the service.

It is explained in the aforementioned appendices that the respondent had to reconsider the transfers of the applicants in view of the decisions of the Court annulling same. After inviting and considering the views of the Director of Elementary Education, the respondent concluded that it was necessary, in the interests of the service, for the applicants to be transferred temporarily, until the end of the school year, to the places where they were already serving since the beginning of the school year.

In deciding so the respondent took into consideration the fact that due to the short time left until the end of the school year any changes in the teaching staff of schools would create serious problems in the smooth running and functioning of the schools
5 concerned.

I find that the respondent was entitled to reach the sub judice decision having regard to the circumstances of the case and that it was reasonably open to it to do so, and this part of the recourse should, therefore, fail.

10 In the result this recourse fails and is hereby dismissed with costs in favour of the respondent.

Recourse dismissed.
Costs in favour of respondents.