1987 July 14

[PIKIS J]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

OLGA TINGIRIDOU,

Applicant,

v

THE REPUBLIC OF CYPRUS, THROUGH
1 THE EDUCATIONAL SERVICE COMMISSION,
2 THE MINISTRY OF EDUCATION,

Respondents

(Case No 580/86)

Educational Officers — Transfers —The Educational Officers (Teaching Staff) (Appointments, Emplacements, Transfers, Promotions and Related Matters) Regulations 71/85 — Regs 23(1), 14(2), 24(3) and 4 — Whether respondents could weigh numerically in a uniform manner the criteria laid down by Reg 23(1) — Question answered in the affirmative — Aristides v The Republic (1986) 3 C L R 466 distinguished — A uniform code relating to transfers is the best way to ensure equality of treatment and exclude favouritism or the semblance of favouritism — The aforesaid way in which the respondents acted did not, in the circumstances, exclude their discretion to act differently in the face of compelling circumstances — Reg 14(2) does not have retrospective effect and, therefore, is not ultra vires the enabling law on that ground — The time limit in regulation 24(3) is of an indicative nature — Reg 4 does not change the nature of such time limit by necessary implication

Administrative Law — Time limit — Implications of non adherence to — Distinction between time limits concerning the subject and time limits concerning the Administration — In the former case their nature is mandatory, whereas in the latter indicative

Retrospectivity of a law — Principles applicable to determine whether an enactment has retrospective effect or not

Administrative Law — Discretion of Administration — Guidelines for its exercise — Administration entitled to evolve such guidelines, provided room is left to act otherwise in the face of compelling circumstances

In making transfers of educationalists the respondents were guided by the criteria laid down by Reg 23(1) of the aforesaid Regulations. In evaluating the

importance of these criteria and their impact upon the transferability of members of the Educational Service they evolved a uniform formula, whereby the importance of these criteria was weighted numerically and then duly adjusted to reflect the liability to transfer of individual members of the service

As a result, the applicant (Assistant Headmaster Secondary Education) was transferred to Larnaca, and following her objection, to Dhali

Applicant challenges the validity of her transfer on the following grounds, namely

(a) There was no sanction in law for the course, which the respondents followed and, furthermore, the weighting system neutralized their discretion, thereby alienating their competence as the sole arbiter of the liability of members of the service to transfer

(b) Reg 14(2) of the aforesaid Regulations is ultra vires the enabling law in that it has retrospective effect In the submission of applicant's counsel retrospectivity derives from the fact that the seat of educationalists is discerned by reference to events, which occurred before its enactment, and

(c) Failure on the part of the Administration to compile the table of transfer within the second fortnight of April as provided by Reg 24(3)

Held, dismissing the recourse (A)(1) In this case the Court is required to decide whether it was competent for the respondents, in the exercise of their discretion to weight numerically the significance of the criteria envisaged by Reg 23(1) as a yardstick for the exercise of the their power to transfer An ancillary question is whether it was competent for the respondents to evolve a uniform formula for the determination of the transferability of educationalists

(2) The decision in *Aristides v The Republic* (1986) 3 C L R 466 should be distinguished from the present case, because its ratio was confined to the validity of Reg 23(2)

(3) It is settled that the Administration may lay down guidelines for the exercise of its discretion, provided room is left to do otherwise in the face of compelling circumstances

(4) The criteria of Reg 23(1) are objective The legislature intended to make the transfer of educationalists subject to objective criteria However, the importance of the various criteria and their interaction was left to the discretion of the respondents The respondents were not incompetent to adopt the uniform system of weighting numerically the aforesaid criteria Uniformity of treatment is, in the light of Art 28 of the Constitution, mandatory The establishment of a uniform code regarding transfers closes the door to favouritism and to a semblance of favouritism and is the best way to achieve equality of treatment

(5) As it is evident from the fact that the respondents, following objection by applicant, changed the place of her transfer, the respondents did not alienate their discretion to depart from such uniform code in the face of extraordinary circumstances

5 B A law is not regarded as retrospective merely because its application is made dependent on past events The law becomes retrospective only if it upsets rights that crystallized and vested under the law before the impugned legislation

C Administrative law distinguishes between the implications of non
10 adherence to time limits by the subject on the one hand and the Administration on the other Time limits are mandatory for the subject whereas they are only indicative for the Administration It follows that failure to comply with the time limit of Reg 24(3) does not invalidate the sub judice decision Reg 4, providing that the time limit of Reg 23(2) is indicative only
15 for the first year cannot be construed as rendering by necessary implication an action subsequent to the expiration of the time limit null and void

Recourse dismissed

Cases referred to

Aristides v The Republic (1986) 3 C L R 466

20 *Georghiades v The Republic* (1987) 3 C L R 343,

Kilaniotis v The Republic (1986) 3 C L R 1797,

Kyriacou v Republic (1986) 3 C L R 1845,

Vassiliou v. Republic (1982) 3 C L R 220,

Santis and Others v Republic (1983) 3 C L R 419,

25 *Republic v Menelaou* (1982) 3 C L R 419

Recourse.

Recourse against the decision of the respondents to transfer applicant from Nicosia to Larnaca and following her renewed objections, to Dhali.

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

E. Loizidou (Mrs.), for the respondents.

Cur. adv. vult.

PIKIS J. read the following judgment. Olga Tingiridou, an educationalist (Assistant Headmaster secondary education),
35 questions in these proceedings the legitimacy of her transfer from

Nicosia to Larnaca and following her renewed objections, to Dhali. In February 1986 she signified to the authorities her opposition to her being transferred from Nicosia on account of her age. The respondents considered transfer of educationalists for the ensuing academic year at two meetings held on 29th April and 10th May, 1986. At those meetings firm criteria were evolved for the determination of the transferability of teachers and a table was compiled in exercise of the powers vested in them under Reg. 24(3) of the Regulations*; and a decision was taken to transfer the applicant from Nicosia to Larnaca. This time she raised objection to her transfer for family and health reasons. Her objections she articulated at an interview with the respondents held on 23rd June, 1986. Following her representations against her transfer, the decision was modified and Dhali was substituted for Larnaca as the new place of her work. Evidently the change was approved in order to shorten the distance that applicant would have to travel daily in order to attend to her duties.

In making transfers, including that of the applicant, the respondents were guided by the criteria laid down in Reg. 23(1). In evaluating the importance of these criteria in the context of the educational service and their likely impact upon the transferability of members of the service, they evolved a formula whereby the importance of these criteria was weighted numerically and then duly adjusted to reflect the liability to transfer of individual members of the service. In their task they were aided by a mathematician who was seconded for the purpose by the Ministry to assist them in their work.

The foremost ground upon which the applicant challenges her transfer affects the legitimacy of the system adopted for the determination of the liability of educationalists to transfer. In the contention of applicant there was no authority in law for the respondents to streamline the exercise of their discretion in a predetermined and inflexible manner by attaching a fixed weight to the considerations indicated by law as relevant to the exercise of their discretion. The course followed had no sanction in law and in the absence of specific authorization it was arbitrary on their part to measure numerically the impact of the different criteria set

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* *Educational Officers (Teaching Personnel) (Appointments, Placements, Transfers, Promotions and Related Matters) (Amending) Regulations 1985, official Gazette 22.2.1985, Suppl. No. 3, Not. 71/85.*

down by law for the liability of educationalists to transfer. Furthermore the weighting system adopted neutralized their discretion, as submitted, thereby alienating their competence as sole arbiters of the liability of members of the service to transfer.

5 Counsel sought to derive support for the submissions stated above from the decision of Triantafyllides, P., in *Aristides v. The Republic**. In that case the learned President declared Reg. 23(2) ultra vires the enabling law, The Educational Service Law 10/69, inasmuch as the regulation purported to empower the Council of 10 Ministers to weight the importance of the criteria laid down by Reg. 23(1), whereas the enabling law vested sole competence in matters of transfer to the Educational Service Commission**. The case of *Aristides* (supra) does not lend support to the submissions of counsel for the applicant for its ratio is confined to the validity of 15 Reg. 23(2). A similar question to the one posed in these proceedings was raised in *Georghiades v. The Republic**** but the matter was left open as resolution of it was considered unnecessary for the determination of that case. The question arising for decision in this case is wholly different from that in 20 *Aristides* (supra). We are required to decide whether it was competent for the respondents, in the exercise of their discretion, to weight numerically the significance of the criteria envisaged by Reg. 23(1) as a yardstick for the exercise of their power to transfer educationalists. A question ancillary to the above but bound up 25 with it, is whether it was competent for the respondents to evolve a uniform formula for the determination of the transferability of educationalists. The two arguments advanced for the nullification of the process, are to recapitulate (a) lack of statutory authorization, and (b) neutralization of the discretion of the 30 respondents to respond to the merits of the situation of individual members of the service.

To begin, it is settled that the Administration may lay down guidelines for the exercise of its discretionary power provided room is left to do otherwise in the face of compelling 35 circumstances justifying departure therefrom****. In this case the

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* *(1986) 3 C.L.R. 466.*

** *The decision in Aristides was followed by Savvides, J., in Kilaniotis v. The Republic (1986) 3 C.L.R. 1797.*

*** *(1987) 3 C.L.R. 343.*

**** *Kyriacou v. Republic (1986) 3 C.L.R. 1845. Vassiliou v. Republic (1982) 3 C.L.R. 220, 227, 228.*

question is somewhat different in that the legislator did lay down the criteria that should govern the exercise of the discretionary power of the respondents. We are asked to decide whether it was competent in the exercise of their discretion to attach a differing importance to the various criteria firstly, and secondly adopt them as a uniform code for the determination of the transfers of educationalists.

The criteria laid down by Reg. 23(1) are objective in the sense that they relate mainly to verifiable factors applicable to all educationalists. It can be validly presumed that the legislature intended to make the transfer of educationalists subject to objective criteria in the interest of uniformity of treatment; a salutary objective it must be added more so as we are concerned with a branch of the public service with thousands of officers. The importance of the various factors and their interaction is rightly left to the discretion of the competent authority. As the law stands, it is very much for the respondents to evaluate these cirteria and attach to them such importance as the determining factors for transfer as they may deem appropriate in the light of the needs of the service and their experience in that area. The first question I must ask myself is whether it would be incompetent for the respondents to adopt the weighting system they did for the determination of an individual application for transfer. My answer is unhesitatingly no; the law leaves the application of the relevant criteria to the respondents including power to evaluate their impact as they may judge appropriate. Is the system invalidated because of the generality of its application? In the first place, the legislature intended that transfers should be made on the basis of objective considerations. Secondly and more importantly, uniformity of treatment of the employees of the Administration is not only a desirable objective but in the case of Cyprus a mandatory one in view of the provisions of Art. 28.1 of the Constitution. The adoption of a uniform code for the determination of the liability of educationalists to transfer, in accordance with the criteria laid down by the law, was not only permissible but, in my judgment, salutary too. Adherence to a preordained code closes the door to favouritism and just as importantly to a semblance of favouritism, equally damaging to the image of the Administration and faith in its impartiality. If the weight attached to the criteria provided by law was unreasonable, any decision founded thereon might be vulnerable to be set aside on that account. No such suggestion was made in this case nor

does the system evolved appear to me in any way unreasonable or irrelevant to the needs of the educational service

The establishment of a uniform guide for the preparation of the tables determining the transferability of educationalists is probably the best way to ensure equality of treatment, a factor of very great importance considering the magnitude of the service

It is evident from the fact that the respondents modified their decision following the objections of the applicant that they did not rule out the possibility of responding to individual needs of educationalists They did not alienate their discretion to depart from the code in the face of extraordinary circumstances Of course, any such departure must be duly merited and the burden is on the respondents to justify deviation from the norm Else the objectivity they sought to inject in the system would be destroyed

In the light of the above, I dismiss the submission that the adoption of a uniform system for the evaluation of the importance of the criteria laid down in Reg 23(1) was either outside the ambit of the enabling law or a measure resulting from abuse or excess of power

Two other grounds were put forward for the annulment of the sub judice decision The first was that Reg 14(2) is ultra vires the enabling law in that contrary to the provisions of the statute, a retrospective legislative measure was enacted thereby Retrospectivity derives, as counsel submitted, from the fact that the seat of educationalists is discerned by reference to events that occurred prior to the enactment of the law This is, with respect, a fallacious understanding of the principle of retrospectivity A law is not made retrospective merely because its application is made dependent on past events* The law becomes retrospective only if it upsets rights that crystalized and vested under the law before the enactment of the impugned legislation I find this ground to be devoid of merit and as such it is dismissed

Lastly, the transfer is impugned for failure on the part of the Administration to compile the table of transfers provided for by Reg. 24(3) within the second fortnight of April In the submission of counsel this was a mandatory requirement of the law in view of the provisions of Reg 4 providing that time limits should be

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* *Santis and Others v Republic (1983) 3 C L R 419*
Republic v Menelaou (1982) 3 C L R 419

indicative only for the first year. It was argued that Reg. 4 should, by necessary implication, be construed as providing that time limits were mandatory for the ensuing years.

Administrative law distinguishss between the implications of non adherence to time limits by the subject on the one hand and the Administration on the other. In the case of the Administration time limits are invariably indicative of the time within which the Administration must act. Departure from the limit prescribed by law does not invalidate administrative action, save in exceptional circumstances where the delay is such as to cast the action taken thereby wholly outside the framework of the law (*Conclusions from Decisions of the Greek Council of State,* pages 105, 108 and 95). To render time limits for the Administration mandatory ould often prove to be a formula for inactivity on their part. On e other hand time limits are mandatory for the subject and failure adhere thereto disentitles him from asserting his rights before e Administration. In my judgment Reg. 4 aimed to relieve ducationalists from the consequences of failure to comply with e time provisions of the regulations considering that they were nacted in the middle of the academic year 1984-1985, notably, n 22nd February, 1985. I cannot presume that the legislator tended by the enactment of Reg. 4 and as a matter of necessary nplication to invalidate the action of administrative authorities ken subsequent to the time limits ordained by the regulations.

In the result the application is dismissed. The sub judice decision confirmed pursuant to the provisions of Art. 146.4(b) of the onstitution.

Recourse dismissed.
No order as to costs.