1987 January 27

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

GEORGHIOS S. SARRIS,

Applicant,

v.

THE REPUBLIC OF CYPRUS, AND/OR
THE EDUCATIONAL SERVICE COMMISSION,

Respondent.

(Case No. 940/85).

Delegated Legislation—Once enacted by a competent organ, the administration should comply with it, until it is repealed or declared by the Court to be «ultra vires».—Thus, notwithstanding that regulations 5 and 10 of The Educational Officers (Teaching Staff) (Appointments, Postings, Transfers, Promotions and Related Matters) Regulations, 1972 were declared by this Court, after the sub judice decision was taken, as ultra vires, the respondent Commission was not entitled to ignore the priority list compiled by virtue of the said regulations 5 and 10.

Administrative Law—Discretion of administration—Respondent Commission failed to exercise its own discretion but merely adopted decision of Council of Ministers and recommendations of Minister of Education—It thus took into consideration extraneous matters—Exercise of discretion defective—Sub judice decision annulled.

Applicant's name was placed under serial number 20 on the priority list of candidates for appointment as teacher of Chemistry, which had been compiled in accordance with regulations 5 and 10 of The Educational Officers (Teaching Staff) (Appointments, Postings, Transfers, Promotions and Related Matters) Regulations, 1972. The three interested parties were placed on the same list under serial numbers 28, 29 and 30.

On 2.8.85 the Council of Minister decided that with certain exceptions the same officers as those serving during 1984-1985 should be appointed on contract for a period of three months. When the said decision was communicated to the respondent Commission by the Director-General of the Ministry of Education, the Chairman of the Commission wrote to the Minister, conveying the views of the Commission and requesting that «there should be a clear written recommendation on the subject». The Minister replied that «it is my suggestion that a three months contract be offered to those

educationalists who had been serving on contract during the year 1984-1985 In the meantime a relevant Bill will be placed before the House of Representatives for the regulation of the matter by law».

5 On 30.8.85 the Commission after referring to the said letter of the Minister reconsidered the matter and appointed again on contract for a period of three months various educationalists, among whom were the three interested parties, who had served on contract during 1984-85.

10 As a result the applicant, who was not among those appointed, filed the present recourse It should be noted that some time after the sub judice decision was taken the said regulations 5 and 10 were declared as «ultra vires» of the enacting law in *Savva v The Republic (1986) 3 C.L.R 445.*

15 The following two questions were formulated for determination by the Court: (a) Whether the order of priority in the list in question could have been ignored by the respondent, and (b) Whether the sub judice decision was taken in the exercise of the respondents' own discretion or whether it was a mere adoption of the decision of the Council of Ministers and/or the Minister of Education

20 Held, annulling the sub judice decision (1) Once legilsation of a delegated nature has been enacted by the competent organ, an administrative organ has to comply with it until it is repealed or until it is found to be «ultra vires» by a Judicial decision *(Psara-Kronidou v. The Republic (1985) 3 C.L.R.1900* and Kouis and Others v. The Republic (1986) 3 C.L R 1874 adopted) As in this case the said regulations 5 and 10 were declared «ultra vires» after the sub

25 judice decision was taken, the Commission was not entitled to ignore them, when it took such decision

30 (2) From the material placed before the Court no doubt is left that the respondents did not exercise their own discretion in the matter, but merely acted in compliance with the decision of the Council of Ministers and the recommendations of the Minister of Education. It follows that the Commission relied on extraneous considerations and failed to exercise its discretion properly.

Sub judice decision annulled.
No order as to costs

Cases referred to:

35 *Savva v. The Republic* (1986) 3 C.L.R. 445;

Psara - Kronidou v. The Republic (1985) 3 C.L.R. 1900;

Kouis and Others v. The Republic (1986) 3 C.L R. 1874;

PapaKyriacou v The Republic (1983) 3 C.L.R. 870.

Recourse.

Recourse against the decision of the respondent to appoint the interested parties to the post of Teacher of Chemistry on contract in preference and instead of the applicant. 5

A.S. Angelides with L. Sarris, for the applicant.

R. Vrahimi - Petridou (Mrs.), for the respondent.

Cur. adv. vult.

SAVVIDES J. read the following judgment. By the present recourse the applicant prays for the following relief: 10

(a) A declaration of the Court that the act and / or decision of the respondent published in the daily press on 1.9.85, whereby the interested parties, namely, Tembriotou Elisavet, Stavrinakis Andreas and Nicolaidou Athanasia were appointed to the post of Teacher of Chemistry on contract is null and void and of no legal 15 effect.

(b) A declaration that the refusal and/or omission of the respondents to appoint the applicant to the post of Teacher of Chemistry, in spite of his priority on the list of candidates for appointment, is null and void and of no legal effect. 20

The facts of the case are as follows:

The applicant is a graduate of the Metsovion National Technical University of Athens in Chemical Engineering, having graduated in 1973 and his name appears under serial number 20 on the list of candidates for appointment as teachers of Chemistry. By its 25 decision dated the 30th August, 1986 (the sub judice decision) the respondent Commission appointed the three interested parties on contract as Teachers of Chemistry for a period of three months. The serial number of the interested parties were 28, 30 and 29 respectively. In fact, the said interested parties had also been 30 appointed on yearly contracts for the school years 1983-1984 and 1984-1985. The applicant challenged also their previous appointments by recourses Nos 424/83 and 456/84 which are still pending before the court. The applicant filed the present recourse challenging the sub judice decision and contending that the 35 respondent Commission by failing to appoint him instead of the

interested parties acted in violation of the law and the regulations.

From the written addresses of both parties, two legal questions pose for consideration.

(1) Whether the order of priority on the list of candidates set up 5 in accordance with the regulations, could have been ignored by the respondent.

(2) Whether the decision of the respondent was properly taken in the present case in the exercise of its own discretion or whether it was a mere adoption of a decision of the Council of Ministers 10 and/or the Minister of Education.

Counsel for applicant in dealing with the first question submitted that according to the Regulations, The Educational Officers (Teaching Staff) (Appointments, Postings, Transfers, Promotions and Related Matters) Regulations of 1972, a list of 15 candidates for appointment is set up in order of priority and the appointments have to be made in the order appearing on the list. Counsel further submitted that the respondent was bound by such regulations and could not act in any other way, irrespective of the fact that it might have the opinion that such regulations were ultra 20 vires or unreasonable and it should continue so to act until such regulations were either repealed or declared as invalid by a competent court. In advancing his argument on this issue he submitted that the decision of this Court in *Efstathios Savva v. The Republic* (Case No.361/83 in which judgment was delivered on 25 the 8th March, 1986)*, by which the said regulations were declared void for unreasonableness and consequently ultra vires, was delivered after the sub judice decision and at the material time the respondent was bound to abide by the Regulations.

In arguing the second question, counsel submitted that in the 30 present case the decision for the contractual appointment of those who had already been so appointed during the previous years was taken by the Council of Ministers and was communicated to the respondent through the Minister of Education who suggested that appointment should be offered to those already serving on 35 contract. The respondent, therefore, in taking the sub judice decision acted on extraneous considerations and in fact instead of exercising its own discretion on the basis of the Regulations,

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

adopted and gave effect to the suggestion of the Minister of Education.

Counsel for the respondent, on the other hand, submitted that the respondent in this case did not act on the basis of the Regulations which were ultimately found by the court as unreasonable and ultra vires in the case of *Savva v. Republic* but proceeded to select those who in its opinion were the most suitable candidates and that had the respondent followed the procedure contemplated by the Regulations its decision would have been annulled on the basis of the above decision. Counsel further added that the respondent in dealing with the said appointments, acted on the basis of all the material before it which consisted of-

(1) the decisions of the Council of Ministers dated 20.5.85 and 2.8.85.

(2) A letter from the Director-General of the Ministry of Education dated the 26th August, 1985.

(3) A letter from the Minister dated the 29th August, 1985.

(4) The relevant laws and regulations.

The decision of the Council of Ministers, counsel submitted, was properly taken in accordance with section 27 of Law 10/69. The decision of the Council of Ministers and the letters of the Ministry and the Minister to the respondent, clearly indicated that the Council of Ministers did not take a final decision on the matter, and the letter of the Minister is merely an expression of opinion to the respondent. The respondent did not in any way consider itself bound by the opinion of the Minister and this is clear from the minutes of the meeting of 30.8.85 when the sub judice decision was taken.

Counsel in concluding his argument submitted that from the material which is before the court, the respondent Commission took a decision to offer new contracts of three months duration and it appears nowhere in the decision that it was a renewal of existing contracts which is mentioned in the decision of the Council of Ministers and the letter of the Minister.

Under the provisions of the Educational Officers (Teaching

Staff) (Appointments, Postings, Transfers, Promotions and Related Matters) Regulations, 1972 published in the official Gazette of the 10th November, 1972, Supplement No.3, Part I, Not.205, as amended by the Educational Officers (Teaching Staff) (Appointments etc.) (Amendment No.2) Regulations, 1974, published in the official Gazette of the 20th September, 1974, Supplement No.3 Part I, Not.250, and in particular Regulations 5 and 10, provision is made for the setting up of a list of priority of candidates for appointment and appointments should be made on the basis of the order of priority as appearing on the list of those eligible to be appointed.

The validity of such Regulations was considered by this court in the recent case of *Savva v. The Republic* (1986) 3 C.L.R. 445 in which the Court found such regulations as ultra vires the law and also as void for unreasonableness. Triantafyllides, P. in his judgment at pp.448, 449 had this to say:

«*In the light of the submissions of the parties I have carefully considered the issue of ultra vires of the relevant provisions of the aforesaid Regulations and I have reached the* conclusion that the said provisions and, in particular, regulations 5 and 10 and the Appendix thereto, especially when applied together, are ultra vires Law 10/69, and, particularly, sections 28 and 76, thereof, because the said section 28 of Law 10/69 enumerates exhaustively the prerequisites for appointment and section 76, under which the Regulations in question were made, does not empower the addition of the further prerequisite that the educationalists to be appointed should have priority for this purpose in accordance with a list of those eligible to be appointed, which is prepared on the basis of the criteria set out in the Appendix to such Regulations ....

I am, furthermore, of the opinion that the aforementioned provisions of the Regulations in question, and, in particular, of the Appendix thereto, are void for unreasonableness, and, consequently, ultra vires, because they introduce some unreasonable criteria of priority for appointment which are clearly entirely incompatible with the paramount object of appointing the most suitable candidates (see, inter alia, in this respect, *Avraam v. The Municipality of Morphou*, (1970) 2

C L R 165, and *Angelides v The Republic*, (1982) 3 C L R 774)»

The sub judice decision was prior to the above decision in the *Savva* case With regard to the question whether the respondent could, in the absence of any decision of the Court on its own motion, consider the Regulations as ultra vires and refrain from acting upon them, in the case of *Psara-Kronidou v The Republic* (1985) 3 C L R 1900, at p 1903, Loris, J expressed the following opinion

> «I hold the view that the respondent Commission could not disregard the Regulations in question which have never been repealed or declared unconstitutional or 'ultra vires' the enabling Law These regulations are in effect legislation of a delegated nature enacted by the Council of Ministers pursuant to the provisions of s 76 of the Public Educational Service Law of 1969 (Law 10/69) and as stated by the learned President of this Court in the case of *Kapsou v The Republic* (1983) 3 C L R 1336 at p 1341 'Once such legislation was made by the competent organ, in this case by the Council of Ministers, such legislation has to be complied with until it is repealed by the Council of Ministers or until it is found to be 'Ultra vires' by a judicial decision (see in this respect, inter alia, Tsoutsos on the Administration and the Law (1979) pp 41, 88, 89, 99, 116, Manual of Administrative Law by Spiliotopoulos (1977) p 79 et seq , and Delikostopoulos on Administrative Law Vol A (1972) p 47 et seq)»

The same view was also expressed by me in the case of *Kouis & Others v Republic*, Cases Nos 34/85 etc judgment delivered on 25 9 86, still unreported)*

In view of the above I find that this ground of law succeeds, but I will proceed to consider the other ground as well

Relevant in this respect is the decision of the Full Bench in *PapaKyriacou v The Republic* (1983) 3 C L R 870, in which the appeal against the dismissal of the recourse of the applicant was allowed Hadjianastassiou, J in delivering the judgment of the Court, had this to say at pp 881 - 882

* *Reported in (1986) 3 C L R 1874*

«Therefore the Council of Ministers in deciding who should be appointed exceeded their powers. Their suggestion for filling the post by the renewal of existing contracts ought to be disregarded by the respondents. Far from disregarding them, 5 the respondents approved the recommendation of the Council of Ministers in this respect and appointed officers who were serving during the preceding year on a contractual basis. They acted contrary to the provisions of the law, notably s.5(1), making them in the absence of provision to the 10 contrary the sole judges of who should be appointed. This duty they failed to carry out completely. They failed to exercise any discretion in the matter. They merely rubber stamped the decision of the Council of Ministers.»

The question to be decided is whether the decision of the 15 respondent was properly taken, in the proper exercise of its discretionary power, or whether it was taken merely to give effect to the decision of the Council of Ministers and the recommendation of the Minister of Education.

For the purpose of answering this question, I find it necessary to 20 make reference to the material before me and also to the minutes of the meeting of the respondent Commission at which the sub judice decision was taken.

The Council of Ministers at its meeting of the 2nd August, 1985, decided that the same number of educational officers as those 25 serving during 1984-1985, with the exception of those appointed as replacements and wives of Greek Officers for whom a separate decision was taken, should be appointed on contract for a period of three months. Such decision was communicated by the Director-General of the Ministry of Education to the respondent 30 Commission by letter dated the 26th August, 1985.

As a result of such letter, the Chairman of the Respondent Commission wrote a letter, on the 29th August, 1985, to the Minister of Education the contents of which read as follows:

«*Subject:* Appointments of educationalists on contract for the 35 needs of schools of Secondary/Technical and Elementary education.

I wish to refer to the documents of the Ministry of

Education dated 26 8 85 and 28 8 85 (photocopies of which are attached) in connection with the above subject and to convey to you the views of the Commission

If the intention of the Ministry of Education is the appointment of the educationalists who were serving on contract during the school year 1984-1985, we request that there should be a clear written recommendation on this matter

Otherwise, the Educational Service Commission is bound in accordance with the existing legislation and bearing in mind a recent decision of the Supreme Court to proceed to the appointment on contract of those entitled on the basis of the list of those eligible for appointment

We request to have your reply as soon as possible in view of the fact that Secondary Education schools commence their work on 2 9 1985 »

The Minister of Education by his letter dated the 29th August, 1985, replied to the respondent as follows

«I refer to your letter dated 29 8 1985 and you are requested to note that, in connection with the decision of the Council of Ministers on the subject of appointments of educationalists on contract, it is my suggestion that a three months contract be offered to those educationalists who had been serving on contract during the year 1984-85 (with the exception of replacements)

In the meantime a relevant bill will be placed before the House of Representatives for the regulation of the matter by law »

The respondent met on 30 8 1985 and took the sub judice decision In the relevant minutes we read the following

«In view of the document of the Minister of Education No 197/69/3 dated 29/8/85, by which he informs the Commission that within a period of three months a Bill will be submitted to the House of Representatives for the regulation of the question of appointments on contract by law, the

Commission reconsiders the matter (see minutes 29/8/85) and for the purpose of avoiding any obstacle which may be caused to such arrangement and in order to face, on the other hand, the immediate educational needs, decides, for the purpose of supplementing the needs of the schools with the commencement of the new school year, to select on the basis of all relevant matters and appoint again on contract for a period of three months only, that is, from 1 9 85 - 30/11/85 the under-mentioned educationalists »

And the names of the persons appointed follow

In the circumstances of the present case and on the basis of the material before me, bearing in mind the correspondence between the Chairman of the respondent Commission and the Minister of Education and in particular the letter of the Chairman dated the 29th August, 1985 requesting «a clear written recommendation» from the Minister otherwise the E S C would be bound to act in accordance with the existing legislation and the reply of the Minister thereto that it was his recommendation that a three months contract should be offered to all educationalists who had been serving during the school year 1984-1985, on the basis of which the respondent, according to its minutes took the sub judice decision, no doubt is left in my mind that the respondent did not exercise any discretion in the matter but merely acted in compliance with the decision of the Council of Ministers and the recommendations of the Minister of Education The respondent should have carried its own inquiry in the matter on the basis of the relevant material before it instead of rubber-stamping the decision of the Council of Ministers and the recommendations of the Minister of Education In taking its decision the respondent relied on extraneous considerations and failed to exercise its discretion properly Therefore, the sub judice decision has to be annulled on this point as well

In the result, the sub judice decision is annulled with no order for costs

Sub judice decision annulled
No order as to costs