

1986 April 5

[TRIANAFYLIDIS P]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CHRISTODOULOS ELIA,

*Applicant,*

v

THE REPUBLIC OF CYPRUS, THROUGH  
1 THE PUBLIC SERVICE COMMISSION,  
2 THE DIRECTOR OF THE DEPARTMENT  
OF CIVIL AVIATION,

*Respondents*

*(Case No 574/84)*

*Acts or decisions in the sense of Article 146 of the Constitution — Scheme of service made by Council of Ministers under Article 54 of the Constitution — It is of a legislative nature — Cannot be challenged directly by a recourse — Combined establishment in public service — Refusal or failure to promote applicant — Applicant may indirectly challenge validity of scheme as far as relevant to his complaint against sub judice refusal or failure.*

5

*Public Officers — Promotions — Combined establishment, promotion to a higher grade or office in — Does not depend on existence of a vacancy — It is not made on basis of comparison of candidates — But only on strength of possessing required qualification — Those promoted are not promoted instead of other candidates — Therefore, such other candidates not entitled to challenge their promotion — The Public Service Law 33/67, section 44(1)(a)*

10

*Public Officers — Promotions — The Public Service Law 33/67 — The proviso to s 31, as amended by s 2 of Law 10/83 — Promotion on the basis of said proviso — Applicant not entitled to challenge it*

15

*Legitimate interest — Promotions of public officer — Applicant not possessing required under the scheme of service qualifications — Assuming scheme of service is valid, applicant did not possess a legitimate interest to file a recourse against such promotions*

By means of this recourse the applicant challenges the decision to promote the interested parties to the post of Assistant Operations Officer, 1st Grade, in the Department of Civil Aviation as well as the refusal to promote him to such a post

20

The applicant did not satisfy the requirements of the scheme of service for

the said post. He is, however, challenging the validity of such scheme. Moreover, it must be noted that the post in question is on a combined establishment with the immediately lower post and that one of the four interested parties, namely interested party Makrides, was promoted as being the only officer eligible for promotion under the proviso to s 31 of Law 33/67, as amended by s 2 of Law 10/83.

5

Held, dismissing the recourse (1) Assuming that the scheme of service is valid, the applicant did not possess a legitimate interest entitling him to file the present recourse.

10

(2) In any event the promotion to higher office or grade in a combined establishment is governed by s 44(1)(a) of Law 33/67, which provides that such a promotion may be made irrespective of the existence of a vacancy in the higher office or grade. It is, also, well settled that such a promotion is not effected on the basis of comparison between the candidates, but only on the strength of possession by the officer concerned of the required qualifications for promotion. It follows that it cannot be said that the three interested parties Hamalis, Savva and Papanicolaou were promoted instead of the applicant. It follows that the applicant is not entitled to challenge their promotions. Nor is he entitled to challenge the promotion of the interested party Makrides, who was promoted in virtue of the proviso to s 31 of Law 33/67, as amended by s 2 of Law 10/83.

15

20

25

(3) A scheme of service made by the Council of Ministers under Article 54 of the Constitution is an act of a legislative nature and, as such, it cannot be challenged directly by a recourse. To the extent to which it can be challenged indirectly as an issue relevant to applicant's complaint against the refusal or failure to promote him, the applicant cannot succeed, as his allegation that the adoption of the scheme resulted in unequal treatment against him was not substantiated.

*Recourse dismissed*

30

*Cases referred to*

*Georgiades v The Republic* (1982) 3 C.L.R. 16,

*Anstidou v The Republic* (1984) 3 C.L.R. 503,

*Seraphim v The Republic* (1985) 3 C.L.R. 286,

35

*Pankypnos Syntechnia Dimosion Ypallilon v The Republic* (1978)  
3 C.L.R. 27,

*Ioannou v The Electricity Authority of Cyprus* (1981) 3 C.L.R. 280;

*Viotomas v The Republic* (1984) 3 C.L.R. 423

**Recourse.**

Recourse against the decision of the respondents to promote the interested parties to the post of Assistant Operations Officer, 1st Grade in the Department of Civil Aviation in preference and instead of the applicant and against the refusal to promote him to the above post 5

*A S Angelides*, for the applicant

*M. Clendou — Tsiappa (Mrs )*, for the respondents

*Cur adv vult*

TRIANAFYLLIDES P read the following judgment By 10  
means of the present recourse the applicant challenges the  
decision of the respondent Public Service Commission to  
promote I Hamalis, S Savva, N Papanicolaou and A Makrides  
(hereinafter to be referred as «interested parties») to the post of 15  
Assistant Operations Officer, 1st Grade, in the Department of Civil  
Aviation He, also, complains against the refusal of the  
respondents to promote him to such post

The Director of the Department of Civil Aviation  
recommended, by means of a letter dated the 15th May 1984, the  
promotion of interested parties Hamalis, Savva and Papanicolaou 20  
to the aforesaid post

The promotion of the applicant was not recommended as he  
could not be treated as satisfying the requirements of the relevant  
scheme of service

At its meeting on the 8th June 1984 the respondent 25  
Commission decided that the aforementioned interested parties  
were suitable and promoted them to the post concerned

On the 15th May 1984 the Director-General of the Ministry of  
Communications and Works had requested the filling of the 30  
vacancy in a permanent post of Assistant Operations Officer, 1st  
and 2nd Grade At that time interested party Makndes was serving  
as Assistant Operations Officer, 1st Grade, on a month to month  
basis

At its meeting of the 22nd June 1984 the Commission found

that interested party Makrides, who was, by operation of law, the sole candidate, as he was already serving on a monthly basis in the post in question, was suitable and proceeded to promote him.

- 5 The promotions of the interested parties were published in the Official Gazette of the Republic on the 24th August 1984.

From the material before the Court it appears that the applicant was first appointed in the Civil Aviation Department on the 16th March 1970, as an Operations Assistant, and that he resigned from such post on the 1st July 1971.

- 10 On the 1st February 1979 he was re-appointed to the post of Operations Assistant.

On the 1st January 1981 the title of this post was changed to Operations Officer, 2nd Grade, and on the 1st January 1983 it was changed to Assistant Operations Officer, 2nd Grade.

- 15 From relevant documents it appears that the service of the applicant before his resignation and after his re-appointment was eventually recognised as being continuous; and in a letter dated 2nd March 1982 it is officially stated that the applicant would receive the same treatment as his colleagues in the same post.

- 20 The relevant scheme of service for the post of Assistant Operations Officer, 1st Grade, which is on a combined establishment with the post of Assistant Operations Officer, 2nd Grade, was approved by the Council of Ministers on the 4th February 1983.

- 25 Counsel for the applicant has conceded that as the applicant did not possess at the material time the qualifications required by such scheme of service for the post of Assistant Operations Officer, 1st Grade, the applicant could not be considered for promotion thereto; but counsel for the applicant has challenged the validity of  
30 the said scheme of service.

- As the applicant did not possess the qualifications required by the relevant scheme of service for promotion to the post in question, and assuming that such scheme is valid, it is plainly obvious that he did not possess a legitimate interest, in the sense  
35 of Article 146(2) of the Constitution, entitling him to file the present recourse.

In any event, the promotion to higher office or grade in a combined establishment is governed by the proviso to section 44(1)(a) of the Public Service Law, 1967 (Law 33/67), which provides that such promotion may be made irrespective of whether or not there is a vacancy in the higher office or grade; and it is well settled that such a promotion is not effected after a comparison of the merits, qualifications and seniority of the candidates holding the lower post in the combined establishment, but only on the strength of the possession by the officer to be promoted of the required qualifications for promotion.

It is quite clear, therefore, in the circumstances of this case, that it cannot be said that interested parties Hamalis, Savva and Papanicolaou were promoted instead of the applicant who, consequently, is not entitled to challenge the validity of the decision of the respondent Commission to promote the said interested parties (see, in this respect, inter alia, *Georghiades v. The Republic*, (1982) 3 C.L.R. 16, *Aristidou v. The Republic*, (1984) 3 C.L.R. 503 and *Seraphim v. The Republic*, (1985) 3 C.L.R. 286).

Moreover, the promotion of interested party Makrides was made pursuant to the proviso to section 31 of Law 33/67, as amended by means of section 2 of the Public Service (Amendment) Law, 1983 (Law 10/83), as a result of which such interested party was at the time the sole eligible candidate. Consequently, his promotion could not be challenged by the applicant by means of this recourse since it was effected on the basis of the aforesaid legislative provision which was not applicable to the applicant as well.

As regards the complaint of the applicant against the validity of the relevant scheme of service it must be pointed out that it is well settled that a scheme of service, made by the Council of Ministers under the provisions of Article 54 of the Constitution, is an act of legislative nature and as such it cannot be challenged directly by a recourse of annulment under Article 146 of the Constitution (see, in this respect, inter alia, *Pankyprios Syntechnia Dimosion Ypallilon v. The Republic*, (1978) 3 C.L.R. 27, *Ioannou v. The Electricity Authority of Cyprus*, (1981) 3 C.L.R. 280 and *Viotomas v. The Republic*, (1984) 3 C.L.R. 423); and to the extent to which the applicant could raise indirectly the validity of the said scheme

of service, as an issue which is relevant to his complaint against the refusal, or failure to promote him, too, to the post in question, since he was not qualified under such scheme of service for promotion, the applicant cannot succeed in this respect in the present recourse because, in my opinion in the light of the material before me, it has not been shown that the adoption of the scheme of service resulted in unequal treatment or discrimination against the applicant, contrary to Article 28 of the Constitution, as alleged by him.

10 In the light of all the foregoing this recourse fails and is dismissed accordingly; but with no order as to its costs.

*Recourse dismissed.  
No order as to costs.*