1987 April 15

[SAVVIDES J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

EFTYCHIOS YIOUTANIS,

Applicant,

-v-

THE REPUBLIC OF CYPRUS, THROUGH
THE EDUCATIONAL SERVICE COMMISSION,

Respondent
(Case No. 58/85)

Educational Officers — Promotions — Due inquiry — Personal and confidential files of all candidates examined on previous occasions — Doubt whether applicant's were examined for the purpose of sub judice decision — Ground for annulment

The administrative act challenged by this recourse is the same as that challenged by recourse 495/85 (see *Papaioannou v. The Republic* (1987) 3 C.L.R. 474). The facts are the same.

The Court reiterated for the purposes of this recourse the judgment in the above case in respect of the grounds which were raised in both recourses and then examined two grounds, which were raised in this recourse, but not in Recourse 495/85.

These two grounds are (a) That the sub judice decision is the result of lack of due inquiry in that it does not appear anywhere in the minutes of the respondent who were the candidates considered for promotion and whether the applicant was so considered, and

(b) that the recommendations submitted by the Head of the Department were not those of the Department.

It must be noted that in the minutes of the respondent dated 2.1.85 it is stated that «The Educational Service Commission studies personal and confidential files of candidates for the above posts. It is noted that the Educational Service Commission had recently dealt with the filling of other posts of Headmaster A' and Headmaster of Schools of Elementary Education (see minutes of 30.11.84 and 5.12.84), when it had the opportunity to examine in detail the files of all candidates».

Held, *annulling the sub judice decision* (1) It is apparent from the extract of the minutes cited above that the respondent examined the personal and confidential files of all the candidates on previous occasions. This is however a separate and distinct administrative act and has to be viewed as such It transpired from the wording of the said extract that the respondent did not examine the files of all candidates on the present occasion and since no list appears of the candidates whose files were examined, it cannot be said, without any doubt, that the file of the applicant was considered for the purposes of the sub judice decision It follows that the sub judice decision has to be annulled for lack of due inquiry

(2) It is clear from the minutes that the views expressed by the Head of the Department were not his own, but those of his Department

Sub judice decision annulled
No order as to costs

Cases referred to

Papaioannou v The Republic (1987) 3 C L R 474

Recourse.

Recourse against the decision of the respondent to promote the interested parties to the post of Headmaster A΄ in the Elementary Education in preference and instead of the applicant.

A.S. Angelides, for the applicant.

M. Florentzos, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

SAVVIDES J. read the following judgment. The applicant challenges by this recourse the decision of the respondent dated 3.1.1985 whereby the interested parties, namely, 1) Klitos Leonidou, 2) Panayis M. Panayides, 3) Ioannis N. Stylianou, 4) Fryne Charalambous, 5) Andreas Poyiadzis and 6) Marios Nicolaides, were promoted to the post of Headmaster A΄ in the Elementary Education instead of and in preference to him.

The administrative act challenged by this recourse is the same as that challenged by recourse No. 497/85* in which judgment was delivered by me on 3.4.1987. The facts are also the same and I will only make a brief reference to them.

The Minister of Education requested, by letter dated

* See (1987) 3 C.L.R. 474

17.12.1984 the filling of 7 posts of Headmaster A in the Elementary Education (promotion posts) which were to become vacant on 31.12.1984. The applicant and the interested parties were holding at the time, the immediately lower post of Headmaster. On the 2nd January, 1985, the recommendations of the Department of Elementary Education were submitted through its Director to the respondent, which met on the following day and took the sub judice decision, promoting seven candidates to the vacant posts, amongst whom the six interested parties, as from 1.1.1985.

The legal grounds raised are again similar to those raised in recourse No. 495/85 and are the following:

1. The respondent acted contrary to sections 26(3) and 35(2) of the Educational Service Law (Law No. 10/69), as amended by Law No. 53/79.

2. The previous approval of the Minister of Finance for the filling of the vacant posts was not obtained.

3. The procedure for the filling of the posts had commenced before the posts became vacant.

4. The sub judice decision is the result of lack of due inquiry in that it does not appear anywhere in the minutes of the respondent who were the candidates considered for promotion and whether the applicant was so considered.

5. The recommendations submitted by the Head of the Department were not those of the Department, as provided by section 35(3), and were, in any event, incomplete and defective.

Grounds 1, 2 and 3 have been dealt with by me in my judgment in Case No. 495/85, *Niovi Papaioannou v. Republic* (in which judgment was delivered on 3.4.1987) (not yet reported)*. These grounds are dismissed for the reason explained in my said judgment, which I adopt for the purposes of the present recourse and I need not repeat them.

I will now proceed to examine ground 4, that is, whether the applicant in the present recourse was considered for promotion by the respondents, in view of the fact that nothing appears in the

* *Reported in (1987) 3 C.L.R. 474.*

minutes of the respondent or anywhere in the records before me to that effect.

It is stated in the minutes of the meeting of the respondent dated 2.1.1985, that -

«Η Επιτροπή Εκπαιδευτικής Υπηρεσίας μελετά προσωπικούς και εμπιστευτικούς φακέλλους υποψηφίων για τις πιο πάνω θέσεις. Σημειώνεται ότι η Επιτροπή Εκπαιδευτικής Υπηρεσίας είχε πρόσφατα επιληφθεί της πλήρωσης και άλλων θέσεων Διευθυντή Α΄ και Διευθυντή Σχολείων Δημοτικής Εκπαίδευσης (βλ. *πρακτ. 30/11/84 και 5/12/84), οπότε είχε την ευκαιρία να* διεξέλθει διεξοδικά τους φακέλλους όλων των υποψηφίων.»

(«The Educational Service Commission studies personal and confidential files of candidates for the above posts. It is noted that the Educational Service Commission had recently dealt with the filling of other posts of Headmaster A΄ and Headmaster of Schools of Elementary Education (see minutes of 31.11.84 and 5.12.84), when it had the opportunity to examine in detail the files of all candidates.»

It is apparent from the extract of the minutes cited above that the respondent examined the personal and confidential files of all the candidates on previous occasions. This is however a separate and distinct administrative act and has to be viewed as such. It transpires from the wording of the said extract that the respondent did not examine the files of all candidates on the present occasion and since no list appears of the candidates whose files were examined, it cannot be said, without any doubt, that the file of the applicant was considered for the purposes of the sub judice decision. It is stated, in the minutes of the respondent dated 3.1.1985, that the Commission studied the files of all candidates. Reference is made, however, in this respect, to the minutes of 2.1.1985 (cited earlier) which, as I said before, leave room for doubt whether the files of the applicant were considered for the promotion in question.

In the light of the above I have come to the conclusion that there was lack of due inquiry in this case and, therefore, the sub judice decision has to be annulled on this ground.

Before concluding I wish to mention that I find no merit in the fifth ground raised by counsel for applicant. It is clear from the

minutes that the recommendations conveyed by the Head of the Department were not his own, but those of his Department which were made on the basis of his personal views, the views and recommendations of the relevant Inspectors of Education, the service reports and other material concerning the candidates.

In the result this recourse succeeds and the sub judice decision is hereby annulled with no order for costs.

Sub judice decision annulled. No order as to costs.

1987 February 17

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CHRISTOPHOROS KYTHREOTIS, ADMINISTRATOR OF THE ESTATE OF ARIADNI ZAKKA,

Applicant,

v.

THE REPUBLIC OF CYPRUS THROUGH THE COMMISSIONER OF INCOME TAX,

Respondent.

AND BY ORDER OF THE COURT DATED 17.2.86,

CHRISTOPHOROS KYTHREOTIS, ADMINISTRATOR OF THE ESTATE OF ARIADNI ZAKKA,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE DIRECTOR OF INLAND REVENUE,

Respondent.

(Case No. 201/86).

Compulsory acquisition — Capital gains tax on compensation deducted and paid together with interest to Director of Inland Revenue by Acquiring Authority — The Compulsory Acquisition of Property (Amendment) Law 148/85 - Exempted with retrospective effect the compensation for property compulsorily acquired from any tax — As a result the Director of Inland Revenue had to refund to the applicant in accordance with section 23 of the Capital Gains Tax Law, 1980 the amounts collected as aforesaid — Not entitled to refund any amount in excess of what is provided in the aforesaid section.

Recourse for annulment — Subsidiary formalities, such as wrong description of respondent — Do not defeat the substance.

The applicant is the administrator of the estate of the deceased Ariadni Zakka, who was the co-owner of certain immovable property at Paphos, which was compulsorily acquired by the Republic.

The Acquiring Authority paid compensation after deducting a sum of £32,789 14, representing Capital Gains Tax (£26,105) and interest thereon (£6,684 14)

The applicant challenged the said deduction by a Recourse to this Court While such Recourse was pending the Compulsory Acquisition of Property (Amendment) Law 148/85 was enacted This Law exempted compensation for compulsory acquisitions from all taxes with retrospective effect as from 27 5 83

As a result the respondent in the said Recourse revoked the sub judice decision and informed the applicant that the amount, deducted as aforesaid, would be refunded in accordance with section 23 of Law 52/80, that is with interest at 9% per annum on the amount of the tax of £26,105 as from 20 12 84 till the date of the refund

As a result the applicant filed the present recourse, challenging the validity of the said decision for the refund Counsel for the applicant contended that the whole of the amount deducted as aforesaid is part of the compensation payable for the acquisition and, therefore, it must be paid with interest thereon at 9% as provided by the Compulsory Acquisition of Property Laws

Held, *dismissing the recourse* (1) The respondent Director acted all along in accordance with the Capital Gains Tax Law 52/80 As there was no provision exempting property compulsorily acquired from the payment of capital gains tax, he was under the belief that the acquisition amounted to disposition and, consequently, he imposed capital gains tax on the amount of compensation plus interest as provided by section 22 of Law 22/85 The Acquiring Authority deducted in accordance with the Compulsory Acquisition Law and in particular section 12(3) the amounts of the said tax and the interest thereon and paid them to the Director The position change radically and with retrospective effect by Law 148/85, whereby the compensation payable for property compulsorily acquired was exempted from any tax

(2) As a result of the enactment of Law 148/85 the amounts deducted as aforesaid had to be refunded to the applicant in accordance with section 23* of Law 52/80 The respondent Director could only act under section 23, in virtue of which he was not entitled to refund any amount in excess of what is provided therein

(3) Any claim of the applicant for the balance of any amount of compensation alleged to be payable was not a matter for the respondent Director, but a matter concerning the applicant and the Acquiring Authority

(4) The respondent was described in the recourse as «Commissioner of Income Tax», whereas the appropriate organ was the «Director of Inland

* *Quoted at p 500 post*

Revenue». The Court, however, looks into the substance and does not allow subsidiary formalities, such as the description of the respondent, to defeat the substance. The title of the Recourse should be amended accordingly

Recourse dismissed. No order as to costs.

Cases referred to:

Christodoulou v. The Republic, 1 R.S.C.C 1;

HadjiPapasymeou v. The Republic (1984) 3 C.L.R. 1182;

Hyatt International v. The Republic (1985) 3 C.L.R. 337;

Demetriou v. The District Officer of Limassol (1986) 3 C.L.R. 2086.

Recourse.

Recourse for:(a) A declaration that the act and/or decision of the respondent revoking the decision whereby the sum of £32,789.14 c. was deducted from the compensation payable to applicant in respect of immovable property compulsorily acquired as representing capital gains tax and interest thereon and offering a refund of such sums with interest at the rate 9% on the amount of the tax, is null and void and of no effect whatsoever, (b) A declaration that the amount due is compensation, and (c) A declaration that the applicant is entitled to 9% interest on the total of the amount of tax and interest deducted as aforesaid.

L. Kythreotis, for the applicant.

Y. Lazarou, for the respondent.

Cur. adv. vult.

SAVVIDES J. read the following judgment. The applicant is the administrator of the estate of the deceased Ariadni Zakka. The deceased was the co-owner of certain immovable property at Paphos which was compulsorily acquired by the Republic of Cyprus.

The Acquiring Authority offered to the applicant compensation in respect of the property so acquired and paid same after deducting a sum of £32,789.14 c. as representing capital gains tax and interest thereon imposed by the respondent on the gain realised by the disposal of the said property as a result of the acquisition.

The applicant objected against the imposition of capital gains tax on the compensation and so he filed recourse No. 1041/85 to

the Supreme Court challenging such decision. Subsequently and while the recourse was still pending, the Compulsory Acquisition of Property (Amendment) Law of 1985 (Law 148/85) was enacted exempting from all tax compensation payable by the Government on compulsory acquisitions, with retrospective effect as from the 27th May, 1983, the date of coming into operation of the Compulsory Acquisition of Property (Amendment) Law of 1983 (Law 25/83).

On the 13th March, 1986, the respondent informed the applicant by letter that the assessment, subject matter of Recourse No. 1041/85 had been revoked and that the taxes and interest which were collected, would be refunded in accordance with the provisions of section 23 of Law 52/80. The contents of such letter read as follows:

«I refer to your letter dated 1st March, 1986 in reply to my letter No. 69-0048638/6 dated 21.2.1986 and wish to inform you as follows:

(a) As I have informed the administrator of the estate of the deceased Ariadni Zakka, the sub judice assessments have now been revoked and no question arises for the issue of a judgment of the Court on the imposition of capital gains tax for the immovable property acquired.

(b) The amount of capital gains tax of £26,105 and interest of £6,684.14 c. which has been collected through the Director of Lands and Surveys on 20.9.1985 will be returned. In addition, interest will be refunded at 9% on the amount of £26,105 as from 20.12.1984 till the date of the refund in accordance with the provisions of section 23 of the Capital Gains Tax Law of 1980.»

As a result, the applicant withdrew his Recourse No. 1041/85 and filed the present recourse whereby he prays for-

1. A declaration that the act and/or decision of the respondent contained in his letter dated 13.3.1986, attached hereto,, is null and void and of no effect whatsoever.

2. A declaration that the amount due to the administrator is compensation payable under the provisions of Law 25/83.

3. A declaration that the Administrator is entitled to 9% interest on £32,789.14 c. from 25.9.1985 until payment.

The grounds of law relied upon in support of the application are the following:

A. By virtue of the provisions of Law 148/85 compensation payable on compulsory acquisitions is not subject to any tax.

B. Compensation by virtue of the provisions of Law 25/83 carries 9% interest from the date of the publication of the notice of acquisition until payment.

C. Law 52/80 in its entirety is not applicable to compulsory acquisitions.

In expounding on his legal grounds counsel for applicant submitted that section 23 of Law 52/80 is inapplicable in the present case and that compensation payable on compulsory acquisition is not subject to any tax. No question of refunding excess tax arises and that the amount which the respondent deducted from the compensation as capital gains tax which he was not entitled to do by virtue of the provisions of Law 148/85, is part of the compensation which was payable to the applicant and in fact was not paid, and which the applicant is entitled to recover with interest thereon at 9%, as provided by Law 148/85. He concluded his address by submitting that the amount of £26,105 deducted as capital gains tax and the interest of £6,684.14 c. which had been deducted from the amount of compensation, must be treated as one sum and such sum being payable as part of the compensation of the property acquired should have been refunded to the applicant with interest at 9% as from the date that the notice for acquisition was published in accordance with the provisions of Law 148/85.

Counsel for the respondent by his written address contended that the said tax was properly levied in accordance with the provisions of the legislation then in force and the subsequent enactment of Law 148/85 could not make the levying of such tax unlawful. Therefore, the provisions of section 10 of Law 52/80 were applicable at the material time and the tax was properly imposed on the date when compensation was payable. He concluded by submitting that since the tax which was returned to the applicant was lawfully levied and collected under the provisions of the Capital Gains Tax Law, such tax could only be refunded in accordance with the provisions of the law under which it was levied and in particular under the provisions of section 23 of the Law. Therefore, the payment of interest is confined to the tax

paid in excess and no interest is allowable on refunds of interest. He finally submitted that the applicant could not challenge in these proceedings the validity of the respondent's decision to levy the tax and interest under consideration, on the ground that such a challenge is out of time.

Before embarking on the issues before me, I find it necessary to expound on the law material to the present recourse. Under the provisions of section 4 of the Capital Gains Tax Law, 1980 (Law No. 52/80), a tax is imposed and paid, at the rate of 20% in respect of any profit realised from the disposition of immovable property. It is further provided under section 22 that simple interest at 9% is payable on any amount of tax due after the lapse of three months from the date of the disposition of such property. Section 23 provides as follows:

23. Εάν αποδειχθή κατά τρόπον ικανοποιούντα τον Διευθυντήν ότι πρόσωπόν τι κατέβαλε φόρον υπερβαίνοντα το ποσόν του φόρου του ορθώς επ' αυτού επιβλητέου, το πρόσωπον τούτο δικαιούται όπως τω αποδοθή το ούτω καθ' υπερβολήν καταβληθέν ποσόν ομού μετά απλού τόκου προς εννέα τοις εκατόν κατ' έτος από της παρόδου τριών μηνών από της ημερομηνίας της πληρωμής του καθ' υπέρβασιν πληρωθέντος φόρου μέχρι της ημερομηνίας της αποδόσεως.

(«23. If it be proved, to the satisfaction of the Director, that a person has paid tax in excess of the amount with which he is properly chargeable, that person shall be entitled to have the amount so paid in excess refunded to him, together with simple interest at the rate of nine per centum per annum from the expiry of three months from the date of payment of the tax paid in excess until the date of the refund.»).

The properties of the applicant in this case were compulsorily acquired by notices of acquisition published in 1981, 1982, 1983 and 1984. Under the provisions of the Compulsory Acquisition of Property Law of 1962 (Law No. 15/62) as amended by Law 25/83, the amount of compensation was agreed upon between the parties and on the basis of the compensation so agreed the Director of Inland Revenue by treating the acquisition as a disposition of immovable property, falling within the provisions of Law 52/80, assessed the amount of £26,105 as capital gains tax, plus interest at 9 per cent running from the expiration of three

months from the acquisition and amounting to £6,684.14c which, in accordance with the provisions of the Acquisition of Property Law and in particular section 12(3) the Acquiring Authority had to deduct and pay to the Director of Inland Revenue before paying any compensation to the owner.

The position changed radically in 1985 by the enactment of the Acquisition of Property (Amendment) Law 148/85 by virtue of which the compensation payable on property compulsorily acquired is exempted from the payment of any tax. Such provision was given retrospective effect as from the 27th May, 1983.

As a result of the enactment of the said law, the Director of Inland Revenue came to the conclusion that in view of the retrospectivity of the said law the capital gains tax and interest thereon collected by him should be refunded to the applicant in accordance with the provisions of section 23 of the Capital Gains Tax Law, 1980, with interest on the amount of the tax at 9 per cent as from the 20th December, 1985, that is, three months after such tax had been collected, and the compensation paid to the applicant.

From the material before me it is clear that all along the Director of Inland Revenue acted in accordance with the provisions of the Capital Gains Tax Law, 1980 and exercised the powers vested in him under such law. At the time of the imposition of the tax and its collection the Director of Inland Revenue was under the belief that as there was no provision in the law exempting property compulsorily acquired from the payment of capital gains tax, the acquisition of the property amounted to a disposition and, therefore, a capital gains tax had to be imposed on the amount of compensation payable, plus simple interest at 9 per cent on such amount, calculated three months after the disposition of such property till the collection of the tax. Such tax and the interest thereon were collected through the Director of Lands and Surveys on the 20th September, 1985. At some later date and in fact on 8.11.1985 Law 148/85 was enacted, which, as already mentioned, was given retrospective effect as from the 27th May, 1983. Law 148/85, expressly exempted properties compulsorily acquired from capital gains tax. As a result of such law, the Director was bound to refund the tax collected by him in respect of the acquired property, and, exercising his power under section 23, informed the applicant by letter dated the 13th March 1986 that the tax so collected would be refunded with interest at 9 per cent as from the 20th December, 1985 (three months after the date it

was paid in accordance with section 23) as well as any interest which was paid on such amount.

Bearing in mind the legal position as above, the Director of Inland Revenue could only act in the circumstances under the provision of section 23 of Law 52/80, and by virtue of such provision he was not entitled to refund any other amount in excess of what is provided therein. I therefore find that the decision of the respondent was correct and in accordance with the relevant law. Any claim of the applicant for the balance of any amount alleged by him to be compensation under the Acquisition of Property Law, was not a matter for the Director of Inland Revenue to consider but it was a matter concerning the applicant and the Acquiring Authority as the payment of compensation in respect of property compulsorily acquired is the responsibility of the Acquiring Authority and not of any organ or person.

Having found as above, I have come to the conclusion that this recourse should fail.

Before concluding, I wish, however, to make an observation. In the title of this recourse the respondent is described as «The Republic of Cyprus through the Commissioner of Income Tax.» In fact, under the provisions of the relevant Law and from the letter embodying the sub judice decision, the appropriate organ which was empowered to act in the case and which in fact has acted accordingly, was the Director of Inland Revenue and not the Commissioner of Income Tax. This, however, is not a matter which may render a recourse invalid, since the court looks into the substance of the case and the act that is challenged and does not allow subsidiary formalities, such as the description of the respondent, to defeat the substance (see *Christodoulou and The Republic*, 1 R.S.C.C. 1; *Hadjipapasymeou v. The Republic* (1984) 3 C.L.R. 1181; *Hyatt International v. Republic* (1985) 3 C.L.R. 337 and *Demetriou v. The District Officer of Limassol* (Case No. 401/84, in which judgment was delivered on the 22nd December, 1986, still unreported*).

Therefore, I have come to the conclusion that the title of this recourse may be amended to read «The Republic of Cyprus through the Director of Inland Revenue» instead of «The Republic of Cyprus through the Commissioner of Income Tax» so as to

* *Reported in (1986) 3 C.L.R. 2086.*

bring it in conformity with the true facts of the case, and I direct accordingly.

In the result the recourse fails and is hereby dismissed. There will be no order for costs.

5 *Recourse dismissed.*
No order as to costs.