

1987 May 30
[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

GEORGHIOS PAPALEONTIOU,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondents.

(Case No. 371/84).

10 *Revisional Jurisdiction Appeal — Approach of Full Bench — Basic issue remains the validity of the administrative act, decision or omission in respect of which a recourse under Art. 146 of the Constitution was filed and in relation to which there was issued a decision by a Judge of this Court — The only final and effective judgment with regard to the legality of the sub judice act, decision or omission is the judgment of the Full Bench — In the light of a decision of a Judge of this Court whereby applicant's promotion to the post of General Inspector of Elementary Education was annulled, the respondent Commission, in taking the sub judice decision, considered applicant as an Inspector B, General Subjects Elementary Education — Said annulling decision reversed on appeal some time after the taking of the sub judice decision — Sub judice decision annulled on ground of taking into account of a non existing fact, i.e. that applicant was Inspector B, and of failing to take into account an existing fact, i.e. that applicant was a General Inspector of Elementary Education.*

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20 *Administrative Law — Misconception of fact — Appointment to first entry and promotion post — Taking into consideration a candidate's seniority on the basis of the post, to which he was reverted by reason of the annulment by a Judge of this Court of his promotion to a senior post — After the taking of the sub judice decision, the said annulling decisions was reversed on appeal — Sub judice decision annulled on ground that the Commission took into account a non existing fact and failed to take into account an existing fact.*

25 *Educational Officers — Appointments/Promotions — First Entry and Promotion posts — Interviews — Performance at — Absence of contemporaneous record — Evaluation made 10 months after interviews — Probability of mistakes — Ground of annulment.*

The applicant by means of this recourse challenges the appointment of the interested party to the post of Director Primary Education, which is a first entry and promotion post

On 26.11.83 a Judge of this Court annulled the decision, whereby the present applicant had been promoted with effect as from 1.11.80 to the post of General Inspector of Primary Education (See *Karayiorghis v. The Republic* (1983) 3 C L R 1211). The present applicant, feeling aggrieved, filed Revisional Appeal No 350. On 30.11.83 another Judge of this Court annulled the decision whereby the interested party in this recourse Papadopoulos, had, also, been promoted with effect from 1.11.80 to the said post of General Inspector (See *Tornaris v. The Republic* (1982) 3 C.L.R. 1165).

On 22.12.83 - 5 days before the filing of the said appeal and long before the expiration of the time prescribed for appeal - the respondent Commission reconsidered the matter of the promotions to the said post of General Inspector and decided to promote to the said post retrospectively as from 1.11.80 the interested party in this recourse and the said Tornaris.

Notwithstanding a request in writing by counsel for the present applicant for postponement of the decision relating to the sub judge post of Director Primary Education until determination of Revisional Jurisdiction Appeal 350, the respondent Commission decided to proceed and finally appointed interested party Papadopoulos to the post of Director Primary Education

In reaching the sub judge decision the respondent Commission took into consideration the seniority of the applicant. The applicant was considered as the most junior because he was deemed «Inspector B», General subjects, i.e. to the post to which he reverted by reason of the said annulment of his promotion to the post of General Inspector of Elementary Education.

The Full Bench of this Court allowed Revisional Jurisdiction Appeal 350 (See *Papaleontiou v. The Republic* (1987) 3 C.L.R 211) and confirmed the present applicant's promotion with effect as from 1.11.80 to the post of General Inspector of Elementary Education

The sub judge decision is challenged on two grounds, namely that the Commission laboured under a misconception of fact as regards applicant's seniority and that the evaluation of the performance of the candidates at the interview almost 10 months after the interview vitiates the process of the taking of the decision and the evaluation by the Commission.

Held, *annulling the sub judge decision*: (1) An Administrative act is valid until its annulment by the Supreme Court. Section 9 of the Administration of Justice (Miscellaneous Provisions) Law 33/64 vests in the Supreme Court the jurisdictions of the Supreme Constitutional Court and of the High Court of Justice. In dealing with a revisional jurisdiction appeal the Full Bench of this Court approaches it by way of complete re-examination of the case, the basic

5 issue continuing to be the validity of the act decision or omission in respect of which a recourse under Art 146 of the Constitution was made and in relation to which there has decided in the first instance one of the Judges of this Court (Per Triantafyllides P in *Papaleontiou v The Republic* (1986) 3 C.L.R. 1238 at pp 1240 - 1241) From the jurisprudence of this Court on the interpretation and application of Section 11(1) and (2) it is settled that the litigants are entitled to the opinion of the Full Bench of the Supreme Court in a case coming within the revisional jurisdiction vested in the Supreme Constitutional Court under Article 146 Therefore where an appeal is filed against a judgment of a Judge of this Court exercising jurisdiction under paragraph (2) of s 11, the only final judgment and effective one with regard to the legality of an act or decision is the judgment of the Full Bench

15 (2) There can be no doubt that the seniority of the candidates influenced the respondent Commission in taking the sub judice decision The Commission considered the applicant as the holder of the post of Inspector B General Subject This was an error of fact because in the light of the aforesaid principles and the outcome of Revisional Jurisdiction Appeal 350 the Commission took into account a non existing fact and did not take into account the correct fact namely that the applicant held the post of General Inspector of Primary Education as from 1 11 80

25 (3) In view of the absence of any official contemporaneous record of the Commission regarding the performance of the candidates and in view of the period of almost 10 months which elapsed between the interviews and the evaluation by the Commission of the performance of the candidates at such interviews there exists a probability that notwithstanding the undoubted good faith of the Commission because of the passage of time mistakes have crept in It is humanly impossible to reach a reasonably correct evaluation 10 months after an interview

30 (4) For the foregoing reasons this recourse succeeds

Sub judice decision annulled
No order as to costs

Cases referred to

- 35 *Karagiorghis v The Republic* (1983) 3 C.L.R. 435
Tormans v The Republic (1982) 3 C.L.R. 1165
Karagiorghis v The Republic (1983) 3 C.L.R. 1211,
Tormans v The Republic (1983) 3 C.L.R. 1292
Papaleontiou v The Republic (1986) 3 C.L.R. 1238
Papaleontiou v The Republic (1986) 3 C.L.R. 1233,
Kinanis and Others v Republic (1986) 3 C.L.R. 151

The Republic v. Maratheftis and Another (1986) 3 C.L.R. 1407.

Recourse.

Recourse against the decision of the respondents to appoint the interested party to the post of Director of Primary Education in preference and instead of the applicant. 5

A.S. Angelides, for the applicant.

A. Vassiliades, for the respondents.

A. Pandelides, for the interested party.

Cur. adv. vult.

STYLIANIDES J. read the following judgment. The applicant 10
by means of this recourse challenges the appointment of the
interested party to the post of Director Primary Education.
Another relief prayed is a declaration that the refusal of the
respondents to suspend the procedure of filling the said post until
the determination of Revisional Appeal No. 350 is null and void 15
and with no legal effect.

The request for the filling of the post of Director Primary
Education was made by letter 21.7.82. The post is a first entry and
promotion post. It was advertised in the Official Gazette No. 1693
dated 6.8.82. The last date for submitting applications was 20
28.8.82.

Seven educationalists in the service of the Ministry of Education
applied for the post. A Departmental Board was formed. It
submitted its report to the respondent Commission on 9.11.82.

On 9.12.82 clarifications were asked under Reg. 6 for the 25
establishment and functioning of the Departmental Boards, which
were furnished on 28.12.82.

The Public Service Commission interviewed the four
candidates, including the applicant and the interested party,
recommended by the Departmental Board, and on their request 30
also the other candidates. The interview in the presence of the
Director-General of the Ministry took place on 13.7.83 and
14.7.83. Questions were put to the candidates on general subjects
mainly concerning the duties of the post, which are set out in the
scheme of service. At the meeting of the respondent Commission 35
of 16.7.83 the Director-General of the Ministry stated his views on
the performance of the candidates at the interview - (Appendix

12) He proceeded and made recommendations.

- On the same day the respondent Commission, as all the candidates were in the Educational Service of the Republic, decided to inquire of the Ministry as to their seniority. On 19.7.83 a table indicating the seniority of the candidates was furnished to the Commission. The interested party and the applicant were top in the list as they were General Inspectors as from 1.11.80, having been promoted to that post on 22.10.80. That promotion of the applicant was annulled by Judge Hadjianastassiou in Recourses No. 371/80 and 483/80 on 5th May, 1982 - (*Karayorghis v. The Republic*, (1982) 3 C.L.R. 435). The same Judge on 21st October, 1982, annulled the promotions of applicant Papaleontiou and interested party, Papadopoulos, to the said post - (*Tornaris v. The Republic*, (1982) 3 C.L.R. 1165).
- 15 On 11th May, 1982, and on 25.10.82 applicant Papaleontiou and Papadopoulos were respectively promoted to the same post retrospectively as from 1.11.80.

- The new promotions were challenged in Recourse No. 258/82 by one of the candidates, namely, Karayorghis. This recourse was pending on 2.8.83 when the respondent Commission took cognizance of the table of seniority furnished by the Ministry of Education. On that day it was decided to «ask for legal advice whether amongst the factors that should be taken into consideration for the general evaluation of the candidates was the seniority of these two candidates according to their second promotion to the post of General Inspector or if that should be ignored in view of the fact of the annulment of the original decision of the Educational Service Commission and the further impeachment of the second promotion before the Supreme Court». The legal advice, on which, it appears, that the Commission acted, is contained in Appendix 16 dated 15.12.83. They were advised to take into consideration the seniority of these two officials according to their second promotion to the post of Inspector-General. It is further stated in this appendix that the final act of the Public Service Commission would be legally faulty if the Commission took into consideration their seniority to the post of General Inspector, had such promotion been annulled shortly by the Supreme Court in the pending recourse as the Administration has to act on the factual and legal situation existing at the time that a decision is taken.

Recourse No 258/82 was determined by a first instance judgment of a Judge of this Court on 26th November 1983, with the result that the decision of this promotion was annulled - (*Karayorghis v The Republic* (1983) 3 CLR 1211) The promotion of interested party Papadopoulos was annulled in Recourse No 27/83 by another Judge of this Court on 30th November 1983 - (*Tornaris v The Republic*, (1983) 3 CLR 1292) The present applicant, Papaleontiou being aggrieved filed Revisional Appeal No 350 against the decision in Recourse No 258/82

On 22nd December, 1983 - 5 days before the filing of the said appeal and long before the expiration of the time prescribed for appeal - the Educational Service Commission reconsidered the matter of the filling of the two posts of General Inspector of Elementary Education and promoted Papadopoulos and Tornaris

On 14 4 84 the Director-General of the Ministry sent to the respondent Commission a new revised table showing the seniority of the candidates, in which the present applicant was the last, i e 6th, as holder of the post of Inspector «B», General Subjects, and drawing salary in the scale A 12 whereas Tornaris and Papadopoulos were given the first places as holders of the post of General Inspector and drawing salary in the scale of A 14 In his letter of 14 4 84 a further evaluation of the candidates is made by the Director-General

On 30 4 84 the respondent Commission considered the seniority of the candidates according to this new table and the contents of the letter of the Director-General of 14 4 84

On 4 5 84 Commission considered the scheme of service of the post of General Inspector, Inspector «A» and Inspector «B», of Primary Education, i e the scheme of service of the posts the candidates were holding

On the same day they considered a letter from counsel for the applicant dated 2 5 84 whereby he prayed that the Commission postponed reaching a decision until after the determination of Revisional Appeal No 350 whereby the applicant challenged the judgment of the first instance Judge annulling his promotion to General Inspector and Recourse No 565/83 whereby he impugned the new promotions decided on 22 12 83

The Commission declined to accept this request and proceeded to evaluate the performance of the candidates at the interviews, having regard to the opinions of the Director-General. After doing so, it proceeded to the general evaluation and comparison of the applicants. It took into consideration the seniority of the candidates as set out in the letter and the table of 14 4 84. The applicant was recorded as the most junior as he was deemed Inspector «B», General Subjects. Then they took pains to make a particular comparison between Papadopoulos, the interested party and Tomans, who were in order of seniority, according to that table, Nos 1 and 2, and finally reached the sub-judice decision whereby Papadopoulos was selected and appointed with effect from 15 5 84.

The Supreme Court in Revisional Appeal No 350 allowed the appeal and confirmed under Article 146 4 of the Constitution the decision of 11 5 82 of the Educational Service Commission whereby the applicant was promoted with effect from 1 11 80 to the post of General Inspector of Primary Education.

The legality of the sub-judice decision is challenged on a number of grounds, including -

(a) That it was taken under a misconception of fact in the sense that the respondent Commission took into consideration the seniority of the applicant as holder of the post of Inspector «B» and not General Inspector and that the promotion of either the interested party or Tomans to the said post on 22 12 83 was untenable in view of the confirmation of the promotion of the applicant, and,

(b) That the evaluation of the performance of the candidates at the interview almost 10 months after the interview vitiates the process of the taking of the decision and the evaluation by the Commission.

An administrative act is valid until its annulment by the Supreme Court under Article 146 4(b) of the Constitution. The jurisdiction vested in the Supreme Constitutional Court under Article 146 is exercised by the Supreme Court under the Administration of Justice (Miscellaneous Provisions) Law, 1964 (No 33 of 1964).

Section 9 of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (No 33 of 1964), which defines the

jurisdiction to be exercised under Section 11, vests in the Supreme Court the jurisdictions of the Supreme Constitutional Court and of the High Court of Justice.

In particular, the Supreme Court is vested, inter alia, with the revisional jurisdiction of the Supreme Constitutional Court, under Article 146 of the Constitution, and with the appellate, original and revisional jurisdictions of the High Court of Justice, under Article 155 of the Constitution. 5

Section 11 provides:-

«11. (1) Any jurisdiction, competence or powers vested in the Court under section 9 shall, subject to subsections (2) and (3) and to any Rules of Court, be exercised by the full Court. 10

(2) Any original jurisdiction vested in the Court under any law in force and any revisional jurisdiction, including jurisdiction on the adjudication of a recourse made against an act or omission of any organ, authority or person exercising executive or administrative authority as being contrary to the law in force or in excess or abuse of power, may be exercised, subject to any Rules of Court, by such Judge or Judges as the Court shall determine: 15 20

Provided that, subject to any Rules of Court, there shall be an appeal to the Court from his or their decision.

(3) Any appellate jurisdiction vested in the Court shall, subject to any Rules of Court, be exercised by at least three Judges nominated by the Court. 25

Each such nomination shall be made in respect of a period of four months at the beginning of such period».

The nature and scope of a revisional jurisdiction appeal was aptly described by Triantafyllides, P., in *Georghios Papaleontiou v. The Republic*, (1986) 3 C.L.R. 1238, at pp. 1240-41, as follows:- 30

«It is well settled (see, inter alia, *Vassiliades v. The Republic*, (1967) 3 C.L.R. 82, 83) that a revisional jurisdiction appeal, such as the one with which we are now dealing, is intended to ensure to the parties to it the benefit of the opinion of the Full Bench of the Supreme Court in a case coming within the revisional jurisdiction which was vested in the Supreme Constitutional Court under Article 146 of the Constitution and 35

which is now exercised in the first instance by a Judge of the Supreme Court under section 11(2) of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law 33/64).

5 In dealing with a revisional jurisdiction appeal the Full Bench of this Court approaches it by way of a complete re-examination of the case (see, inter alia, *The Republic v. Georghiades*, (1972) 3 C.L.R. 594, 690, *The President of the Republic v. Louca*, (1984) 3 C.L.R. 241, 249, and *Ayios Andronikos Development Co. Ltd. v. The Republic*, (1985) 3
10 C.L.R. 2362, 2373).

In such an appeal the basic issue continues to be the validity of the administrative act, decision or omission in respect of which a recourse under Article 146 of the Constitution was made and in relation to which there has decided, in the first
15 instance, one of the Judges of this Court (see, inter alia, in this respect, *Pikis v. The Republic*, (1968) 3 C.L.R. 303, 305, *Constantinides v. The Republic*, (1969) 3 C.L.R. 523, 530, *The Republic v. Pericleous*, (1972) 3 C.L.R. 63, 68, *Christou v. The Republic*, (1982) 3 C.L.R. 634, 639, the *Louca* case, supra, 265, *Ethnikos v. K.O.A.*, (1984) 3 C.L.R. 1150, 1154, and *Zachariades v. The Republic* (1984) 3 C.L.R. 1193, 1218). Thus, in effect, the Full Bench of the Court is seized of
20 the matter 'ab initio'.

From the jurisprudence of this Court on the interpretation and
25 application of Section 11(1) and (2), it is settled that the litigants are entitled to the opinion of the Full Bench of the Supreme Court in a case coming within the revisional jurisdiction vested in the Supreme Constitutional Court under Article 146. Therefore, where an appeal is filed against a judgment of a Judge of this Court
30 exercising jurisdiction under paragraph 2 of section 11, the only final judgment and effective one with regard to the legality of an act or decision is the judgment of the Full Bench.

The applicant exercised his right of appeal within the prescribed time. Revisional Appeal No. 350 was pending before the Full
35 Bench. This was brought to the knowledge of the respondent Commission by the letter of his counsel. The only final judgment in the case is the judgment confirming the promotion of the applicant with effect from 1.11.80 to the post of General Inspector. The fact that the Educational Service Commission did
40 not appeal against the aforementioned first instance judgment has no bearing on this case.

It is noteworthy that the Full Bench in another interim decision in Revisional Appeal No 350 - (*Papaleontiou v The Republic*, (1986) 3 C L R 1233, at p 1237) - had this to say -

«In the present instance, however if the appeal of the appellant is successful, the annulment of his promotion by the first instance judgment will be set aside and the decision to promote him, which was taken by the respondent Commission, as aforesaid, on the 11th May, 1982, will preserve its executory nature and there will have then to be examined the validity of the aforementioned subsequent decision of the Commission, on the 22nd December, 1983, which was taken on the assumption that the earlier promotion of the appellant had been annulled judicially»

It is plain that the respondent Commission in reaching the sub-judice decision took into consideration the seniority of the candidates according to the table presented to it by the Director-General of the Ministry on 14 4 84 in which the applicant is listed last and the interested party second, being the holders of the posts of Inspector «B» and General Inspector of Primary Education, respectively That this seniority influenced their decision is undoubted and it is borne out plainly from the contents of the decision itself Throughout the process of their deliberations and their inquiries they took pains to find out this seniority

In view of the decision of the Full Bench of this Court in Revisional Appeal No 350, the factor of seniority as taken into consideration by the Commission is erroneous If the actual fact that it should have been taken into consideration is as it finally resulted from the decision of the Full Bench in Revisional Appeal No. 350, which reversed the first instance judgment in Recourse No 258/82, then the Commission laboured under a misconception of fact in the sense that they took into consideration a non-existing fact and they did not take into account the correct fact The Commission took into consideration erroneous factors The position of the applicant crystallized in Revisional Appeal No 350 The promotion of the applicant on 11 5 82 with effect from 1 11 80 preserved its executory nature and it was continuously valid and was confirmed by the Court

«Court» in the context of the Administration of Justice, as established by s 11 of Law No. 33/64, is the first instance Court, one Judge of this Court, but if an appeal is filed, then the Full

Bench, as the jurisdiction is vested in the Full Bench.

The sub-judice decision is, therefore, faulty and cannot survive the judicial scrutiny.

5 The evaluation by the Commission of the performance of the candidates at the interview was preceded by the evaluation and the recommendations of the Director-General of the Ministry who thought it fit to send many months later, in April, 1984, in the form of clarification further recommendations.

10 The Public Service Commission is a very busy body. It has high responsibilities; it interviews many candidates for appointment and promotion in all sectors of the public service. The interview in the present case for a post that carries serious administrative responsibilities is not to be deemed as an ordinary interview for which the Courts have imposed certain limitations with regard to their scope. It is noteworthy further that the Director-General rated the interested party as «Very Good». He rated also the applicant as «Very Good» but the «Very Good» of the one was unequal to the «Very Good» of the applicant. He said that the first was Papadopoulos who was «Very Good» and then he listed three others as «Very Good», including the applicant. It is true that the respondent Commission rated both as «Very Good», but it is not clear whether the «Very Good» of the one is different from the «Very Good» of the other or if they had been influenced by the oral evaluation and the written communication of the Director. I leave that issue open.

25 I have reached the conclusion, however, that in view of the absence of any official contemporaneous record of the Commission regarding the performance of the candidates and in view of the period of almost 10 months which elapsed between the interviews and the evaluation by the Commission of the performance of the candidates at such interviews, that there exists a probability that, notwithstanding the undoubted good faith of the Commission, because of the passage of time mistakes have crept in. It is humanly impossible to reach a reasonably correct evaluation 10 months after an interview. It is clear from the record placed before me that the evaluation was not made shortly after the interviews but records were kept and inserted in their decision at such late time. Had it been so, the matter would have been different.

With regard to the belated evaluation at the interviews, useful reference may be made, inter alia, to *Kinanis and Others v. The Republic*, (1986) 3 C.L.R. 151, 157, and *The Republic v. M. Maratheftis and Another*, (1986) 3 C.L.R. 1407.

For the foregoing reasons this recourse succeeds. The sub- 5
judice decision is declared null and void and of no effect
whatsoever under Article 146.4(b).

Let there be no order as to costs.

Sub judice decision
annulled. No order 10
as to costs.