

1988 July 14

[A. LOIZOU, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION
CONSTANTINOS POURGOURIDES AND OTHERS (No. 1),

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE EDUCATIONAL SERVICE COMMISSION,

Respondent.

(Cases Nos. 723/86, 732/86, 771/86, 789/86).

Educational Officers—Promotions—Head of Department—Recommendations—Inadequate recording of, in the minutes—Effect—Mere listing of candidates recommended by the Department—Should not be given any weight.

Educational Officers—Promotions—Misconception of fact—Impression that interested party had better marks in his confidential reports than applicant, whereas in truth the applicant was superior by one mark—Sub judice promotion annulled. 5

Educational Officers—Promotions—Misconception of fact—Seniority—Wrong impression that interested party senior to applicant—Ground of annulment. 10

The facts and legal principles emanating from this case need not be summarised because they can be adequately surmised from the headnote hereinabove.

Sub judice decision annulled. 15
No order as to costs.

3 C.L.R. **Pourgourides (No.1) v. Republic**

Cases referred to:

Partellides v. The Republic (1969) 3 C.L.R. 480;

Constantinides v. The Republic (1973) 3 C.L.R. 508;

Trimikliniotis v. The Republic (1971) 3 C.L.R. 293;

5 *Eleftheriou v. Central Bank* (1980) 3 C.L.R. 85;

Iossif v. CYTA (1975) 3 C.L.R. 261;

Ellinas v. The Republic (1975) 3 C.L.R. 248;

Yenakritou and Others v. The Republic (1985) 3 C.L.R. 2731;

Ioannidou and Others v. The Republic (1984) 3 C.L.R. 1283.

10 **Recourses.**

Recourses against the decision of the respondent to promote the interested parties to the post of Headmaster in the Secondary Education in preference and instead of the applicants.

15 *A.S. Angelides*, for applicants in Cases Nos. 723/86, 732/86 and 789/86.

N. Clerides, for applicant in Case No. 771/86.

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

N. Papaefstathiou for T. Papadopoulos, for interested party Ch. Onoufriou in Recourses Nos. 723/86 and 732/86.

20 *E. Evripidou*, for interested party L. Philippides.

Cur. adv. vult.

A. LOIZOU P. read the following judgment. By the present recourses which were tried together as they present common issues of law and fact and which were taken over by me on the 17th February, 1988 after the retirement of His Honour Loris, J. the applicants seek a declaration of the Court that the decision of the respondent Commission to promote the interested parties Ch. Onoufriou and D. Philippides to the post of Headmaster in Secondary Education retrospectively as from the 1st September 1980 is null and void and of no legal effect whatsoever.

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The background to these recourses is as follows:

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The Supreme Court by means of its Judgment in Recourses Nos. 332/80 etc. , reported as *Kleri Angelidou and others v. Republic* (1982) 3 C.L.R. 520 annulled the promotions to the post of Headmaster in Secondary Education which were effected by the respondent Commission on the 30th August, 1980. As a result, the respondent Commission re-examined the matter on the 21st June 1982 and effected new promotions which were also challenged and which were annulled by the Supreme Court on the 30th April 1986 by its judgment in R.A. 396. (See *Kinanis and others v. Educational Service Commission* (1986) 3 C.L.R. 1705). It was held therein that the impressions of the Commission about the performance of the interested parties concerned at the interviews two years earlier, which in the absence of any contemporaneous official written record could not be treated as safely and accurately reliable, were wrongly treated as being of decisive significance in leading up to the choice for promotion of the two interested parties.

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In the light of this decision the respondent Commission decided at its meeting of the 8th September 1986 to re-examine the matter once again. At its meeting of the 17th September 1986, the respondent Commission having examined the personal files and confidential reports of all candidates for promotion and the matter at hand under the legal and factual situation as applicable on the 30th August 1980 when the original annulled decision was reached, but, as stated therein, without taking into consideration

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at the re-examination the performance of the candidates at the personal interviews and bearing in mind the provisions of the Law and the requirements of the Scheme of Service as at the 30th August 1980 and also the merit, qualifications and seniority of the candidates and the recommendations of their Departments, concluded that the interested parties were the most suitable for promotion. As a result the present recourses were filed.

The sub-judice decision so far as is relevant reads as follows:

"The Commission having in mind the provisions of the Law and the Schemes of Service as in force on the 30th August 1980, as well as the aforesaid judgment of the Supreme Court and after taking into consideration,

(a) The merit, qualifications and seniority of the candidates, and evaluating together all these criteria and giving to each one of them due weight and

(b) The recommendations of the appropriate Departments, arrives at the conclusion that Messrs Demetrios Philippides and Charalambos Onoufriou are the most suitable candidates for promotion to the above posts.

Mr. Demetrios Philippides is one of the most senior candidates (he has been promoted to the post of Assistant Headmaster since 1st September 1971 and to the post of Technologist on scale B.13, which was the same as the scale of Assistant Headmaster, as from 31st August 1969), he has excellent marks, additional qualifications and has been recommended to the post of Assistant Headmaster since the 15th September 1973, and possesses a total of Educational Service of 26 and 8/12 years as at 31st August 1980. Though he is not recommended by the appropriate Department, the Commission considers him as being superior to the recommended candidates, who have not been promoted because they are not superior to Mr. Onoufriou, neither in merit, nor in qualifications, nor in seniority and he is the most suitable than all the candidates because on the basis of the lawful criteria he presents

on the whole a better picture than them, as also, emanating from the following:

With regard to candidates who have not been selected the Educational Service Commission observes the following:

- (a) 5
- (b) The following have been promoted to the post of Assistant Headmaster on the same date as Mr. Onoufriou but they lack behind in seniority in comparison with Mr. Philippides (Assistant Headmaster from 15th September 1973).
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 - (2)
 - (3) Andreas Christodoulides, (applicant in recourse No. 789/86): He is not superior in marks and lacks behind Mr. Onoufriou regarding the total of the service (seniority, at first appointment.). He has no additional qualifications. He has not been recommended". 15
 - (4) Constatinos Pourgourides, (applicant in recourse No.723/86). He is not superior in marks. He lacks behind Mr. Onoufriou with regard to the total of the service (seniority at first appointment). He is slightly superior in qualifications. He has not been recommended. 20

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Learned counsel for the applicants argued:-

- 1. Recourse No.723/86

This recourse is directed against the promotion of both interested parties. 25

- (a) In the recommendation list of the appropriate Department there were included only those who were performing the duties of Acting Assistant Headmaster during the school year 1979-1980, and those who have been recommended for an acting appointment 30

5 to the post of Headmaster for the following school year (1980-1981). Applicant who was absent on leave since 1973-1974, and returned to Cyprus in 1979-1980 and thus could not be asked to perform duties on an acting capacity, was not recommended in spite of his superior merit, qualifications, seniority, and his unique experience. The recommendations in question is a mere listing of the recommended candidates without any explanation at all.

10 (b) The statement of the respondent Commission that the applicant is not superior in marks is erroneous. He is superior because he has thirty-seven marks whereas the two interested parties thirty-six. Therefore, the Educational Service Commission acted under a misconception, or it did not inquire fully into the files in spite of its general reference that it examined the files.

15 (c) The statement of the respondent Commission that the applicant lacks behind Mr. Onoufriou with regard to the totality of the service (seniority at first appointment.), is erroneous. In the comparative table (Appendix E,) to the Opposition Mr. Onoufriou is stated to have 26 and 8/12 years of service as at 31st August 20 1980, and applicant 21. Mr. Onoufriou was initially an elementary school teacher (from 1st September 1953 until 7th January 1965) and subsequently he became a secondary education Schoolmaster. What is of significance in his previous post and not the total of his service in view of section 37(2) of Law 10/ 25 1969. Under section 37(2) in case of Schoolmasters' appointment on promotion to a particular post... " Seniority is judged by reference to the previous seniority of educational officers." Under section 37(2), the applicant who was appointed as Secondary Education Schoolmaster in 1959, is senior to interested party who 30 was appointed on the 7th January 1965.

(2) Recourse No. 732/86.

35 The above recourse was directed only against the promotion of interested party Onoufriou. Learned counsel for the applicant adopted his address in Recourse No. 723/86, and particularly his contentions about the recommendations of the appropriate Depart-

ment. He further submitted that in the minutes of the respondents no reference at all is made to the applicant and that though a general reference that the files of the candidates is made in the minutes, it is not clear whether applicant was considered for promotion.

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(3) Recourses Nos. 771/86 and 789/86.

Both above recourses were directed only against the promotion of interested party Philippides.

Learned counsel relied mostly on the above conclusion about the recommendations of the Head of Department.

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Looking at the sub judice decision one can be driven to the safe conclusion that one of the factors that led to the preference of interested party Philippides was the recommendation of the appropriate Department: and one of the factors that led to the non-selection of applicants in Recourses Nos. 723/86, and 789/86, was the absence of such recommendation. Regarding the applicants in Recourses Nos. 732/86 and 771/86, the relevant minute of the Commission does not make any reference to them and so we are in the dark as to the reasons that led to their non-selection. In view of the above it is clear that the existence or absence of the said recommendations played a decisive role in the selection process.

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What is the effect in law of the absence of adequate recording of the recommendations. As far back as 1969, the Full Bench of this Court in *Partellides v. The Republic* (1969) 3 C.L.R. 480 disapproved the inadequate recording of the recommendations of the Head of Department. Triantafyllides, J. , as he then was in delivering the Judgment of the Full Bench is reported to have said the following at p. 484;

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"While on this point let it be stated that we have, indeed, noted a general statement, in the relevant minutes of the Respondent, that the decisions as to the promotions concerned - including the sub judice one - were reached bearing in mind,

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inter alia, the "recommendations" of Mr. Hajioannou (which were made orally at the particular meeting of the Respondent on the 3rd July, 1968); but, in the opinion of the Court, without these recommendations being adequately recorded in the said minutes, so as to enable this Court to examine how and why it was reasonably open to the Respondent to act upon them, notwithstanding the greater seniority of the Appellant and the equally good confidential reports, such a general statement in the minutes of the Respondent, as aforesaid, cannot have the effect of rendering the promotion of Interested Party Gregoriades one which can be treated as having been properly decided upon in the exercise of the particular powers of the Respondent."

(See also *Constantinides v. The Republic* (1973) 3 C.L.R. 508; *Trimikliniotis v. The Republic* (1971) 3 C.L.R. 293; *Eleftheriou v. Central Bank* (1980) 3 C.L.R. 85; *Iossif v. CYTA* (1975) 3 C.L.R. 261; *Ellinas v. The Republic* (1975) 3 C.L.R. 248.)

In a rather recent case that of *Yenakritou and Others v. The Republic* (1985) 3 C.L.R. 2731, Pikis, J., dealing with the same matter said the following at pp. 2741- 2742:

"Recommendations of the Department of Elementary Education:

The submission that the basis upon which these reports were compiled is nowhere revealed, is correct. In *Ioannidou and Others v. Republic* (1984) 3 C.L.R. 1283 I explained in detail the implications of s. 35(3) - Law 10/69 (as amended by Law 53/79), and the impact of a departmental recommendation on the selection process. The law aimed to set up a collective and impersonal procedure for the assessment of the suitability of teachers serving in different parts of the country. The process followed for arriving at the departmental list is not stated nor is it made known whether it is to any extent founded on the impressions of Mr. Papaleon-tiou of the performance of the candidates at the interview. Even if

we were to assume that this vacuum could be filled by the presumption of legality, the recommendations were wholly unreasoned. And as such cannot stand the test of judicial review. Not only final but every preliminary administrative act, too, must be reasoned in a way making possible judicial review. L. Loizou, J., dealt specifically with the duty to reason recommendations, under s. 35(3), in *Themistocleous and Others v. Republic* (1985) 3 C.L.R. 1070, 1081, 1082. The following passage from his judgment is indicative of the need for reasoning and the form it should take to make possible its review by judicial action:-

"In the present case the department concerned confined itself to merely listing the names of those candidates whom it recommended for promotion without stating why and on what criteria it chose to recommend them....."

The list of recommended candidates may be regarded as a bare recommendation that should carry no weight with the Educational Service Commission. It is evident from their decision that they attached specific weight to it as a guide to the suitability of candidates and to that extent their decision is liable to be set aside for misconception of material facts."

Further the sub judge decision is so far as it concerns applicant in Recourse No. 723/86, is liable to be set aside on another ground, namely in that the respondents in taking the sub judge decision were labouring under the misconception that he is not "superior in marks" to the interested party whereas in fact and in truth he was superior by one mark. Also they were labouring under the misconception that interested party Onoufriou was senior to applicant in so far as the previously held by them post was concerned, whereas in fact this was not so.

In the result all the above recourses succeed and the sub judge decision is annulled, but in the circumstances there will be no order as to costs.

*Sub judge decision annulled.
No order as to costs.*