

1988 November 29

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

IOANNIS PANAYI,

*Applicant,*

v.

THE REPUBLIC OF CYPRUS, THROUGH  
THE PUBLIC SERVICE COMMISSION,

*Respondents.*

(Case No. 864/85).

*Legitimate interest—Free and voluntary acceptance of an administrative act—  
Deprives acceptor of such an interest to challenge it—Acceptance of public  
officer of conditions as to salary accompanying offer of appointment—  
Acceptor deprived of interest to challenge such conditions.*

*Executory act—Informative act—An informative act cannot be challenged by a  
recourse.*

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*Constitutional Law—Equality—Constitution, Art. 28—Does not exclude rea-  
sonable distinctions and differentiations—Law 33/85—Salary of post re-  
duced, but position of holders safeguarded—Said law not contrary to Art.  
28.*

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The applicant accepted a written offer made to him in writing on 27.7.85 for his appointment to one of 4 vacant posts of Air Traffic Control. The offer contained clearly the salary scales for the post in question, namely A8—A10.

The other vacant posts were filled at the same time by three other officers. Their scale was A8 - A10 - A11 (Law 33/85). The applicant requested re-examination of his scale. The Commission informed him that they had no power to offer salary other than the one provided by Law.

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Hence this recourse. Law 33/85 reduced the scale of the post in question from A8 - A10-A11 to A8 - A10, but safeguarded the position of holders of the post prior to its enactment. The applicant was not among such holders as, at the time, he was holding an inferior post, whereas the other three persons were among those thus protected, as they were holding such post in a temporary capacity.

Held, dismissing the recourse: (1) The applicant has no legitimate interest as he has freely and voluntarily accepted his appointment.

2) The act complained of is not executory, but informative.

3) The principle of equality does not prohibit reasonable distinctions and differentiations. Law 33/85 makes a reasonable distinction between classes or groups of persons. It does not infringe the principle of equality.

*Recourse dismissed.*

*No order as to costs.*

Cases referred to:

*Papadopoulou and Another v. C.B.C.* (1987) 3 C.L.R. 1685;

*Koudounaris v. The Republic* (1967) 3 C.L.R. 479;

*Lardis v. The Republic* (1970) 3 C.L.R. 356;

*HadjiKyriacos and Sons Ltd. v. The Republic* (1971) 3 C.L.R. 286;

*Republic v. Demetriou and Others*, (1972) 3 C.L.R. 219;

*Theodorou v. Attorney-General* (1974) 3 C.L.R. 213;

*Hadjipanayi v. Municipal Committee of Nicosia*, (1974) 3 C.L.R. 366;

*Economides v. The Republic* (1980) 3 C.L.R. 219;

*Meletis and Others v. Cyprus Ports Authority and Another* (1987) 3 C.L.R. 1984;

*The Board for Registration of Architects and Civil Engineers v. Kyriakides.* (1966) 3 C.L.R. 640;

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

*Papaxenophontos and Others v. The Republic* (1982) 3 C.L.R. 1037;

*Kyprianides v. The Republic* (1982) 3 C.L.R. 611.

## Recourse.

Recourse against the decision of the respondents to emplace applicant on salary scale A8 - A10 instead of salary scale A8 - A10 - A11 on his promotion to the post of Air Traffic Control Officer in the Department of Civil Aviation. 5

*A. S. Angelides*, for the applicant.

*M. Flourentzos*, Senior Counsel of the Republic, for the respondents. 10

*Cur. adv. vult.*

STYLIANIDES J. read the following judgment. The applicant was a public officer in the Department of Civil Aviation, holder of the post of Operations Officer. 15

There were four vacant posts of Air Traffic Control Officer. The Public Service Commission decided to fill these posts by appointment of the applicant and three other persons.

A written offer of appointment was sent to the applicant on 27th July, 1985 - Appendix A in the opposition. Attached thereto are the terms and conditions of service of the post - Appendix D. 20

The salary of the post, as fixed by Law 33/85, is in the scales of A8 - A10.

In paragraph 2 of Appendix D the salary of the post is clearly set out as follows: 25

"2. Μισθός: Η μισθοδοτική κλίμακα της θέσης είναι:

A8: £2272X111-3493 και

A10: £3,180X152-4396 (Συνδυασμένες κλίμακες)."

5 The applicant by letter dated 5th August, 1985 accepted with thanks the offer as set out in the communication of 27th July, 1985, aforesaid - (Appendix B).

10 On 3rd September, 1985, the respondent Commission informed the applicant that he was appointed to the permanent post of Air Traffic Control Officer of the Department of Civil Aviation (Ordinary Budget) as from 16th September, 1985, in accordance with the terms and conditions of service set out in the offer No. II. 13691, dated 27th July, 1985.

15 It has to be noted that publication in the Official Gazette, though provided in sub-section 4 of section 37 and sub-section 6 of section 44, is not a constitutional element for the validity of the appointment or promotion, but only a declaratory act of the already existing executory decision. Therefore, the formal existence or validity of the appointment or the promotion concerned commences as from the communication of same to the officer concerned.

20 Sub-section (1) of section 37 reads:

"A permanent appointment shall be effected by written offer made by the Commission to the person selected for appointment and accepted by him in writing."

25 At the same time three other persons - namely Paris Georghides, Petros Michael and Andreas Pericleous - were, also, appointed to the same post in the personal scales of A8 - A10 - A11.

30 On 13th September, 1985, Mr. Angelides for the applicant, after referring to the aforesaid appointments, contended that they were infringing the principle of equality; that Law 33/85 could not be interpreted contrary to the constitutional order and requested re-examination of the matter.

The Respondents by letter dated 26th September, 1985, Appendix Στ - informed applicant's counsel that the Commission had no power to offer salary other than the one provided by Law.

In no time this recourse ensued, by means of which he seeks:

- (a) The annulment of the act or decision contained in the letter of 26th September, 1985, and 5
- (b) Declaration that the refusal and/or omission of the Respondents to satisfy the request of the applicant and to remove the unequal term, is null and void and with no legal effect whatsoever and whatever had been omitted should have been performed. 10

Before proceeding, it is useful to refer to the provisions of Law 33/85. The post of Air Traffic Control Officer was carrying salary in the scales A8, A10 and A11. Under this Law the salary was reduced to the scales: A8 and A10 only, that is, the salary of the post was fixed by Law at these scales and no more. 15

Section 4 makes certain provisions for personal salaries of certain public servants. "Public officer" is defined in this Law as the holder of a post permanently, temporarily, or acting and includes every person employed on full and continuous basis, either on a casual basis or on contract. The holders of the post in any of the aforesaid capacities before the enactment of this Law were safeguarded: Public officers falling within the above definition on appointment/promotion to the organic post continue to draw on personal basis the old salary scales. The three public officers, to which reference was made by Mr. Angelides, fall within this category and, therefore, on appointment they were given the personal salary provided by Law. They were on a casual basis employed as Air Traffic Control Officers, whereas the applicant was holding the permanent post of Operations Officer. 20  
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Counsel for the applicant argued that the differentiation between the applicant and the three other public officers was unreasonable

and violated the principle of equality safeguarded by Article 28 of the Constitution. He invited the Court to declare Law 33/85, so far as it affects this case, unconstitutional.

Counsel for the Respondents contended:

- 5       A. That the applicant had no legitimate interest in the sense of Article 146.2 of the Constitution to pursue this recourse.
- B. That the act complained of is informatory and not an executive administrative act and, therefore, is not amenable to review by this Court.
- 10       C. That the principle of equality is not violated by Law 33/85 and the differentiation is reasonably justifiable.

**A. LEGITIMATE INTEREST:**

15       The applicant was offered appointment; the terms and conditions of the post were plainly set out in the documents sent to him. He accepted freely and unreservedly the appointment and his emplacement in the salary scales.

20       The facts of this case are not different from those in *Phrini Papadopoulou and Another v. The Cyprus Broadcasting Corporation*, (1987) 3 C.L.R. 1685. It was said by the Full Bench at pp. 1690-1691:

      "As provided by Article 146.2 of the Constitution a person making a recourse must be one whose any 'existing legitimate interest' is 'adversely and directly affected' by the decision, act or omission which is challenged by the recourse.

25       Mr. Talarides in his very able address referred to the French Jurisprudence and some cases of the Greek Council of State and the principle enunciated by our case-law that the free and voluntary acceptance of an act or decision deprives a person of  
30       the legitimate interest to challenge the said act or decision before the Administrative Court and invited the Court, either to

depart from it, or to differentiate it, or to limit it to cases where only financial interest is involved.

For more than 20 years this Court repeatedly held that voluntary and unreserved acceptance of an administrative act or decision deprives the person concerned of a legitimate interest 5 entitling him to file a recourse for an annulment under Article 146.2 of the Constitution. The acceptance may be expressed or implied. It must be free and voluntary, which it is not if it has been brought about by pressure of the prejudicial consequences of non-acceptance. (See *Paschali v. Republic* (1966) 3 10 C.L.R., 593 at pp. 603-604; *Piperis v. Republic* (1967) 3 C.L.R., 295; *Stephanos Ioannou and Others v. Republic* (1968) 3 C.L.R., 146 at p. 153; *Petros Antoniou v. Republic* (1968) 3 C.L.R., 452; *Costas Ioannou v. The Grain Commission* (1968) 3 C.L.R., 612, at p. 617; *Markou v. Republic* 15 (1968) 3 C.L.R., 267; *Pericleous v. Republic* (1971) 3 C.L.R., 141, at p. 145; *Myriantthis v. Republic* (1977) 3 C.L.R., 165; *HadjiConstantinou and Others v. Republic* (1980) 3 C.L.R., 184; *Tomboli v. CYTA* (1980) 3 C.L.R., 266; and on Appeal (1982) 3 C.L.R., 149; *Neocleous and Others v. Republic* (1980) 3 C.L.R., 497, at p. 508; *Stavros Aniliades v. CYTA* (1981) 3 C.L.R., 21; *Lefkos Georghiades v. Republic* (1981) 3 C.L.R., 431; *Zambakides v. Republic* (1982) 3 C.L.R., 1017; *Goulielmos v. Republic* (1983) 3 C.L.R., 883; *Stylianides v. Republic* (1983) 3 C.L.R., 672; 25 *Ioannou and Others v. Republic* (1983) 3 C.L.R., 150; *Hadji-constantinou and Others v. Republic* (1984) 3 C.L.R., 319, F.B. case, at p. 328; *Vlahou and Others v. Republic* (1984) 3 C.L.R., 1319, at p. 1322; *G. Michaelides v. Republic* (1984) 30 3 C.L.R., 1419, at pp. 1423-1424; *Mavrommatis and Others v. Republic* (1984) 3 C.L.R., 1006, at p. 1023; *Mavrogenis v. Republic* (1984) 3 C.L.R., 1140, at pp. 1148-1149; *Kalos v. Republic* (1985) 3 C.L.R., 135, at pp. 142-143; *Raftis Co. v. Municipality of Paphos* (1985) 3 C.L.R., 1664; *Nakis Bonded Warehouse v. Republic* (1985) 3 C.L.R., 1179; *Vrahimis v. Republic* (1985) 3 C.L.R., 2057; *Pierides v. Republic* (1985) 3 C.L.R., 1275, at pp. 1282-1283; *Chrysanthou* 35

5 *and Others v. Republic* (1986) 3 C.L.R., 1128, F.B. case, at p. 1136; *Provita Ltd., v. Grain Commission of Cyprus* (1986) 3 C.L.R., 737; *Theodoros Papadopoulos v. Republic* (1986) 3 C.L.R., 1073, at p. 1083; *Republic v. Makaronopeion Car-kotis* (1987) 3 C.L.R., 72.)

This principle is of universal application. It is well embodied in our administrative law. We see no reason to depart from it.

10 Having considered the content of the offers of appointment and the written acceptance by the appellants, and in the light of all relevant circumstances of this case, we are in full agreement with the trial Judge, that the acceptance of the aforesaid appointments was unreserved and free, and, therefore, by such acceptance the appellants have been deprived of legitimate interest in the sense of Article 146.2 of the Constitution, entitling them to file their recourse against the sub judice decision to appoint them with salary scale A8/9."

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20 In the light of all the circumstances of the present case, I am of the view that the acceptance of the appointment freely and unreservedly by the applicant has deprived him of legitimate interest in the sense of Article 146.2 of the Constitution and this recourse, therefore, can not be entertained by this Court.

**B. DOES THE LETTER OF 26TH SEPTEMBER, 1987, CONTAIN AN EXECUTORY ACT?**

25 It is well settled that a letter, which is merely of an informatory nature and does not contain a decision creating a new legal situation, is not of an executory nature and, therefore, it cannot be made the subject-matter of a recourse, under Article 146 - (*Chrysanthos P. Koudounaris v. Republic (Ministry of Education)* (1967) 3 C.L.R., 479, 482; *Andreas Lardis v. Republic (Public Service Commission)* (1970) 3 C.L.R., 356, 359; *Hadjikyriacos and Sons Ltd. v. Republic (Minister of Agriculture and Natural Resources)* (1971) 3 C.L.R., 286, 290; *Republic (Council of*

*Ministers and Others*) v. *Costas Ch. Demetriou and Others* (1972) 3 C.L.R., 219, 223; *Panayiotis Theodorou v. The Attorney-General of the Republic (Ministry of Finance)* (1974) 3 C.L.R., 213; *Kathelen Andre Hadjipanayi v. Municipal Committee of Nicosia* (1974) 3 C.L.R., 366, 375; *Economides v. Republic* (1980) 3 C.L.R., 219 and *Kyprianides v. Republic* (1982) 3 C.L.R., 611, 619-620). 5

Having considered with the utmost care this letter, I am of the opinion that it is of informatory nature and does not contain any decision which determines the legal position of the applicant. It cannot, therefore, be the subject of a recourse. 10

### C. PRINCIPLE OF EQUALITY:

I consider pertinent not to leave unresolved the ground of violation of the principle of equality, as under section 11.2 of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law No. 33/64), under which I exercise the revisional jurisdiction of this Court in the first instance, appeal lies before the Full Bench of this Court. 15

It is the duty of the Court to determine the constitutional validity of an impugned law, because the Constitution is the organic or fundamental law in contravention of which no law can be allowed to stand, and the official authority to determine whether the legislature has acted within the powers conferred upon it by the Constitution rests with judiciary. 20

A law which is inconsistent and/or contrary to any provision of the Constitution may be declared by this Court as unconstitutional. A law is presumed to be constitutional until so declared and the burden is upon the litigant challenging constitutionality to prove it beyond reasonable doubt - (*The Board for Registration of Architects & Civil Engineers v. Christodoulos Kyriakides* (1966) 3 C.L.R., 640). 25 30

An act or decision based or taken under invalid legislation has to be declared null and void and of no effect whatsoever - (*Miltiades Christodoulou and the Republic (Collector of Customs Nicosia)* 1 R.S.C.C. 1; *Papaxenophontos and Others v. Republic* 35

(1982) 3 C.L.R., 1037; *Antonis Meletis and Others v. The Cyprus Ports Authority and Another* (1987) 3 C.L.R. 1984).

Article 28 enshrines the right of equality.

5 Article 28 does not forbid every difference in treatment. The principle of "equality of treatment" is violated if the distinction has no objective and reasonable justification. The existence of such justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. Article 10 28 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between means employed and the aim sought to be realized - (European Court of Human Rights *Belgian Linguistic Case*, Series A, Volume 6, p. 34, paragraph 10, as regards Article 14 of the European Convention). 15

In *Argiris Mikrommatis and the Republic (Minister of Finance and Another)* 2 R.S.C.C., 125, at p. 131 it was said that:

20 "... 'equal before the law'... does not convey the notion of exact arithmetical equality but it safeguards only against arbitrary differentiation and does not exclude reasonable distinctions which have to be made in view of the intrinsic nature of things."

25 Classification is for governmental or legislative judgment. It ordinarily becomes a judicial question only when it has been drawn and is then subjected to the relevant constitutional tests.

The different treatment in Law 33/85 is not between individual person but classes or groups of persons. The one includes those public servants who held the post on a casual basis, or temporarily, or on contract and prior to the date appointed in the Law.

30 The applicant was a holder of the post of Operations Officer. This is a lower post. The differentiation was, in the circumstances, reasonable and justifiable.

For the foregoing reasons, this recourse is dismissed.

Let there be no order as to costs.

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*Recourse dismissed.  
No order as to costs.*