1988 March 15

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

MARIA CHRISTOUDHIA,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 668/86).

Constitutional Law—Separation of powers—Prescription of qualifications for a post in the public service, Contents of a scheme of service—They are matters within the competence of the executive, and in particular of the Council of Ministers—The Temporary Public Employees (Appointment to Public Positions) Law, 1985 (Law 160/85)—Unconstitutional.

Constitutional Law—Separation of powers—Predicating by law in a definitive manner the conditions of appointment and those eligible for appointment to a post in the public service—Transgresses limits of legislative power—The Temporary Public Employees (Appointment to Public Positions) Law, 1985 (Law 160/85)—Unconstitutional.

The Temporary Public Employees (Appointment to Public Positions) Law, 1985 (Law 160/85)—Unconstitutional as it infringes doctrine of separation of state powers.

The aforesaid law provided that temporary employees in the public service who held the same position on 31st December, 1984, should be appointed to corresponding organic posts, provided they satisfied the relevant schemes of service and had the formal attributes required for appointment to a public position.

In virtue of the said law the interested parties were appointed Clerical

Officers 2nd Grade. The applicant holds a permanent post in the Public Service. She satisfied the qualifications of the scheme of service for appointment to the said post. But she was considered ineligible for appointment, because she was not a temporary employee at the material date, i.e. on 31.12.84.

Hence this recourse.

Held, *annulling the sub judice decision:* (1) The Constitution of Cyprus, as often proclaimed, is based on a strict separation of the powers of the State; the Legislative, the Executive and the Judicial. Consequently, every State competence must, unless specifically allocated by the Constitution to another branch of the State, be assummed and exercised by that power to which the competence naturally belongs.

(2) The residue of Executive and Administrative power vests in the Council of Ministers. However, in plain and undisguised language s.3 of Law 160/85 prescribes the qualifications for appointment in the public service.

(3) Moreover, Law 160/85 modifies a scheme of service; this is another transgression of the limits of legislative power.

(4) Furthermore, by predicating in the definitive manner laid down in s.3 the conditions of appointment, and enumerating those eligible for appointment, the legislature assumed to a great extent the appointing and selection functions of the Public Service Commission, as well as encroached upon the competence of the organ assigned by the Constitution to make appointments in the public service to the exclusion of every other body.

Sub judice decision annulled.

Cases referred to:

Papapetrou v. The Republic, 2 R.S.C.C. 61;

Ishin v. The Republic, 2 R.S.C.C. 16;

The President of the Republic v. The House of Representatives (1985) 3 C.L.R. 1724;

The President of the Republic v. The House of Representatives (1985) 3 C.L.R. 2137;

The President of the Republic v. The House of Representatives (1985) 3 C.L.R. 2729;

The President of the Republic v. The House of Representatives (1985) 3 C.L.R. 2801.

Recourse.

Recourse against the decision of the respondent to appoint the interested parties, who were temporary employees, to the post of Clerk 2nd Grade under the provisions of the Temporary Public Employees (Appointment to Public Positions) Law, 1985 (Law No. 160/85).

Chr. Christophorou, for the applicant.

L. Koursoumba (Mrs.), for respondent.

L. Parparinos for P. Polyviou, for interested party Sk. Petrou.

Cur. adv. vult.

PIKIS J. read the following judgment. At issue in these proceedings is the constitutionality of the Temporary Public Employees (Appointment to Public Positions) Law, 1985 (Law 160/85), hereafter referred to as "the Law". The resolution of the constitutional issue requires us to determine the amenity, if any, of the legislature to prescribe qualifications for appointment to the public service, and freedom to determine who shall be candidates for appointment to positions in the civil establishment. The law provided that temporary employees in the public service who held the same position on 31st December, 1984, should be appointed to corresponding organic posts, provided they satisfied the relevant schemes of service and had the formal attributes required for appointment to a public position. Selection was ordained to be confined to persons included in a list submitted by the Director of Personnel compiled in accordance with the provisions of the law. The discretion of the Public Service Commission to choose the

candidates for appointment was limited to ascertaining whether the persons listed in the catalogue of the Personnel Department satisfied the scheme of service and were not otherwise precluded from entering the public service.

The case for the applicant is that the law is unconstitutional and appointments of the interested parties made in furtherance to the provisions of the law are invalid. Unconstitutionality arises from breach of the principle of separation of powers deriving from the assumption by the legislature of executive competence and, secondly, breach of the provisions of article 125 of the Constitution that confers on the Public Service Commission sole competence to make appointments in the public service. Also, the applicant challenges the law as inconsistent with the provisions of the Public Service Law (33/67) to the detriment of constitutional order safeguarded thereby. The submission rests on the assumption that the Public Service Law is in pari materia with the Constitution and that breach thereof impairs constitutional order; a fallacious assumption. Like every statute, Law 33/67 can be modified, amended or suspended by a subsequent enactment. As indeed happened with Law 160/85 that provided that effect should be given to its provisions notwithstanding the stipulations of Law 33/67. In plain language, Law 160/85 sanctioned a departure from the provisions of Law 33/67. If unconstitutional for any reason, the objection must be pegged to the provisions of the Constitution itself.

A few words about the grievance of the applicant that led her to challenge the appointments of the interested parties. Maria Christoudhia, though in the government service at the time of the enactment of the law, lacked the qualifications necessary for appointment under its provisions. In particular, she lacked one of the qualifications envisaged by law, namely, holding the position of a temporary employee at the material date of 31.12.84. Otherwise, she satisfied the schemes of service and was eligible for appointment to the positions awarded to the interested parties - Clerical Officers Second Grade. Because of lack of the qualifications laid down by Law 160/85, she was considered ineligible for ap-

pointment. Hence the present proceedings.

The Constitution of Cyprus, as often proclaimed is based on a strict separation of the powers of the State; the Legislative, the Executive and the Judicial. Consequently, every State competence must, unless specifically allocated by the Constitution to another branch of the State, be assumed and exercised by that power to which the competence naturally belongs. From the early days of the establishment of the Cyprus State it was acknowledged that the residue of Executive and Administrative power vests in the Council of Ministers. In *Theodoros G. Papapetrou v. Republic*, 2 R.S.C.C. 61, 65 (E), it was held that power associated with the making of the amendment of schemes of service prescribing the qualifications necessary for appointment in the public service, vests exclusively in the Council of Ministers. Whereas the making of appointment in the public service is entrusted to an independent body specified by the Constitution - the Public Service Commission - again to the exclusion of every other body. The same principles were given expression to in *Ilter Ishin v. Republic,* 2 R.S.C.C. 16, 18. Emphasis was laid on the fact that in the absence of an organic law sole competence for the making of schemes of service lies with the Council of Ministers.

The Constitution of Cyprus prohibits the assumption of competence by any power of the State of a species that naturally belongs to another branch of the State or is assigned to a body set up under the Constitution, such as the Public Service Commission.Recently, the Full Bench of the Supreme Court pronounced in *The President of the Republic v. The House of Representatives* (1985) 3 C.L.R. 1724 that the prescription of conditions necessary for employment in the public service is the sole province of the Executive, wholly outside the sphere of authority of the legislature. The direction and control of Government of the Republic, it was pointed out, is a competence that vests in the Executive in virtue of the provisions of article 54.1 of the Constitution. Therefore, the provisions of the Engagement of Temporary Employees (Public and Educational Service) Law, 1985, was held unconstitutional to the extent that it made the engagement of personnel in

the public service subject to approval, be it indirectly, by the legislature. A similar approach underlines the decision of the Court in *The President of the Republic v. The House of Representatives* (1985) 3 C.L.R. 2137. In a fairly detailed judgment that I delivered in that case, I drew attention to the principles underlying the separation of the powers of the State and the need for strict adherence to the division of competence among the three branches of Government; in the interest of constitutional order and the sustenance of the rule of law. Two other decisions of the Full Bench of the Supreme Court may be cited with benefit, notably, *The President of the Republic v. The House of Representatives* (1985) 3 C.L.R. 2729 and *The President of the Republic v. The House of Representatives*, (1985) 3 C.L.R. 2801 as they exemplify the allocation of State competence and preconditions for the valid exercise of it.

For two independent but equally consequential reasons, the law here under review is unconstitutional. Therefore, the authorisation for the appointment of the interested parties and the legal framework of their appointment were defective, necessitating the invalidation of the sub judice decision.

The reasons for the unconstitutionality of the law are the following:

In plain and undisguised language s.3 of Law 160/85 prescribes the qualifications for appointment in the public service. The prescription of qualifications for appointment in the public service is the exclusive province of the Executive. Evidently, the legislature assumed competence outside the constitutional framework of its powers. For the reasons indicated earlier in this judgment, prescription of the qualifications for appointment in the public service is in the exclusive competence of the Council of Ministers. Moreover, they modified by legislative action the schemes of service in force, transgressing again the limits of their power, a process entailing in addition the overriding of the will of the Executive in a matter assigned to it by the Constitution; furthermore, by predicating in the definite manner laid down in s.3

the conditions of appointment, and enumerating those eligible for appointment, the legislature assumed to a great extent the appointing and selection functions of the Public Service Commission, as well as encroached upon the competence of the organ assigned by the Constitution to make appointments in the public service to the exclusion of every other body.

The inevitable conclusion is that the sub judice decision was founded on the premise of a law enacted in breach of the doctrine of separation of powers, in defiance to the competence of the Executive and that of the Public Service Commission. That being my decision, it is unnecessary to debate whether Law 160/85 was also unconstitutional for violation of the provisions of article 28.1 of the Constitution by differentiating between holders of the qualifications laid down in the schemes of service depending on whether they held the position of a temporary employee on 31st December, 1984. In delivering my judgment I have not overlooked that the motives of the legislature in enacting Law 160/85 were benevolent, intended to remedy an anomaly in the public service. No doubt the legislature aimed by the enactment of the law to confer on temporary government personnel the security of tenure enjoyed by holders of organic positions in the public service. On the other hand, the motives of the legislature, salutary though they may be, cannot prevail over the dictates of the law and the Constitution.

For all the above reasons, the sub judice decision is declared null and of no effect whatsoever, pursuant to the provisions of article 146.4(b) of the Constitution.

Sub judice decision annulled.