IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

THEOCHARIS DAFNIDES,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH THE BOARD FOR THE REINSTATEMENT OF DISMISSED PUBLIC OFFICERS,

Respondent.

(*Case No.* 203/62)

Dismissed Public Officers Reinstatement Law, 1961 (*Law* 48/61)—*Claim for reinstatement—Decision of the Respondent Board reached under a misconception of the factual situation in the matter, null and void. Case of Applicant to be re-examined* ab initio *and in the light of the proper facts.*

Administrative Law—Practice—Re-opening of case after its hearing and reservation of Judgment—Duty of administrative court to reach own conclusions irrespective of course adopted by parties.

Applicant by this recourse, complains against the decision of the Board for the Reinstatement of Dismissed Public Officers (The respondent), to the effect that he is not an entitled officer under the Dismissed Public Officers Reinstatement Law, 1961 (Law 48 of 1961).

At the hearing of this case on the 1st September, 1964, it was common ground between counsel for both sides that applicant was compelled by his British superiors through psychological pressure, to retire in June, 1956, $3\frac{1}{2}$ years before his normal date of retirement in December, 1959, ostensibly for the sake of the efficiency of the Police but in true fact for " political reasons ", as they are defined in section 2 of Law 48/61.

In considering this case with a view to delivering Judgment the Court reached the conclusion that in spite of the consensus of counsel for the parties, concerning its salient aspects, it was bound, as an administrative Court, to inquire further into certain aspects of the matter, and in particular into the fate of any relevant records of, and the actual course of proceedings followed by, the Respondent Board.

The court therefore gave on the 7th September, 1964, a Ruling, whereby it was directed as follows :

(A) It is directed, under rules 19 and 12 (2) of the Supreme Constitutional Court Rules, which are still applicable to a case like this one, by virtue of sections 11 and 17 of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law 33 of 1964) that :

(i) The hearing of this case shall be re-opened and resumed on the 22nd of September, 1964, at 10 a.m.

(B) At such hearing respondent, through any properly authorised official, shall supply information on oath concerning the following :

(i) What relevant records, including any file of the case of applicant, minutes of the Board and a drawn up decision thereof, exist or have come at any time into existence in connection with applicant's claim for reinstatement ;

(ii) In case all or any of such records have never come into existence or having come into existence they are no longer available, what are the causes for such state of affairs ;

(iii) What is the actual course followed by the proceedings before the Board in relation to applicant's application ;

(iv) Any cognate or otherwise relevant aspect of the matter which may be raised by the court or counsel by leave of the court.

The proceedings were, therefore, re-opened pursuant to the above ruling and after some delay, due to difficulties arising in serving the necessary summons, the Chairman of the Respondent Board came before the Court on the 19th October, 1964, and testified in relation to the matters to be inquired into further.

The court on 31st October, 1964, delivered its judgment, and :

Held, (1) applicant has succeeded to discharge the onus of showing that the decision of the Respondent Board has been reached under a misconception of the factual situation in the matter. As, fairly, pointed out by counsel for respondent, himself, the re-employment of applicant does not militate against the conclusion that he was forced to retire,

because he may have not been wanted in the Police but this does not mean that he was not to be given any other unconnected work.

2. Even if it had only appeared reasonably probable, and not certain, that the decision concerned has been reached on a misconception of the true factual situation, it would still have been proper to annul the said decision, so as to enable the Board to examine the facts without any room for doubt being left. (*Vide* the judgment in *Photos Photiades and Co.* and *The Republic*, reported in this vol. at p. 102 *ante* adopting principles as set out in Stasinopoulos on " The Law of Administrative Acts " (1951) p. 305).

3. In this case there exists in my mind no mere probability but substantial certainty that the Respondent Board misconceived the factual situation in treating the re-employment of applicant as the key to the problem. It is, in my opinion, only a secondary aspect of the matter and it ought to have been treated as such.

4. As the sub judice decision of the Respondent Board has been reached because of the aforesaid misconception it is hereby declared to be null and void and the Board has to re-examine the case of applicant *ab initio*. It is for the Board to reach a decision afresh in the light of the proper facts and, of course, by a correct application of Law 48/61.

5. In deciding this case I have kept constantly in mind that it would not have been open to me to interfere with the decision of the Board had it been only a case of an erroneous, in my opinion, subjective evaluation of the facts. But I have reached the conclusion that in this case it is more than that. It is a case of a mistaken objective understanding of facts leading to a misconception concerning the nature of the case. It was wrong, in an objective and not only in a subjective sense, for the Board to treat the subsequent short re-employment of applicant as determining the true circumstances in which he retired.

Decision of respondent declared null and void; Board to re-examine the case of applicant ab initio.

Per curiam : The absence of minutes, of a formally drawn up reasoned decision or of any other record of the Respondent Board renders the task of the court very difficult. One

of the purposes for which authorities should always see that all necessary records are kept in relation to their actions is in order to enable such actions to be submitted, if necessary, to the appropriate review either heirarchically or judicially.

Cases referred to :

Photos Photiades and Co. and The Republic (reported in this vol. at p. 102 *ante*).

Recourse.

Recourse against the decision of the Board for Reinstatement of Dismissed Public Officers to the effect that Applicant is not an entitled officer under the Dismissed Public Officers Reinstatement Law, 1961 (Law 48/61).

E. Emilianides with *G. Tornaritis*, for the applicant.

K. C. Talarides, Counsel of the Republic, for the respondent.

Cur. adv. vult.

The following Ruling was on the 7th September, 1964, read by :

TRIANTAFYLLIDES, J. : On the 1st September, 1964, after a hearing of this case, judgment was reserved until to-day. In the course, however, of considering it I have come to the conclusion that at the present state of the proceedings it would not be proper to deliver judgment and that the hearing of the case has to be reopened.

The reasons which have led to the adoption of such a course are the following :

In spite of the fact that, thanks to diligent efforts of counsel for both sides, a considerable number of relevant documents have been traced and produced as exhibits, the Court still does not have before it any document containing the actual decision of the Respondent Board, which was communicated to Applicant by means of a letter dated the 18th July, 1962 (exhibit 5) ; nor are there before the Court any relevant minutes or other records of the said Board, which in the normal process of proper administration ought to have come into existence in relation to Applicant's claim for reinstatement under the Dismissed Public Officers Reinstatement Law, 1961 (Law 48/61).

Counsel for Respondent has stated at the hearing that as far as he could find out there does not exist a drawn up

decision or any minutes of the Respondent Board concerning the subject-matter of this recourse. He has also, with fairness justifiably expected from a counsel of the Republic, invited the Court to annul the decision of the Respondent Board, as communicated by exhibit 5, as he agreed with counsel for Applicant that, in the light of the documentary and the oral evidence adduced in this case, Applicant should have been deemed to be an " entitled officer ", within the meaning of such term under section 2 of Law 48/61 ; it has come to be common ground at the hearing that applicant was indeed compelled, through psychological pressure, to retire in June 1956, 3½ years before his normal date of retirement in December 1959, ostensibly for the sake of the efficiency of the Police but in true fact for " political reasons ", as they are defined under the aforesaid section 2.

I have considered carefully whether, on the basis of the present state of the record of proceedings and in the light of the consensus by counsel as to the proper outcome of this case—which consensus is a very weighty consideration—indeed—I could proceed to issue judgment annulling the sub judice decision of the Respondent Board. I have come to the conclusion that as a court exercising, in this case, the revisional jurisdiction vested in an administrative court, I could not follow such a course before enquiring further into the existence and fate of any relevant records of the Respondent Board, as well as into the question of the actual course followed by the proceedings before such Board in relation to applicant's application for reinstatement, a question which is closely interwoven with the question of the existence of any records relevant to such application.

Though I do not doubt at all the bona fides of what I have mentioned earlier, as having been stated by counsel for respondent at the hearing, *i.e.* that as far as he could find out there does not exist a drawn up decision or minutes of the Board concerning the subject-matter of this recourse, I feel duty-bound to proceed also to an examination of this matter using the appropriate procedural means at the disposal of the court.

The question of the existence ever or of the subsequent fate of all or any of the normally and properly expected and required, relevant to the issues of this case, records of the Respondent Board and the interconnected question of the actual course followed by the proceedings before it, on the subject of applicant's application to it, are so vitally

material to the validity or otherwise of the decision of such Board to dismiss applicant's said application, that such questions cannot be left unresolved or treated as secondary aspects of the matter.

An administrative court, though never overlooking what has been stated by counsel for the parties—and in this Case their considered consensus to the effect that the decision in issue should be annulled is to be duly considered—has to reach its own conclusions on the legal as well as the factual aspects of the validity of an administrative decision, including the question of its validity from the point of view of the observance, in arriving thereat, of essential procedural formalities (*vide* Kyriakopoulos on Greek Administrative Law, 4th ed., vol III p. 41). It is the responsibility of an administrative court, exercising its competence in the public interest, not only to adjudicate on the issues raised by the parties, but to enquire fully into the validity of the administrative decision in question, once such validity has been put in issue by means of a recourse, (*vide* Tsatsos on the Recourse For Annulment Before The Council of State, 2nd ed., p. 225 et. seq.).

It is directed, therefore, under rules 19 and 12 (2) of the Supreme Constitutional Court Rules, which are still applicable to a case like this one, by virtue of s.s. 11 and 17 of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law 33/64) that—

(A) the hearing of this case shall be reopened and resumed on the 22nd of September, 1964, at 10 a.m.

(B) at such hearing respondent, through any properly authorised official, shall supply information on oath concerning the following :

(i) What relevant records, including any file of the case of applicant, minutes of the Board and a drawn up decision thereof, exist or have come at any time into existence in connection with applicant's claim for reinstatement ;

(ii) In case all or any of such records have never come into existence or having come into existence they are no longer available, what are the causes for such state of affairs ;

(iii) What is the actual course followed by the proceedings before the Board in relation to applicant's application ;

(iv) Any cognate or otherwise relevant aspect of the matter which may be raised by the Court or counsel by leave of the court.

Counsel for respondent is requested to see with all possible dispatch to the implementation of what has been hereby directed and he is at liberty to seek any further Directions from the Court, if need be.

Order in terms.

The following judgment was, on the 31st October, 1964, delivered by :

TRIANTAFYLLIDES, J. : In this recourse applicant is complaining against the decision of the Respondent Board, to the effect that he is not an entitled officer under the Dismissed Public Officers Reinstatement Law, 1961 (Law. 48/61).

The said decision was communicated to applicant in a letter dated the 18th July, 1962 ; according to the evidence of the Chairman of the Respondent Board there does not exist any other document or entry in any record in relation thereto. The decision was reached at a meeting of the Respondent Board and communicated afterwards by the said letter.

At the hearing of this Case on the 1st September, 1964, it was common ground between counsel for both sides that applicant was compelled by his British superiors through psychological pressure, to retire in June, 1956, 3½ years before his normal date of retirement in December, 1959, ostensibly for the sake of the efficiency of the Police but in true fact for " political reasons ", as they are defined in section 2 of Law 48/61.

In considering this Case with a view to delivering Judgment I had reached the conclusion that in spite of the consensus of counsel for the parties, concerning its salient aspects, I was bound, as an administrative Court, to inquire further into certain aspects of the matter, and in particular into the fate of any relevant records of, and the actual course of proceedings followed by, the Respondent Board.

The proceedings were, therefore, re-opened pursuant to a Ruling delivered on the 7th September, 1964, and after some delay, due to difficulties arising in serving the necessary summons, the Chairman of the Respondent

Board came before the Court on the 19th October, 1964, to testify in relation to the matters to be inquired into further. He did his best to assist the Court within the limited means at his disposal. As explained by him no minutes were kept and no formal decisions were drawn up but afterwards letters were written communicating and embodying the Board's decisions ; copies of the letters were kept by way of record of the decisions. The procedure followed was for the Board to meet and consider each application before it on the basis of anything addressed to it by the applicant concerned, as well as, of the personal file of such applicant obtained from the Department where he was employed before his services were terminated, and this procedure was also followed in relation to the case of applicant.

The absence of minutes, of a formally drawn up reasoned decision or of any other record of the Respondent Board renders the task of the court very difficult. One of the purposes for which authorities should always see that all necessary records are kept in relation to their actions is in order to enable such actions to be submitted, if necessary, to the appropriate review either hierarchically or judicially.

It is, in any case, clear from the evidence of the Chairman of the Respondent Board that the decisive factor contributing to the refusal of Applicant's application for reinstatement under Law 48/61 was that he had been re-employed by the British after his retirement. It is not disputed that he was re-employed on a casual basis in relation to provisioning matters and that he was again dismissed after about 1 ½ or 2 months. Nevertheless, the Board thought that a person who was later re-employed, as applicant was, could not have been forced to retire because the British did not trust him.

Having considered all relevant circumstances of this case, including the evidence adduced at the presentation, having paid also due regard to the weighty consensus of the submissions of counsel for both sides, I have reached the conclusion, in agreement with counsel, that applicant has succeeded to discharge the onus of showing that the decision of the Respondent Board has been reached under a misconception of the factual situation in the matter. As, fairly, pointed out by counsel for respondent, himself, the re-employment of applicant does not militate against the conclusion that he was forced to retire, because he may

have not been wanted in the Police but this does not mean that he was not to be given any other unconnected work.

Even if it had only appeared reasonably probable, and not certain, that the decision concerned has been reached on a misconception of the true factual situation, it would still have been proper to annul the said decision so as to enable the Board to examine the facts without any room for doubt being left. (Vide the Judgment in *Photos Photiades and Co. and The Republic*, Case 47/63, (reported in this vol. at p. 102 *ante*) adopting principles as set out in Stasinopoulos on " The Law of Administrative Acts " (1951) p. 305).

In this case there exists in my mind no mere probability but substantial certainty that the Respondent Board misconceived the factual situation in treating the re-employment of applicant as the key to the problem. It is, in my opinion, only a secondary aspect of the matter and it ought to have been treated as such.

As the sub judice decision of the Respondent Board has been reached because of the aforesaid misconception it is hereby declared to be null and void and the Board has to re-examine the case of applicant ab initio. It is for the Board to reach a decision afresh in the light of the proper facts and, of course, by a correct application of Law 48/61.

In deciding this case I have kept constantly in mind that it would not have been open to me to interfere with the decision of the Board had it been only a case of an erroneous, in my opinion, subjective evaluation of the facts. But I have reached the conclusion that in this case it is more than that. It is a case of a mistaken objective understanding of facts leading to a misconception concerning the nature of the case. It was wrong, in an objective and not only in a subjective sense, for the Board to treat the subsequent short re-employment of applicant as determining the true circumstances in which he retired.

In all the circumstances of this case I have decided also to direct the payment of £40 costs to applicant by the Republic, on behalf of which the Respondent Board was acting, partly in respect of costs reserved on past occasions during the proceedings. The amount of £40 is not the full amount of costs to which applicant would be ordinarily

entitled but I have taken into account that there is no evidence that the Respondent Board has acted with anything but good faith and that counsel for the respondent very fairly did his best to assist applicant in whatever respect he felt that applicant was entitled to succeed.

Republic to repay also all amounts paid by applicant as day-wages of public officers who gave evidence in this case.

Decision of respondent declared null and void; Board to re-examine the case of applicant ab initio.