IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

MICHAEL MITSIKOURIDES,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH THE COUNCIL OF MINISTERS,

Respondent.

(Case No. 21/67).

Elementary Education—Elementary school-teachers—Pensions and gratuities—Computation—Headmaster's duty allowance—Basis of computation of pension and gratuity in instances where a Headmaster was in receipt of duty allowance—Section 37 of the Teachers of Communal Schools of Elementary Education Law, 1963 (Greek Communal Law No. 7 of 1963)—Section 37 as amended and substituted by section 3 of the Teachers of Communal Schools of Elementary Education (Amendment) Law, 1964 (Greek Communal Law No. 1 of 1964)—Section 45 of the Elementary Education Law, Cap. 166—Sub judice *decision in no way discriminatory or offending Article 6 and 28 of the Constitution safeguarding the principle of equality—Nor is it repugnant to the provisions of Article 192 of the Constitution safeguarding certain rights enjoyed "immediately before the coming into operation of the Constitution", i.e. immediately before the 16th August, 1960.*

School Teachers—Elementary school-teachers—Pensions and gratuities—Computation—Headmaster's duty allowance—See above.

Pensions and gratuities—Computation—Elementary school-teachers—See above.

Gratuities and Pensions—Computation—Elementary school-teachers—See above.

Elementary school-teachers—Pensions and gratuities—Computation—Headmaster's duty allowance—See above.

Headmaster's duty allowance—See above under Elementary Education.

The Applicant served as an elementary school-teacher for a period of over 30 years and he retired as a Headmaster, Grade B, on the 31st August, 1966. He had been serving as a Headmaster, Grade B, for six years prior to his retirement *i.e.* from the 1st September, 1960 to the 31st August, 1966. Prior to the enactment on the 4th July, 1963, of the Teachers of Communal Schools of Elementary Education Law, 1963 (Greek Communal Law No. 7 of 1963) the salary of the Applicant as a Headmaster, Grade B, was £798 per annum which included a sum of £96 which was payable as Headmaster's duty allowance. With the enactment of the said Law No. 7 of 1963, new salary scale came into force and the salary scale of the post of Headmaster Grade B, under this Law was £606 x 24—£774. However, section 37 of of the Law saved the right of elementary school-teachers whose "basic salary, inclusive of the Headmaster's duty allowance", was higher than the new salary scales and they were, by virtue of this section, to continue to receive the higher salary; but section 37 was repealed and substituted by section 3 of the Teachers of Communal Schools of Elementary Education (Amendment) Law, 1963 (Greek Communal Law No. 1 of 1964, of the 27th March, 1964).

The new section 37 reads as follows:

> «37. Ὁ βασικὸς μισθὸς ὃν λαμβάνουν οἱ διδάσκαλοι κατὰ τὴν ψήφισιν τοῦ παρόντος Νόμου καὶ ἐὰν ἀκόμη εἶναι ὑψηλότερος ἐκείνου ὃν ἔδει νὰ λαμβάνωσιν ἐπὶ τῇ βάσει τοῦ παρόντος Νόμου δὲν θὰ ἐπηρεασθῇ.»

It is to be noted that by the 1964 amendment (which was given retrospective effect as from the date of the enactment of the principal Law No. 7 of 1963, *supra*) the words "inclusive of the Headmaster's allowance" which followed the words "basic salary" were omitted from section 37, *(supra)*. Thus, the Applicant collected Headmasters duty allowance only during the period 1.9.60 to 31.8.63.

It is common ground that on his retirement Applicant's pension and gratuity were calculated on the basis of the new salary scale *i.e.* £774 and not £798. To this the Applicant objected by his letter dated the 8th October 1966 and by his present recourse on the following grounds:-

> (1) The decision complained of is discriminatory *i.e.* contrary to the principle of equality safeguarded under Articles 6 and 28 of the Constitution;

(2) The said decision is also contrary to Article 192 of the Constitution which safeguards rights enjoyed "immediately before the coming into operation of the constitution" (*i.e.* immediately before the 16th August 1960) as well as section 45 of the Elementary Education Law, Cap. 166. Section 45 defines the word "salary" as follows:

" 'Salary' with respect to any teacher shall include.... but shall otherwise be exclusive of allowances: Provided that where a teacher has during the course of his service held posts in respect of which a *duty allowance* is payable for an *aggregate period of not less than five years* the governor may direct that, for the purposes of computing pension, gratuity or..... the salary shall be enhanced by a sum equal to the average of the allowance payable at the time of such computation in respect of the posts held during the last five years of the aggregate period. Provided.....".

In dismissing the recourse the Court:-

Held, (1). On the material before the Court there is not the shadow of a suspicion that there has been any discrimination against the Applicant.

(2) In so far as Article 192 of the Constitution is concerned it is quite clear that the Applicant was not "immediately before the coming into operation of the Constitution" (*i.e.* before the 16th August 1960) performing the duties of a Headmaster nor was he receiving any duty allowance and it therefore follows that the provisions of section 45 of Cap. 166 *(supra)* regarding the computation of pension and gratuity where duty allowance was payable were not at the time applicable to him.

(3) In the light of the above and in view of the fact that the Applicant held a post in respect of which duty allowance was payable for a period of less than five years, in fact for three years only *(supra)*, and he was not in receipt of such allowance at the time of the computation of his pension and gratuity, he did not qualify to have his pension and gratuity computed on the basis of £798 which sum included £96 Headmaster's duty allowance, but on the basis of £774 as it was done in the present case.

Recourse dismissed with costs.

Recourse.

Recourse for a declaration that the decision of the Respondent regarding the pensionable emoluments and/or gratuity payable to Applicant by virtue of his acting as a Headmaster from 1.9.1960, is *null* and *void.*

L. Clerides, for the Applicant.

L. Loucaides, Counsel of the Republic, for the Respondent.

Cur. adv. vult.

The following Judgment was delivered by:

LOIZOU, J.: By this recourse the Applicant seeks "a declaration of the Court that the decision of the Council of Ministers embodied in a letter addressed to Applicant on the 12.11.1966 received by him on the 13.11.1966 regarding the pensionable emoluments and/or gratuity payable to Applicant by virtue of his acting as a Headmaster from 1.9.1960, is *null* and *void* and of no effect whatsoever".

The Applicant served as an elementary school-teacher for a period of over 30 years and he retired as a Headmaster, Grade B, on the 31st August, 1966. He had been serving as a Headmaster, Grade B, for six years prior to his retirement *i.e.* from the 1st September, 1960 to the 31st August, 1966. Prior to the enactment of the Teachers of Communal Schools of Elementary Education Law, 1963, (Law 7 of 1963 of the Greek Communal Chamber) which was published in the Gazette of the 4th July, 1963, the salary of the Applicant as a Headmaster, Grade B, was £798 per annum which included a sum of £96 which was payable as Headmaster's duty allowance. With the enactment of Law 7 of 1963, new salary scales came into force and the salary scale of the post of Headmaster, Grade B, under this Law was £606x24–£774. However, section 37 of the Law saved the right of elementary school-teachers whose basic salary, including the Headmaster's duty allowance, was higher than the new salary scales and they were, by virtue of this section, to continue to receive the higher salary; but section 37 was repealed and substituted by section 3 of the Teachers of Communal Schools of Elementary Education (Amendment) Law, 1964 (Law 1 of 1964 of the Greek Communal Chamber) which was published in the Gazette of the 27th March, 1964. The

new section reads as follows:

> «37. Ὁ βασικὸς μισθὸς ὃν λαμβάνουν διδάσκαλοι κατὰ τὴν ψήφισιν τοῦ παρόντος Νόμου καὶ ἐὰν ἀκόμη εἶναι ὑψηλότερος ἐκείνου ὃν ἔδει νὰ λαμβάνωσιν ἐπὶ τῇ βάσει τοῦ παρόντος Νόμου δὲν θὰ ἐπηρεασθῇ.»

Law 1 of 1964 was given retrospective effect as from the date of the enactment of the principal law (Law 7 of 1963).

It is to be noted that by the 1964 amendment the words "inclusive of the Headmaster's allowance" which followed the words "basic salary" were omitted from section 37.

It is common ground that on his retirement Applicant's pension and gratuity were calculated on the basis of the new salary scale *i.e.* £774 and not £798. To this the Applicant objected by his letter dated 8th October, 1966 (*exhibit* 5), On the 12th November, 1966, the Applicant received a reply to his objection from the Ministry of Education; it is the letter *exhibit* 6 and it reads as follows:

> «Εἰς ἀπάντησιν ἐπιστολῆς σας 8/10/66 λυποῦμαι νὰ σᾶς πληροφορήσω, ὅτι ἡ ἀπόφασις τοῦ Ὑπουργικοῦ Συμβουλίου δὲν καλύπτει τὴν περίπτωσίν σας. Αὕτη ἔχει ὡς ἑξῆς:
>
> > 'Τὸ Συμβούλιον ἀπεφάσισεν ὅπως ἐγκρίνῃ ὅπως αἱ συντάξεις τῶν Διευθυντῶν τῶν Δημοτικῶν Σχολείων, οἱ ὁποῖοι εἶχον μέχρι τῆς 1ης Σεπτεμβρίου, 1963 συμπληρώσει συνολικὴν ὑπηρεσίαν πέντε ἐτῶν εἰς θέσεις διὰ τὰς ὁποίας ἦτο πληρωτέον ἐπίδομα διευθύνσεως καὶ οὕτω ἀπέκτησαν τὸ δικαίωμα ὅπως ὁ μέσος ὅρος τοῦ ἐπιδόματος τούτου θεωρηθῇ ὡς συντάξιμος ἀπολαβὴ δυνάμει τοῦ ἄρθρου 45 τοῦ περὶ Στοιχειώδους Παιδείας Νόμου, Κεφ. 166, αἱ τοιαῦται δὲ ἀπολαβαὶ ἦσαν ὑψηλότεραι τῶν συνταξίμων ἀπολαβῶν αὐτῶν ἐπὶ τῇ βάσει τῶν νέων μισθοδοτικῶν κλιμάκων, ὑπολογισθῶσιν ἐπὶ τῶν πρώτων συνταξίμων ἀπολαβῶν καὶ ἡ πληρωμὴ τῆς διαφορᾶς γίνῃ χαριστικῶς μέχρις ὅτου τὸ θέμα τοῦτο κανονισθῇ διὰ νόμου'.
>
> Εἰς τὴν περίπτωσιν σας εἰσεπράττετε ἐπίδομα διευθύνσεως ἀπὸ 1/9/60 μέχρι 31/8/63, ὅτε ἐτέθησαν ἐν ἰσχύϊ αἱ νέαι μισθολογικαὶ κλίμακες. Συνεπῶς δὲν ἦτο δυνατὸν νὰ ὑπολογισθῇ ἡ σύνταξις ἐπὶ τῶν παλαιῶν ἀπολαβῶν

σας ἐφ' ὅσον δὲν εἰσπράττετε ἐπίδομα διευθύνσεως ἐπὶ πενταετίαν.»

It is the decision of the Council of Ministers contained in the above letter that the Applicant challenges by this recourse.

The Application is based on the following grounds of law:

"The Supreme Court has exclusive jurisdiction to declare any act and/or decision of any organ exercising executive or administrative authority *null* and *void* if it is contrary to the provisions of any law or the Constitution.

Likewise a decision may be annulled if it is discriminatory *i.e.* contrary to Arts. 6 and 28 of the Constitution.

It is contended that the decision of the Council of Ministers is contrary to Arts. 6 & 28 & 192 of the Constitution as well as section 45 of Cap. 166".

The Opposition, on the other hand, is based on the following grounds of law:

(a) The decision challenged was lawfully taken on the basis of the facts of the case.

(b) The said decision does not in any way contravene the provisions of Arts. 6, 28 or 192 of the Constitution or section 45 of Cap. 166.

It may be stated at this stage that learned counsel for the Applicant made no allegation, in the course of his address, that there has been any discrimination against the Applicant and no reference at all to Articles 6 and 28 of the Constitution; nor did he allege or attempt to establish the practice to which he refers at paragraph 3 of the facts relied upon in support of his Application—and which, he alleges in the said paragraph, amounts to a vested right under Article 192 of the Constitution—to the effect that before 1960 "if a Headmaster completed three years service as a Headmaster he was entitled to have the extra allowance payable to him as a Headmaster, as pensionable". And in fact on the material placed before the Court, there is not the shadow of a suspicion that there has been any discrimination against the Applicant; and in so far as Article 192 of the Constitution is concerned it is quite clear that the Applicant was not "immediately before the coming into operation of the Constitution" per-

forming the duties of a Headmaster nor was he receiving any duty allowance and it, therefore, follows that the provisions of section 45 of Cap. 166 regarding the computation of the pension and gratuity where duty allowance was payable were not at the time applicable to him.

It was, however, contended on the part of the Applicant that in view of the provisions of section 37 of Law 7 of 1963 the calculation of Applicant's pension and gratuity should have been made on the basis of £798 and not on the basis of £774. Learned counsel for the Applicant after referring to section 45 of the Elementary Education Law (Cap. 166) submitted that the fact that the Applicant received duty allowance for three years only did not matter because although from 1963 he was not receiving any duty allowance such duty allowance was included in his salary "as a vested right under section 37".

I find myself unable to agree with learned counsel's contention and submission. In so far as section 37 is concerned, as stated earlier on, it was repealed and substituted by the 1964 amendment and the words "Headmaster's allowance" were deleted from the section and only the basic salary, where it happened to be higher than the salary provided under the new salary scales, was saved thereby; and this with effect from the date of the enactment of the principal law.

Let us now for one moment turn to section 45 of the Elementary Education Law, Cap. 166. Such section is included in part V of the law which deals with the retirement and pensions of teachers.

Under this section (as set out in section 2 of Law 21 of 1959) the word "salary" is defined as follows:

> " 'Salary' with respect to any teacher shall include a portion of the cost-of-living allowance paid to such teacher for the time being amounting to twelve and one half per centum of the salary of such teacher but shall otherwise be exclusive of allowances:
>
> Provided that where a teacher has during the course of his service held posts in respect of which a duty allowance is payable for an aggregate period of not less than five years the Governor may direct that, for the purposes

of computing pension, gratuity or benevolent grant, the salary shall be enhanced by a sum equal to the average of the allowance payable at the time of such computation in respect of the posts held during the last five years of the aggregate period".

Then follows a second proviso which is not relevant for the purposes of this case.

In fact (except where he held a post in respect of which duty allowance was payable for an aggregate period of not less than five years) a teacher's "salary" never included any allowance for pension and gratuity purposes since what is now numbered as section 45 was first introduced in 1944 (by section 21 of Law 3 of 1944); and the position has remained substantially the same until Law No. 19 of 1967 was enacted.

In the light of the above and in view of the fact that the Applicant held a post in respect of which duty allowance was payable for a period of less than five years, in fact for three years only, and he was not in receipt of such allowance at the time of the computation of his pension and gratuity, he did not, in my opinion, qualify to have his pension and gratuity computed on the basis of £798 which sum included £96 Headmaster's duty allowance.

The obvious scope of the decision of the Council of Ministers challenged by the present recourse was to protect the rights acquired, by virtue of the provisions of section 45 of Cap. 166, by those elementary school-teachers who had until the 1st September, 1963 completed an aggregate of not less than five years service in posts in which duty allowance was payable. The Applicant quite clearly never acquired such a right and, in my opinion, his pension and gratuity were correctly computed on the basis of his pensionable emoluments at the time of his retirement without taking into account the duty allowance.

For all the above reasons this recourse must fail.

Recourse dismissed with costs.