

1988 May 27

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CHARALAMBOS KAPSOS,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondents.

(Case No. 35/87).

Annulling decision of Supreme Court—Compliance thereto—Misinterpretation of decision—Led to misconception of law and fact.

Misconception of fact and law—Misinterpretation of annulling decision of supreme Court—Sub judice decision taken under a misconception of fact and law.

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Following a successful recourse by the applicant, the commission appointed him to the post of Attaché in the Ministry of Foreign Affairs as from 1.7.84. Following another recourse by the applicant, whereby he complained why his appointment was not made retrospective as from 1.9.81, the Commission reconsidered the matter and decided to appoint him to such post as from 1.9.81.

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This decision was impugned by recourse 843/85 (Vide Ieronymides and Others v. The Republic (1986) 3 C.L.R. 2424). In annulling the sub judice decision in that recourse the Court had this to say:

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"The decision consists in fact of two parts. The first part refers to the decision concerning the appointment of the applicant, published on the 31st August, 1984, to the post of Attache and the second the decision giving ret-

rospective effect to such appointment as from the 1st September, 1981, instead of the 1st June, 1984. The first part is nothing more than merely confirmatory of the appointment. The second part of the decision embodies in fact a new decision that of giving retrospective effect to his appointment which is an executory administrative act by itself and as such it can be challenged by a recourse by any person who has a legitimate interest." 5

Finally the sub judice decision in that recourse was annulled on the ground that two of the applicants were wrongly not considered for promotion.

In virtue of a legal advice by counsel for the Republic the Commission thought that the decision annulled also the original appointment of the applicant as from 1.7.84. Consequently, the Commission revoked the two further promotions of the applicant which were made after the 1.7.84 and informed the applicant that he reverts to the position he had prior to his appointment to the post of Attaché. 10

Hence this recourse. 15

Held, annulling the sub judice decision: It is obvious that the Commission misinterpreted the annulling decision in *Ieronymides*, supra. Instead of restricting itself in compliance with the said judgment to the annulment of the retrospective part of that decision only, it took the sub judice decision, operating under a misconception of fact and law. 20

*Sub judice decision annulled.
Costs against respondent.*

Recourse.

Recourse against the decision of the respondent to revoke applicant's appointment as from 1.6.1984 to the post of Attaché in the Foreign Service. 25

A. *Constantinou*, for the applicant.

R. *Gavrielides*, Senior Counsel of the Republic, for the respondent. 30

Cur. adv. vult.

SAVVIDES J. read the following judgment. Applicant by this recourse prays for the following relief:

5 (a) A declaration of the Court that the decision of the respondent dated 13th January, 1987, whereby his appointment as from 1st June, 1984, to the post of Attaché in the Foreign Service was revoked is unconstitutional and, or illegal and/or without any legal effect.

10 (b) A declaration of the Court that after the annulment of the aforesaid decision the respondent should take all necessary steps for the full restoration of the applicant to his post with retrospective effect.

The decision complained of is contained in a letter sent to the applicant by the Chairman of the Public Service Commission which reads as follows:

15 " Έχω οδηγίες να αναφερθώ στο διορισμό σας στη μόνιμη (Τακτ. Προυπ.) θέση Ακολούθου, Εξωτερικές Υπηρεσίες, αναδρομικά από 1.9.81 και να σας πληροφορήσω ότι το Ανώτατο Δικαστήριο με την απόφαση του ημερ. 22.12.86 στην Προφυγή με αρ. 843/85 (Μάριος Ιερωνυμίδης και άλλοι εναντίον της Κυπριακής Δημοκρατίας μέσω της Επιτροπής Δημοσίας Υπηρεσίας), κήρυξε την απόφαση της Επιτροπής Δημοσίας Υπηρεσίας, με την οποία διοριστήκατε στην πιο πάνω θέση, άκυρη.

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25 2. Μετά την πιο πάνω απόφαση του Ανώτατου Δικαστηρίου, η Επιτροπή Δημοσίας Υπηρεσίας έκρινε ότι η ακύρωση του διορισμού σας στη μόνιμη (Τακτ. Προυπ.) θέση Ακολούθου από 1.9.81 συμπαράσχει και τις μετέπειτα προαγωγές σας στις μόνιμες (Τακτ. Προυπ.) Θέσεις Γραμματέα Β' ή Υποπρόξενου και Γραμματέα Α' ή Πρόξενου από 1.3.84 και 1.3.86 αντίστοιχα, και έτσι αποφάσισε να ανακαλέσει τις σχετικές αποφάσεις που έλαβε στις συνεδρίες της με ημερ. 2.12.85 και 24.4.86.

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3. Υστερα από τα πιο πάνω επανέρχεστε στην υπηρεσιακή κατάσταση που ίσχυε πριν από το διορισμό σας στη μόνιμη (Τακτ. Προύπ.) θέση Ακολούθου, δηλαδή στη θέση Διοικητικού Λειτουργού, Υπηρεσία Δημοσίας Διοίκησης και Προσωπικού."

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The English translation of which is:

"I have instructions to refer to your appointment to the permanent post of Attaché, Foreign Service, retrospectively as from 1.9.81 and to inform you that the Supreme Court by its decision dated 22.12.86 in recourse No. 843/85 (Marios Ieronymides and Others v. The Republic of Cyprus through the Public Service Commission) annulled the decision of the Public Service Commission by which you were appointed to the aforesaid post.

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2. In consequence of the aforesaid decision of the Supreme Court the Public Service Commission found that the annulment of your appointment to the permanent post of Attaché as from 1.9.81 sweeps away your subsequent promotions to the posts of Secretary B' or Vice Consul and Secretary A' or Consul as from 1.3.84 and 1.3.86, respectively and, therefore, it decided to revoke the relevant decisions which took at its meetings dated 2.12.85 and 24.4.86.

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(3) As a result of the above you revert to the service status prevailing before your appointment to the permanent post of Attaché i.e. to the post of Administrative Officer, Public Administration and Personnel Service."

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The history of this case and the relevant facts run back to 1981 when a number of vacancies for the post of Attaché in the Ministry of Foreign Affairs was to be filled. The applicant was amongst the candidates for appointment to such post who were considered by the Public Service Commission. Other candidates, to the exclusion of the applicant, were found suitable for promotion and as a result they were offered appointment as from 1st September,

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1981. The applicant filed recourse No. 356/81 as a result of which the Court annulled the appointment of one of the interested parties in such recourse, namely, G. Evriviades (see, *Kapsou v. The Republic* (1983) 3 C.L.R. , 1336). As a result of the annulment of the appointment of Evriviades the respondent Commission re-examined the matter in 1984 and decided to appoint to the post the applicant as from 1st July, 1984. The decision was published in the official Gazette of the Republic of the 31st August, 1984, under notification 2033 (his said promotion was not challenged by anybody). The applicant requested that his appointment be made with retrospective effect as from 1st September, 1981. His request was turned down and as a result he filed a recourse to this Court which, however, was withdrawn when the Commission undertook to consider the matter of retrospectivity. Finally, the Commission decided on the 29th May, 1985 that the appointment of the applicant should be given retrospective effect as from the 1st September, 1981, the date of the appointment in such post of Evriviades whose appointment had been annulled by the Supreme Court in recourse No. 356/81. The notification to that effect was published in the official Gazette of the Republic of the 19th July, 1985. A recourse was filed against such promotion by a number of interested parties some of which had a legitimate interest to challenge the retrospectivity of such promotion and others who were challenging the promotion of the applicant to the post of Attaché (see *Ieronymides and Others v. The Republic* (1986) 3 C.L.R. 2424 which was dealt with by me and in which judgment was delivered on the 22nd December, 1986).

As the sub decision rests entirely on the construction of the said judgment I find it necessary to refer to some of my findings in the said judgment concerning the annulment of the decision of the respondent published in the Gazette on the 19th July, 1985. I had this to say in this respect at pp. 2431 and 2432 of the judgment:

"The decision of the respondent which was published on the 19th July, 1985, bearing in mind all the surrounding circumstances of the case consists in fact of two parts. The first

part refers to the decision concerning the appointment of the applicant, published on the 31st August, 1948, to the post of Attaché and the second the decision giving retrospective effect to such appointment as from the 1st September, 1981 instead of the 1st June, 1984. The first part is nothing more than merely confirmatory of the appointment of the interested party to the post which he was already holding and as such it could not be challenged by a recourse once the original act of his appointment was not challenged by any of the applicants within the 75 days time limit prescribed by the Constitution. (See minutes of the meeting of 29.5.85 from which it is obvious that only the date of the appointment of the interested party was reconsidered.) The second part of the decision embodies in fact a new decision that of giving retrospective effect to his appointment which is an executory administrative act by itself and as such it can be challenged by a recourse by any person who has a legitimate interest affected by such decision."

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Then I went on to examine the position of the various applicants in that case and bearing in mind my above finding I concluded that two of the applicants and in particular applicants 2 and 4 in that case had no legitimate interest to challenge the sub judice decision.

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Concerning three other applicants and in particular applicants 3, 5 and 8 I concluded that their recourse should fail in view of the fact that they had also been offered appointment as from 1st September, 1981 and, therefore, no legitimate interest of theirs would have been affected by the retrospective promotion of the applicant as from 1st September, 1981. As to the remaining applicants 1 and 6 I found as follows at p. 2433:

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"Applicants 1 and 6 were appointed since 1983 and were holding the same post as the one offered to the interested party. As already found they had no legitimate interest to challenge the part of the decision concerning the appointment of the interested party as from the 1st June, 1984 as such appointment was subsequent to their own. They were however,

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entitled to challenge the retrospective effect given to his appointment as by such decision the interested party was given an advantage over them, that of nearly two years seniority."

and at p. 2434 I concluded as follows:

5 " In the light of my above findings I have come to the conclusion that the respondent Commission by excluding applicants 1 and 6 from consideration when it decided to appoint the interested party retrospectively acted under a misconception of law and fact and failed to carry out a due inquiry into the matter."

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Counsel who appeared for the respondent in recourse No. 843/85, by letter dated 2nd January, 1987 informed the respondent as to the result of the recourse giving at the same time his opinion as to the necessary steps to be taken by the respondent in compliance with the said decision. As the contents of such letter
15 are material for the outcome of the present case and they form the basis on which the respondent took the sub judice decision I find it necessary to refer to the full text of such letter which reads as follows:

"Εν σχέσει προς την υπό τον ως άνω αριθμόν και τίτλον προσφυγήν και εν συνεχεία της επιστολής μου της 23ης
20 Δεκεμβρίου 1986, σας πληροφορώ ότι, κατά την γνώμη μου, δια να υπάρξη ουσιαστική συμμόρφωσις προς την ακυρωτικήν απόφασιν του Ανωτάτου Δικαστηρίου, και δυνατότης επανεξετάσεως και επιλογής δια διορισμόν με-
25 ταξύ των αιτητών και του ενδιαφερομένου μέρους, από της 1ης Σεπτεμβρίου, 1981, αυτή, (η απόφασις) πρέπει να ερμηνευθή ότι πρακτικώς ηκύρωσε τον διορισμόν του ενδιαφερομένου μέρους από της 1ης Σεπτεμβρίου 1981, περιλαμβανομένου του αρχικού διορισμού του από 1ης Ιουλίου 1984, και τούτο ανεξαρτήτως των όσων αναφέρονται
30 στη σελίδα 5 της αποφάσεως.

2. Περαιτέρω, εις πλήρη συμμόρφωσιν προς την ακυρω-

τικήν απόφασιν, η Επιτροπή, μετά την εξαφάνισιν των αποτελεσμάτων του κατά τα ανωτέρω ακυρωθέντος διορισμού, θα πρέπει να προχωρήση και εις την ανάκλησιν της προαγωγής του ενδιαφερομένου μέρους εις την θέσιν Γραμματέως Β ή Υποπροξένου (Εξωτερικές Υπηρεσίες) από 1ης Μαρτίου 1984, εφ' όσον ο ακυρωθείς διορισμός απετέλεσε την βάση της εν λόγω προαγωγής ευρισκόμενος, επομένως, εις στενόν σύνδεσμον με αυτήν.

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3. Όσον αφορά την επανεξέτασιν, πιστεύω ότι πρέπει να αναμένωμεν να παρέλθη η προθεσμία της εφέσεως."

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The respondent met on 10th January, 1987 and according to its minutes after making verbatim reference to the aforesaid letter took the sub judge decision which was incorporated in the letter sent to the applicant.

In fact two appeals were filed against my judgment in the above recourse, one by the applicant himself and one by one of the interested parties, both of which, however, were withdrawn before they were heard. The respondent did not file an appeal against the said judgment.

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Counsel for applicants argued that the respondent misinterpreted and wrongly applied the judgment of the Supreme Court in recourse No.843/85 and failed to pay congruance and comply with the directions of the Court as appearing in the reasoning of the judgment of the Court in the above recourse. He further argued that the respondent by revoking the appointment of the applicant to the post of Attaché in the Foreign Service of the Republic which he was holding since 1st June, 1984 acted arbitrarily and contrary to the law and the Constitution.

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Counsel for respondent instead of filing a written address in accordance with the directions of the Court sent a letter to the Chief Registrar on the 16th September, 1987, with copy to the applicant, the contents of which read as follows:

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5 " With reference to the above intituled recourse which has
been fixed by the Court for clarifications and evidence on the
5th November, 1987 and in which I have not filed a written
address you are requested to bring to the notice of the Court
that my position on the question raised in this recourse is con-
tained in my opinion to the respondent dated 2nd January,
1987, which is attached as annex '1' to my opposition. I adopt
such opinion for the purposes of a written address, making
myself available for any clarifications which might be asked
10 by the Court."

15 I pause at this point to state that the least I should say is that it
is regrettable that responsible counsel who appear for the Republic
instead of complying with the directions of the Court and file
an address expounding on the grounds of their opposition and re-
plying to the arguments advanced by the other side they feel satis-
fied by addressing a letter to the Registrar repeating only an opin-
ion which was expressed by him to the respondent Commission
and not appearing before the Court to advance any argument in
support of his opinion. When the case was fixed for clarifications
20 counsel who was handling the case did not appear in person and
counsel appearing on his behalf stated that he had nothing else to
add in clarification.

25 The decision of the Court in *Ieronymides and Others v. The Republic* (supra) is in my view clear and unambiguous. As stated
therein the decision of the respondent of the 29th May, 1985 con-
sisted of two parts. The first part confirmed the appointment of
the applicant to the post of Attaché which was published on the
31st August, 1984 and the second part was giving merely retro-
spective effect to his previous appointment as from 1st Septem-
ber, 1981. The opinion expressed by counsel for the respondent
30 in his letter dated 2nd January, 1987 is clearly based on a com-
plete misconception on his part of the effect of such judgment and
a wrong interpretation given as to its effect. It was his own inter-
pretation of the judgment that led the respondent to take the sub
35 judice decision who on its part took for granted the contents of
his letter without going into the trouble of reading the judgment

and drawing its own conclusions as to what was in fact decided by the Court. The respondent, therefore, instead of restricting itself in compliance with the said judgment to the annulment of the retrospective part of its decision only, operating under a misconception of fact and law, to which they were led by their legal advisers, took the sub judice decision which for all intents and purposes is null and void and not in compliance with the judgment of the Court in case No. 843/85.

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For all the above reasons the sub judice decision is annulled with costs against the respondent.

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*Sub judice decision annulled
with costs against respondent.*