

[TRIANTAFYLLOIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE
CONSTITUTION

CHLOE GRIMALDI,

Applicant,

and

THE REPUBLIC OF CYPRUS THROUGH THE
PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 85/63)

Administrative Law—Public Officers—Appointments to the post of Assistant Welfare Officer—Policy decision concerning re-employment of female officers who retired on grounds of pregnancy—Applicant's claim to priority under.

Public Service Commission—Duty to select the most suitable candidate when filling vacancies—Discretion—Failure to consider all candidates before making appointments, an improper exercise of the relevant discretion—Appointments annulled as made contrary to, and in abuse and excess of powers.

Administrative law—Public Offices—Appointments to the post of Assistant Welfare Officer without proper advertisement—Proper advertisement for such appointments, a part of and an essential prerequisite for the relative administrative act.

Applicant challenges the appointments of four Interested parties to the post of Assistant Welfare Officer as having been improperly made. Counsel for Applicant has also submitted, at the hearing of the recourse, that such appointments were void in public law in view of the non-advertisement of the vacancies in the post in question after the amendment of the relevant scheme of service, a factor which came to light during such hearing.

Held, I. There has been a clear failure to apply the policy decision of the Council of Ministers concerning re-employment of female officers who retired on grounds of pregnancy in favour of Applicant to the extent to which she was entitled thereunder to such application. Such failure constitutes, in the circumstances, an abuse of the relevant powers of the Commission.

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The advertisement of the vacancies in question under the old scheme of service cannot be deemed to be a proper advertisement for the purposes of the new scheme of service and it follows that the Commission proceeded to fill the said vacancies in the first entry and promotion post of Assistant Welfare Officer without proper advertisement thereof.

II. Moreover, the Commission has contravened the relevant scheme of service (defining the post in question as a first entry and promotion post and requiring, thus, an advertisement thereof before the appointment thereto of outsiders) and acted in breach of its duty to select the most suitable candidate for the post (because it limited itself to the narrow circle of candidates who applied under the first advertisement and failed to pay due regard to the possibility of more suitable candidates who could come forward in response to an advertisement under the new scheme of service).

III. The Commission has always to comply with the scheme of service in force at the time and it has also to try and select the most suitable candidate for appointment; both these courses of action are considered as prerequisites for the discharge of its duties under Article 125 and, therefore, failure to do so entails the annulment of the relevant decision of the Commission, *Papapetrou and The Republic*, 2 R.S.C.C. 61, *Theodossiou and The Republic*, 2 R S.C.C. 44 at p. 47, followed.

IV. The appointments of the Interested Parties, as effected by the Commission in this Case, have to be declared *null* and *void* and of no effect whatsoever.

V. It is up to the Commission now to advertise the vacancies thus arising, on the basis of the scheme of service in force, and to consider properly the filling thereof paying also due regard to the duty to apply properly the circular-letter containing the policy decision of the Council of Ministers concerning re-employment of female officers who retired on grounds of pregnancy.

VI. When a decision of an administrative organ is discretionary no question of a wrongful omission can arise as a result of such decision having been taken but

such decision is to be set aside, if found, as in this Case, that it is invalid for any reason.

VII. There shall be an order for part of the costs in these proceedings in favour of Applicant which I assess at £20.-

*Appointments complained of
declared null and void.*

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Cases referred to:

Theodossiou and The Republic, 2 R.S.C.C. 44 at p. 47;

Papapetrou and The Republic, 2 R.S.C.C. p. 61;

Dafnides and The Republic, 1964 C.L.R. 180;

Papapetrou and The Republic (No. 2) 2 R.S.C.C. 115
at p. 118;

Morsis and The Republic (reported in this Part at p. 1 ante);

*Pancyprian Federation of Labour and the Board of Cinema-
graph Film Censors*, (reported in this Part at p. 27 ante).

Recourse.

Recourse for the annulment of four appointments made instead of, and in preference to, applicant to the post of Assistant Welfare Officer and, also, for a declaration that the omission of respondent to appoint applicant to such post ought not to have taken place.

A. *Triantafyllides* for the applicant.

L.G. *Loucaides*, Counsel of the Republic, for the respondent.

Cur. adv. vult.

The facts of the Case sufficiently appear in the following judgment of:

TRIANTAFYLLIDES, J.: In this Case the Applicant claims, in effect, the annulment of four appointments made instead of, and in preference to, herself to the post of Assistant Welfare Officer and, also, a declaration that the omission of Respondent to appoint her to such post ought not to have taken place.

Applicant was originally permanently appointed to such post, as from 1st October, 1956, until the 1st January, 1959. Then due to childbirth she lost her permanent status and became the temporary holder of the same post; this took place because of the then in force service arrangements with regard to such matters.

Again through childbirth she lost even her temporary status and as from November, 1960, she has been re-employed in the same post on daily-wage only. She is still so employed.

After the establishment of the Republic the essential undesirability of the aforesaid past service arrangements appears to have been fully realized and in 1962 the Respondent Commission addressed a circular-letter (*exhibit 1*) to all Departments in Government informing them that "according to a recent decision of the Council of Ministers, pensionable and provident fund officers who have retired on grounds of pregnancy since the 16th August, 1960, will now be reinstated in their former posts and that unestablished/temporary officers so retired will be considered for re-employment and given priority over other candidates when filling vacancies in the posts they had held before their services were terminated".

There is no doubt from the whole context of such circular-letter that the Respondent Commission did adopt as its own policy the decision of the Council of Ministers, mentioned therein, a thing which it was entirely free to do.

As Applicant was only a temporary officer in November 1960, when she lost that status through childbirth, it is clear that she was not entitled, on the basis of the said policy, to be reinstated to her post, but only to priority in case of vacancy in such post.

Applicant on hearing of this circular-letter raised her case with the Ministry of Labour and Social Insurance by letter dated the 5th May, 1962, and the Ministry, having referred the matter to the Respondent Commission, received a reply, in June, 1962, which was made known to Applicant; it was to the effect that though it was not possible to reinstate her, she would be considered for appointment by the Respondent Commission when vacancies would come to be filled as "unestablished temporary officers who have retired on account of reaching an advanced stage of pregnancy will be con-

sidered for re-employment and given priority over other candidates when filling vacancies in the posts they had before their services were terminated”.

Such vacancies in the post of Assistant Welfare Officer—the post which Applicant once held permanently—occurred subsequently and were advertised by the Commission in the official Gazette on the 27th September, 1962, (Not. 1208).

On the strength of such advertisement the following qualifications were required:

A good general education plus a number of passes in certain specified subjects of the Cyprus Certificate of Education. A qualification in Social Science would be an advantage and holders of the Diploma in Social Science of the London University were not required to have passed the specified subjects of the Cyprus Certificate of Education.

It was required, moreover, that candidates should be of strong physique and intelligent, have personality, maturity, be of a stable disposition and possess ability to win confidence and to handle persons with patience and systematically.

Candidates had to be female citizens of the Republic not younger than 22 years of age and not older than 35.

Applications for appointment had to be sent to the Chairman of the Public Service Commission not later than the 13th October, 1962.

The Applicant and Interested Parties Protopapa, Panayiotou and Papantoniou were among those who applied within the prescribed period, as above.

Interested Party Petridou did not apply for appointment within the said period; her application for the post in question has been duly produced and is dated 25th February, 1963, i.e. subsequent even to the date when the Public Service Commission decided to appoint her viz. the 11th February, 1963. She had only written a letter to the District Welfare Office, Limassol, on the 30th December, 1962, stating that she was ready to serve in the public service and asking that it should be forwarded to the Public Service Commission (see *exhibit 11*).

From the application for appointment of Applicant it appears that—apart from her long experience as an Assistant

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Welfare Officer, since October 1956—she did not possess any other academic qualification for such post.

From the application of the three Interested Parties who applied for appointment it appears that Interested Party Protopapa had a University Diploma in Social Studies but no previous experience at the post in question and she was not in the public service at the time; Interested Party Papan-toniou had a Diploma in Social Welfare and was at the time since August 1962 an Assistant Welfare Officer on a daily-paid basis and Interested Party Panayiotou had also a Diploma in Social Welfare but had no previous experience at the post in question and she was not at the time in the public service.

From the much-belated application of Interested Party Petridou it appears that she had no academic qualifications for the post in question but she possessed experience, in that she had served as Superintendent of Homes from 1956 to 1960 and had been seconded to the post of Assistant Welfare Officer from 1960 to 1961, when she had to leave the public service due to childbirth. She had remained outside Government service since then.

On the 19th October, 1962, the relevant scheme of service was amended and it became as it is up to this date. It was published in the official Gazette when vacancies in the post in question were advertised for *male* candidates on the 14th March, 1963 (Not. 265). It is *exhibit* 8 in this Case and the required qualifications are as follows:—

Leaving certificate of a 6-year Secondary School with a good knowledge of English. High intelligence, uprightness of character, personality, maturity, temperamental stability, ability to form constructive relationship with people, real concern for troubled people, ability to win confidence and deal with others patiently and sympathetically are essential requirements. A University Certificate or Diploma in Social Science or Sociology or a Certificate of a recognized School of Social Work will be an advantage. The age limits for candidates were fixed as 21-35.

The vacancies for *female* candidates, though they were not filled between the 19th October, 1962 and February 1963, were not advertised again on the strength of the new scheme of service. In this Case we are concerned all the time with

only the vacancies which were destined for female appointees.

On the 30th January, 1963, the Public Service Commission, dealing with vacancies in the posts of Assistant Superintendent of Homes and Superintendent of Homes called for interview, among others, the Interested Parties Protopapa, Panayiotou and Petridou; Applicant was not called to such an interview. According to the testimony of Mr. Proestos, a member of the Public Service Commission who has assisted greatly the Court in this Case by very lucid and definite evidence, the said three persons stated at the time that they were only interested in the post of Assistant Welfare Officer.

On the 11th February, 1963, when the Commission came to deal with vacancies in the post of Assistant Welfare Officer it decided at once to appoint the said three Interested Parties to such post (see minutes, *exhibit 6*) after considering their "qualifications and abilities"; it decided also to call for interview on the 22nd February, 1963, the other candidates for such post including Applicant.

On that day the Commission decided to appoint another two persons to vacancies in the post in question, one of them being Interested Party Papantoniou after considering "the qualifications, experience and merits of the candidates interviewed" (see minutes, *exhibit 7*). Applicant was not appointed.

This recourse was filed on the 20th May, 1963, after the appointments of the Interested Parties were published in the official Gazette on the 21st March and 28th March, 1963, respectively. Applicant had been notified in writing by letter dated the 6th March, 1963, that she had not been selected for appointment.

The Case came up originally for Presentation but in view of the subsequent lacuna in the constitution of the Supreme Constitutional Court, before which it was originally destined to be tried, the Presentation proceedings remained in abeyance and then, after the Supreme Court started functioning, it was fixed for hearing *de novo*. By direction of the Court, on the 26th August, 1965, the proceedings were reopened so that certain further information necessary for the determination of the issues *sub judice* could be placed before the Court and this proved to be of great assistance indeed.

All four Interested Parties have been notified, according

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to the existing practice, quite early in the proceedings, of their right to take part in such proceedings for the protection of their interests; they were also notified in writing of the day of the hearing before this Court but they did not choose to appear at such hearing.

In this Case the Applicant challenges the appointment of all four Interested Parties as having been improperly made, instead of and in preference to her. Counsel for Applicant has also submitted, at the resumed hearing, that such appointments were void in public law in view of the non-advertisement of the vacancies in the post in question after the amendment of the relevant scheme of service—a factor which came to light during such resumed hearing.

As it appears from *exhibit 8*,—the new scheme of service which came into force in October, 1962—the post of Assistant Welfare Officer is a first entry and promotion post.

It is inherent in the first entry nature of such a post that it can only be properly filled by appointment of a person outside the public service if it has been advertised, so that all willing candidates will come forward and the Public Service Commission may pick the most suitable candidate—as it is its paramount duty to do (*vide Theodossiou and The Republic*, 2 R.S.C.C. 44 at p. 47).

The need for advertisement in the case of filling of a first entry and promotion post was recognized by the practice existing under the General Orders, applicable to the public service during the colonial regime before Independence, (*vide G.O.II/1/17*).

As apparently no question arose of filling the vacancies in the post in question by promotions only, such vacancies were properly advertised in the official Gazette on the 17th September, 1962. The terms of such advertisement were based on the scheme of service then in existence. When, however, the scheme of service was amended in October, 1962, no new advertisement, on the basis thereof, was made for the said vacancies for females in the post of Assistant Welfare Officer until the time when the *sub judice* appointments were made.

Thus only candidates who had applied under the first advertisement, on the strength of the qualifications required by the old scheme of service, were before the Commission. A perusal of the schemes of service involved in this matter,

the old and the new, shows at once that due to broader educational qualifications laid down by the new scheme a much wider circle of persons would be enabled to apply for appointment under the new scheme than under the old one—and among such candidates there might be persons possessing the all-important for the post character qualifications, who did not come forward before due to the narrow ambit of the educational qualifications laid down by the old scheme.

In my opinion, therefore, the advertisement of the vacancies in question under the old scheme of service cannot be deemed to be a proper advertisement for the purposes of the new scheme of service and it follows that the Commission proceeded to fill the said vacancies in the first entry and promotion post of Assistant Welfare Officer without proper advertisement thereof.

As an appointment is the culmination of a composite administrative act and in a case such as the present proper advertisement constitutes a part of and an essential pre-requisite for such act, it follows that lack of such prerequisite vitiates the appointment itself too. (Vide the Jurisprudence of the Greek Council of State 1929-1959 p. 244).

Moreover, the Commission has contravened the relevant scheme of service (defining the post in question as a first entry and promotion post and requiring, thus, an advertisement thereof before the appointment thereto of outsiders) and acted in breach of its duty to select the most suitable candidate for the post (because it limited itself to the narrow circle of candidates who applied under the first advertisement and failed to pay due regard to the possibility of more suitable candidates who could come forward in response to an advertisement under the new scheme of service).

The Commission has always to comply with the scheme of service in force at the time (vide *Papapetrou and The Republic*, 2 R.S.C.C. p. 61) and it has also to try and select the most suitable candidate for appointment (vide *Theodossiou and The Republic*, *supra*); both these courses of action are considered as prerequisites for the discharge of its duties under Article 125 and, therefore, failure to do so entails the annulment of the relevant decision of the Commission (see *Papapetrou and The Republic*, *supra*, *Theodossiou and The Republic*, *supra*).

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The appointments of the Interested Parties, as effected by the Commission in this Case, have to be declared *null* and *void* for the foregoing reasons. It matters not that the reasons for the nullity of such appointments are not those which actually acted to the prejudice of Applicant in this Case. The legitimate interest of an Applicant is necessary to enable him to bring a matter by way of recourse before an administrative Court, such as this Court under Article 146, but, once the matter is before the Court, the Court is duty-bound to examine the legality thereof (vide *Dafnides and The Republic*, 1964 C.L.R. 180). The legitimate interest affected by an administrative act is not the reason behind the administrative proceedings; such reason is the illegality of the act concerned and the re-establishment of legality through the annulment of the said act, (vide Kyriakopoulos on Greek Administrative Law, 4th edition volume III, p. 118).

We pass now to further reasons for annulling the appointments made by the Commission on the 11th February and the 22nd February, 1963.

It is useful to consider first reasons unconnected with the claim to priority which Applicant had under the circular-letter of the 12th February, 1962 (*exhibit 1*).

In my opinion the Commission by hurrying to appoint the three Interested Parties, Panayiotou, Protopapa and Petridou, before interviewing all the candidates for the post in question, including Applicant, has failed to exercise its discretion by taking into account all relevant considerations i.e. all the candidates who had applied for such post and which were entitled to be considered for appointment *vis-a-vis* each other. Since it is the duty of the Commission to appoint the most suitable candidate it follows that it was a very relevant consideration to see all candidates before deciding who were to be appointed. The failure of the Commission to see all candidates and consider all candidates before appointing the said three Interested Parties clearly amounts to an improper exercise of the relevant discretion and leaves no alternative to the Court but to declare the appointment of such three persons as *null* and *void* as having been made contrary to, and in abuse and excess of, the relevant powers of the Commission.

In the case of Interested Party Petridou the Commission has erred, further, by treating her as a candidate though she

had never applied for appointment in accordance with the advertisement of the post, i.e. up to the 13th October, 1962. Even the letter which she wrote on the 30th December, 1962, —long after the said prescribed date—could not be properly regarded as an application for appointment to the post of Assistant Welfare Officer; on the contrary, there is an endorsement in pencil on such letter indicating the post contemplated for her re-employment as being Superintendent of Homes.

In my opinion, the advertisement of a post is intended both to find all suitable candidates and to define the circle of persons entitled to be considered for appointment; it is not, therefore, possible for the Commission to proceed to take into account other persons, outsiders, even if they do apply for appointment belatedly. It should be borne in mind that the Commission is not bound to appoint anyone of the candidates who answer an advertisement. It may decide to readvertise in an effort to find a suitable candidate. (Vide *Papapetrou and The Republic* (No. 2) 2 R.S.C.C. at p. 118). But to consider as a candidate, a person from outside the service who has failed to apply within the specified time-limit in answer to the advertisement for a post, renders, in my opinion such time-limit meaningless, is in excess of the powers of the Commission and amounts also to allowing an extraneous and non-legitimate factor to influence the exercise of its discretion while choosing from among the candidates properly before it. It is, further, unequal treatment discriminating in favour of such a person and against those who have applied in time; therefore, the appointment of Interested Party Petridou has to be annulled on these additional grounds too.

We come now to deal with the circular-letter (*exhibit 1*).

It goes without saying that such priority presupposes suitability for appointment; but in the case of Applicant such essential requirement could not be doubted because Applicant had been serving at the said post right up to the moment when her case came up to be considered by the Commission. She had over six years service at such post and she had been kept there in spite of the fact that her status had been affected from time to time by reasons irrelevant to her suitability.

A lot of argument has been devoted as to what exactly the “priority” mentioned in the said circular-letter means. In my opinion no all-embracing abstract hard and fast rule

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can be derived from the wording of such letter. It is a question of reasonable application thereof in the light of the particular circumstances of each case. I would say, however, this: Priority under *exhibit 1* certainly entails that there should exist sufficient grounds of superior suitability of another candidate before the Commission by-passes a person entitled to such priority and that such grounds must be beyond doubt and not a mere speculative evaluation of the respective merits of candidates. The Commission should lean in favour of the person entitled to priority under the said circular-letter and not by-pass him in favour of another candidate unless such candidate, is not only of equal or of doubtful superior merit, but is definitely superior as far as his suitability for appointment is concerned. Otherwise priority under the said letter would become meaningless. This conception of priority, which has just been expounded, is in my opinion not incompatible, also, with the duty of the Commission to appoint the most suitable candidate.

I have also approached this Case bearing in mind the margin of appreciation with which the Commission should be entrusted in exercising its relevant discretion in the matter. But there are limits to such margin which should not be transgressed.

Due effect to the policy contained in the letter, *exhibit 1*, (which was adopted, as stated earlier, by the Commission as a general policy before it came to deal with the vacancies concerned) had to be given. Such policy had been quite properly adopted as a stop indicated by the provisions for equal rights contained in the Constitution. Compliance with such policy, once adopted and announced by means of the said circular-letter (*exhibit 1*) was obligatory for the Commission, because of the basic principle of administrative law—which ought to be treated as part of the Law of Cyprus too—requiring that there should be proper administration; it would be definitely contrary to proper administration to announce a policy and not to abide by it. It would also be an abuse of powers.

Breach of a basic principle of administrative law involves the annulment of the offending act or decision (*vide Morsis and The Republic* (reported in this Part at p. 1 *ante*). So it has to be examined to what extent, if any, there has been breach

of such principle, as above stated, through failure to abide by the aforesaid circular-letter.

Let us start with the case of Interested Party Petridou, where the failure to abide by such circular-letter in my opinion is beyond doubt.

She had been in public service in the past (1956-1961) but she had served for a year only (1960-1961), and then only on secondment, at the post in question. Her substantive post was that of Superintendent of Homes. On the other hand Applicant had been serving at such post since 1956 right up to the date when she was rejected for appointment, in 1963, by the Commission i.e. for over 6 years. She had held such post permanently and lost that status through no fault of her own.

It is true that Interested Party Petridou had had to leave the service in 1961 due to childbirth. She was, therefore, entitled also to priority under the circular-letter (*exhibit 1*). But such priority could only relate to appointment to her ex-substantive post i.e. Superintendent of Homes. She declared to the Commission when interviewed on the 30th January, 1963, that she was not interested in appointment to such post, but that she was interested in appointment to the post which she had held on secondment, i.e. Assistant Welfare Officer. Even if she were to be considered as being entitled to some priority under *exhibit 1*, in view of such secondment, there is no doubt that Applicant was entitled to far greater priority because she had held such post in a substantive manner, when she lost her permanent, and later her temporary status, through childbirth.

Interested Party Petridou had no academic qualifications superior to Applicant and had much lesser service and experience at the post in question than Applicant. At the material time she was outside the service whereas Applicant had been in service all along.

There has been a clear failure to apply the circular-letter (*exhibit 1*) in favour of Applicant to the extent to which she was entitled thereunder to such application; not only there did not exist definite superiority of Interested Party Petridou over Applicant but on the contrary Applicant appeared to have been the superior candidate. Through the failure to abide by *exhibit 1* the aforementioned principle of law re-

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quiring proper administration has been contravened and it is thus necessary to annul the appointment of this Interested Party on this ground too. Such failure, also, constitutes, in the circumstances, an abuse of the relevant powers of the Commission.

Concerning the other three Interested Parties, Panayiotou, Protopapa and Papantoniou, I am not prepared to say definitely now—especially in view of their academic qualifications—that there has been, beyond doubt, such a failure to give priority to Applicant as to lead to annulment of their appointments. Nor do I decide now, on the other hand, whether or not their qualifications were such as to amount to a definite superiority justifying the non-giving of priority to Applicant under *exhibit 1*. I leave the matter open as it will have to be considered by the Commission afresh in view of the appointments in question having been already otherwise annulled.

In this connection, however, I would say that it would have been also proper to annul the said three appointments—as well as the appointment of Interested Party Petridou—on the ground that the relevant decisions were taken by the Commission without giving due reasons for disregarding the claim to priority of Applicant, under *exhibit 1*.

Such decisions were particularly adverse to Applicant; not adverse in the sense that she was not appointed, like all other candidates who were rejected, but in the sense that she had a special right of priority under *exhibit 1* which was not given effect to, rightly or wrongly. In view of the nature of the matter the Commission had to give reasons for not applying *exhibit 1* in favour of Applicant and it is, therefore, a case where the absence of due reasons for such unfavourable for Applicant decisions is a fatal defect of the said decisions. (*Pancyprian Federation of Labour and the Board of Cinematograph Film Censors*, (reported in this Part at p. 27 *ante*). Not only such due reasons are not to be found in the relevant minutes or any other relevant document but on the contrary in the relevant minutes of the Commission, of the 11th and 22nd February, 1963 (*exhibits 6 and 7*), the circular-letter *exhibit 1* is not mentioned at all as having been duly considered; stating that the “experience”, “merits”, “qualifications” or “abilities” of candidates were taken into account are reasons given in cases of ordinary selection among candi-

dates none of whom is entitled to priority. If such considerations are to be treated as justifying the disregard of such priority that has to be expressly stated and, moreover, justified.

For all the several reasons in this judgment there shall be a declaration that the appointments of Interested Parties Niovi Protopapa, Myrianthi Panayiotou, Lefki Petridou and Demetra Papantoniou are *null* and *void* and of no effect whatsoever.

It is up to the Commission now to advertise the vacancies thus arising, on the basis of the scheme of service in force, and to consider properly the filling thereof—in the light of this judgment, paying also due regard to the duty to apply properly the circular-letter, *exhibit* 1.

Applicant by the motion of relief has complained also against an omission to appoint her. I have no difficulty in holding that no question of a wrongful omission to appoint Applicant arises in this Case as she was not entitled to reinstatement but only to priority consideration. The Commission, therefore, did not have an absolute duty to appoint her, but had to grant her priority in the course of properly exercising its relevant discretion. When a decision of an administrative organ is discretionary no question of a wrongful omission can arise as a result of such decision having been taken but such decision is to be set aside, if found, as in this Case, that it is invalid for any reason.

Regarding costs, there shall be an order for part of the costs in these proceedings in favour of Applicant which I assess at £20.-

*Appointments complained of
declared null and void.*

*Order as to costs as
aforesaid.*

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