

[MUNIR, J.]

IN THE MATTER OF ARTICLE 146 OF THE
CONSTITUTION

CHARILAOS FRANGOULIDES,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 75/63).

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Administrative Law—Practice—Evidence—Production in evidence of minutes and other records of public bodies—Confidential reports—Production of confidential reports on Applicant, as were actually laid before, and considered by, the Public Service Commission, when it arrived at the decision the subject matter of this recourse, would be in the interests of justice, having regard to all the facts and circumstances of this particular case.

During the hearing of this recourse, by which the Applicant, who is a Welfare Officer in the Welfare Department seeks to *annul* a decision of the Public Service Commission to promote certain Officers in the Welfare Department to the post of Senior Welfare Officer, and at the stage when a member of the Public Service Commission was giving evidence, counsel for Applicant asked the said member to produce certain confidential reports made on the Applicant to which request counsel for Respondent objected on the ground that the production of such confidential reports would be contrary to the public interest and, in particular, to the interest of the Public Service because, he submitted, if the production of such reports became the general rule then such reports would lose their confidential character and their usefulness would, therefore diminish. Counsel for Respondent further submitted that this was a case in which the principles of the English Common Law applied and should not be relaxed; he submitted that under the authority of the House of Lords decision in the Case of *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624, once it has been stated by the responsible authorities of the State, either directly or through counsel, that the produ-

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ction of such documents would be contrary to the public interest then such documents should not be produced.

Held, I. In accordance with the principles enunciated in the cases of *Phedias Kyriakides v. The Republic* 1 R.S.C.C 66 and *Nicos Kalisperas v. The Republic* 3 R.S.C.C. 146, it would be in the interests of justice, having regard to all the facts and circumstances of this particular case, to order at this stage, the production of those confidential reports on the Applicant as were actually laid before, and considered by, the Public Service Commission when it arrived at the decision, which is the subject-matter of this recourse at its deliberations on the 24th January, 1963.

II. The Applicant has made out a sufficient *prima facie* case, having regard to the relative seniorities and records of service of the Applicant and of the Interested Parties, as to make it necessary that the aforementioned confidential reports on the Applicant be produced.

III. It would not be possible for this Court to do justice in the matter without the production of such confidential reports, and, I rule accordingly. The question of other confidential reports or other documents will be considered on their respective merits as and when such questions arise.

IV. It is hardly necessary for me to state that nothing in this Ruling should be taken as meaning that all such confidential reports on public officers are produceable generally as a matter of course, but, as in all cases before this Court, each case must be considered on its own merits. As has already been pointed out by the Supreme Constitutional Court in the passages quoted earlier in this Ruling,* although this Court will use its power to order the disclosure of official information “sparingly in the interests of justice” yet it should not hesitate to do so, in accordance with the above-mentioned principles, “whenever it deems necessary for the proper fulfilment of its mission” in exercise of its administrative jurisdiction.

Order in terms.

*Note: Vide *Nicos Kalisperas and The Republic*, 3 R.S.C.C. p.146, at p. 148, quoted *post* at p. 536.

Cases referred to:

Duncan v. Cammell, Laird & Co., [1942] A.C. 624 at p. 635;

Phedias Kyriakides and The Republic, 1 R.S.C.C. p. 66 at p. 69;

Nicos Kalisperas and The Republic, 3 R.S.C.C. p. 146 at p. 148;

Ellis v. Home Office, [1953] 2 Q.B. 135;

Christoforos G. Petsas and The Republic 3 R.S.C.C. p. 60 at pp. 62-63;

Georghios Evangelou and The Republic (reported in this Part at p. 292 ante).

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Ruling.

Ruling on an objection, against the production of certain confidential reports made on applicant, raised by counsel for the respondents in the course of the hearing of a recourse for annulment of promotions made by the Respondent Public Service Commission.

A. Triantafyllides for the applicant.

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

Cur. adv. vult.

The following Ruling was delivered by:—

MUNIR, J.: This is a recourse under Article 146 of the Constitution by which the Applicant, who is a Welfare Officer in the Welfare Department, seeks to have set aside a decision of the Public Service Commission to promote certain officers in the Welfare Department to the post of Senior Welfare Officer in preference to, and instead of the Applicant. During the hearing of the recourse and at the stage when Mr. Protestos, a member of the Public Service Commission, was giving evidence, counsel for Applicant asked Mr. Protestos to produce certain confidential reports made on the Applicant to which request counsel for Respondent objected on the ground that the production of such confidential reports would be contrary to the public interest.

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After hearing extensive argument by both counsel on the issue of whether or not such confidential reports should be produced the Court reserved its Ruling on this issue until to-day.

In support of his submission that it was necessary for the confidential reports, not only of the Applicant but also of the three officers who were promoted by the decision in question (hereinafter referred to as "The Interested Parties"), to be produced, counsel for Applicant submitted that having regard to the nature of this recourse and the fact that the whole case turned on the contents of the confidential reports, this was a case in which such confidential reports should be produced in evidence. Counsel for Applicant pointed out that it was expressly stated in paragraph 3 of the facts relied upon in opposition by the Respondent that the Public Service Commission "considered the merits and abilities of the candidates as reflected in their Annual Confidential Reports, and also their record of service and seniority". It was submitted by counsel for Applicant that the material before the Court concerning the record of service and seniority of the Applicant, vis-a-vis the Interested Parties, clearly establishes that the Applicant was in a much more favourable position as regards record of service and seniority than the Interested Parties and that, therefore, it must have been the contents of the confidential reports which had tipped the scales against the Applicant and in favour of the Interested Parties. Counsel for Applicant submitted that unless the relevant confidential reports were produced in evidence it would not be possible for justice to be done in this case.

Counsel for Respondent submitted, on the other hand, that the production of such confidential reports would be contrary to the public interest and, in particular, to the interest of the Public Service because, he submitted, if the production of such reports became the general rule then such reports would lose their confidential character and their usefulness would, therefore, diminish. Counsel for Respondent further submitted that this was a case in which the principles of the English Common Law applied and should not be relaxed; he submitted that under the authority of the House of Lords decision in the Case of *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624, once it has been stated by the responsible authorities of the State, either directly or through counsel, that the production of such documents would be

contrary to the public interest then such documents should not be produced.

In deciding this important issue it is, of course, necessary for the Court to consider and bear in mind every aspect of the matter, including the system of administrative law now prevailing in Cyprus, the nature of the recourse before the Court, the type of official document the production of which is sought and, generally, the particular circumstances in which the production of the confidential reports in question are being sought.

It is convenient at the very outset to recall in this connection the observations of the Supreme Constitutional Court in a Ruling given by it in the case of *Phedias Kyriakides v. The Republic*, 1 R.S.C.C., p. 66, at p. 69. I, therefore, set out in full the following passages from the above-mentioned Ruling:

“The Supreme Constitutional Court is modelled on similar judicial institutions existing in many European countries, and it is a court exercising constitutional and administrative jurisdiction.

The jurisdiction of the Supreme Constitutional Court is laid down in the Constitution. The paramount consideration which should weigh with this Court when exercising its said jurisdiction is how best to serve the interests of justice and at the same time to perform as effectively as possible its mission under the Constitution. The basic difference existing between the nature of the jurisdiction of this Court and of courts exercising civil or criminal jurisdiction makes it necessary for this Court to apply, in many instances, principles different from those applicable by other courts in Cyprus.

With regard to the law and rules of evidence, in particular, this Court, of course, will first look for guidance to the law and rules of evidence applicable in Cyprus in respect of other courts but whenever it deems it necessary for the proper fulfilment of its mission under the Constitution it will not hesitate to relax or even depart from such law and rules of evidence.

Without in any way wishing to prevent parties from raising any legitimate objection to the admissibility of any evidence adduced before this Court, the Court draws their attention to the fact that one of the guiding

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factors to be applied in considering the admissibility of any such evidence is whether such evidence is reasonably relevant to, and probative of, any issue before the Court and can or cannot be of assistance to the Court in doing justice in the particular case in accordance with its jurisdiction”.

In another Ruling of the Supreme Constitutional Court, which was given in the case of *Nicos Kalisperas v. The Republic*, 3 R.S.C.C., p. 146, at p. 148, (which was a case in which the Applicant had summoned a member of the Public Service Commission to give evidence regarding what took place at the relevant meeting of the Public Service Commission and to which course counsel for the Commission had objected) the Court stated as follows:

“The Court, itself, however, may decide, and this is a power which would be used sparingly in the interests of justice, to order that the body in question or any member thereof should supply the Court with information, on oath or otherwise, concerning any particular matter at issue. The Court will not make such an order unless the Applicant has first established such a *prima facie* case as to require, in the interests of justice, the making of such an order.

It is useful to observe that in a case where the Applicant has raised a presumption that a decision of an official body has been taken in excess or in abuse of its powers it certainly is not to the detriment of such body but, on the contrary, it is in the public interest that such body should endeavour to rebut by evidence this presumption, because if it remains unrebutted the Court may in a proper case, come to the conclusion that the body in question has in fact acted in excess or in abuse of its powers”.

While it is, of course, important for obvious reasons to preserve, as far as possible, the confidential character of reports made on public officers by their superior officers in the Public Service, and for this reason such confidential reports should not be disclosed to unauthorised persons or even to those members of the Public Service whose duties do not require them to be acquainted with the contents of such reports, I am of the opinion that it would not be right to hold that in no circumstances should such confidential reports

ever be produced before this Court in the exercise of its administrative jurisdiction.

In this recourse it is apparent on the face of the pleadings and from the evidence already adduced before the Court that the confidential reports of the Applicant and of the Interested Parties were considered by the Public Service Commission, and quite properly so in my opinion, together with their record of service and seniority, in coming to the decision which is now being attacked by this recourse. I am satisfied from the evidence which has been adduced before me and from the uncontested facts of this Case that of the three relevant factors taken into account by the Public Service Commission in arriving at the decision in question, namely, confidential reports, record of service and seniority, it appears that the Applicant compared favourably with the Interested Parties as regards record of service and seniority and that the determining factor in arriving at the decision in question undoubtedly appears to have been the contents of the relevant confidential reports.

It will be seen, therefore, that in these circumstances, and, having regard to the facts of this particular case, this Court must decide, in the light of the principles enunciated by the Supreme Constitutional Court in the two cases referred to earlier, whether it is possible for it to do justice in this particular case in accordance with its administrative jurisdiction without the production of the relevant confidential reports which appear to have played such an important part in arriving at the decision which is the very subject-matter of this recourse.

It may well be that under the law and rules of evidence in force in England, which are made applicable in all civil or criminal proceedings in Cyprus by section 3 of the Evidence Law, Cap. 9, if the Crown were to claim privilege in respect of a document such as the confidential reports in question and where it has been stated by counsel for the Crown that the production of such documents would be contrary to the public interest, then under the authority of the House of Lords decision in *Duncan v. Cammell, Laird & Co.* (*supra*) the court would not order the production of such a document. (See also the case of *Ellis v. Home Office*, [1953] 2 Q.B. 135 where the production of a prisoner's file was refused).

In cases where the State objects to the production of a

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document on the ground that its production would be contrary to the public interest, a distinction should, I think, be made between those classes of documents or information which may be regarded as "state secrets" proper, i.e. the disclosure of which might prejudice the defence or security of the State, and other classes of official information which do not come under the aforesaid category. It has been contended that even though official information may not contain "state secrets" in the above strict sense, yet its disclosure may not be in the public interest because, it has been said, the administration might be seriously hampered if official documents, files etc. were liable to be made public in litigation. In the words of Lord Simon in the case of *Duncan v. Cammell, Laird & Co. (supra)* at p. 635 "the candour and completeness of such communications might be prejudiced if they were ever liable to be disclosed in subsequent litigation". A subsequent Lord Chancellor of England, Lord Kilmuir, is also reported to have stated in this respect that "the basis is that if you are to make all confidential reports by civil servants disclosable, then the result will be that the State will not have the advantage of as clear, honest, and forthright report from its civil servants, as it would if they were protected". It has been pointed out, however, by Dr. Bernard Schwartz in his book on "An Introduction to American Administrative Law" (2nd Edition, at p. 264), that views such as those expressed by Lord Simon and Lord Kilmuir in the above quoted statements are "based upon *a priori* reasoning which may or may not be consistent with the facts of administrative life. Is it proved that employees make reports less honestly if they think that there is the slightest possibility of someone other than their employers seeing them at some future time?"

Novel though the idea of the production of such confidential reports on public officers by their superiors may seem in the Anglo-Saxon system where administrative justice is not administered by separate administrative courts as in Continental Europe and in Cyprus, it will not, however, be the first time that the production of such confidential reports will have been made in Cyprus since the establishment of the Republic and the setting up of a court with administrative jurisdiction. In the case of *Christoforos G. Petsas v. The Republic*, 3 R.S.C.C., p. 60, at pp. 62-63, it will be seen that the latest and current annual confidential reports in the

personal files of both the Applicant and the Interested Party which had been laid before the Public Service Commission were produced before the Court and became evidence in the proceedings, apparently without objection by the Republic on that occasion. It will be observed from the judgment of the Court in that case that the production of the confidential reports not only enabled the Court to do justice in the matter but, by frankly disclosing to the Court the fact that the material confidential report of the Interested Party had been signed by his own brother, enabled the Public Service Commission to exculpate itself by giving an explanation to the satisfaction of the court regarding this irregularity; thus by bringing the whole thing into the open and by producing the confidential reports, the Public Service Commission was enabled to remove any suggestion or suspicion of any graver irregularity in the matter which might have continued to exist if the contents of the confidential reports had been suppressed and not been produced.

My attention has also been drawn by both learned counsel to the case of *Georghios Evagelou v. The Republic* (reported in this Part at p. 292 *ante*), where it appears from the judgment (at p. 296) that the confidential reports in question in that case "in view of their nature, were not, by consent of both counsel, put actually in evidence but their relevant contents, after inspection by the Court, were incorporated into the record of the case". Happily in that case it was possible for counsel to agree to that course of action which, while safeguarding the confidential character of the reports in question, enabled the Court to do justice in the matter.

In this case, however, and again probably having regard to the fact that it would appear that the whole case turns on the contents of the confidential reports in question, it has not been possible for counsel to agree to some such course and it has, therefore, fallen on me to decide whether justice can be done in this Case without the actual production in evidence of the relevant confidential reports.

As pointed out in the above-mentioned Ruling of the Supreme Constitutional Court in the case of *Nicos Kalisperas v. The Republic* (*supra*) the Court may decide to order the Public Service Commission or any member thereof to supply the Court with information on oath or otherwise concerning any particular matter at issue and in considering whether or not to make such an order I have reminded myself of the two

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words of warning given in the above-mentioned Ruling, namely, that "this is a power which would be used sparingly in the interests of justice" and that the Court "will not make such an order unless the Applicant has first established such a *prima facie* case as to require, in the interests of justice, the making of such an order".

It seems to me that just as records of the proceedings of public bodies such as the Public Service Commission are confidential and should not as a rule be divulged to unauthorized persons and just as what goes on, and what has been said and considered, during the deliberations of such a body are confidential and should not, likewise as a rule be divulged unless it were absolutely necessary to do so in the interests of justice, so I consider should be the position of confidential reports made on public officers by their superior officers and which are taken into account, for example, by the Public Service Commission in reaching a particular decision. It should be borne in mind that the giving by members of the Public Service Commission of what would otherwise be highly confidential information to this Court in appropriate cases as regards the proceedings and deliberations of the Commission and the production of minutes and other records of their proceedings (the disclosure of which to unauthorized persons could well be equally, if not more, prejudicial to the public interest and the interest of the Public Service than the disclosure of a particular confidential report on an officer) is almost a daily occurrence before this Court in the exercise of its administrative jurisdiction. I do not, therefore, consider, that the disclosure of the contents of such confidential reports by their production before this Court in appropriate cases and in cases where it is absolutely necessary to do so in the interests of justice would be any more detrimental to the interests of the Public Service than would be the production of minutes and other confidential information concerning the confidential deliberations of the Public Service Commission.

The claim which has usually been advanced, in the words of Pollock C.B., that the "public interest must be considered paramount to the individual interest of a suitor in a court of justice" has been commented upon by John Henry Wigmore in the following, somewhat dramatic, terms: "As if the public interest were not involved in the administration of justice! As if the denial of justice to a single suitor were not

as much a public injury as is the disclosure of any official record! When justice is at stake, the appeal to the necessities of the public interest on the other side is of no superior weight". (Vide "An Introduction to American Administrative Law" by Bernard Schwartz, cited *supra*, at p. 253).

Having given careful and anxious consideration to this important issue before me and having considered the able arguments of both learned counsel and the respective authorities cited by them, I have come to the conclusion that, in accordance with the principles enunciated in the cases of *Phedias Kyriakides v. The Republic (supra)* and *Nicos Kalisperas v. The Republic (supra)* to which I have referred earlier in this Ruling, it would be in the interests of justice, having regard to all the facts and circumstances of this particular case, to order at this stage, the production of those confidential reports on the Applicant as were actually laid before, and considered by, the Public Service Commission when it arrived at the decision, which is the subject-matter of this recourse at its deliberations on the 24th January, 1963. I am satisfied that the Applicant has made out a sufficient *prima facie* case, having regard to the relative seniorities and records of service of the Applicant and of the Interested Parties, as to make it necessary that the afore-mentioned confidential reports on the Applicant be produced. I am of the opinion that it would not be possible for this Court to do justice in the matter without the production of such confidential reports, and, for all the reasons given above, I rule accordingly. The question of other confidential reports or other documents will be considered on their respective merits as and when such questions arise.

It is hardly necessary for me to state that nothing in this Ruling should be taken as meaning that all such confidential reports on public officers are produceable generally as a matter of course, but, as in all cases before this Court, each case must be considered on its own merits. As has already been pointed out by the Supreme Constitutional Court in the passages quoted earlier in this Ruling, although this Court will use its power to order the disclosure of official information "sparingly in the interests of justice" yet it should not hesitate to do so, in accordance with the above-mentioned principles, "whenever it deems necessary for the proper fulfilment of its mission" in exercise of its administrative jurisdiction.

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