

1965
May 28,
June 8,
Oct. 18, 22,
Nov. 1, 16,
Dec. 2, 7,
1966
Jan. 7

—
CHARILAOS
FRANGOULIDES
(No. 1)
and
THE REPUBLIC OF
CYPRUS
THROUGH THE
PUBLIC SERVICE
COMMISSION

[MUNIR, J.]

IN THE MATTER OF ARTICLE 146 OF THE
CONSTITUTION

CHARILAOS FRANGOULIDES (No. 1),
Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,
Respondent.

(Case No. 75/63).

Public Service—Public officers—Promotions—Recourse against decision of the Public Service Commission to promote three persons to the post of Senior Welfare Officer, in preference to the applicant — Respondent Commission went fully into the matter after paying due regard to all relevant considerations and without taking into account irrelevant factors.

Public Service—Public Officers—Promotions—Discretion of the Public Service Commission in that regard—Interviews of candidates—Absence of a candidate from the interview, for the reason that he was absent from Cyprus at the time, does not, having regard to all the circumstances, involve a wrong exercise of the discretion of the Commission in this respect.

Public Service—Public Officers—Promotions—Excess or abuse of power :

No striking superiority of the applicant over the three interested parties (i.e. the three persons promoted) as to lead to the conclusion that the respondent Commission, in preferring them to the applicant acted in excess or abuse of powers.

Seniority—Seniority by itself is not necessarily the determining factor—It is only part of the overall picture—And it is on the totality of the merits of each candidate that the selection of the most suitable should be made.

Views of the Head of a Department—In cases of promotions in the public service due consideration should be given to the views of the Head of a Department—Confidential reports —In a proper case confidential reports should be produced in Court.

Confidential reports—The Commission of Public Service in

dealing with promotions of public officers is entitled to accept the statements of fact and opinions expressed in confidential reports on their face value and is not required, due regard being had to the circumstances of the case, to investigate the matter further and try to substantiate or refute the correctness or accuracy of such facts and opinions—Nothing improper in the Minister himself acting as the countersigning officer on a confidential report concerning an officer coming under his Ministry, particularly where the post of the Head of Department of the officer in question was vacant at the time.

Administrative Law—Abuse of power—Onus of establishing abuse of power rests with the applicant in a recourse under Article 146 of the Constitution.

Evidence—Confidential reports—In a proper case admissible in evidence in order to enable the Court to reach a proper decision.

By this recourse under Article 146 of the Constitution the applicant, who is a Welfare Officer in the public service of the Republic, is attacking the promotions to the post of Senior Welfare Officer of three persons (*i.e.* the Interested Parties) by a decision of the Public Service Commission taken on the 24th January, 1963. All three Interested Parties were at the time of their promotion Welfare Officers like the applicant. The applicant was senior in service to only two of the Interested Parties by two and fourteen months respectively. Interviews of all candidates were duly held before the Public Service Commission with the exception of one of the Interested Persons who was absent from Cyprus at the time.

As regards the relative experience and other relevant merits of the applicant and the three Interested Parties (other than the confidential reports) the margin would appear to be very close indeed, if not, perhaps, in favour of the applicant. There seems to be no doubt that what has ultimately weighed with the Public Service Commission in deciding to promote the Interested Parties in preference to the applicant were the contents of the applicant's confidential report in section III of which the Minister of Labour and Social Insurance has personally made certain observations adverse to the applicant.

Counsel for the applicant made it quite clear that he was,

1965
May 28,
June 8,
Oct. 18, 22,
Nov. 1, 16,
Dec. 2, 7,
1966
Jan. 7

CHARILAOS
FRANGOULIDES
(No. 1)
and
THE REPUBLIC OF
CYPRUS
THROUGH THE
PUBLIC SERVICE
COMMISSION

1965
May 28,
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Oct. 18, 22,
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1966
Jan. 7

—
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FRANGOULIDES
(No. 1)
and
THE REPUBLIC OF
CYPRUS
THROUGH THE
PUBLIC SERVICE
COMMISSION

in effect, attacking the decision in question of the Public Service Commission on the following main grounds:

- (1) That the Commission did not make proper inquiry and that there exists an error as to the correct facts; and
- (2) that it has been established that the said Commission acted "in abuse of powers" in that it disregarded the striking superiority of the applicant over the three Interested Parties (i.e. the three persons promoted as aforesaid in preference to the applicant).

The Court in dismissing the instant recourse:-

Held, with regard to the first ground on which the decision in question is attacked :-

(1) I am satisfied that the Commission went fully into the matter after paying due regard to all relevant considerations and without taking into account irrelevant factors. The Commission had before it the personal files of the candidates and the latest current confidential reports, and it also had the benefit of the views of the Director-General of the Ministry, who was also present at the interviews and made recommendations to the Commission regarding the candidates interviewed. The importance of giving due consideration to the views of the Head of a Department has been fully stressed in *Theodossiou and The Republic* (2 R.S.C.C. 44) and many subsequent cases. Furthermore the candidates, including the applicant, were called for interview, at which the Commission had the opportunity of seeing the candidates for themselves.

(2) With regard to the point made that one of the Interested Parties was not called for an interview by the Commission because of his absence from Cyprus at the time, I consider that, as the Commission had before it all the other relevant material concerning this absent candidate, it was not unreasonable for the Commission not to burden the candidate concerned or the public revenue by insisting that he should travel to Cyprus for the purpose of the interview. In *Petsas and The Republic* (3 R.S.C.C. 60, at p. 63) it was held that "the mere fact that the Commission did not call the candidates for an interview does not involve a wrong exercise of discretion....." (*See also: Neophytou*

and The Republic 1964 C.L.R. 280 at p. 296 and *Kyriacou v. C.B.C. and Another* (1965) 3 C.L.R. 482 at p. 513.

(3) As regards the contents of the respective confidential reports on the applicant and the three Interested Parties, which were before the Commission at the time it reached its decision in question, I think that the Commission was entitled to accept the statements of fact and opinions expressed in those reports on their face value and was not required, having regard to the circumstances of the case, to investigate the matter further and to try to substantiate or refute the correctness or accuracy of such facts and opinions.

(4) The confidential reports which were before the Commission at the time it reached its decision in question should be produced and admitted in evidence in order to enable the Court to reach a proper decision.

Held, with regard to the second ground on which the decision in question of the Commission is attacked, i.e. the question of abuse of powers :-

(1) It is well settled that the onus of establishing abuse or excess of powers rests with the applicant in a recourse of this nature (*vide: Saruhan and The Republic* 2 R.S.C.C. 133; *Neophytou and The Republic, supra*, at p. 299 and *Evangelou and The Republic* (1965) 3 C.L.R. p. 292 at p. 298). And in my opinion the applicant failed in this case to discharge the onus.

(2) With regard to the question of seniority it has been laid down that seniority by itself is not, necessarily, the determining factor and that this factor is only part of the overall picture and that it is on the totality of the merits of each candidate that the selection of the most suitable should be made (*see: Theodossiou and the Republic (supra), Evangelou and The Republic (supra)* at p. 297), and more recently *Kyriacou v. C.B.C. and Another (supra)* at p. 514).

(3) In *Evangelou's* case (*supra* at p. 300) it has been laid down that "it is a settled principle of administrative law that mere superiority, not being of a striking nature, is not sufficient to lead to the conclusion that the appointing authority has acted in excess or abuse of powers (see Conclusions from the Council of State in Greece 1929-1959 at p. 268 and the decision of the Greek Council of

1965
May 28,
June 8,
Oct. 18, 22,
Nov. 1, 16,
Dec. 2, 7,
1966
Jan. 7

—
CHARILAOS
FRANGOULIDES
(No. 1)
and
THE REPUBLIC OF
CYPRUS
THROUGH THE
PUBLIC SERVICE
COMMISSION

1965
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June 8,
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Dec. 2, 7,
1966
Jan. 7

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CHARILAOS
FRANGOULIDES
(No. 1)
and
THE REPUBLIC OF
CYPRUS
THROUGH THE
PUBLIC SERVICE
COMMISSION

State No. 1406/54.”. This principle has been followed in *Kyriacou's case (supra)* at p. 514).

(4) In my opinion any margin that might have been found to exist in favour of the applicant over the three persons promoted in preference to him, in the spheres of seniority, experience and the like, could at most only be described as mere superiority and could never come anywhere near to being regarded as striking superiority.

(5) In any event such simple superiority as the applicant may have over the three Interested Parties (*i.e.* the persons promoted) is far outweighed by the nature of the comments which are made in section III of his confidential report by his Minister.

(6) I should also observe that, in my opinion, there was nothing improper in the Minister himself acting as the countersigning officer on a confidential report concerning an officer coming under his Ministry, particularly where, as in this case, the post of the Head of Department concerned was vacant at the time.

Application dismissed.
No order as to costs.

Cases referred to:

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

Petsas and The Republic, 3 R.S.C.C. 60, at p. 63;

Neophytou and The Republic 1964 C.L.R. 280 at pp. 296 and 299.

Kyriacou v. C.B.C. and Another (1965) 3 C.L.R. 482 at pp. 513, 514, 515 and 517;

Saruhan and The Republic, 2 R.S.C.C. 133;

Evangelou and The Republic (1965) 3 C.L.R. 292 at pp. 297, 298 and 300;

Decision of the Greek Council of State No. 1406/54 in Reports of the judgments of the Council of State, 1954, p. 1737.

Recourse.

Recourse against the validity of the promotions made by the Respondent to the post of Senior Welfare Officer.

A. Triantafyllides, for the Applicant.

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

Cur. adv. vult.

1965
May 28,
June 8,
Oct. 18, 22,
Nov. 1, 16,
Dec. 2, 7,
1966
Jan. 7

The following judgment was delivered by:—

MUNIR, J.: By this recourse under Article 146 of the Constitution the Applicant, who is a Welfare Officer in the Public Service of the Republic, is attacking the promotions to the post of Senior Welfare Officer of three persons, namely, Charilaos Kitromilides, Demetrakis Christofides and Christakis Ierides (hereinafter referred to as “the Interested Parties”), which were made by the Public Service Commission (hereinafter referred to as the “Commission”) by a decision of the Commission taken on the 24th January, 1963 (as recorded in *Exhibit 28*). All three Interested Parties were at the time of their promotion Welfare Officers like the Applicant.

The recourse in respect of a fourth officer, who was also similarly promoted by the same decision, was subsequently withdrawn by the Applicant on the 19th September, 1964.

Prior to the hearing of this recourse, which commenced on the 28th May, 1965, all three Interested Parties were, in accordance with the usual practice adopted by this Court, notified, by the Registrar, by registered post, of the date fixed for the hearing and of their right to appear at the hearing if they so wished and to watch their interests. None of the three Interested Parties (two of whom appear to have been absent from Cyprus at the time) wished to avail themselves of this opportunity and were not present at the hearing on that or subsequent dates.

It is not in dispute that the Applicant was first appointed to the Public Service on the 8th October, 1951, and that he was appointed to his present post of Welfare Officer on the *1st May, 1955*: that Interested Party Charilaos Kitromilides was first appointed to the Public Service on the 1st September, 1942, and to the post of Welfare Officer on the *1st May, 1955*: that Interested Party Demetrakis Christofides was first appointed to the Public Service on the 12th June, 1936, and to the post of Welfare Officer on the 1st July, 1955; and that Interested Party Christakis Ierides was first appointed to the Public Service on the 1st February, 1944 and to the

—
CHARILAOS
FRANGOULIDES
(No. 1)
and
THE REPUBLIC OF
CYPRUS
THROUGH THE
PUBLIC SERVICE
COMMISSION

1965
May 28,
June 8,
Oct. 18, 22,
Nov. 1, 16,
Dec. 2, 7,
1966
Jan. 7

CHARILAOS
FRANGOULIDES
(No. 1)
and
THE REPUBLIC OF
CYPRUS
THROUGH THE
PUBLIC SERVICE
COMMISSION

post of Welfare Officer on the 1st July, 1956. (See the Staff List of 1962 (*Exhibit 17*) at pp. 39-40).

It will be seen, therefore, that although the Applicant and Interested Party Kitromilides were both appointed to the post of Welfare Officer on the *1st May, 1955* Kitromilides, having been appointed to the Public Service some nine years prior to the Applicant, was senior in service to the Applicant, and that the Applicant, in turn, was senior in service to the other two Interested Parties, the one, Demetrakis Christofides, having been appointed to the post of Welfare Officer two months after the Applicant and the other, Christakis Ierides, having been so appointed one year and two months after the Applicant.

The Commission decided at a meeting on the 14th September, 1962, to consider on the 20th September, 1962 the filling of vacancies in the post of Senior Welfare Officer which had existed at the time, and at its meeting on the latter date decided to call 14 candidates for interview, including the Applicant and two of the Interested Parties. It was decided not to call Interested Party Kitromilides for interview because he was serving in England at the time and it was, therefore, decided to consider his case "*in absentia*" (*vide Exhibit 26*). These interviews were duly held on the 1st October, 1962, and both according to the evidence of Mr. D. Proestos, a member of the Commission, and as stated in the extract from the minutes of the meeting of the Commission on that date (*Exhibit 27*), Mr. I. Suleiman, Director-General of the Ministry of Labour and Social Insurance, was in attendance at the interviews.

At its meeting of the 24th January, 1963, the Commission decided, "after considering the confidential reports, seniority, merits and abilities of all candidates" (*vide* extract from the minutes of the Commission held on the 24th January, 1963, —*Exhibit 28*), to promote, *inter alia*, the three Interested Parties to the post of Senior Welfare Officer in preference to the Applicant and the other candidates interviewed. It is this decision which is the subject-matter of this recourse.

Counsel for Applicant made it quite clear in his final address to the Court that he was, in effect, attacking the decision in question of the Commission on the following two grounds:—

(1) that the Commission did not make a proper and full inquiry and that there exists an error as to the correct facts; and

(2) that it has been established that the Commission acted "in abuse of powers" in that it disregarded the striking superiority of the Applicant over the Interested Parties.

With regard to this first ground on which the decision in question is attacked, I am satisfied that the Commission went fully into the matter after paying due regard to all relevant considerations and without taking into account irrelevant factors. The Commission had before it the personal files of the candidates and the latest current confidential reports, and it also had the benefit of the views of the Director-General of the Ministry of Labour and Social Insurance, under which Ministry the Department in question came, who was also present at the interviews on behalf of the Ministry and who made recommendations to the Commission regarding the candidates interviewed. The importance of giving due consideration to the views of the Head of a Department, etc. has been fully stressed in *Theodossiou and The Republic* (2 R.S.C.C. p. 44) and many subsequent cases. Furthermore, the candidates, including the Applicant and two of the Interested Parties, were called for interview, at which the Commission had the opportunity of seeing the candidates for themselves.

It is convenient at this stage to deal with the point that Interested Party Kitromilides was not called for an interview by the Commission because of his absence from Cyprus at the time. I consider that, as the Commission had before it all the other relevant material concerning this candidate, it was not unreasonable for the Commission not to burden the candidate concerned or the public revenue by insisting that Mr. Kitromilides should travel to Cyprus for the purpose of the interview. In *Petsas and The Republic* (3 R.S.C.C. p.60, at p.63) it was held that "the mere fact that the Commission did not call the candidates for an interview does not involve a wrong exercise of discretion. In a matter like this it is not improper for the Commission to base its decision on the application forms and other relevant documents". (See also *Neophytou and The Republic* 1964 C.L.R. 280 at p. 296 and *Kyriacou v. C.B.C. and Another*, (1965) 3 C.L.R. p. 482, at p. 513). As I have said, the absence of Mr. Kitro-

1965
May 28,
June 8,
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Nov. 1, 16,
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1966
Jan. 7

—
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(No. 1)
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THE REPUBLIC OF
CYPRUS
THROUGH THE
PUBLIC SERVICE
COMMISSION

1965
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—
CHARILAOS
FRANGOULIDES
(No 1)
and
THE REPUBLIC OF
CYPRUS
THROUGH THE
PUBLIC SERVICE
COMMISSION

milides from the interview, for the very good reason that he was absent from Cyprus at the time, does not, in my opinion, having regard to all the circumstances, involve a wrong exercise of the discretion of the Commission in this respect.

As regards the contents of the respective confidential reports on the Applicant (*Exhibit 21*) and the three Interested Parties (*Exhibits 22-24*), which were before the Commission at the time it reached its decision in question, I think that the Commission was entitled to accept the statements of fact and opinions expressed in those reports on their face value and was not required, having regard to the circumstances of the case, to investigate the matter further and to try to substantiate or refute the correctness or accuracy of such facts and opinions.

Counsel for Applicant has submitted that the Applicant has been prejudiced by the fact that section II of his relevant confidential report (*Exhibit 21*) has been completed by Mr. Christoforos Michael, who was also a co-candidate with the Applicant for the vacant posts of Senior Welfare Officer. It is not in dispute, however, that at the material time Mr. Michael was also the District Welfare Officer in charge of Famagusta and as such was the proper reporting officer on the Applicant. A comparison of section II of the Applicant's confidential report (*Exhibit 21*) with section II of the three confidential reports on the three Interested Parties (*Exhibits 22-24*) will, in my view, show that the remarks made by Mr. Michael, in respect of the ten specific characteristics listed in section II, compare very favourably with the corresponding remarks made in section II by the other reporting officers on the three Interested Parties in *Exhibits 22-24*. It is noted that the space left for general observations in section II has not been filled in by the reporting officer (Mr. Michael) in respect of the Applicant's confidential report (*Exhibit 21*) (whereas the corresponding space has been completed in *Exhibits 22-24*), no doubt because the Applicant had only been working under Mr. Michael, the reporting officer (as stated in *Exhibit 21*) since the 1st May, 1962 *i.e.* some four and a half months prior to the making of the report in question on the 20th September, 1962. In any event Mr. Protestos stated in evidence that in the circumstances he "did not pay much, or any, attention to what Christoforos Michael wrote" in section II of Applicant's confidential report (*Exhibit 21*).

I do not consider that there is anything sinister, as suggested by counsel for Applicant, in the fact that the Applicant was in this instance reported upon on the 20th September, 1962, instead of at the end of March as was the case with the confidential reports on the three Interested Parties. It may well be that this additional *ad hoc* report on the Applicant was required in view of the pending consideration of the filling of vacancies for the post of Senior Welfare Officer, and an efficient officer should have nothing to fear from being reported upon at any, or all, times of the year.

Coming now to the second ground on which the decision in question of the Commission is attacked, *i.e.* the question of abuse of powers, I must point out at the outset that it is well settled that the onus of establishing abuse or excess of powers rests with the Applicant in a recourse of this nature (*vide Saruhan and the Republic*, 2 R.S.C.C. p. 133, *Neophytou and the Republic*, *supra*, at p. 299 and *Evangelou and the Republic* (1965) 3 C.L.R. p. 292 at p. 298).

The question which this Court has to decide here is whether the Applicant has discharged the onus of establishing that the Commission has acted in abuse of its powers in promoting the three Interested Parties to the post of Senior Welfare Officer in preference to, and instead of, the Applicant.

With regard to the question of seniority, as has been stated above, it is true that the Applicant, in accordance with the accepted rules and practice governing seniority in the Public Service, was senior in service to one of the three Interested Parties, namely, Demetrakis Christofides, by two months and that he was senior in service to another of the three Interested Parties, namely, Christakis Ierides, by fourteen months. In *Theodossiou and the Republic*, *supra*, and as followed in many cases subsequently and in particular in *Evangelou and the Republic*, *supra*, at p. 297 and more recently in *Kyriacou v. C.B.C. and Another*, *supra*, at p. 514) it has been laid down that seniority by itself is not, necessarily, the determining factor and that this factor is only part of the overall picture and that it is on the totality of the merits of each candidate that the selection of the most suitable should be made.

As regards the relative experience and other relative general merits of the Applicant and the Interested Parties (other than the confidential reports) the margin would appear to

1965
May 28,
June 8,
Oct. 18, 22,
Nov. 1, 16,
Dec. 2, 7,
1966
Jan. 7
—
CHARILAOS
FRANGOULIDES
(No. 1)
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THE REPUBLIC OF
CYPRUS
THROUGH THE
PUBLIC SERVICE
COMMISSION

1965
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Oct. 18, 22,
Nov. 1, 16,
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1966
Jan. 7

—
CHARILAOS
FRANGOULIDES
(No. 1)
and
THE REPUBLIC OF
CYPRUS
THROUGH THE
PUBLIC SERVICE
COMMISSION

be very close indeed, if not, perhaps, in favour of the Applicant. It is not in dispute that the Applicant has various qualifications not possessed by the three Interested Parties including the fact that he attended a course at the Ecole Hotelier Lausanne, Switzerland, from which he obtained a Diploma for "General Hotel Management" and has also a Diploma in "General Business Management" of the La Salle Extension University Chicago. It is also true that the Applicant has had experience as District Welfare Officer in charge of a District, having been District Welfare Officer in charge of Famagusta for nearly two years and was also District Welfare Officer in charge of the Welfare Office in Kyrenia from April, 1954 until June, 1958.

There seems to be no doubt that what has ultimately weighed with the Commission in deciding to promote the Interested Parties in preference to the Applicant were the contents of the Applicant's confidential report (*Exhibit 21*), in section III of which the Minister of Labour and Social Insurance has personally made certain observations concerning the Applicant and which need not, in view of their nature and in fairness to the Applicant, be set out in this judgment.

I should also observe at this point that, in my opinion, there was nothing improper in the Minister himself acting as the countersigning officer on a confidential report concerning an officer coming under his Ministry, particularly where, as in this Case, according to the evidence of Mr. Protestos, the post of the Head of Department in question was vacant at the time.

It might be mentioned here that counsel for Respondent had objected to the request of counsel for Applicant for the production of the confidential reports which were before the Commission at the time it reached its decision in question, and the Court, after hearing argument on this point by both learned counsel, ruled that such confidential reports should be produced and be admitted in evidence in order to enable the Court to reach a proper decision in this recourse. This ruling was given on the 1st November, 1965, and is now published in the monthly publication of Judgments of this Court ((1965) 11 J.S.C. p. 1116)*. The four material con-

*Now reported in (1965) 3 C.L.R. 531.

fidential reports (*exhibits 21-24*) were then duly produced and admitted in evidence.

In *Evangelou and The Republic*, (*supra*, at p. 300) a Judge of this Court has pointed out in his judgment that "it is a settled principle of administrative law that mere superiority, not being of a striking nature, is not sufficient to lead to the conclusion that the appointing authority has acted in excess or abuse of powers (see Conclusions from the Council of State in Greece 1929-1959 p. 268 and Decision 1406/54 of the same organ (reports 1954 p. 1737))". This principle has again been followed in *Kyriacou v. C.B.C. and another*, (*supra*, at p. 514).

In my opinion any margin that might have been found to exist in favour of Applicant, over the three Interested Parties in question, in the spheres of seniority (in the case of two of them) and experience, could at most, only be described as mere superiority, and, even in those two spheres alone, could never come anywhere near to being regarded as striking superiority.

In any event I consider that such simple superiority as the Applicant may have had over the three Interested Parties in the spheres of seniority and experience is far outweighed by the nature of the comments which are made in section III of his confidential report (*Exhibit 21*) by his Minister.

On the whole, and bearing fully in mind all the evidence given in this Case, both oral and documentary, including all the evidence in favour of the Applicant's merits (and not overlooking such factors, as for example, his secondment to the temporary post of Senior Welfare Officer in 1958 and the circumstances concerning his attendance before a Selection Board in 1958), I am not in a position to hold that there existed such striking superiority of Applicant over the three Interested Parties as to lead me to the conclusion that the Commission, in preferring the Interested Parties to the Applicant, acted in excess or abuse of powers (see *Kyriacou v. C.B.C. and Another, supra*, at pp. 514-515). To do so would, in my view, in all the circumstances, amount to substituting the Court's discretion for the discretion of the Commission (*Saruhan v. The Republic supra*).

I should like to point out that in dealing with the various points which have so ably been made by counsel for Appli-

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THROUGH THE
PUBLIC SERVICE
COMMISSION

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(No. 1)
and
THE REPUBLIC OF
CYPRUS
THROUGH THE
PUBLIC SERVICE
COMMISSION

cant on the Applicant's behalf I have only made specific reference to those points which I considered merited such specific mention. This does not, of course, mean that any of the other points made by counsel for Applicant (e.g. with regard to the nature of the certificate issued to Interested Party Ierides by the University of Exeter—*Exhibit 29*) have been overlooked. They have all been fully considered by me even though they may not have been specifically referred to in this judgment.

For all the reasons given above this Application cannot succeed and it is hereby dismissed accordingly.

In conclusion, it would not be out of place to follow the example of the learned Judge who decided the case of *Kyriacou v. C.B.C. and Another (supra)* by pointing out, as he did (at p. 517), that the dismissal of the Applicant's claim "should not by any means be deemed to amount to a judicial determination of the respective abilities of Applicant and the Interested Party, should a comparison of their abilities have to be resorted to in future in respect of any other appointment". The Applicant in this Case, throughout the somewhat protracted hearing, impressed me as being a conscientious and devoted public servant with, no doubt, many good qualities but, no doubt also, at the same time, with the shortcomings referred to in the Minister's remarks in section III of his confidential report (*Exhibit 21*).

With regard to the question of costs I am of the view that there should be no order as to costs in this Case. Although the Applicant has lost this recourse I am not prepared to say that it was frivolous and should not have been made. The Applicant sincerely felt that he had a grievance and, as such, he was entitled to come to this Court in an effort to seek a redress for the grievance which he believed he had.

*Application dismissed. No
order as to costs.*