

1966
May 31,
June 1

NICOS ARTEMIOU
(No. 2)

and
THE REPUBLIC
OF CYPRUS,
THROUGH THE
PUBLIC SERVICE
COMMISSION

[TRIANTAFYLIDIS, J.]
IN THE MATTER OF ARTICLE 146 OF THE
CONSTITUTION

NICOS ARTEMIOU (No. 2),

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 129/66).

Administrative Law—Recourse under Article 146 of the Constitution—Provisional order postponing or suspending effect of the act or decision subject matter of the recourse—Circumstances in which the Court may interfere with such act or decision by means of a provisional order—Principles laid down in Georghades (No. 1) and the Republic (1965) 3 C.L.R. 392, applied—Positive decision—Negative decision—Because of its nature the Court cannot suspend by means of a provisional order a negative decision—See, also, under Public Service, below.

Public Service—Public Officers—Transfer of—Postponing or suspending effect of transfer by means of a provisional order—No irreparable harm would be suffered by applicant in this case if the order is refused—In the circumstances of this case and in the light of the principles expounded in Georghades case (supra), provisional order refused—See, also, under Administrative Law, above.

This recourse was filed on the 28th May, 1966, and it is aimed at the decision of the respondent Commission to transfer applicant, a public officer in the service of the Republic, from Nicosia to Paphos. Applicant is attacking, in effect, both the decision of the Commission, taken on the 26th April, 1966, to transfer him to Paphos and the decision of the Commission, taken on the 20th May, 1966, not to alter its said decision of the 26th April. By an application made on the same day the recourse was filed, the applicant applied for a Provisional Order directing that his transfer to Paphos be postponed until final determination of this

recourse. In an affidavit sworn on the 28th May, 1966, in support of his application for a Provisional Order, the applicant referred to the health of his wife, stating that the facilities at Paphos are not sufficient for his wife's treatment and supervision etc. In refusing the provisional order applied for, the learned justice :—

Held, (1) out of the said two decisions of the Commission of the 26th April and 20th May, 1966, respectively, (*supra*), the only one, of course, which could be suspended by Provisional Order would be the first one *i.e.* the one of the 26th April, 1966, which is a positive one, directing the transfer of the applicant from Nicosia to Paphos. No doubt this Court cannot suspend by means of a Provisional Order—because of its nature—a negative decision such as the one taken by the Commission on the 20th May, 1966, whereby they decided not to alter their previous decision of the 26th April (*supra*).

(2) (a) Bearing in mind whatever is stated in the aforesaid affidavit of the applicant ; bearing, also, in mind the fact that according to the certificate of the Director of the Department of Medical Services, there exists in Paphos a Government specialist surgeon—Urologist and that, therefore, no irreparable harm would be suffered by the applicant's wife if the transfer takes effect as from today ;

(b) Bearing, further, in mind the exigencies of the service *viz.* that if the applicant's transfer is not allowed to take effect, serious obstacles will be caused to the proper functioning of the Administration and that, therefore, the personal interest of the applicant has to be subjected to the general interest of the public ;

(c) I have reached the conclusion that this is a case where it would not be proper, in the light of the relevant principles, as expounded in *Georghiades (No. 1) and the Republic (1965) 3 C.L.R. 392*, to grant a provisional order suspending the applicant's aforesaid transfer from Nicosia to Paphos.

Application for Provisional Order refused. Costs to be costs in cause.

Cases referred to :

Georghiades (No. 1) and the Republic (1965) 3 C.L.R. 392 applied ;

Iordanou (No. 1) and the Republic (reported in this Part at p. 308 ante).

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Application.

Application for a provisional order directing that Applicant's transfer from Nicosia to Paphos be postponed until the hearing and final determination of a recourse against the decision of the Respondent to transfer Applicant as above.

L. Clerides for the Applicant.

M. Spanos, Counsel of the Republic, for the Respondent.

Cur. adv. vult.

The following Decision was delivered by:—

TRIANTAFYLIDIS, J.: This recourse was filed on the 28th May, 1966 and it is aimed at "the decision of the Respondent to transfer Applicant from Nicosia to Paphos as from the 1st June, 1966".

By an application made on the same day, the Applicant applies for a Provisional Order directing that Applicant's transfer to Paphos should be postponed until the final determination of this recourse.

Due to the urgency of the matter, counsel were heard yesterday, the 31st May, 1966, on the question of the Provisional Order, and I shall now proceed to give my Decision thereon.

It is necessary to ascertain, first, which is in fact the decision of the Commission the effect of which it is sought to postpone by means of a Provisional Order.

The Applicant was informed by letter dated the 28th April, 1966, and signed by the Chairman, himself, of the Respondent Commission, (*exhibit 1*) that the Commission had decided to transfer him from the Veterinary Headquarters in Nicosia to the District Veterinary Office in Paphos with effect from the 1st June 1966.

This letter did not reach Applicant before the 11th May, 1966.

On the 25th April, 1966, the Respondent Commission had met and considered the question of the transfer of Applicant and decided that "before communicating to him the existing decision about his transfer to Paphos, the Director

of the Department of Veterinary Services be asked to attend the Commission's meeting" on the next day, the 26th April, 1966, during which there would be considered the possibility of Applicant being transferred "to a District other than Paphos". The relevant minutes of the Commission for the 25th April, 1966 are *exhibit 10* in these proceedings.

The "existing decision" referred to in *exhibit 10* apparently is a decision of the Respondent Commission, to transfer Applicant to Paphos, which was taken as far back as the 12th November, 1965.

Against such decision of the Respondent Applicant had filed recourse 67/66, on the 5th April, 1966. As found in a Decision given in such recourse on the 6th May, 1966, the decision of the Commission to transfer Applicant to Paphos, taken on the 12th November, 1965, remained in force though its effect was postponed, for family reasons of Applicant, until the 1st April, 1966.

The aforesaid Decision of the Court was given, on the 6th May, 1966, on a preliminary objection that the decision to transfer Applicant had not yet been duly communicated to him by the Respondent Commission; it was held therein, by this Court, that such communication had taken place, through Applicant's Head of Department, by means of a letter dated the 9th March, 1966.

It seems, however, that, in the meantime, when the Commission had met on the 25th April, 1966, as stated above, (see *exhibit 10*), it was under the impression—on the strength of a Decision given by this Court on the issue of due communication of administrative decisions, in another Case, *Iordanou and The Republic* (recourse 82/66, not reported yet)* that its decision to transfer Applicant to Paphos had not yet been communicated to him properly, and this explains the expression "before communicating to him the existing decision about his transfer to Paphos" to be found in *exhibit 10*.

As already stated, it was decided on the 25th April, 1966, to consider on the ensuing day, the 26th April, 1966, in the presence of Applicant's Head of Department, the possibility of posting Applicant in a District other than Paphos.

*Now reported in this part at p. 308 *ante*.

The minutes of the Respondent Commission for the 26th April, 1966, are *exhibit 9* in these proceedings. It appears therefrom that the Commission heard the views of Applicant's Head of Department and decided eventually that Applicant's transfer to Paphos should take effect from the 1st June, 1966.

As a result, the letter of the Commission of the 28th April, 1966, (*exhibit 1*), was written to Applicant, through his Department.

I should state at this point that, in my view, the Commission, on the 26th April, 1966, reconsidered the whole question of the transfer of Applicant to Paphos, and having heard extensively the reasons why such transfer was necessary, reached a new executory decision, in which merged its earlier decision to transfer Applicant to Paphos; this time it was not merely a question of fixing a new date for the taking of effect of a decision already taken.

This decision was not, however, communicated to Applicant—by means of the letter of the 28th April, 1966, (*exhibit 1*)—until only the 11th May 1966.

In the meantime, on the 6th May, 1966, the said recourse 67/66 was withdrawn, under circumstances which appear in the following relevant extract from the record of the Court, which is *exhibit 4* in these proceedings:—

“At this stage, *counsel for Applicant* states that Applicant seeks leave to withdraw this recourse without prejudice to the allegations on which the recourse has been based. Though Applicant will proceed to Paphos, as per his transfer, to take up duties as soon as he ceases being on sick leave due to his recent injury, he, nevertheless, intends to place before the Public Service Commission, in writing, as soon as possible, all grounds on the basis of which he contends that he should not have been, and should not continue to be, posted at Paphos, and will seek a reconsideration accordingly of the relevant decision of the Commission; such grounds will include the permanent ill-health of his wife which is a matter never placed before the Commission yet in relation to the transfer of Applicant to Paphos.

“*Counsel for Respondent* does not object to the above course and states that the Commission will deal expedi-

tiously, and in any case within the constitutional time-limit prescribed by Article 29, with any complaint of Applicant about his posting at Paphos, in the light of the material to be placed before it, and will reach such new decision in the matter as it may deem fit in the circumstances.

“*Counsel for Applicant* reserves the right of Applicant to challenge such new decision, if necessary, by new recourse.

Court: Case struck out accordingly; no order as to costs”.

Counsel for Respondent has told the Court that the communication of Applicant’s transfer made to him on the 28th April, 1966, by means of *exhibit* 1, was not necessary and that he had advised, at the time, the Commission that, in his view, there had already been proper communication of its decision to transfer Applicant to Paphos, as taken on the 12th November, 1965; and indeed it was subsequently found by the Court, in the Decision* given in recourse 67/66 on the 6th May, 1966, that there had been due communication of the decision for transfer taken on the 12th November, 1965.

In the light, however, of my conclusion, as above, that, in fact, on the 26th April, 1966, the Respondent Commission reached a new decision in the matter of the transfer of Applicant to Paphos, I have to observe that it is just as well, from the point of view of such decision taking effect, that the letter of the 28th April, 1966. (*exhibit* 1), was written, because it was no longer a question of communicating the original decision of the Commission dated 12th November, 1965, but of communicating the new decision of the Commission dated 26th April, 1966, and had the letter of the 25th April, 1966, not been written, I would have been inclined to hold that the decision to transfer Applicant to Paphos as from the 1st June, 1966, which was taken on the 26th April, 1966—and which, in my opinion, is the only decision of the Commission now in force in the matter—has not been properly communicated and, therefore, could not take effect.

*Decision reported in this Part at p. 436 *ante*.

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In the meantime, before receipt of the letter of the 28th April, 1966, (*exhibit* 1), Applicant's counsel pursuant to the terms under which recourse 67/66 had been withdrawn, applied to the Respondent Commission on the 9th May, 1966, (*exhibit* 3), placing before it the grounds on which the Commission was being requested to reconsider the transfer of Applicant to Paphos

The two medical certificates mentioned by counsel for Applicant in *exhibit* 3, in relation to the health of the wife of Applicant, have been produced and they are *exhibits* 5 and 6 in these proceedings

The Commission met on the 20th May, 1966, and considered the representations of counsel for Applicant, as it appears in its minutes which are *exhibit* 7 in these proceedings and they read as follows:—

“The Commission considered the reasons put forward by Mr L Clerides, Advocate, on behalf of his client Mr Artemiou, on the basis of which Mr. Artemiou contends that he should not be transferred to Paphos. After considering the reasons put forward against the transfer in question and having regard to the fact that Mr Artemiou's wife may be attended to by an excellent Government Specialist Surgeon—Urologist, who according to a certificate issued by the Director of the Department of Medical Services, is available at Paphos, and bearing in mind that the other points raised have already been considered at its meeting of 26.4.66, the Commission decided unanimously that there was no reason to alter its previous decision by which Mr Artemiou should be transferred to Paphos w.e.f 16.66”

It may be observed, at once, that the above minutes of the Commission strengthen even more my view—already expressed in this Decision—that the Commission's decision now in force and relating to Applicant's transfer to Paphos is the one reached on the 26th April 1966, and no other

The certificate of the Director of the Department of Medical Services referred to in *exhibit* 7, above, has been produced and is *exhibit* 8 in these proceedings

In my view, on the 20th May, 1966, the Public Service Commission decided, on reconsidering the question of Appli-

cant's transfer to Paphos, not to alter its previous decision of the 26th April, 1966; it did not reach a new decision for transfer.

Accordingly, the Commission addressed to counsel for Applicant, on the 26th May, 1966, a letter informing him of the position, (*exhibit 2*).

It is clear from the above that, in challenging by means of this recourse "the decision" to transfer him to Paphos as from the 1st June, 1966, (and by referring in the Application—vide paragraphs 11 and 12—to both letters of the Commission, dated 28th April, 1966, *exhibit 1*, and 26th May, 1966, *exhibit 2*) Applicant is attacking, in effect, both the decision of the Commission, taken on the 26th April, 1966, to transfer him to Paphos and the decision of the Commission, taken on the 20th May, 1966, not to alter its said decision of the 26th April, 1966.

Out of the two said decisions of the Commission, the only one, of course, which could be suspended by Provisional Order would be the first, i.e. the one of the 26th April, 1966, which is a positive one. No doubt this Court cannot suspend, by means of a Provisional Order—because of its very nature—a negative decision of the Commission such as the one taken on the 20th May, 1966.

The circumstances in which this Court may interfere by means of a Provisional Order with the effect of an administrative act or decision have been discussed in a Decision of this Court given in the Case of *Cleanthis Georghiadis (No. 1) and The Republic*, (1965) 3 C.L.R. p. 392 and need not be repeated herein.

In an affidavit sworn on the 28th May, 1966, in support of his application for a Provisional Order, the Applicant refers to the health of his wife, as borne out by the medical certificate of Dr. HadjiDemetriou, (*exhibit 5*), and he states that the facilities at Paphos are not sufficient for his wife's treatment and supervision, and that if she accompanies him to Paphos her health will be seriously endangered. He further adds that he, being newly married, cannot live at Paphos alone without his wife and child and that it will be impossible for his wife and child to live apart from him.

Bearing in mind fully whatever is stated in the said affidavit

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by Applicant; bearing in mind, too, the relevant medical certificates, which are *exhibits 5 and 6* in this Case; bearing also in mind, however, in this respect, the fact that, according to the certificate of the Director of the Department of Medical Services, which is *exhibit 8* in this Case, there exists a Government Specialist Surgeon—Urologist in Paphos; and bearing in mind the exigencies of the service, as are to be found explained by the Head of the Department of Applicant and recorded in the minutes of the Commission (*exhibit 9*) of the 26th April, 1966, I have reached the conclusion that this is a case where it would not be proper, in the light of the relevant principles, as expounded in *Georghiades and The Republic* (*supra*), to grant a Provisional Order suspending the taking of effect of Applicant's transfer to Paphos pending the determination of this recourse.

Of course I should make it clear that the fact that the personal circumstances of Applicant—in which are to be included his family circumstances—have not been held by me, in this Decision, as sufficient to lead me to the conclusion that I should grant the Provisional Order applied for, does not necessarily mean that I decide from now that the existence of such circumstances, or the mode of their consideration by the Respondent Commission, cannot lead this Court to annul, eventually, either of, or both, the sub judice decisions of the said Commission, i.e. of the 26th April, 1966, and of the 20th May, 1966; I leave such issues entirely open to be determined at the hearing of this recourse.

I have, simply, refused the Provisional Order applied for because I am not satisfied that the harm to be suffered by Applicant, if his transfer takes effect as from today, the 1st June, 1966, will be irreparable, and I am, further, satisfied that this is a Case where, if the transfer of Applicant is not allowed to take effect serious obstacles will be caused to the proper functioning of the Administration and that, therefore, the personal interest of Applicant has to be subjected to the general interest of the public. (Vide *Georghiades and The Republic*, *supra*).

Nor do I find at this stage that there is such a *flagrant* illegality of the decision of the Commission to transfer Applicant to Paphos—or of its refusal to alter such decision—as would possibly entitle this Court to grant the Provisional Order applied for in order to prevent a flagrantly illegal

course of action of the Administration from taking effect; but otherwise, the question of the validity of the sub judice decisions of the Commission from the point of view of legality or of excess or abuse of powers remains open, to be determined at the hearing of this recourse.

Another ground on which I have been asked to grant a Provisional Order is the fact that too short notice was given to Applicant of his transfer to Paphos, as from the 1st June, 1966. It is a fact that the communication of his transfer, made by means of the letter of the 28th April, 1966, (*exhibit 1*), only came to his knowledge on the 11th May, 1966.

In view of all the circumstances of this Case, and bearing in mind that Applicant must have known all along that he was in the course of being transferred to Paphos—for quite a considerable time in the past—and he even stated himself on the 6th May, 1966, (see *exhibit 4*) that he was ready to proceed to Paphos, as soon as his current sick leave would end, I do not regard that the period between the 11th May, 1966 and the 1st June, 1966 is so unreasonably short as to make it necessary for this Court to grant a Provisional Order as applied for.

In refusing, however, the application for a Provisional Order, for the reasons given in this Decision, I have also decided to grant this Case an as early a hearing as possible, so that in case Applicant decides not to have his family to Paphos while the question of the validity of his transfer is being judicially examined, then the period during which he will have to be away from his family, as a result of these proceedings pending, should be as short as possible in the circumstances.

Regarding costs, I order that the costs of this application should be costs in cause.

Application for Provisional Order refused.

Cost to be costs in cause.

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