

IN THE MATTER OF ARTICLE 146 OF THE
CONSTITUTION

GEORGHIOS THEOFYLACTOU,

Applicant.

and

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 225/65)

1966
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Public Officers—Promotions—Promotion to the post of Senior Air Traffic Control Officer—Invalidity of the decision—As taken in a legally invalid manner by a not properly constituted collective organ, viz. the respondent Commission, contrary to the relevant principle of Administrative Law governing the proper functioning of collective organs—Said defect not cured by the subsequent enactment of the Public Service Commission (Temporary Provisions) Law, 1965 (Law No. 72 of 1965), section 5, at a time when the present recourse, challenging the aforesaid decision, had already been filed—And the main ground of law relied on in the recourse was precisely the defective constitution of the respondent Commission at the material time, i.e. the very defect which section 5 of the said law purported to cure—To apply the said section 5 for the purpose of bringing about, ex post facto, the validity of the said decision, would lead to unconstitutionality—Because it would amount, in effect, to interfering with the constitutionally safeguarded right of recourse under Article 146 of the Constitution—See also under Public Service Commission, Administrative Law, Collective Organ, Constitutional Law, hereafter.

Public Service Commission—It is a collective organ—Therefore the principles governing the functioning of collective organs not properly constituted are applicable to the said Commission—“Constitution” of the Public Service Commission as distinct from its “Quorum”—Validity of certain decisions taken by the Public Service Commission—Law No. 72 of 1965, section 5 supra—Its effect—See under Public Officers above, and under Administrative Law, Collective Organ, Constitutional Law, hereafter.

Public Service Commission—Quorum—Prior to the enactment of Law No. 72 of 1965, (supra,) five members could not constitute a proper quorum (see Maratheftis case infra)—Invalidity of a decision, taken by a collective organ, for lack of proper quorum—“Quorum” as distinct from “constitution” of a collective organ.

Administrative Law—Collective Organ—Proper Constitution—Quorum—“Constitution” as distinct from “Quorum”—Collective organ not properly constituted due to existence of vacancies either through death or resignation—Cannot function validly—Because it is a well settled principle of Administrative Law that a collective organ should be fully constituted—And the Public Service Commission being a collective organ, cannot be held to be exempt from the application of the aforesaid general rule of Administrative Law—See, also, under Public Officers, Public Service Commission, above, and under Collective Organ, Constitutional Law, hereafter.

Collective Organ—Properly constituted—The proper constitution of a collective organ is a necessary requirement for the validity of its decisions—Well settled principles of Administrative Law in the matter—Therefore, a decision taken by the Public Service Commission at a time when due to two vacancies it was not properly constituted, is a decision taken in a legally invalid manner and, thus, has to be annulled—Effect of the subsequent legislation viz. Law No.72 of 1965, section 5, supra—See, also, under Public Officers, Public Service Commission, Administrative Law, above, and under Constitutional Law, hereafter.

Constitutional Law—Administrative Law—Recourse filed under Article 146 of the Constitution—Challenging a decision ex hypothesi invalid on certain grounds—Enactment after the filing of the said recourse of legislation purporting to cure retrospectively the very defects relied on in the said same recourse—Such legislation cannot affect that recourse—It would be indeed unconstitutional to hold otherwise—Because to apply such legislation for the purpose of bringing about, ex post facto, the validity of the said decision, would amount, in effect, to interfering with the constitutionally safeguarded right of recourse under Article 146 of the Constitution—However, such legislation would affect the recourse, although filed prior to the enactment of the said legislation, where the defect purported to be cured thereby was for the first time put

forward and relied on in support of the recourse not in the body of the application filed but at the hearing of the case after the enactment of the said legislation purporting to cure the defect.

Quorum—See above.

Article 146 of the Constitution—Right of recourse thereunder safeguarded—Legislation improperly interfering therewith—See under Public Officers, Constitutional Law, above.

Legislation—Retrospective legislation purporting to cure defects in decisions already taken—Effect of such legislation on pending recourses—See under Public Officers, Constitutional Law, above.

Decisions—Defective decisions—Cured by subsequent legislation etc. etc.—See above.

In this case, the applicant challenges the validity of the promotion of the Interested Party, Mr. M. H., to the post of Senior Air Traffic Control Officer. The said promotion was decided upon by the respondent Public Service Commission at its meeting of the 27th October, 1965. It is common ground that only five members of the Public Service Commission were present at such meeting; one of such five members being the Chairman of the Commission. It is, also, common ground that, at this material time (*viz.* on the 27 October, 1965), the Public Service Commission was not fully constituted due to the existence of two vacancies.

This recourse was filed on the 26th November, 1965 and some time thereafter *viz.* on the 16th December, 1965, the Public Service Commission (Temporary Provisions) Law, 1965 (Law No. 72 of 1965) was enacted, curing retrospectively certain defects in the decisions taken by the said Commission between the 21st December 1963 and the 16th December 1965, (date of the enactment of the Law), those defects being the defective constitution of the Commission as well as the lack of proper quorum thereof.

Counsel for applicant has submitted that the *sub judice* decision is invalid in that the Commission at the time was not properly constituted and that, in any case, the then present members of the commission could not form a proper quorum. On the other hand, counsel for the respondent has relied on the aforesaid law (*supra*) and particularly section 5 thereof, which, as stated, was enacted on the 16th December

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1965 *viz.* after the filing of this recourse (*supra*). It is to be noted that the question of improper quorum of this Commission at the material time had not been raised in the body of the application in this recourse. But only at the stage of the hearing of the case—*viz.* on the 17th June, 1966.

Section 5 of the aforesaid Law No. 72 of 1965, *supra*, provides :

“5. Πάσα απόφασις τῆς Ἐπιτροπῆς ληφθεῖσα διαρκούσης τῆς περιόδου τῆς ἀρχομένης ἀπὸ τῆς 21ης Δεκεμβρίου 1963 καὶ ληγούσης κατὰ τὴν ἡμερομηνίαν ἐνάρεξως τῆς ἰσχύος τοῦ παρόντος Νόμου, (*note*: 16 Δεκεμβρίου 1965), ἀνεξαρτήτως τῆς κατὰ τὴν ἡμερομηνίαν λήψεως τῆς ἀποφάσεως κατὰ νόμον συγκροτήσεως τῆς Ἐπιτροπῆς, θὰ θεωρῆται ὡς νομίμως ληφθεῖσα καὶ ἔγκυρος καθόσον ἀφορᾷ τὴν συγκρότησιν καὶ ἀπαρτίαν τῆς Ἐπιτροπῆς ἐάν ἐλήφθῃ εἰς συνεδρίασιν καθ’ ἣν παρίστατο ἢ κατὰ τὸ ἐδάφιον (2) τοῦ ἄρθρου 4 ἀπαρτία καὶ διὰ τῆς ἐν τῷ ἐδαφίῳ (3) τοῦ αὐτοῦ ἄρθρου προνοουμένης πλειοψηφίας”.

Under Article 146.1 of the Constitution exclusive jurisdiction is given to the proper Court to adjudicate finally on a recourse made to it on a complaint that a decision, an act or omission of any organ, authority or person exercising any executive or administrative authority, is contrary to any of the provisions of the constitution or of any law or is made in excess or abuse of powers vested in such organ, authority or person.

The Court in annulling the *sub-judice* decision :

Held, (1) (a) regarding the proper quorum of the Commission, it has been already held in *Maratheftis and The Republic* (1965) 3 C.L.R. 576, at p. 581, that five members of the Commission cannot constitute a proper quorum.

(b) But the question of the proper quorum had not been raised in the application in this recourse filed on the 26th November, 1965, but only at the stage of the hearing of this case on the 17th June, 1966, *viz.* after the enactment of Law No. 72 of the 16th December, 1965 (*supra*), curing the defect as to the quorum of the Commission at the material time.

(c) It is an established principle of Administrative Law that if a ground of invalidity of a decision, the subject-matter of a recourse, has not been raised in due course, but was raised at a later stage in the proceedings, after, in

the meantime, legislation had been enacted curing the relevant defect, then the Court dealing with the matter has to apply the legislation in question in favour of the validity of the decision concerned : (Vide, *inter alia*, decisions of the Greek Council of State Nos. 737, 758, 783, 785 and 1670 of 1954, and No. 98 of 1956).

(d) When it is stated in the relevant ground of law in the body of the application in this recourse, that the Public Service Commission at the material time was not properly "constituted", without connecting this to the aspect of quorum, we have to read such ground of law as limited to the "constitution", as distinct from "quorum".

(e) It follows, as a result, on the basis of the aforesaid principles, that the applicant cannot succeed on the issue of quorum which he raised for the first time after section 5 of Law No. 72 of 1965 (*supra*) had cured the relevant defects.

(2) We pass next to the question of the constitution of the respondent Public Service Commission at the time when the *sub judice* decision was taken *i.e.* 27th October, 1965.

(a) It is common ground that at the material time the Public Service Commission was not fully constituted due to the existence of two vacancies ; one having occurred through the death and the other through the resignation of greek members.

(b) But it is a well settled rule of Administrative Law that a collective organ cannot function validly if there exist vacancies in its strength due to death or resignation, because it is a requirement of legality that a collective organ should be fully constituted (see decision of the Greek Council of State No. 681 of 1936. Stassinopoulos "Discourses on Administrative Law", 1957 p. 234 ; Kyriakopoulos on Greek Administrative Law, 4th edition, volume 2, pp. 20-21).

(c) The functioning of the Public Service Commission, as a collective organ cannot be held to be exempt from the application of this aforesaid general rule of Administrative Law.

(3) (a) There remains now to consider whether section 5 of Law 72 of 1965 (*supra*), enacted on the 16th December, 1965, while this recourse was pending (it having been filed

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on the 26th November, 1965), and which validates, also, decisions of the respondent Commission, taken before such date, with its then defective constitution, can be held to save the validity of the decision which is the subject matter of this recourse.

(b) In *Georghiades and The Republic*, (reported in this Part at p. 252 *ante*) it has been held that section 5 could not be construed as being, and was not validly, applicable to a *sub judice* recourse in which Judgment had been reserved.

(c) I am of the opinion that no different result can be reached with regard to the application of the aforesaid section 5 of Law No. 72 of 1965 (*supra*) to a recourse, such as the present, where Judgment had not yet been reserved when section 5 was enacted, but which had been filed before its enactment *and at the time of the filing of which the defect in the constitution of the Commission, which section 5 purports to remedy, had been expressly raised as a ground of invalidity of the sub judice decision.*

(d) To apply the said section 5 for the purpose of bringing about, *ex post facto*, the validity of the said decision, would lead to unconstitutionality, because it would amount, in effect, to interfering with the constitutionally safeguarded right of recourse under Article 146 of the Constitution. (See, also, the aforementioned decisions of the Greek Council of State of 1954 and 1956 (*supra*)).

(e) In the result, there being no dispute that at the material time there existed two vacancies for Greek members of the Commission, and there being no doubt in my mind, for the foregoing reasons, that this rendered the constitution of the Commission defective at the time and that section 5 of Law No. 72 of 1965 (*supra*) is not properly applicable to cure the defect in question, it follows that the *sub judice* decision to promote the Interested Party was taken in a legally invalid manner, contrary to the relevant principles of Administrative Law and has, thus, to be annulled.

It is up to the Commission to consider the matter afresh.

Decision annulled. Order for costs in favour of applicant.

Cases referred to :

Maratheftis and The Republic (1965) 3 C.L.R. 576, at p. 581,
applied ;

Georghiades and The Republic (reported in this Part at p. 252,
ante) ;

Mozoras and The Republic (1965) 3 C.L.R. 458, and at p. 356,
in this Part *ante* ;

Decisions of the Greek Council of State :

No. 681/1936 ;

Nos. 737, 758, 783, 785 and 1670 of 1954 ;

No. 98 of 1956.

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Recourse.

Recourse against the validity of a decision taken by the Respondent concerning a promotion to the post of Senior Air Traffic Control Officer.

L. Clerides for Applicant.

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

Cur. adv. vult.

The following Judgment was delivered by:—

TRIANAFYLLIDES, J.: In this Case the Applicant challenges the validity of the promotion of the Interested Party, Mr. Michael Herodotou, to the post of Senior Air Traffic Control Officer.

The said promotion was decided upon by the Public Service Commission at its meeting of the 27th October, 1965. It is common ground that only five members of the Public Service Commission were present at such meeting; one of such five members being the Chairman of the Commission.

At the commencement of these proceedings, counsel for Applicant has submitted that the sub judice decision is invalid in that the Commission at the time was not properly constituted and that, in any case, the then present members of the Commission could not form a proper quorum.

Counsel for Respondent, in meeting the case of Applicant, has relied on The Public Service Commission (Temporary Provisions) Law 1965 (Law 72/65) and particularly section 5

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thereof, which was enacted on the 16th December, 1965, after the filing of this recourse on the 26th November, 1965.

In view of the vital importance, for the outcome of the present Case, of the issues regarding the proper constitution and quorum, at the material time, of the Commission, the decision on such issues has been reserved and proceedings have, in the meantime, been stayed.

Regarding the question of the proper quorum of the Commission, it has already been held in *Maratheftis and The Republic* ((1965) 3 C.L.R. p. 576 at p. 581) that five members of the Commission cannot constitute a proper quorum.

Counsel for Respondent has submitted that, as the question of the quorum of the Commission had not been raised in the Application in this recourse, but only at the stage of the hearing—on the 17th June, 1966—and as, in the meantime, section 5 of Law 72/65 had been enacted, validating any decision of the Commission taken, during the period between the 21st December, 1963 and the date of the enactment of such Law, with a quorum of three members of the Commission, including its Chairman, (the sub judice decision having been taken on the 27th October, 1965), the Applicant is not entitled to succeed on a ground of invalidity which was not raised by way of recourse *before* the enactment of legislation curing the defect in question. Counsel for Respondent has referred me, in this respect, to the Conclusions from the Jurisprudence of the Greek Council of State, 1929–1959, at p. 224.

Counsel for Applicant has, on the other hand, submitted, in reply, that the ground of law in the Application, referring to the constitution, at the material time, of the Commission, is generic enough to include, also, the question of the quorum of the Commission; so such issue was sub judice, already, when Law 72/65 was enacted.

In my opinion the contention of Respondent is well founded, in the sense that it appears to be an established principle of Administrative Law that if a ground of invalidity of a decision, the subject-matter of a recourse, has not been raised in due course, but was raised at a later stage in the proceedings, after, in the meantime, legislation had been enacted curing the relevant defect, then the Court dealing with the matter has to apply the legislation in question in

favour of the validity of the decision concerned; (vide, *inter alia*, Decisions of the Greek Council of State 737/1954, 758/1954, 783/1954, 785/1954, 1670/1954 and 98/1956).

The relevant ground of law in the Application does not state that the Public Service Commission, at the material time, was not properly constituted *from the point of view of quorum*; and "constitution", as such, is not the same thing as "quorum". So when it is stated in the said ground of law that the Commission was not properly "constituted", without connecting this to the aspect of quorum, we have to read such ground of law as limited to "constitution", as distinct from "quorum". It follows, as a result; on the basis of the aforesaid principle, that the Applicant cannot succeed on the issue of quorum which he raised, for the first time, after section 5 of Law 72/65 had cured the relevant defect, through being enacted before Judgment had been reserved in these proceedings.

We pass next to the question of the constitution of the Public Service Commission at the material time:

It is common ground—and it appears, also, to be recognized by the preamble to Law 72/65—that, at the material time, the Public Service Commission was not fully constituted due to the existence of two vacancies; one having occurred *through the death and the other through the resignation* of Greek members of the Commission.

The question of the possibility of the Commission functioning validly notwithstanding the said two vacancies has come up before this Court in the past but it has not been found necessary to resolve it. It was left open in *Mozoras and The Republic*, ((1965) 3 C.L.R. p. 458) and when that case was dealt with *on appeal* (p. 356 *ante in this Part*), the problem was not resolved at that stage, either. It appears, now, necessary to deal with it:—

It is a well settled rule of Administrative Law that a collective organ cannot function validly if there exist vacancies in its strength due to death or resignation, because it is a requirement of legality that a collective organ should be fully constituted. (See Stasinopoulos "Discourses of Administrative Law" (1957) p. 234, Kyriakopoulos on Greek Administrative Law, 4th edition, volume 2, p. 20-21 and also, *inter alia*, Decision of the Greek Council of State 681/36).

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The functioning of the Public Service Commission, as a collective organ, cannot be held to be exempt from the application of this general rule of Administrative Law; and no "necessity", the existence of which might have overridden the requirements of such rule, has been alleged in the present proceedings. It follows that at the material time the Commission could not function validly, due to the existence of the two aforementioned vacancies.

There remains, now, to examine whether section 5 of Law 72/65, which was enacted on the 16th December, 1965, while this recourse was pending, and which validates, also, decisions of the Commission, taken before such date, with its then—defective—constitution, can be held to save the validity of the decision which is the subject-matter of this recourse.

In *Cl. Georghiades and The Republic*, (reported in this Part at p. 252 ante) it has been held that section 5 could not be construed as being, and was not validly, applicable to a sub judice recourse in which Judgment had been reserved.

I am of the opinion that no different result can be reached with regard to the application of section 5 of Law 72/65 to a recourse, such as the present, where Judgment had not yet been reserved, when section 5 was enacted, but which has been filed before its enactment *and at the time of the filing of which the defect in the constitution of the Commission, which section 5 purports to remedy, had been expressly raised as a ground of invalidity of the sub judice decision.* To apply the said section 5 for the purpose of bringing about, ex post facto, the validity of the said decision, would lead to unconstitutionality, because it would amount, in effect, to interfering with the constitutionally safeguarded right of recourse under Article 146, (see, also, the aforementioned Decisions of the Greek Council of State 737/1954, 758/1954, 783/1954, 785/1954, 1670/1954 and 98/1956).

In the result, there being no dispute that at the material time there existed two vacancies for Greek members of the Commission, and there being no doubt in my mind, for the foregoing reasons, that this rendered the constitution of the Commission defective and that section 5 of Law 72/65 is not properly applicable to cure the defect in question, it follows that the *sub judice* decision to promote the Interested

Party was taken in a legally invalid manner, contrary to the relevant principle of Administrative Law and has, thus, to be annulled; and it is so declared accordingly. It is up to the Commission to reconsider the matter, afresh, in the proper manner.

Regarding costs I have decided that Applicant is entitled to costs which I assess at £15.-

*Sub judice decision annulled.
Order for costs as aforesaid.*

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