

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

KYRIACOS G. PAPASAVVAS,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

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(Case No. 185/66).

Public Officers—Date of birth—Omission of the Public Service Commission to examine the issue of the correct date of birth of the Interested Party—Competence and duty of the Commission to deal with the matter—Commission both competent and duty bound to deal with the matter under the provisions of Article 125.1 of the Constitution—Cfr. Article 29.1 of the Constitution—See, also, herebelow.

Public Officers—Safeguards under Article 192.1 of the Constitution of rights enjoyed by public officers on the day immediately preceding the coming into operation of the Constitution (i.e. the 16th August, 1960)—“Terms and conditions of service”—The expression also includes retirement from service—Article 192.7 (b)—But the said expression cannot be said to include a wrong assumption of fact relating to a public officer’s date of birth recorded before the coming into operation of the Constitution.

Constitutional Law—Article 192.1 and 7 (b) of the Constitution—See immediately above.

Administrative and Constitutional Law—Recourse under Article 146 of the Constitution—“Legitimate interest” required—Article 146, paragraph 2—Such recourse may be made by “a person whose any existing legitimate interest is adversely and directly affected” by the decision, act or omission complained of—Meaning, scope and effect of the said expression—Omission of the Public Service Commission to deal with the issue of the correct date of birth of the Interested Party—Who was the holder in the

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public service of the post of Senior Dental Officer—The Applicant, a Dental Officer, 1st grade, eligible for promotion to the higher post held by the Interested Party as aforesaid—Applicant possessing such legitimate interest within paragraph 2 of Article 146 of the Constitution entitling him to make a recourse under that Article against the aforesaid omission—See, also, under Legitimate Interest immediately below.

Legitimate Interest—Within paragraph 2 of Article 146 of the Constitution — ‘Existing legitimate interest adversely and directly affected. . . .’—Paragraph 2, of Article 146—The requirements of that paragraph (supra) must be satisfied at the time of the filing and hearing of the recourse—Such requirements, however, are satisfied if at the said material times it is clear that the existing interest of an Applicant, though not yet actually adversely and directly affected, is unavoidably bound to be so affected eventually—See, also, under Administrative and Constitutional Law, above.

Recourse—Recourse under Article 146 of the Constitution—See above.

Public Service Commission—Competence and duties—Article 125, paragraph 1 of the Constitution—The Commission is bound to exercise its competence without awaiting the enactment of legislation regulating the exercise of such competence—The examination of the matter of the correct date of birth of a public officer, in relation to his or her retirement from service—A matter within the competence of the Commission under the provisions of Article 125.1 of the Constitution—Also the Commission had a duty thereunder to deal with the matter—Since it had been requested so to do either by the competent Minister or, as in this case, by public officers, including the Applicant, whose legitimate interest is affected by the matter complained of—Competence of the Commission—One of the objects of the competence vested in the Commission under Article 125.1 of the Constitution is the safeguarding of the proper functioning of the public service—Also, the protection of the legitimate interests of the individual holders of public offices.

Public Service—See above.

Constitutional Law—Public Service Commission—Article 125.1 of the Constitution—See above.

In this recourse under Article 146 of the Constitution the Applicant complains against an omission of the Respondent

Public Service Commission to correct the date of birth of the Interested Party, Mrs. Stavroulla Lyssioutou, the Senior Dental Officer.

The Applicant is a Dental Officer, 1st grade; and he and another Dental Officer, 1st grade, are the most senior among all Dental Officers in the Government service.

In April, 1960, the date of birth of the Interested Party was altered, in the relevant records, to be, for official purposes, the 26th December, 1912, instead of the 26th December, 1911, as it stood before; had such alteration not taken place, the Interested Party would, under section 8 of the Pensions Law, Cap. 311, have retire from public service on the 26th December, 1966, on attaining the age of fifty-five years, whereas now she is due to retire on the 26th December, 1967.

It is a common ground that the Applicant does possess all the qualifications required for promotion to the post, now held by the Interested Party, of Senior Dental Officer (*supra*).

On the 10th January, 1966, the Applicant in his capacity as the Secretary of the Association of Government Dental Officers, addressed a letter to the Ministry of Health complaining about the aforesaid change of the date of birth of the Interested Party as officially recorded in relation to her service; a re-examination of the matter was sought by that letter, for the protection of the interests of other Dental Officers. Eventually, the Ministry of Health after having consulted, twice, the Attorney-General, placed the matter before the Respondent Public Service Commission, as being the organ vested with the relevant competence.

The Public Service Commission met on the 9th June, 1966, and, as it appears from its minutes, it decided "not to deal with the matter and let anybody affected to have a recourse to the Court".

This recourse was filed by the Applicant in his personal capacity on the 27th July, 1966.

The first point that arises for consideration is whether or not a legitimate interest of the Applicant has been adversely and directly affected, within the meaning of paragraph 2 of Article 146 of the Constitution, by the aforesaid decision of the Respondent Commission not to deal with the matter placed

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before it as stated above. Paragraph 2 of Article 146 reads as follows:

"2. Such a recourse may be made by a person whose any existing legitimate interest, which he has either as a person or by virtue of being a member of a Community, is adversely and directly affected by such decision or act or omission".

And the second crucial point that arises is whether or not the Respondent Public Service Commission is the competent organ to deal with the matter *viz.* the change of the date of birth of the Interested Party as aforesaid. The competence of the Public Service Commission as defined under paragraph 1 of Article 125 of the Constitution, is as follows:

"1. Save where other express provision is made in this Constitution with respect to any matter set out in this paragraph and subject to the provisions of any law, it shall be the duty of the Public Service Commission to.....
..... appoint, confirm, emplace on the permanent or pensionable establishment, promote, transfer, retire, and exercise disciplinary control over, including dismissal or removal from office of, public officers."

Held, I. On the issue of legitimate interest within paragraph 2 of Article 146 of the Constitution:

(1) As pointed out in *Chrysostomides and The Greek Communal Chamber*, 1964 C.L.R. 397 at p. 402, and in *Neophytou and The Republic* 1964 C.L.R. 280 at p. 292, our Article 146.2 (*supra*) is analogous to the corresponding provision in Greece, which is section 48 of Law 3713/1928. Consequently the jurisprudence which has evolved in applying the said Greek provision can be of very great help. And a useful guidance, in approaching such issue in the present case, can be derived from the decision of the Greek Council of State No. 357/1949 (see 1949 (A) Volume of the Decisions of the Council of State p. 605).

(2) In the above case No. 357/1949, *supra*, the legitimate interest of the Applicant was found by the Greek Council of State to be a moral one; and actually there is express provision made in the aforesaid section 48 of Law 3713/1928, *supra*, that the legitimate interest of an Applicant need not be a pecuniary one.

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(3) I am inclined to the view that though no such provision has been expressly made in our Article 146.2 (*supra*), nevertheless, a moral interest should be deemed as included in the notion of "interest" therein, because of the fact that such notion must have been based on the notion of "interest" as it has evolved in Administrative Law, in Greece and elsewhere. But no definite decision need be reached regarding the exact extent of the meaning of the term "interest" in Article 146.2, because, as it will be seen from what follows next, the relevant interest of the Applicant in the present case is not merely a moral one, but also a material one as well.

(4) (a) It is common ground that the matter of the correct age of the Interested Party has been raised in connection with the proper date of her retirement from service on her attaining the age of fifty-five years. When this takes place the post of Senior Dental Officer will fall vacant.

(b) It is not disputed, on the other hand, that the Applicant has, at all material times, been eligible for such post, which is a post higher than his own and carries greater responsibilities and emoluments. So when the post of Senior Dental Officer falls vacant on the retirement of the Interested Party, the Applicant would stand a chance (and not a remote one, in view of his seniority as a Dental Officer, 1st grade) to gain both moral and material advancement through promotion to Senior Dental Officer; and so long as the retirement of the Interested Party does not take place the said chance of Applicant cannot materialize.

(c) It is useful in this connection to note that the French Council of State has held in, *inter alia*, the case of Charles (decided on the 1st July, 1955, reported in the Collection Lebon Vol. 1955, p. 379) that public officers may challenge illegal appointments which prejudice them by retarding irregularly their advancement.

(5) In the light of all the foregoing, and in the particular circumstances of this case, I have reached the conclusion that the Applicant possesses a legitimate interest in the matter of the legality of the Interested Party's continuing service in the post of Senior Dental Officer; such interest is an existing one, because the Applicant has been qualified for such post at all material times and it has been adversely and directly affected by the refusal of the Respondent Commission to examine the

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matter of the proper date of birth, and, consequently, of the lawful date of the retirement, of the Interested Party.

(6) (a) It has been, also, argued by counsel for the Interested Party that the Applicant is not entitled, under Article 146.2 of the Constitution, (*supra*), to make this recourse because, in any case, this recourse was filed and heard prior to the alleged date of retirement of the Interested Party, *i.e.* the 26th December, 1966, (*supra*); thus, no existing interest of his, the argument went on, was affected at the time.

(b) It is quite correct that the requirements of Article 146.2 of the Constitution (*supra*) must be satisfied at the time of the filing and hearing of the recourse; but such requirements are satisfied if at the said material times it is clear that the existing interest of an Applicant, though not yet actually adversely and directly affected, is unavoidably bound to be so affected eventually (see Conclusions from the Jurisprudence of the Greek Council of State, 1929–1959, p. 260). And there can be no doubt in the present case that the refusal of the Respondent Commission to examine the question of the proper date of birth of the Interested Party took place so proximately near, in point of time, to the alleged proper date of her Retirement from service, that the unavoidable consequence of such refusal was the continuance in service of the Interested Party after such date, thus adversely and directly affecting the relevant legitimate interest of the Applicant,—assuming, of course, as it has to be assumed for the purposes of the issue of the existence of the prerequisites under Article 146.2 (*supra*), that the correct date of retirement of the Interested Party were to be found to be the 26th December, 1966 (in accordance with her originally accepted date of birth) and not the 26th December, 1967, (in accordance with her currently accepted date of birth).

Held, II. On the merits:

(1) It may be stated right at the outset that no question could arise in the present case of an omission of the Respondent Commission to correct the date of birth of the Interested Party—as complained by the Applicant in the motion for relief in the application. All that there could be found to exist in this case would be an omission to deal at all with the issue of the date of birth of the Interested Party, as raised by the Applicant's letter of the 10th January, 1966 (*supra*). I take the view that a claim for such omission can be fairly deemed to be included

in the motion for relief in the application in this recourse, because the greater, naturally, includes the lesser.

(2) (a) For an omission to arise there should first exist a duty to take a certain course; there can be no question of an omission when it is discretionary whether or not to take a certain course.

(b) It follows from paragraph 1 of Article 125 of the Constitution (*supra*) that decisions relating to retirement of public officers—other than administrative action implementing retirement and taken automatically by operation of law—are among the duties of the Respondent Public Service Commission (see *Ali Rouhi and The Republic*, 2 R.S.C.C. 84, at p. 87); consequently the examination of the matter of the correct date of birth of an officer, in relation to his or her retirement is part of the Commission's duties (see *Ieromonachos and The Republic*, 4 R.S.C.C. 82).

(3) (a) Irrespective of the generality of Article 125.1 of the Constitution (*supra*), it has been argued by counsel for the Interested Party that she is entitled to retire, by virtue of Article 192.1 of the Constitution, on the date on which she was due to retire before the 16th August, 1960, when the Constitution came into operation; and that, therefore, the Respondent Commission was not competent in this case to examine the correctness of the date of birth of the Interested Party, as such date had been fixed and the matter settled before the 16th August, 1960.

(b) What are protected under Article 192.1 (*supra*) for the benefit of public officers within its ambit, such as the Interested Party, are the "terms and conditions of service" applicable to them before the 16th August, 1960, and which are, thus, constitutionally safeguarded. And it is quite clear from the definition in paragraph 7 (b) of Article 192 of the Constitution that the expression "terms and conditions of service" includes "removal from service" which, of course, covers "retirement from service".

(c) But, in my opinion the "terms and conditions of service"—relating to the time of occurrence of retirement—which are safeguarded by Article 192.1 of the Constitution (*supra*), can be nothing else than the provisions regulating such occurrence, through fixing, *inter alia*, the relevant age-limit; surely the

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expression "terms and conditions of service" in Article 192.1 cannot be said to include a wrong assumption of fact about any particular officer's date of birth.

(d) By operation of law an officer has to retire on reaching the prescribed age of retirement; the exact date on which, as a matter of fact, he does attain such age is a thing to be ascertained in the interests of legality; if necessary, this may be done, in the proper manner, at any time during the service of the officer concerned and it makes no difference whether or not an officer is one of those within the ambit of Article 192.1 of the Constitution (*i.e.* those who were in the public service on the date of the coming into force of the Constitution *viz.* the 16th August, 1960). Surely, it could not have been the intention of Article 192.1 to safeguard a vested interest in the eventual illegality which would be involved in a retirement based on a wrongly relied upon date of birth.

(e) For the same reasons, as well as because of the continuity of administration in cases of State Succession, I am of the view that the Commission is not precluded from dealing with the date of birth of an officer in a case in which such date has been fixed by an act of the past Colonial Government of Cyprus; in such a case the Commission would be dealing with, and ascertaining, facts so as to ensure legality of action in respect of the present.

(f) It follows that the Respondent Commission was competent to deal with the matter of the date of birth of this particular public officer, the Interested Party.

(4) (A) The next question that arises is: Did the Respondent Public Service Commission have, in the circumstances of the present case, to exercise its relevant competence? And this leads to the wide issue: In what circumstances does the Commission have to discharge its duties under Article 125.1 of the Constitution?

(B) (a) Subject to the provisions of any Law regulating the matter, I am of the view that the Commission is bound, for the sake of proper administration, to consider and decide a matter relating to the proper date of retirement of a public officer if it is requested so to do by the appropriate Minister or Head of Department. One of the objects of the competence vested in the Public Service Commission under Article 125.1 of the Constitution (*supra*) is the safeguarding of the proper

functioning of the public service (see *Nedjati and The Republic*, 4 R.S.C.C. 78, at p. 82). The proper date of retirement of a public officer, being a matter of legality, is part and parcel of the proper functioning of the public service. So, when a Minister or Head of Department, who is *virtute officio* responsible for the proper functioning of the branch of public service under him (see *Ozturk and The Republic*, 2 R.S.C.C. 35, at p. 42) requests the Commission to exercise its relevant competence under Article 125.1 of the Constitution (*supra*), it is duty-bound to do so.

(b) But in the present case I find that no question of an omission on the part of the Commission to take action, on a request by the Ministry of Health, arises at all.

(C) (a) However, the Commission's duty to exercise its competence under Article 125.1 of the Constitution (*supra*) does arise, also, when the Commission is called upon, as in this case, by a public officer to deal with a matter affecting a legitimate interest of his. This is so, because, as held in *Nedjati and The Republic* (*supra* at p. 82), one of the objects of Article 125.1 (*supra*) is, also, the protection of the legitimate interests of the individual holders of public offices; and the more so, in view of Article 29.1 of the Constitution (set out in full in the judgment, *post*).

(b) In the present case the Commission had before it a complaint emanating from the Association of Government Dental Officers—all of them being public officers, and one of them being the Applicant.

(5) I have, therefore, no difficulty in holding that the said Commission had a duty, under Article 125.1 of the Constitution (*supra*), to deal with the complaint before it. True, the said complaint was not addressed directly to the Commission but to the Minister of Health. But apart from any other considerations the fact remains that through the Minister of Health the said complaint did reach the competent organ, *i.e.* the Respondent Public Service Commission.

(6) (a) Although I do appreciate fully the complications facing the Commission in this matter as set out in its *sub judice* decision, still I am unable to find that such complications could be held to amount to justification for its refusal to examine the issue of the date of the birth of the Interested Party.

(b) The absence of legislation governing the matter concerned is indeed a handicap; but not such as to justify the Commission in refusing to act; as held in *Morsis and The Republic* 4 R.S.C.C. 133, at p. 136, the Commission is not only entitled but also bound to exercise its competence under Article 125 of the Constitution (*supra*) without awaiting the enactment of legislative provisions regulating the exercise of such competence.

(7) For all the above reasons I am of the opinion that, in the circumstances of this case, the Commission's refusal to deal with the matter raised by the aforesaid letter dated the 10th January, 1966. (*exhibit 3*) (*supra*) amounts to a wrongful omission and it is hereby declared that such omission ought not to have been made and that what has been omitted should have been performed.

Declaration in terms.
No order as to costs.

Cases referred to:

Chrysostomides and The Greek Communal Chamber, 1964 C.L.R. 397 at p. 402, *applied*;

Neophytou and The Republic, 1964 C.L.R. 280 at p. 292, *applied*;

Ali Rouhi and The Republic, 2 R.S.C.C. 84, at p. 87, *applied*;

Ieromonachos and The Republic, 4 R.S.C.C. 82, *applied*;

Nedjati and The Republic, 4 R.S.C.C. 78, at p. 82; *followed*;

Ozturk and The Republic, 2 R.S.C.C. 35, at p. 42; *followed*;

Morsis and The Republic, 4 R.S.C.C. 133, at p. 136, *applied*;

Decision of the Greek Council of State No. 357/1949 in 1949 (A)
Volume of the Decisions of the Council of State p. 605;

Decision of the French Council of State in case Charles, reported in the Collection Lebon Vol. 1955, p. 379.

Recourse.

Recourse against an omission of the Respondent Public Service Commission to correct the date of birth of the Interested Party, Stavroulla Lyssiotou, who is the Senior Dental Officer.

L. *Demetriades*, for the Applicant.
M. *Spanos*, Counsel of the Republic, for the Respondent.
A. *Anastassiades*, for the Interested Party.

Cur. adv. vult.

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The following Judgment* was delivered by:

TRIANTAFYLLIDES, J.: In this recourse the Applicant complains against an omission of the Respondent Public Service Commission to correct the date of birth of the Interested Party, Stavroulla Lyssiou, who is the Senior Dental Officer.

The Applicant is a Dental Officer, 1st grade; the Applicant and another Dental Officer, 1st grade, are the most senior among all Dental Officers in Government service.

It is not in dispute that the Applicant does possess the qualifications for promotion to the post of Senior Dental Officer, now held by the Interested Party.

The Applicant is a member of the Association of Government Dental Officers and at all material times he has been the Secretary of such Association.

The history of relevant events is as follows:

On the 10th January, 1966, the Applicant, in his capacity as the Secretary of the said Association, addressed a letter to the then Acting Minister of Health (*exhibit 3*) complaining that the date of birth of the Interested Party, as officially recorded in relation to her service, had been altered wrongly, so as to make her appear younger than what she actually was; a re-examination of the matter was sought, for the protection of the interests of other Dental Officers.

As a matter of fact in April, 1960, the date of birth of the Interested Party was altered to be—for official purposes—the 26th December, 1912, instead of the 26th December, 1911; had such alteration not taken place Interested Party would, under section 8 of the Pensions Law (Cap. 311), have retired from public service on the 26th December, 1966, on attaining the age of fifty-five years, whereas now she is due to retire on the 26th December, 1967.

On the 24th March, 1966, the Acting Minister of Health after having consulted, twice, the Attorney-General of the

*For final decision on Appeal see (1968) 4 J.S.C. 336 to be published in due course in (1968) 3 C.L.R.

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Republic, placed the matter before the Public Service Commission, as being the Organ vested with the relevant competence; the advice given by the Attorney-General was forwarded to the Commission, by the Minister, for its information (see *exhibit 5*).

On the 13th May, 1966, another Minister, acting at the time as Minister of Health, addressed a letter to the Commission requesting a reply as to whether or not the Commission was prepared to examine the matter (see *exhibit 4*).

The Commission met on the 9th June, 1966 and, as it appears from its minutes (see *exhibit 1*), it decided "not to deal with the matter and let anybody affected to have a recourse to the Court".

On the 21st June, 1966, the Acting Minister of Health addressed a letter to the Association concerned, informing them of the position (see *exhibit 2*).

This recourse was filed by the Applicant on the 27th July, 1966.

The first point that arises for consideration in this recourse is whether or not a legitimate interest of the Applicant has been adversely and directly affected, in the sense of Article 146.2 of the Constitution, by the decision of the Respondent Commission which is the subject-matter of this recourse; because only in such a case the Applicant would be entitled to make this recourse.

Paragraph 2 of Article 146 reads as follows:

"Such a recourse may be made by a person whose any existing legitimate interest, which he has either as a person or by virtue of being a member of a Community, is adversely and directly affected by such decision or act or omission".

As pointed out in *Chrysostomides and The Greek Communal Chamber* (1964 C.L.R. 397 at p. 402) and in *Neophytou and The Republic* (1964 C.L.R. 280 at p. 292) our Article 146.2 is analogous to the corresponding provision in Greece, which is section 48 of Law 3713/1928.

If we examine the jurisprudence which has evolved in applying the said Greek provision — as such jurisprudence is to be found in, *inter alia*, the Conclusions from the Jurisprudence of the

Greek Council of State 1929–1959, pp. 257–266; Stasinopoulos on the Law of Administrative Disputes, 4th ed. (1964) pp. 197–206; and Kyriakopoulos on Greek Administrative Law 4th ed. vol. 3 pp. 117–124 — we are led to the conclusion that paragraph 2 of our Article 146 is an enactment largely based on, and reproducing, the principles to be found in the said jurisprudence; consequently such jurisprudence can be of very great help.

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Of course, the decision of an Administrative Court regarding the issue of legitimate interest has to be reached in the light of the circumstances of the particular case — and no two cases are exactly identical — but useful guidance, in approaching such issue in the present Case, can be derived from case 357/1949, before the Greek Council of State (see 1949 (A) volume of the Decisions of the Council p. 605). In that case the Applicant, who was a theologian, was complaining, by way of recourse to the Council of State, against the omission of the Minister of Education to retire, on the ground of age, an Inspector-General in Secondary Education, who was inspecting the work of theologians. On being objected that the Applicant had no legitimate interest in the matter, as he was not in a position himself to be appointed to the post of Inspector-General, it was held that senior officials serving in a particular branch of a service possess a moral interest in the senior posts in such branch being held lawfully and that, therefore, the Applicant was entitled to make the recourse. "...Ἐπειδὴ ὁ αἰτῶν, καθηγητὴς τῶν Θεολογικῶν μαθημάτων κέκτηται ἔννομον συμφέρον ἐν τῇ ἀσκήσει τῆς ὑπὸ κρίσιν αἰτήσεως ἀκυρώσεως, διότι οἱ εἰς τὸν αὐτὸν ὑπηρεσιακὸν κλάδον ἀνήκοντες ἀνώτεροι ὑπάλληλοι, κέκτονται ἠθικὸν συμφέρον, ὅπως ἡ εὐνομία καὶ ἡ ὑπηρεσιακὴ τάξις διέπῃ τὸ συγκροτοῦν τὸν κλάδον τοῦτον ὑπαλληλικὸν προσωπικόν, ἰδίᾳ δὲ ὅπως αἱ ἀνώτεροι θέσεις κατέχονται νομίμως.....". This case is cited, as a leading case by Stasinopoulos (*supra*, at p. 201).

In the above case the legitimate interest of the Applicant was found to be a moral one; and actually there is express provision made in section 48 of Law 3713/1928 that the legitimate interest of an Applicant need not be a pecuniary one.

I am inclined to the view that though no such provision has been expressly made in our Article 146.2 nevertheless, a moral interest should be deemed as included in the notion of "interest" therein, because of the fact that such notion must

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have been based on the notion of "interest" as it has evolved in Administrative Law, in Greece and elsewhere. But no definite decision need be reached regarding the exact extent of the meaning of the term "interest" in 146.2, because, as it will be seen from what follows next, the relevant interest of the Applicant is not merely a moral one, but also a material one as well.

It is common ground that the matter of the correct date of birth of the Interested Party has been raised in connection with the proper date of her retirement from service on her attaining the age of fifty-five years. When this takes place the post of Senior Dental Officer will fall vacant. It is not disputed that the Applicant has, at all material times, been eligible for such post, which is a post higher than his own and carries greater responsibility coupled with increased emoluments (see the relevant provision made in the Budget for 1966, Law 1/66). So when the post of Senior Dental Officer falls vacant on the retirement of the Interested Party, the Applicant would stand a chance (and not a remote one, in view of his seniority as a Dental Officer, 1st grade) to gain both moral and material advancement through promotion to Senior Dental Officer; and so long as the retirement of the Interested Party does not take place the said chance of the Applicant cannot materialize.

It is useful, in this connection, to note that the French Council of State, in dealing with the notion of legitimate interest, in relation to recourses corresponding to those under our Article 146, has held in, *inter alia*, the case of *Charles* (decided on the 1st July, 1955 — reported in Collection Lebon vol. 1955 p. 379) that public officers may challenge illegal appointments which prejudice them by retarding irregularly their advancement (. . . les fonctionnaires appartenant à une administration publique ont qualité pour déférer à la juridiction administrative les nominations illégales faites dans cette administration lorsque ces nominations sont de nature à leur porter préjudice en retardant irrégulièrement leur avancement. . .”).

In the light of all the foregoing, and in the particular circumstances of this Case, I have reached the conclusion that the Applicant possesses a legitimate interest in the matter of the legality of the Interested Party's continuing service in the post of senior Dental Officer; such interest is an existing one, because the Applicant has been qualified for such post at all material times, and it has been adversely and directly affected by the refusal of the Respondent Commission to

examine the matter of the proper date of birth, and, consequently, of the lawful date of retirement, of the Interested Party.

Counsel for the Interested Party, who has argued at some length the issue of legitimate interest of the Applicant, has submitted, *inter alia*, that the Applicant does not possess an existing legitimate interest because there exist between the posts of Dental Officers, 1st grade, and the post of Senior Dental Officer, two vacant posts of Dental Registrars. As it appears from the Budget for 1966 (Law 1/66) these two posts of Dental Registrars are new posts which have been interposed between the post of Senior Dental Officer and the posts of Dental Officers, 1st grade; at the time of the hearing of this Case they were still vacant. It cannot be reasonably assumed that when the post of Senior Dental Officer falls vacant, on the retirement of the Interested Party, no appointment will be made thereto, but only the posts of Dental Registrars will be filled; the post of Senior Dental Officer is the post of the Head of the Dental Section and it is bound to be filled anew. So long as the Applicant is, admittedly, eligible for appointment to the post of Senior Dental Officer itself, the existence of the said two posts of Dental Registrars — which have been created, but never filled yet — does not, in any way, prevent his legitimate interest from being an existing one, and from being directly and adversely affected by the *sub judice* decision; and no suggestion has been made that he cannot be appointed directly to the post of Senior Dental Officer without first being appointed as a Dental Registrar. It might have been otherwise had the posts of Dental Registrars being held by others, in which case the Applicant's claim to be appointed to the post of Senior Dental Officer might have appeared *prima facie* as too remote for the purposes of the existence of a legitimate interest of his in the matter of the retirement of the Interested Party.

It has, also, been argued by counsel for the Interested Party that the Applicant is not entitled, under Article 146.2, to make this recourse because, in any case, this recourse was filed and heard prior to the alleged date of retirement of the Interested Party, *i.e.* the 26th December, 1966; thus, no existing interest of his was affected at the time.

It is quite correct that the requirements of Article 146.2 must be satisfied at the time of the filing and hearing of a

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recourse, but such requirements are satisfied if at the said material times it is clear that the existing interest of an Applicant, though not yet actually adversely and directly affected, is unavoidably bound to be so affected eventually (see Conclusions from the Jurisprudence of the Greek Council of State, 1929–1959 p. 260). And there can be no doubt in the present Case that the refusal of the Respondent Commission to examine the question of the proper date of birth of the Interested Party took place so proximately near, in point of time, to the alleged proper date of her retirement, that the unavoidable consequence of such refusal was the continuance in service of the Interested Party after such date, thus adversely and directly affecting the relevant legitimate interest of the Applicant – assuming, of course, as it has to be assumed for the purposes of the issue of the existence of the prerequisites under Article 146.2, that the correct date of retirement of the Interested Party were to be found to be the 26th December, 1966, (in accordance with her originally accepted date of birth) and not the 26th December, 1967 (in accordance with her currently accepted date of birth).

Having found that the Applicant is entitled, under Article 146.2, to make this recourse, this Court should examine next, whether or not he is to succeed in it.

It may be stated right at the outset that no question could arise of an omission of the Commission to correct the date of birth of the Interested Party – as complained of by the Applicant in the motion for relief in the Application – simply because the Commission in this Case has not, as it is clear from its relevant minutes (*exhibit 1*), refused to correct such date, having entered upon the substance of the matter; it has refused to examine, at all, such matter.

So all that there could be found to exist in this Case would be an omission to deal with the issue of the date of birth of the Interested Party, as raised by the letter of the 10th January, 1966, (*exhibit 3*).

I take the view that a claim for such an omission can fairly be deemed to be included in the motion for relief in the Application in this recourse, because the greater, naturally, includes the lesser.

For an omission to arise, there should first exist a duty to take a certain course of action; there can be no question of

an omission when it is discretionary whether or not to take a certain course. Was there, then, a duty of the Commission to examine the issue in question?

The competence of the Public Service Commission, as provided for under paragraph 1 of Article 125 of the Constitution, is as follows:

“Save where other express provision is made in this Constitution with respect to any matter set out in this paragraph and subject to the provisions of any law, it shall be the duty of the Public Service Commission to make the allocation of public offices between the two Communities and to appoint, confirm, emplace on the permanent or pensionable establishment, promote, transfer, retire and exercise disciplinary control over, including dismissal or removal from office of, public officers”.

It follows that decisions relating to retirement of public officers – other than administrative action implementing retirement and taken automatically by operation of law – are among the duties of the Commission (see *Ali Rouhi and The Republic*, 2 R.S.C.C. p. 84 at p. 87); consequently the examination of the matter of the correct date of birth of an officer, in relation to his or her retirement, is part of the Commission's duties (see *Ieromonachos and The Republic*, 4 R.S.C.C. p. 82).

But, did the Commission have competence to deal with the correct date of birth of this particular officer, the Interested Party? This question has to be answered because, in spite of the generality of the provisions of paragraph 1 of Article 125, it has been argued by counsel for the Interested Party that she is entitled – by virtue of Article 192 (1) of the Constitution – to retire on the date on which she was due to retire before the 16th August, 1960, when the Constitution came into operation; and that, therefore, in this particular Case the Commission was not competent to examine the correctness of the date of birth of the Interested Party, as such date had been fixed before the 16th August, 1960.

What are protected under Article 192.1, for the benefit of public officers within its ambit, such as the Interested Party, are the “terms and conditions of service” applicable to them before the 16th August, 1960. In the light of the definition

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of "terms and conditions of service" in paragraph 7 (b) of Article 192, which includes "removal from service", it appears that "retirement" is covered by such definition.

In my opinion the terms and conditions of service — relating to the time of occurrence of retirement — which are safeguarded under Article 192.1, can be nothing else than the provisions regulating such occurrence, through fixing, *inter alia*, the relevant age-limit; surely, such terms and conditions of service cannot be said to include a wrong assumption of fact about any particular officer's date of birth.

By operation of law an officer has to retire on reaching the prescribed age of retirement; the exact date on which, as a matter of fact, he does attain such age is a thing to be ascertained in the interests of legality; if necessary, this may be done, in the proper manner, at any time during the service of the officer concerned and it makes no difference, in my opinion, whether or not an officer is one of those within the ambit of Article 192.1, because it could not have been the intention of Article 192.1 to safeguard a vested interest in the eventual illegality which would be involved in a retirement based on a wrongly relied upon date of birth.

For the same reasons, as well as because of the continuity of administration in cases of State Succession, I am of the view that the Commission is not precluded from dealing with the question of the date of birth of an officer in a case in which such date has been fixed by an act of the past Colonial Government of Cyprus; the Commission in such a case would not be exercising its competence in respect of a past period, prior to its creation, but it would be making an ascertainment of the correct facts so as to ensure legality of action in respect of the present.

It follows, therefore, that the Commission was competent to deal with the matter of the date of birth of this particular officer, the Interested Party.

The next question that arises is: Did the Commission, in the circumstances of the present Case, *have* to exercise its relevant competence?

This leads us to the very wide issue of in what circumstances does the Commission *have* to discharge its duties under

Article 125 (1); when is it bound to examine matters within its constitutional competence?

Such issue need not, and cannot, be resolved in full in the present Case; only certain pertinent aspects thereof will, therefore, be dealt with.

Subject to the provisions of any Law regulating the matter, I am of the view that the Commission is bound, for the sake of proper administration, to consider and decide a matter relating to the proper date of retirement of a public officer if it is requested so to do by the appropriate Minister or Head of Department. One of the objects of the competence vested in the Commission under Article 125.1 is the safeguarding of the proper functioning of the public service (see *Nedjati and The Republic*, 4 R.S.C.C. p. 78 at p. 82). The proper date of retirement of a public officer, being a matter of legality, is part and parcel of the proper functioning of the public service. So, when a Minister or Head of Department, who is *virtute officio* responsible for the proper functioning of the branch of public service under him (see *Ozturk and The Republic*, 2 R.S.C.C. p. 35 at p. 42) requests the Commission to exercise its relevant competence under Article 125.1, it is duty-bound to do so.

Did, in the present Case, the Commission have before it, when it took its *sub judice* decision, such a request from the appropriate Ministry as to render it duty-bound to deal with the question of the date of birth, and consequently the date of retirement, of the Interested Party?

The letter of the then Acting Minister of Health dated the 24th March, 1966 (*exhibit 5*) could be deemed to be a request by the Ministry of Health, for necessary action, on the part of the Commission; but there followed, later, on the 13th May, 1966, a further letter (*exhibit 4*), by a new Acting Minister of Health, in which it was expressly stated that it was open to the Commission to decide that it did not wish or intend to examine the matter, and let anyone with an interest in the matter seek his remedy before the competent Court.

Thus, when the stand of the Ministry of Health in the matter is viewed as a whole there can be no doubt that it was not requesting, in the interests of proper administration and of the proper functioning of its services, that the question of

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the correct date of birth of the Interested Party be dealt with on its merits by the Commission, in the exercise of its relevant competence, but the said Ministry was only requesting that the Commission should make up its mind as to whether or not it was going to deal with the matter, so that a reply could be given to the letter of the 10th January, 1966, of the Association of Government Dental Officers (*exhibit 3*).

I find, therefore, that no question of an omission of the Commission to take action, on a request by the Ministry of Health, arises in this Case.

But, in my opinion, the Commission's duty to exercise its competence under Article 125.1 does arise, also, when the Commission is called upon by a public officer to deal with a matter affecting a legitimate interest of his. This is so because, as held in *Nedjati and The Republic* (*supra* at p. 82) one of the objects of Article 125.1 is also the protection of the legitimate interests of the individual holders of public offices; and the more so, in view of Article 29.1 of the Constitution, which provides that:

“Every person has the right individually or jointly with others to address written requests or complaints to any competent public authority and to have them attended to and decided expeditiously; an immediate notice of any such decision taken duly reasoned shall be given to the person making the request or complaint and in any event within a period not exceeding thirty days”.

In the present Case the Commission had before it a complaint emanating from the Association of Government Dental Officers — all of them being public officers, and one of them being the Applicant; on the basis of all that has been stated earlier on in this Judgment it is quite clear that it was a complaint emanating from public officers whose legitimate interests were involved in the matter of the correct date of birth, and therefore of the retirement, of the Interested Party.

I have, therefore, no difficulty in holding that the Commission had a duty, under Article 125.1, to deal with the complaint before it.

It is correct that the said complaint was not addressed directly to the Commission; it was addressed to the Minister of Health. But it must not be lost sight of that the Ministry

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of Health is the Ministry under which the Government Dental Officers work and it was, therefore, only proper and natural for them to address their complaint, in the first place, to their Minister; and the fact remains that through the Minister of Health their complaint did reach the competent organ *i.e.* the Commission.

Therefore, I do not think that it could validly be said that no need of the *deus* discharge by the Commission of its constitutional duty did arise, because of the fact that the relevant complaint was not addressed directly to it, but reached it through an official channel which the Government Dental Officers were entitled to use in the course of proper administration; and actually, as it appears from the relevant decision of the Commission (*exhibit 1*), the Commission itself did not take the view that it did not have a duty to deal with the complaint in question on the ground that it had not been addressed directly to the Commission; it refused to deal with it for other reasons.

Having held that the Commission had a duty to deal with the complaint of the Dental Officers—including the Applicant—once it had reached the Commission through the Ministry of Health, it is necessary to examine, next, whether the Commission, in the circumstances of this Case, could be held to be justified in not doing so:

The Commission has stated the following, at the end of its *sub jube* decision (*exhibit 1*), by way of reasoning for its refusal to act: "The Commission bearing in mind the irregular manner in which this matter has been dealt with by the Minister of Health and the enquiry carried by the Attorney-General and the decision on the validity of the act which in the mind of the Commission prejudices the point under examination by it and also bearing in mind the number of legal points raised in this case including the revising power suggested and the *non-existence of any Law on the different points and also bearing in mind the letter of the present Minister Mr. T. Papadopoulos dated 13.5.66., decided not to deal with the matter and let anybody affected to have a recourse to the Court*".

Earlier on in its decision the Commission had referred to the fact that the Minister of Health had taken "a number of actions" in the matter, and also to the fact that the Attorney-General had gone into the matter and came to the conclusion

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that the change of the date of birth of the Interested Party — in 1960 — was wrongly made.

The Commission has also mentioned in its decision that “no Law of the Republic” had been cited in support of the view of the Attorney-General that the Commission had a right to re-open the matter, but only “precedents in other countries”; also, that two points had been raised by the Personnel Officer, one regarding the possibility of revoking an act — the earlier change of the date of birth of the Interested Party — after the lapse of seven years, and the other as to whether or not the said act, as made by the Colonial Government before the establishment of the Republic, could be re-opened by the Republic.

Although I do appreciate fully the complications facing the Commission in this matter I cannot find that they could be held to amount to justification for its refusal to examine the issue of the date of birth of the Interested Party.

No matter what other organs, such as the Minister of Health and the Attorney-General, might have done in the matter — assuming even, without, however, finding thus, that they did more than it was expected of, or open to, them — the Commission could not avoid its constitutional duty on such a ground. Nor can there be any question of the Commission being prejudiced by the enquiry carried out, and the conclusion reached, by the Attorney-General; the Commission remained free to conduct its own inquiry and had to reach its own conclusion, on the basis of all relevant material, including the material which was unearthed by the Attorney-General in making his own enquiries.

It is quite true that a number of difficult legal problems might have to be resolved but their existence could not, in any event, properly lead to a decision by the Commission to refuse to deal with the matter; the Commission was not bound to resolve itself the said legal problems, but it could refer them back to the Attorney-General for further advice.

The absence of legislation of the Republic governing the matter concerned is indeed a handicap; but not such as to justify the Commission in refusing to act; as held, already, in *Morsis and The Republic* (4 R.S.C.C. p. 133 at p. 136) the Commission is not only entitled but also bound to exercise its competence under Article 125 of the Constitution without

awaiting the enactment of legislative provisions regulating the exercise of such competence.

Lastly the letter of the Minister of Health dated 13th May, 1966 (*exhibit 4*), though it may have had the effect of putting an end to a request for appropriate action emanating from another organ such as the Ministry of Health, could not absolve the Commission of its duty to deal with the complaint of the Association of Government Dental Officers, of which Applicant is a member; once there were persons properly entitled to raise the matter of the correct date of birth of the Interested Party the Commission had to deal with it, within its competence, irrespective of a request by the Ministry of Health.

For all the above reasons I am of the opinion that, in the circumstances of this Case, the Commission's refusal to deal with the matter raised by the letter dated the 10th January, 1966 (*exhibit 3*) amounts to a wrongful omission and it is hereby declared that such omission ought not to have been made and that what has been omitted should have been performed.

Thus, the Commission has now to examine the matter raised by the aforesaid letter of the 10th January, 1966; but let it be made abundantly clear that nothing in this Judgment should be construed as laying down, in the least, how the Commission has to decide such matter. The omission of the Commission that has been found to exist is an omission to examine the matter of the proper date of birth of the Interested Party, as raised by the letter of the 10th January, 1966 (*exhibit 3*); not an omission to correct such date of birth. The alteration or not of the said date is a matter to be decided upon in the proper exercise of the Commission's discretion and powers, after paying due regard to all relevant considerations of fact and law.

Regarding costs, I have decided to make no order as to costs because this is a Case in which the Respondent Commission has had to act in a novel and difficult situation and the omission of which it has been found guilty is not due to any lack of diligence or *bona fides* on its part, but is one due to a mistaken view of its role in this matter.

*Declaration in terms.
No order as to costs.*

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