IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

THE MINISTER OF FINANCE,

Applicant,

and

THE PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 193/67).

Administrative and Constitutional Law—Recourse under Article 146 *of the Constitution—Recourse by Minister of Finance, in his official capacity, for annulment of a decision of the Public Service Commission in disciplinary proceedings against an Assistant Assessor in the Department of Inland Revenue—Such recourse is not maintanable for two reasons:* (1) *lack of legitimate interest directly affected by the* sub judice *decision within paragraph* 2 *of Article* 146; (2) *in a case such as the present one, a recourse by one organ of Administration against the decision of another organ of Administration is not possible in the absence of legislation for the purpose—Article* 146, *paragraphs* 2 *and* 6 *read in the light of Article* 151.2 *of the Constitution—Comparison between Cyprus, Greek and French Law on the subject—See, also, below.*

Legitimate interest directly affected within Article 146.2 *of the Constitution—See above.*

"Person" in Article 146.2 *of the Constitution—In the present case the Applicant Minister of Finance is not a "person" entitled to challenge the* sub judice *decision by means of a recourse under that Article.*

Recourse under Article 146 *of the Constitution—Such recourse is aimed at the particular decision concerned, and not at the organ responsible for it—Therefore, the process of judicial review cannot be frustrated by any secondary consideration, such as the exact title of the proceedings—See, also, above and below.*

Practice—Title of proceedings—Litigation between two organs of Government—Scope of the Practice Direction in Christodoulou *and* The Republic, 1 *R.S.C.C.* 1, *at p.* 9. *See, also, immediately above.*

Words and Phrases—"Person" in Article 146.2 of the Constitution.

Public Service Commission—Decision of Commission in disciplinary proceedings against a public officer—Whether such decision can be challenged by the Minister concerned—See above.

This recourse is made by the Minister of Finance, in his Official capacity, against the Public Service Commission whereby it is being sought to declare *null* and *void*, under Article 146 of the Constitution, part of a decision of the Respondent Commission, reached on the 28th July, 1967, in disciplinary proceedings against the Interested Party, A. Menelaou, an Assistant Assessor in the Department of Inland Revenue That Department does, admittedly, come under the Ministry of Finance.

Certain legal issues raised by the Opposition filed by the Respondent were heard as preliminary issues. They amount, in effect, to whether or not the Applicant Minister did have a right of recourse under Article 146 in the present matter, and to whether or not, in any case, the requirements regarding legitimate interest laid down by Article 146.2 of the Constitution, were satisfied in this case, so as to entitle the Minister to file this recourse; a subsidiary procedural issue was also raised regarding the proper title of the proceedings, namely, whether or not the description of both the Applicant and the Respondent should have been "The Republic through", respectively, "The Minister of Finance" and "The Public Service Commission".

Paragraphs 1, 2 and 6 of Article 146 of the Constitution provide –

> "1. The Supreme Constitutional Court shall have exclusive jurisdiction 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 this Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person.
>
> 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"

6. Any person aggrieved by any decision or act declared to be *void* under paragraph 4 of this Article or by any omission declared thereunder that it ought not to have been made shall be entitled, if his claim is not met to his satisfaction by the organ, authority or person concerned, to institute legal proceedings in a court for the recovery of damages or for being granted other remedy and to recover just and equitable damages to be assessed by the court or to be granted such other just and equitable remedy as such court is empowered to grant".

In dismissing the recourse, the Court:-

Held, I. As to the procedural point regarding the proper title of the proceedings:-

(1) In administrative law a recourse is regarded as being aimed at the particular administrative decision concerned, with a view to bringing it under proper judicial review, and not as aimed at the organ responsible for it. Thus, the process of judicial review cannot be frustrated by any secondary consideration, such as the exact title of the proceedings.

(2) In any case, though it is correct that a recourse made against an act, decision or omission of an organ of Government should be instituted against "The Republic", through such organ (see the Practice Direction in *Christodoulou* and *The Republic*, 1 R.S.C.C. 1, at p. 9), nevertheless in a case such as the present one, where there is being attempted to litigate between two organs of Government regarding the validity of the decision of one of them, I do not think it was necessary, or proper, to have the Republic appear at the same time both as the Applicant and the Respondent in the title of the proceedings.

Held, II. As to the issue of "legitimate interest":

(1) Though under Article 58 of the Constitution a Minister is the "Head of his Ministry", nevertheless the provisions of paragraph 2 of Article 146 of the Constitution are so framed as to require that the person making the recourse should be the one *directly* affected; so, assuming for the moment that the *sub judice* decision could, otherwise, be made the subject-matter of the present recourse, such recourse could only have been instituted by the Head of the Inland Revenue, the proper functioning of which is, allegedly, affected by such decision; the Applicant Minister

could only be deemed to be *directly* affected if the said decision interfered with the proper functioning of his Ministry—the word Ministry being understood in the narrow sense of the term, and not including all Departments coming under it.

(2) For the foregoing reason, this recourse, even if it could otherwise be made, has to fail and it is dismissed.

Held, III. As to the issue whether or not the sub judice *decision could be challenged at all by the Applicant Minister, by means of a recourse under Article* 146 *of the Constitution:*

(1) On a proper construction of Article 146, read in the light, also, of Article 151.2, a recourse by one organ of Administration against the decision of another organ of Administration is not possible in a case such as the present one.

(2) In this respect Article 146 has to be read as a whole and, bearing, also, in mind the provisions of paragraph 6 thereof *(supra)*, I cannot see how the present Applicant could properly make this recourse under Article 146, in the absence of legislation enabling (as in Greece) a Minister to make a recourse in a matter affecting a public officer. *(Ozturk* and *The Republic,* 2 R.S.C.C. 35, considered and *distinguished).*

(3) On the other hand, I have not been able to derive such decisive guidance from the essentially different, and much more developed position, in France, as would lead me to the conclusion that Article 146 of the Constitution, as it stands by itself, should be applied in such a manner as to enable the Applicant to make this recourse under it.

(4) By this Judgment I am not excluding the possibility of the existence of a case in which a Minister as a Head of Department may happen to be so personally involved in, and affected by, a decision of the Public Service Commission, that he may have a right of recourse, under Article 146, against the said decision; because in such a case he could still be affected in his official capacity, but also, at the same time personally; I leave this aspect entirely open.

(5) In the result this recourse fails.

Recourse dismissed.
No order as to costs.

Cases referred to

Ozturk and *The Republic*, 2 R S C C 35,

Christodoulou and *The Republic*, 1 R S C C 1, *Practice Direction* at p 9,

Decision of the Greek Council of State 803/1931,

Decisions of the French Council of State Cadot, of the 13th December 1889;

Ministre de l' Interieur of the 2nd November 1934,

Percepteurs Y c Sieurs X . et

Directeur de la compatibilité publique of the 10th March, 1923.

Recourse.

Recourse for a declaration that part of a decision of the Respondent Commission, reached on the 28th July, 1967, in disciplinary proceedings against the interested Party, A Menelaou, an Assistant Assessor in the Department of Inland Revenue, is *null* and *void*

K. Talarides, Senior Counsel of the Republic, for the Applicant.

L. Clerides, for the Respondent.

A. Pantelides, for the Interested Party.

Cur adv. vult.

The following Judgment was delivered by

TRIANTAFYLLIDES, J · This recourse was filed by the Minister of Finance, in his official capacity, as an organ of Government—and not personally—against the Public Service Commission.

It is being sought hereby to declare *null* and *void* and of no effect whatsoever, under Article 146 of the Constitution, part of a decision of the Respondent Commission, reached on the 28th July, 1967, in disciplinary proceedings against the Interested Party, A. Menelaou, an Assistant Assessor in the Department of Inland Revenue.

Such Department does, admittedly, come under the Ministry of Finance.

The main grounds on which the relief in question is claimed

by the Applicant Minister are that the Respondent Commission erroneously failed to take into account, in relation to the charges before it, statements made previously by the Interested Party, which were, allegedly, relevant, and furthermore, that the Respondent's decision was contrary to the facts proved by evidence before it.

The legal issues which were raised by paragraphs 1, 2 and 3 of the Opposition, filed by the Respondent, were heard as preliminary issues. They amount, in effect, to whether or not the Applicant did have a right of recourse under Article 146 in the present matter, and to whether or not, in any case, the requirements regarding legitimate interest, laid down by Article 146.2, were satisfied in this case, so as to entitle the Applicant to file this recourse; there was, also, raised a subsidiary issue regarding the proper title of the proceedings, namely, whether or not the description of both the Applicant and the Respondent should have been "The Republic through", respectively, "The Minister of Finance" and "The Public Service Commission".

I start by dealing, first, with the issue regarding the title of the proceedings:-

In administrative law a recourse is regarded as being aimed at the particular administrative decision concerned, with a view to bringing it under proper judicial review, and not as aimed at the organ responsible for it; thus, once such decision is before the Court, by means of appropriate proceedings instituted by a person properly entitled to do so, the process of judicial review cannot be frustrated by any secondary consideration, such as the exact title of the proceedings.

In any case, though it is correct that a recourse made against an act, decision or omission of an organ of Government should be instituted against "The Republic", through such organ (see the Practice Direction in *Christodoulou* and *The Republic*, 1 R.S.C.C., 1. at p. 9), nevertheless in a case such as the present one, where there is being attempted to litigate between two organs of Government regarding the validity of the decision of one of them, I do not think that it was necessary, or proper, to have the Republic appear at the same time as both the Applicant and the Respondent in the title of the proceedings.

Coming next to the issue of legitimate interest, I take the view that though, indeed, under Article 58 of the Constitution, a Minister is the "Head of his Ministry", and though the Department of Inland Revenue does come under the Ministry of Finance, nevertheless the provisions of paragraph 2 of Article 146 of the Constitution are so framed as to require that the person making a recourse should be the one *directly* affected; so, assuming for the moment that the *sub judice* decision could, otherwise, be made the subject-matter of the present recourse, such recourse could only have been instituted by the Head of the Department of Inland Revenue, the proper functioning of which is, allegedly, affected by such decision; the Applicant Minister could only be deemed to be *directly* affected if the said decision interfered with the proper functioning of his Ministry—the Ministry being understood in the narrow sense of the term, and not including all Departments coming under it.

For the foregoing reason, this recourse, even if it could otherwise be made, has to fail, and it is dismissed accordingly.

There is, however, a further reason for which this recourse should fail:

I am in agreement with counsel for the Respondent and the Interested Party that, in the circumstances of this case, the *sub judice* decision could not be challenged at all, by the Applicant, by means of a recourse under Article 146.

I am of the opinion that on a proper construction of such Article a recourse by one organ of Administration against the decision of another organ of Administration is not possible in a case such as this one.

In this respect Article 146 has to be read as a whole and, bearing, also, in mind the provisions of paragraph 6 thereof, I cannot see how the present Applicant could properly make this recourse under Article 146; under this Article one part of the Administration cannot make such a recourse against another part of the Administration (and by Administration I mean, for the purposes, at any rate, of this Judgment, the central Administration of the Republic, of which both the Applicant and the Respondent are parts, even though the Respondent is an independent organ within such Administration).

When one reads Article 146—in the light, also, of Article

151.2—there can be little doubt that the competence brought into being thereunder is of the same nature, in so far as a recourse for annulment is concerned, as the corresponding competence vested in the Greek Council of State under the provisions of Law 3713 (codifying Law 3713/1928 and subsequent amending enactments).

In Greece the view was taken that under section 48 of Law 3713—which corresponds to our Article 146—public authorities, as such, cannot make a recourse for the annulment of an administrative decision affecting an individual or a legal person, unless there does exist express legislative provision enabling such a course (see, *inter alia,* Decision 803(31) of the Greek Council of State and Stassinopoullos on the Law of Administrative Disputes (1964) p. 201); and, actually, in 1940 provision was made (see section 33 of Law 3713 as amended by section 3 of Law 2502/1940) enabling a Minister to make a recourse to the Council of State regarding certain administrative decisions in relation to matters of dismissal or demotion of public officers.

In spite of some difference in the wording between section 48 of Law 3713 and Article 146, I do not think that when one reads Article 146 as a whole (including, as already stated, its paragraph 6) he could reach the conclusion that the nature of the competence created under the latter is, in any substantial way, different from that created under the former.

No legislation enabling a Minister to make a recourse in a matter affecting a public officer exists as yet in Cyprus—desirable though it might be in certain respects.

It is correct that in the case of *Ozturk* and *The Republic*, (2 R.S.C.C., p. 35) the Supreme Constitutional Court has pointed out in its Judgment—by way, really, of an obiter dictum—that "the word 'person' in paragraph 2 of Article 146 should be interpreted as including, in a proper case, a person acting in an official capacity". This view was expressed in relation to a situation in which the Public Service Commission could not reach any valid decision at all, due to the complex relevant requirements of paragraph 3(3) of Article 125 of the Constitution not being satisfied; and it was thought that in such a situation it was the intention of the Constitution that there should be a remedy available to the person responsible for the affected branch of the public service, so that the validity of the course adopted by those

members of the Commission, who had prevented the taking of a decision by it, could be tested before the Court.

On the other hand, it was stressed in the *Ozturk* case that once the Commission had reached a decision no recourse against it was open to a person acting in an official capacity.

The situation in the present case is clearly distinguishable from the situation in which, according to the *Ozturk* case, a recourse under Article 146 could lie by a person acting in an official capacity, because here the Applicant complains against a decision of the Commission, and not against its having not reached any decision at all.

It has been argued by learned counsel for the Applicant that, this being a case of disciplinary proceedings, it was essentially different from any other case in which a decision of the Public Service Commission is reached in relation to a public officer, and that, therefore, this is another instance of "a proper case" in which to interpret the word "person" in Article 146.2 as including a person acting in an official capacity; and that, therefore, a recourse was open to the Applicant, even though the Commission *had reached* a decision in the matter.

I agree that the acquittal of a public officer, in a disciplinary case before the Commission, may create a difficult situation for his superiors, especially if the latter happen to hold strongly the view that such discharge was an erroneous one and will affect the proper functioning of the branch of the public service under them. But the same would apply, with more or less equal force, in the case of a refusal by the Commission to transfer, at the request of his superiors, an uncooperative officer, or in the case of the appointment to a vital post of an officer who is deemed by his superiors to be by far the worse out of the eligible candidates; all such things, and many others, could seriously influence the functioning of a Ministry or a Department. Nevertheless, I cannot accept that it is the object of Article 146—by itself and without being coupled with legislation for such a purpose—to provide a remedy for situations such as these; to hold otherwise would be to go entirely contrary to the essential nature of the competence under Article 146.

Reference has been made, in the course of argument, by counsel for the Applicant, to, *inter alia*, French law on

this subject. I do appreciate all the hard work which he has done in this connection, but I really cannot find much guidance in French law, because the position, in this respect, in France, is fundamentally different from our own.

In Cyprus we have to act within the rigid framework of the provisions of Article 146. In France the analogous jurisdiction started to be developed, primarily, by case law (such as the famous case of *Cadot* decided on the 13th December, 1889, when the French Council of State decided that it was a tribunal of general jurisdiction—juge de droit commun —in the field of administrative law) and proceeded to evolve by means of a combination of jurisprudence and statutory provisions. The French administrative law judges had a much wider scope to fit the said jurisdiction to the changing needs of proper administration, than it is open to this Court, here in Cyprus under only Article 146; and, moreover, whenever necessary, special legislation was being enacted, from time to time, for the purpose.

The above difference is shown by certain cases decided by the French Council of State, two of which are referred to in Auby & Drago on Contentieux Administratif (1962) vol. II, p. 515, and have also been referred to by counsel for the Applicant:-

The first one is the case of *Ministre de l' Interieur,* decided on the 2nd November, 1934; there the Council of State recognized to the Minister of Interior a right of recourse against decisions of the Minister of Pensions of a certain category, by way, apparently, of a necessary reciprocal remedy, in view of the fact that legislation had expressly granted a right of recourse to the Minister of Pensions against decisions of other organs in the matters concerned.

The others are three cases decided by the Council of State on the 10th March, 1923; from one of them, *Percepteurs Y.....c. Sieurs X.....et directeur de la compatibilité publique*—in which the Minister of Finance was one of the Applicants—it appears clearly that as early as the 22nd July, 1806, the right of Ministers to institute proceedings before the Council of State had been regulated by Decree; the other two cases, decided on the same date, were recourses by the Minister of Finance by way of appeal against decisions in public finance matters by Prefecture Councils, which had acted in such matters as first instance administrative courts.

I, thus, have not been able to derive such decisive guidance from the essentially different, and much more developed position, in France, as would lead me to the conclusion that Article 146, as it stands by itself, should be applied in such a manner as to enable the Applicant to make this recourse under it.

Of course, I am not excluding the possibility—by this Judgment—of the existence of a case in which a Minister or a Head of Department may happen to be so personally involved in, and affected by, a decision of the Public Service Commission, that he may have a right of recourse, under Article 146, against the said decision; because in such a case he could still be affected in his official capacity, but also, at the same time, personally; I leave this aspect entirely open.

In the result this recourse fails and it is dismissed, but there should be no order as to costs.

Recourse dismissed.
No order as to costs.