IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

EMMANUEL VASSILIOU AND OTHERS,

Applicants,

and

THE REPUBLIC OF CYPRUS, THROUGH
1. THE MINISTRY OF EDUCATION AND
2. THE EDUCATIONAL SERVICE COMMITTEE,

Respondents.

(*Cases Nos.* 327/68, 354/68, 375/68).

Public law—Contractual appointment of master in the Greek Secondary Education—Appointment made on contract but for the purpose of serving actual and ordinary needs of public education and not being an extraordinary appointment made in special circumstances—Held to be a matter within the realm of public law and as such it can be challenged by a recourse under Article 146 *of the Constitution—The case of* Paschalides v. The Republic, *reported in this Part at p.* 297 ante followed.

Administrative act or decision—Executory act—Composite administrative action—Priority list containing the names of the candidates to be considered for appointment to the post of master of commercial subjects in the Greek Secondary Education—Such list adopted and relied upon for the purpose of appointments which eventually were made—The said list is, therefore, an executory act, crystallizing the rights of candidates to be appointed and thus producing a definite legal situation—And as such it can be challenged by the recourse under Article 146 *of the Constitution—But in the instant case the said list being part of a composite administrative action which resulted in appointments loses its executory nature after said appointments were made—Therefore the recourse, against it, filed before appointments, cannot be proceeded thereafter as such recourse is deprived of a subject-matter that can be attacked by recourse under Article* 146 *of the Constitution.*

Recourse under Article 146 *of the Constitution—See hereabove.*

Contract—Appointment on contract—May be in certain circumstances challenged by recourse under Article 146 *of the Constitution.*

Public Service and Public Officers—Appointment on contract—See above.

Secondary Education—Appointments of masters of commercial subjects—Non consideration of graduates of a certain school as candidates—Reasonably open to the Respondent Educational Service Committee in view of educational needs.

Secondary Education—Educational Service Committee—Laying down certain specific criteria in selecting the most suitable among persons entitled to be considered as candidates for appointment to the post of master of commercial subjects—A proper course for selecting the most suitable candidate—The relevant legislation laying down only the general qualifications entitling candidates to be considered for appointment.

Discretionary powers—Excess or abuse of powers—Proper use of such powers vested in the Educational Service Committee—See hereabove under Secondary Education.

In these three case Nos. 327/68, 354/68 and 375/68 which have been heard together the relief claimed by each Applicant is as follows:–

The Applicant in case No. 327/68 challenges only the validity of a priority list, which was prepared and published by the Respondent Educational Service Committee regarding the making of appointments to the post of master of commercial subjects in the Greek Secondary Education; in particular he challenges the inclusion ahead of him in such list of eight Interested Parties, himself being No. 9 therein. The Applicants in the two other cases challenge the validity of the appointments as masters of commercial subjects of certain of those whose names appear in the list (*supra*). It is to be noted that as there had not been given, in time, approval for the creation of the necessary organic posts, the Respondent Committee decided to and did appoint on contract as masters of commercial subjects the Interested Parties.

Regarding case No. 327/68 (*supra*) it was argued, *inter alia*, that the list challenged (*supra*) was not an executory act and, consequently, it could not be made the subject of a recourse under Article 146 of the Constitution. On the other hand,

regarding the two other cases counsel appearing for some of the Interested Parties raised the objection that no such recourse lies against the appointments made as aforesaid, on the ground that they were made on contract and thus, they were not matters within the realm of public law and, consequently, they were outside the ambit of Article 146 of the Constitution and could not be attacked by means of the recourse provided under that Article.

Rejecting the said objections but dismissing the three recourses for other reasons, the Court:

Held, I. As regards case No. 327/68 (supra).

(1) Bearing in mind that the priority list in question (*supra*) was decided upon as a final priority list, crystallizing the rights of candidates to be then appointed and that it was not only published as such but that it was, also, actually relied upon for the purpose of making the relevant appointments, I cannot but find that the list was indeed an executory act which could be challenged by the recourse under Article 146 of the Constitution, in that it produced a certain definite legal situation directly affecting those concerned.

(2)(a) On the other hand, there is no doubt that such list was part of the composite administrative action which resulted in the said appointments.

(b) Once this is so, I am of the opinion that, after the appointments were made, the list lost its executory nature and, therefore, the recourse in case No. 327/68 (*supra*), which was filed before the appointments, could not be proceeded with thereafter, as it was deprived of a subject–matter that could be attacked by recourse viz. the list as an executory act (see Conclusions from the Jurisprudence of the Greek Council of State 1929–1959 at p. 244; cf. the decision of the Greek Council of State No. 648/1956).

(3) In view of the foregoing the recourse in case No. 327/68 fails and is dismissed accordingly.

Held, II. Regarding the objection raised in cases Nos. 354/68 *and* 375/68 *to the effect that no recourse lies in view of the fact that the appointments in question made on contract are not within the realm of public law:*

In the light of the totality of relevant circumstances, and having in mind why such appointments had to be made on contract, as well as the fact that they were appointments made for the purpose of serving the actual and ordinary needs of public education—and not extraordinary appointments made in special circumstances—I cannot but find, bearing in mind the recent decision of the Supreme Court on appeal, in *Paschalides* v. *The Republic,* reported in this Part at p. 297 *ante,* that the appointments concerned were matters of public law and so they could be challenged by recourse under Article 146 of the Constitution.

Held, III. As to the merits of the cases 354/68 *and* 375/68:

(1) *Regarding case* 354/68:

(A) The Applicant complains that he was not considered as a candidate in the final adoption of the priority list (*supra*), because he had graduated from the Piraeus Graduate School of Industrial Studies and not from the Highest School for Economic and Commercial Sciences in Athens. It is quite clear that—on the basis of legislation and other criteria—in Greece the said Schools are regarded as equivalent for many purposes. On the other hand it is on record that the Respondent Committee decided, in drawing the priority list, to take into account only candidates from the Athens School as it had in mind, also the educational needs as viewed in relation to the subjects which are taught at the schools here under the curriculum in force; and I can see nothing contrary to law or in excess or abuse of powers in adopting such a course which was reasonably open to the Respondent.

(B) The fact that later on the Respondent Committee decided, always subject to the needs of education, to consider, also as candidates graduates from Schools such as the one in Piraeus does not mean that as between candidates from that School and the Athens School, the Respondent was not entitled, in the proper exercise of its discretion to prefer—at the material time when the priority list in question was adopted—candidates who had graduated from the latter School.

(C) Thus, recourse No. 354/68 fails.

(2) *As regards recourse in case No.* 375/68:

(A) I have not been satisfied that the appointments of the Intereted Parties concerned were made in excess or abuse of

powers; on the contrary a comparison of their qualifications and other relevant criteria shows that it was reasonably open to the Respondent to prefer those Interested Parties instead of the Applicant.

(B) The laying down by the Respondent Committee of specific criteria was not a course contrary to law. Indeed the relevant legislation lays down only the general qualifications entitling candidates to be considered for appointment; but it was quite open to the Respondent to lay down criteria for the purpose of selecting the most suitable candidates out of those entitled to be considered for appointment. By acting as it did the Respondent Committee embarked, in my view, upon a quite proper course for the purpose of selecting the most suitable candidates.

(C) In the circumstances the recourse in case 375/68 must also fail.

Recourses dismissed.
No order as to costs.

Cases referred to:

Paschalides and The Republic, reported in this Part at p. 297 *ante*.

Recourse.

Recourse against the validity of a priority list prepared and published by Respondent 2, the Educational Service Committee, regarding the making of appointments to the post of master of commercial subjects in Greek Secondary Education and against the validity of appointments to such posts.

L. Papaphilippou, for the Applicant in 327/68.

A. Triantafyllides, for the Applicant in 354/68.

L. Clerides, for the Applicant in 375/68.

G. Tornaritis, for the Respondents.

M. Christofides and *Ch. Mylonas*, for the Interested Parties.

Cur. adv. vult.

The following judgment was delivered by:-

TRIANTAFYLLIDES, J.: In these three cases, which have been heard together in view of common issues, the relief claimed by each Applicant is as follows:-

The Applicant in Case 327/68 challenges only the validity of a priority list, which was prepared and published by the Respondent Educational Service Committee, regarding the making of appointments to the post of master of commercial subjects in Greek Secondary Education; in particular, he challenges the inclusion ahead of him, in such list, of eight Interested Parties, himself being No. 9 therein.

The Applicant in Case 354/68 challenges the validity of the appointments as masters of commercial subjects of six out of those whose names appear in the list; these Interested Parties being six out of the eight Interested Parties whose inclusion is challenged, as aforesaid, by the Applicant in 327/68.

The Applicant in Case 375/68 challenges the appointments of only two of the six whose appointments are challenged in Case 354/68.

The history of the matter is shortly as follows:-

On the 4th June, 1968, the Respondent Committee decided to advertise vacancies in various posts of school-masters, including the post of master of commercial subjects; this step was taken even though the approval for filling the posts had not yet been given by the appropriate authority; apparently, it was anticipated (see the minutes of Respondent, *exhibit* 8).

A notice was, accordingly, published on the 5th June, 1968 (*exhibit* 9).

At a series of meetings from the 13th July, 1968, to the 19th July, 1968, the Committee examined applications from various candidates, as well as relevant tables which were prepared on the basis of such applications; it was recorded in the minutes of the Committee (*exhibit* 6) that these tables were prepared according to the criteria then in force, viz. qualifications, date of, and marks, in the diploma, and—as between, otherwise, equal candidates—age (the table relating to candidates for the post of master of commercial subjects is *exhibit* 7 in these proceedings). No decision was reached, at the time, regarding those candidates who were not necessarily destined to work in only the educational services; among such candidates there

must have been the Applicants and the Interested Parties because, in view of their qualifications, they could find employment, not only as masters, but also in other fields.

The aforementioned table, *exhibit* 7, is in three parts:- The first part contains the names of those candidates who graduated from the Highest School for Economic and Commercial Sciences in Athens, and there are to be found therein the names of all the Interested Parties and of Applicants in Cases 327/68 and 375/68; the second part contains the names of those candidates who graduated from the Graduate School of Industrial Studies in Piraeus, and there is to be found therein the name of Applicant in Case 354/68; and the third part contains the names of those candidates who graduated from foreign—not Greek—universities.

At a series of meetings from the 20th August, 1968 to the 26th August, 1968 (see the relevant minutes, *exhibit* 5) the Committee decided to adopt the following special criteria regarding new appointments of masters of commercial subjects:- qualifications, date of, and marks, in the diploma, previous educational service, personality and—as between, otherwise; equal candidates—age.

On the 29th August, 1968, the Committee interviewed thirty-five candidates for appointment to the post in question, including all the Interested Parties and the Applicants (see the minutes, *exhibit* 3).

At its meeting of the 3rd September, 1968, the Committee embarked upon the preparation of a priority list regarding future appointments as masters of commercial subjects (see its minutes, *exhibit* 4).

On the 6th September, 1968, the Committee adopted such a priority list; having taken into account the aforementioned special criteria, in correlation to the relevance of the qualifications of the candidates to the subjects to be taught under the curriculum in force, as well as the impressions formed at the interviews, it decided to prepare, first, a priority list out of graduates from the Highest School for Economic and Commercial Sciences in Athens (see the relevant minutes, *exhibit* 2).

As a result, the Applicant in Case 354/68, who did not graduate from the said School, was not included at all in the

list. The Applicants in Cases 327/68 and 375/68 were placed ninth and tenth in such list, respectively. The Interested Parties involved in Case 327/68 were placed first to eighth in the list, and the Interested Parties whose appointments are challenged in cases 354/68 and 375/68 are those placed first, second and fourth to seventh in the list.

On the same date a copy of the list (*exhibit* 1) was published through being posted up on a notice board at the Ministry of Education.

It was recorded in the minutes *exhibit* 2, and at the bottom of the list *exhibit* 1, that appointments would be offered in relation to the number of posts to be created as soon as the needs of the schools were finally ascertained and approval was given by Government for the filling of such posts.

As there had not been given, in time, approval for the creation of the necessary organic posts (see in this respect *exhibit* 25) the Committee, at a meeting on the 1st October, 1968, decided to appoint, on contract, as masters of commercial subjects, six out of the first seven in the priority list which had been adopted on the 6th September, 1969; the candidate placed third on such list was not appointed, but he has not made a recourse and the reason as to why he was not given an appointment has not been referred to as being relevant to the matters in issue in the present proceedings.

It is convenient to examine here an objection raised by counsel for some of the Interested Parties, to the effect that no recourse could be made against the appointments made, as aforesaid, because they were made on contract, and they were, thus, not—according to his contention—matters of public law, so that they could be attacked by means of the remedy under Article 146 of the Constitution:

In the light of the totality of relevant circumstances, and having in mind why such appointments had to be made on contract, as well as the fact that they were appointments made for the purpose of serving the actual and ordinary needs of public education—and not extraordinary appointments made in special circumstances—I cannot but find, bearing in mind the recent decision of the Supreme Court, on appeal, in *Paschalides* v. *The Republic* (reported in this Part at p. 297 *ante*), that the appointments concerned were matters of public law and so they could be challenged by recourse under Article 146.

I shall deal, next, with the fate of each one of the three recourses before me:

Regarding Case 327/68, which challenges only the validity of the priority list in question, it has been submitted that the list in question was not an executory act and, therefore, no recourse could be made against it, as such, under Article 146.

Bearing in mind the fact that this list was decided upon as a final priority list, crystallizing the rights of candidates to be, then, appointed, and that it was not only published as such, but that it was, also, actually, relied upon for the purpose of making the relevant appointments, I cannot but find that the list was indeed an executory act which could be challenged by recourse, in that it produced a certain definite legal situation directly affecting those concerned.

On the other hand, there is no doubt that such list was part of the composite administrative action which resulted in the said appointments.

Once this is so, I am of the opinion that, after the appointments were made, the list lost its executory nature and, therefore, Case 327/68, which was filed before the appointments, could not be proceeded with thereafter, as it was deprived of a subject-matter that could be attacked by recourse, viz. the list as an executory act.

In this respect useful reference might be made to the Conclusions from the Jurisprudence of the Greek Council of State (1929–1959) p. 244. Also, to Decision 648(56) of the Greek Council of State; in that case the facts were different from those of our Case 327/68, but it is a useful illustration of a situation where an originally executory act lost, due to subsequent developments, its executory nature.

I have not lost sight of the fact that only six candidates, out of the eight candidates who were placed in the priority list ahead of the Applicant in Case 327/68, were appointed; in my view, however, the list in question ceased to be of an executory nature in respect of all the candidates on it, even of those who were not appointed, because once the appointments made were on contract, and only for one school year, 1968–1969, (see, for example, *exhibit* 16) there was bound to arise, in the course of good administration, the opportunity of reviewing the claims to appointment of all candidates con-

cerned, in the light of developments in the meantime including the satisfactory or not performance of those appointed for a year.

In view of the foregoing recourse 327/68 fails and it is dismissed accordingly.

Regarding Case 354/68, the Applicant concerned complains that he was not considered as a candidate, during the final adoption of the priority list, because he had graduated from the aforementioned Piraeus School and not from the Athens School from which there had graduated those included in the priority list.

It is quite clear that—on the basis of legislation and other relevant criteria—in Greece the said two Schools are regarded as equivalent for many purposes. On the other hand, the Respondent recorded expressly in its minutes, when drawing up the priority list, that it decided to take into account only candidates from the Athens School as it had in mind, also, the educational needs, as viewed in relation to the subjects which are taught at the schools here under the curriculum in force; and I can see nothing contrary to law or in excess or abuse of powers in adopting such a course, which was reasonably open to the Respondent.

The fact that, later on, the Respondent decided, subject always to the needs of education, to consider, also, as candidates graduates from Schools such as the one in Piraeus (see the notice in the press, *exhibit* 12) does not mean that, as between candidates from that School and the Athens School, the Respondent was not entitled, in the proper exercise of its discretion, to prefer—at the material time when the priority list in question was adopted—candidates who had graduated from the latter School.

It is correct that the Applicant in Case 354/68 was later appointed temporarily as a master of commercial subjects, in order to replace somebody else.

In my opinion the subsequent appointment of this Applicant, as made, does not establish that his exclusion from consideration, at the time of the drawing up of the priority list, was decided upon in excess or abuse of powers. I have not been satisfied by this Applicant—and it was up to him so to satisfy me—that there has been excess or abuse of powers, or any

misconception on the part of the Respondent, in deciding to consider, initially, for the priority list, only candidates who had graduated from the Athens School, as being on the whole more suitable in the light of the actual educational needs.

Nor do I accept his evidence to the effect that he was told by members of the Respondent that they had acted, as they did, in the matter, because of ignorance of material facts regarding the status of the two Schools concerned.

Thus recourse 354/68 fails and it is dismissed accordingly.

Coming now to Case 375/68, the position is that I have not been satisfied, by the Applicant in this case, that the appointments of the two Interested Parties, which she challenges, were made in excess or abuse of powers; on the contrary, a comparison of their qualifications and other relevant criteria (see the minutes *exhibit* 2) shows that it was reasonably open to the Respondent to prefer the Interested Parties instead of the Applicant.

Counsel for the Applicant has submitted that the laying down of specific criteria by the Respondent—as it was done on this occasion—was a course contrary to law, in that no such criteria are envisaged by the relevant legislation; and that, therefore, the Respondent was, in effect, exercising legislative powers, a thing which it was not competent to do.

I cannot accept this submission: The said legislation lays down only the general qualifications entitling candidates to be considered for appointment and it was quite open to the Respondent to lay down criteria for the purpose of selecting the most suitable candidates out of those entitled to be considered for appointment.

I take the view, indeed, that by acting as it did the Respondent embarked upon a quite proper course for the purpose of selecting the most suitable candidates.

In the circumstances recourse 375/68 fails, too, and it is dismissed accordingly.

As these three recourses were filed in an effort to bring before this Court grievances which the Applicants considered, bona fide, to be well-founded, I have decided to make no order as to costs in these proceedings.

Applications dismissed; no order as to costs.