1973
Oct 6
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SPYROS
PLOUSSIOU
v
THE CENTRAL
BANK OF CYPRUS

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

SPYROS PLOUSSIOU,

Applicant,

and

THE CENTRAL BANK OF CYPRUS,

Respondent

(Case No 108/70)

Necessity—Law or doctrine of necessity—Ibrahim's case (infra)*—Doctrine applies regardless of existence of statutory provision providing for departure from constitution—Act sought to be justified by reference to such doctrine must be* necessary *not only in respect of its nature but also in respect of its scope and extent—Permanent appointment in the Central Bank effected by its Governor under section 15(2) and (3) of the Central Bank Law, 1963—And not by the Public Service Commission—Cf Articles 122 and 124 of the Constitution —Cf. The Public Service Law, 1967—Doctrine of necessity as expounded in* Ibrahim's *case* (infra)*—The situation, factual and legal, existing when the* sub judice *decision was taken—In such situation there was no way of making an appointment to the Bank's staff other than the one followed in this case—But, as there is nothing before the Court to show that it was* necessary *to make the appointment in question on a permanent basis—Therefore, the appointment in question has to be annulled—Without prejudice to the filling of the post (manager) in question on a temporary basis or even, if* necessary, *on a permanent basis*

Constitutional Law—Necessity—Doctrine of—Scope and extent —See supra

Central Bank—Appointment by its Governor to the post of Manager—Powers vested in the Public Service Commission no longer applicable—Doctrine of necessity—See supra

By this recourse the applicant, who is an Officer, Grade 1, in the service of the respondent Central Bank of Cyprus, challenges the decision of the respondent to appoint Messrs. D. Th. and H.A. to the post of Manager, Central Bank on a permanent basis.

It was argued on behalf of the applicant that the appointments in question having been made under section 15(2) and (3) of the Central Bank Law, 1963, are invalid inasmuch as that those statutory provisions are repugnant to Articles 122 and 124 of the Constitution whereby the powers to make such appointments were vested in the Public Service Commission. It was argued on the other hand, by counsel for the respondent that the said Articles are no longer applicable; this argument was based on the doctrine of necessity as expounded for the first time in this country in the case *The Attorney-General* v. *Ibrahim*, 1964 C.L.R. 195.

Section 15(2) and (3) of the said Law, *supra*, is set out *post* in the judgment of the Court.

Annulling the *sub judice* appointments, the learned Judge of the Supreme Court :-

Held, (1) It had not been suggested by the respondent Bank that the situation which in *Ibrahim's* case (*supra*) was held to make the enactment of the Administration of Justice (Miscellaneous Provisions) Law, 1964, necessary, and therefore valid, has ceased to exist, and I can take judicial notice of the fact that it has not.

(2) Having regard to the reasoning that constitutes the foundation of the doctrine of necessity, as stated in that case, it is not necessary to inquire whether the provisions of section 15(2) and (3) of the Central Bank Law, 1963 (*supra*) were valid when enacted, or have been validated thereafter; for where the doctrine applies it cannot make any difference whether the action dictated by necessity happens to be prescribed in a statutory text or not.

(3) It appears to me that in the situation, factual and legal, existing when the *sub judice* decision was taken there was no way of making an

appointment or promotion to the Bank's staff other than that followed in this case (*N.B.* Under the Public Service Law, 1967, the Public Service Commission has no power to make appointments or promotions in the Central Bank).

(4)(a) Now, that it was necessary to fill the posts of Manager in the Bank has not been disputed. But the appointments in question were made on a permanent basis; and in my view on the material before me they could not be so made.

(b) Having regard to the very basis of the doctrine of necessity, the act sought to be justified by reference to it must be necessary not only in respect of its nature but also in respect of its scope and extent (cf. *Iosif* v. *Cyprus Telecommunications Authority* (1970) 3 C.L.R. 225, at p. 231; *Messaritou* v. *C.B.C.* (1972) 3 C.L.R. 100, at pp. 114 - 115).

(c) As there is nothing before me to show that the reason why the said appointments were made on a permanent basis was that it was necessary so to make them, I hold that the *sub judice* decision must be annulled without prejudice to the filling of the posts on a temporary basis or, even, if necessary, on a permanent basis.

Sub judice decision annulled.
No order as to costs.

Cases referred to :

The Attorney-General v. *Ibrahim*, 1964 C.L.R. 195;

Iosif v. *The Cyprus Telecommunications Authority* (1970) 3 C.L.R. 225, at p. 231;

Messaritou v. *The Cyprus Broadcasting Corporation* (1972) 3 C.L.R. 100, at pp. 114 - 115.

Recourse.

Recourse against the decision of the respondent to appoint and/or promote the interested parties to the post of Manager in preference and instead of the applicant.

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SPYROS PLOUSSIOU

v

THE CENTRAL BANK OF CYPRUS

E. Nicolaou (Miss), for the applicant on behalf of *Mr. L. Clerides*.

N. Charalambous, Counsel of the Republic, for the respondent.

Cur. adv. vult.

The following judgment * was delivered by :-

STAVRINIDES, J. : The applicant, an Officer, Grade 1, in the respondent bank (hereafter "the bank") seeks a declaration that "the respondent's decision to appoint and/or promote Dem. Theocharides and Haris Ahniotis to the post of Manager, Central Bank, is null and void and of no effect whatsoever". "The appointments and/or promotions" (hereafter "the subject appointments") were made by the Governor of the bank in pursuance of s. 15(2) and (3) of the Central Bank Law, 1963, which, as translated into English in the Ministry of Justice, reads :

> "(2) Without prejudice to the generality of subsection (1) the Governor shall, subject to any Law in force for the time being and in accordance with regulations relating to the officers and employees of the Bank made under this Law, appoint, suspend or dismiss any officer or employee of the Bank other than officers or employees in respect of whom other provision is made in this Law.
>
> (3) The Governor in carrying out any of his functions under subsection (2) shall act in accordance with the advice of a Committee established for the purpose and consisting of himself as Chairman, the Deputy Governor, one director nominated by the Board in this respect, the Minister's Representative and one other person nominated by the Board in this respect to hold office for a period of two years, unless earlier removed by the Governor."

The applicant claims that those provisions are invalid as conflicting with Articles 122 and 124 of the Constitution; that in any case the committee referred to in

* For final judgment on appeal see judgment in Revisional Jurisdiction Appeals Nos. 126, 127 and 128, delivered on October 15, 1976, to be published in due course in (1976) 3 C.L.R

sub-s. (3) of s. 15 "was not properly constituted at the material time"; and that he "was the best candidate available for appointment and/or promotion to the said post". It is clear, and in fact not disputed, that under the Constitution the power to make appointments (including promotions) to posts in the bank was vested in the Public Service Commission for which provision was made by Article 124 thereof.

By consent of the parties the points of law relied upon by the applicant, *viz.* that about the provisions of s. 15(2) and (3) of the 1963 Law being invalid and the Committee mentioned in sub-s. (3) not being properly constituted "at the material time" were set down for argument and determination as preliminary issues of law. Later the latter point was abandoned. With regard to the former point, counsel for the respondent argued as follows: The provisions in question never conflicted with the Constitution; if they did at the time of their enactment, they were validated *ex post facto* as a result of the creation by the Public Service Law, 1967, of a Public Service Commission which had no power to make appointments or promotions to posts in the bank. The latter argument was based on the doctrine of necessity as expounded for the first time in this country in *Attorney-General* v. *Ibrahim*, 1964 C.L.R. 195.

It had not been suggested on behalf of the bank that the situation which in *Ibrahim's* case was held to make the enactment of the Administration of Justice (Miscellaneous Provisions) Law, 1964, necessary, and therefore valid, has ceased to exist, and I can take judicial notice of the fact that it has not. Having regard to the reasoning that constitutes the foundation of the doctrine of necessity, as stated in that case, it is not necessary to inquire whether the provisions of s. 15(2) and (3) of the 1963 Law were valid when enacted, or have been validated thereafter; for where the doctrine applies it cannot make any difference whether the action dictated by necessity happens to be prescribed in a statutory text or not.

It appears to me that in the situation, factual and legal, existing when the subject decision was taken there was no way of making an appointment or promotion to the bank's staff other than that followed in this case.

Now, that it was necessary to fill the posts of Manager in the bank has not been disputed. But the subject appointments were made on a permanent basis, and it remains to consider whether, on the material before me, they could be so made. In *Iosif* v. *Cyprus Telecommunications Authority* (1970) 3 C.L.R. 225, Triantafyllides, J., as he then was, said at p. 231 :

> "Subsequently to the *Ibrahim* case it was stressed in *Georghiades* and *Republic* (1966) 3 C.L.R. 317, *Hadjigeorghiou* and *Republic* (1966) 3 C.L.R. 504 and *Papapantelis* and *Republic* (1966) 3 C.L.R. 515 that the doctrine of necessity could not be validly resorted to for the purpose of taking administrative measures, in relation to personnel matters, which are of permanent or radical effect, and not merely of such temporary nature as may be required to meet, for the time being, the needs of the immediate necessity (see, also, in this respect, the Annual Survey of Commonwealth Law, 1966, at p. 89)."

On the other hand in *Messaritou* v. *C.B.C.* (1972) 3 C.L.R. 100, A. Loizou, J., said at pp. 114 - 115 :

> "It remains however to consider whether, having found that the law of necessity justified the enactment of the said law each particular act done thereunder should be separately justified on the ground of necessity. I cannot agree with such a proposition as in examining the circumstances which I have found satisfied the requirements of the doctrine of necessity, all the provisions of the law under consideration were considered and the pros and cons duly weighed in arriving at the conclusion that the scale has tipped on the side of accepting the justification of the enactment in view of the doctrine of necessity. It would have been too far fetched to say that the law is justified on that doctrine but every appointment, promotion or disciplinary proceeding taken thereunder has to be justified as coming, or not, within the doctrine of necessity. There cannot be such a distinction and what has been said in the case of *Bagdassarian* (*supra*) and *Iosif* (*supra*) about the temporary or permanent character of the *sub judice* decisions in those two

cases, cannot apply to the present case, as, in those cases, there was no enabling law, whereas, in the present case the *sub judice* promotion has been effected under the provisions of the said law. In my view, therefore, this second argument of learned counsel for the applicant must also fail."

It seems to me that, having regard to the very basis of the doctrine of necessity, the act sought to be justified by reference to it must be necessary not only in respect of its nature but also in respect of its scope and extent. As there is nothing before me to show that the reason why the subject appointments or promotions were made on a permanent basis was that it was necessary so to make them, I hold that the subject decision must be annulled without prejudice to the filling of the posts on a temporary basis or even, if necessary, on a permanent basis.

In all the circumstances I think no costs should be awarded.

Subject decision annulled without costs.

Sub judice decision annulled.
No order as to costs.