

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ANDREAS OLYMPIOS,

Applicant,

and

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ANDREAS
OLYMPIOS
v.
REPUBLIC
(PUBLIC SERVICE
COMMISSION
AND OTHERS)

THE REPUBLIC OF CYPRUS, THROUGH

1. THE PUBLIC SERVICE COMMISSION,
2. THE COUNCIL OF MINISTERS,
3. THE MINISTER OF JUSTICE,

Respondents.

(Case No. 53/72).

Public Officers—Acting appointments—They can be made for an indefinite period—And once the appropriate authority recommends for an acting appointment any person possessing the required qualifications, the Public Service Commission is bound to make such appointment and has no power to invite applications from other persons in order to make a selection—Section 42 of the Public Service Law, 1967 (Law 33/1967).

Acting appointments in the public service—Duty of the Public Service Commission—Section 42 of Law 33/1967 (supra)—See supra.

Recourse under Article 146 of the Constitution—Legitimate interest required—Article 146.2 of the Constitution—Legitimate interest should be deemed to include a moral interest as distinct from a pecuniary one—Recourse against acting appointment in the public service—Applicant possessing both moral and pecuniary interest—Moreover he applied himself for appointment before the sub-judice acting appointment of the interested party was made—Applicant, therefore, possessed the legitimate interest in the sense of Article 146.2 to challenge the said acting appointment.

Legitimate interest—Article 146.2 of the Constitution—See supra.

The applicant in this recourse seeks the annulment of the decision whereby the respondent Public Service Commission, on the recommendation of the Minister of Justice, has appointed

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the interested party to the post of acting Director-General of the Ministry of Justice in preference to, and instead of, himself.

It is common ground that both the applicant and the interested party possessed the required qualifications for the post; and that the applicant had applied for appointment long before the *sub judice* acting appointment was made. On December 13, 1971, the Minister of Justice wrote a letter to the Public Service Commission requesting them to appoint the interested party to act as Director-General; and at their meeting of December 16, 1971, the Commission decided to appoint the interested party as requested.

Section 42 of the Public Service Law, 1967 (Law 33/1967) reads as follows:

“ 42 (1) When an office is vacant for any reason or its holder is absent on leave, or incapacitated, another person may be appointed to act in that office under such terms as may be prescribed.

(2) An acting appointment shall be made on the recommendation of the appropriate authority concerned”.

Admittedly the office of Director-General of the Ministry of Justice was vacant since 1963.

Counsel for the interested party raised, *inter alia*, the point that the present recourse is not maintainable in that the applicant has no legitimate interest adversely affected by the *sub judice* decision in the sense of Article 146.2 of the Constitution which paragraph provides:

“ 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”.

Dismissing the recourse on the merits but holding that it is maintainable inasmuch as the applicant has the legitimate interest required under Article 146.2 (*supra*) the learned Judge:-

Held, (1) The notion of interest should be deemed to include a moral interest as distinct from a pecuniary or material one. In the present case the applicant's legitimate interest to challenge the *sub judice* decision was not only moral but also a pecuniary

one taking into consideration that the post of Director-General carries a salary scale 28 whereas the post of Chief Registrar, which the applicant is holding, is on scale 24. Moreover, the applicant applied for the post of Director-General long before the appointment of the interested party. Therefore, the applicant has a legitimate interest which has been adversely and directly affected in the sense of Article 146.2 of the Constitution (*supra*) by the *sub judice* decision of the respondent Commission.

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(2) But the recourse has to be dismissed on the merits. From the wording of the aforesaid section 42 of the Public Service Law, 1967 (Law 33/1967) (*supra*) it is clear that once the appropriate authority recommends any person who is possessed with the necessary qualifications for the acting appointment, the Public Service Commission is bound to make such appointment and cannot invite applications from other persons in order to make a selection. There is no power under section 42 (*supra*) for the Commission to take that course.

*Recourse dismissed. No
order as to costs.*

Cases referred to:

Papasavvas v. The Republic (1967) 3 C.L.R. 111, at pp. 122, 123, 124;

Papapetrou and The Republic (1961) 2 R.S.C.C. 61, at p. 64.

Recourse.

Recourse against the decision of the respondents to appoint the interested party, Mr. Fr. Michaelides, in an acting capacity as Director-General of the Ministry of Justice in preference and instead of the applicant.

A. *Triantafyllides*, for the applicant.

L. *Loucaides*, Senior Counsel of the Republic, for the respondent.

K. *Talarides*, for the interested party.

Cur. adv. vult.

The following judgment was delivered by:—

MALACHTOS, J.: The applicant in this recourse seeks a declaration of the Court that the decision of the respondents

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to appoint Mr. Frixos Michaelides, the interested party, in an acting capacity as Director-General of the Ministry of Justice, in preference and instead of the applicant and/or their decision to assign to Mr. Michaelides the duties of the said post in preference and instead of the applicant, is *null* and *void* and of no effect whatsoever.

The salient facts that gave rise to the present recourse are as follows:

The applicant holds the permanent and pensionable post of the Chief Registrar in the Judicial Department, and his salary scale is 24.

The interested party holds the permanent and pensionable post of Registrar, 1st Grade in the same department, and his salary scale is 16.

By letter dated 8th June, 1970, *exhibit 4*, the acting Director-General of the Ministry of Justice wrote to the Chairman of the Public Service Commission requesting, under section 47 of the Public Service Law 33/67, the secondment of the interested party to the Ministry of Justice for the performance of special duties of a legal nature. The Public Service Commission at its meeting of the 10th June, 1970, considered the above mentioned request and decided to turn it down as they were in doubt whether this was the correct procedure in the circumstances and decided that the employment of Mr. Michaelides, who was then posted in Kyrenia, could be effected by his transfer to Nicosia where he could be posted for special duties to the Ministry of Justice by the Minister. This matter was brought to the knowledge of the Minister of Justice by letter dated 23rd June, 1970, *exhibit 6*.

On the 15th July, 1970, the acting Director-General of the Ministry of Justice and the Chief Registrar forwarded a joint letter, *exhibit 7*, to the interested party, informing him that on the one hand the Chief Registrar agreed to permit the interested party to be attached to the Ministry of Justice for the purpose of performing special duties of a legal nature and on the other hand the Ministry of Justice agreed to accept his attachment.

On the 26th March, 1971, the applicant applied to the Minister of Justice for appointment to the post of Director-General Ministry of Justice, which was due to be vacated on the 1st May, 1971, on the retirement of the then Ag. Director-

General. This application of the applicant was made through the then Honourable President of the Supreme Court and was forwarded by him to the Minister of Justice with the relative recommendations.

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On the 22nd April, 1971, the Acting Director-General of the Ministry of Justice wrote a letter to the Public Service Commission, informing them that he was due to retire on the 30th April, 1971, and that the Minister of Justice recommended for appointment, pending the filling of the vacancy, the interested party, who was then serving in the Ministry of Justice on secondment since the 16th July, 1970, to act as Director-General in addition to his own duties as from the 1st May, 1971. He also informed them that the Minister considered the interested party most suitable and recommended him for acting appointment to this post.

By letter dated 29th April, 1971, *exhibit* 10, the acting Director-General of the Ministry of Justice wrote to the Chief Registrar of the Supreme Court and informed him that the Ministry of Justice had assigned inter departmentally to the interested party, in addition to his special duties, the duties of the post of the Director-General.

On the 13th December, 1971, the Minister of Justice wrote again to the Public Service Commission requesting them to appoint the interested party to act as Director-General. In the said letter the Minister was giving his reasons as to why he was late to bring up this matter again.

At its meeting of the 16th December, 1971, the Public Service Commission decided to appoint the interested party to act as Director-General of the Ministry of Justice as from 15th December, 1971. In the Minutes of the Public Service Commission dated 16th December, 1971, *exhibit* 12, it is stated that "The Commission wishes to make it quite clear that the acting appointment was made for convenience only and was not made on examination of the merits of any other eligible officer. Furthermore, the acting appointment will not stand in the way of the Commission if and when the time comes to fill the post substantively. The Ministry of Justice to be asked to inform Mr. Michaelides accordingly". The above decision of the Public Service Commission was published in the Official Gazette on 23.12.1971.

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The post of the Director-General according to the relative scheme of service, *exhibit 1*, is a first entry and promotion post and is on salary scale 28. It is not in dispute that both the applicant and the interested party possess the required qualifications for this post.

It must be noted here that the post of Director-General of the Ministry of Justice, remained vacant since 1963, due to the inter communal troubles as it was held by a Turkish Cypriot at the time.

By his letter to the Public Service Commission dated 29/12/71, *exhibit 13*, the applicant made representations against the acting appointment of the interested party and requested that the Commission should reconsider its decision. In his said letter applicant maintained that a Court Registrar could not be appointed to act in another post outside the judicial service and that, even if that was possible he, himself, who was holding a post higher than that held by the applicant should have been preferred.

On 12/1/72, the Commission, as it appears from its Minutes, *exhibit 14*, examined the application of the applicant and decided that there was no reason to change its previous decision on the matter and by letter dated 25/1/72, *exhibit 17*, informed the applicant accordingly. As a result, the applicant filed the present recourse.

The application is based on the following grounds of law:

1. Applicant alleges that he should have been preferred to the interested party because he is senior to him holding the post of Chief Registrar Supreme Court as against the post of Registrar 1st Grade held by the interested party.
2. Respondent failed to select the most suitable candidate or to consider applicant's claims although he applied for the acting appointment by letter dated 26/3/71, and appointed the interested party without directing at all its mind to his claims.
3. The reasons given in the decision of the Public Service Commission, *i.e.* "the Commission wishes to make it quite clear that the acting appointment was made for

convenience only and was not made on examination of the merits of any other eligible officer and that this acting appointment would not stand in the way of the Commission if and when the time comes to fill the post substantively”, are not valid ones. And

4. The above grounds of law carry much more weight especially in the present case where the duration of the acting appointment and the period of assignment of duties are not predetermined but are for an indefinite time.

Before proceeding to consider this recourse on its merits, the first point that falls for consideration is whether the applicant has a legitimate interest in the sense of Article 146.2 of the Constitution to file the present application.

This point, although conceded in favour of the applicant by counsel for the respondents, it was raised by counsel for the interested party and so it has to be decided first.

Article 146.2 of the Constitution 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”.

In *Kyriacos G. Papassavvas v. The Republic of Cyprus* (1967) 3 C.L.R. 111 Mr. Justice Triantafyllides, as he then was, had this to say at pages 122–123:

“.....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, pages 257 to 266; Stasinopoulos on the Law of Administrative Disputes, 4th ed., (1964) pages 197 to 206; and Kyriakopoulos on Greek Administrative Law, 4th ed., volume 3 pages 117 to 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

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of very great help.

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”.

The notion of “interest” should be deemed to include a moral interest as distinct from a pecuniary or, in other words, material interest with regard to our paragraph 2 of Article 146. The legitimate interest of an applicant need not be a pecuniary one. This is clearly provided in section 48 of Law 3713/1928, which is the corresponding provision in Greece of our Article 146.2.

At pages 123 to 124 of the *Papasavvas* case (*supra*) Mr. Justice Triantafyllides continues:-

“ 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 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 is not merely a moral one, but also a material one as well”.

In the present case the applicant’s legitimate interest was not only a moral one but also a pecuniary one taking into consideration that the post of Director-General carries a salary scale 28 whereas the post of the Chief Registrar, which the applicant is holding, is on scale 24.

Furthermore, while on this point, useful reference may be made to the case of *Papapetrou* and *The Republic* (1961) 2 R.S.C.C. 61 at page 64 where it is stated that “ Once it is a fact that the applicant had applied to the Public Service Commission for the post in question and that somebody else has been appointed instead to such post, it falls from this fact alone that an existing legitimate interest of his was adversely and directly affected by his not being appointed”.

In the present case, the applicant applied for the post of the Director-General on the 26th March, 1971, long before the appointment of the interested party. Therefore, the applicant

in this recourse has a legitimate interest which 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.

The second and last point to be considered, as learned counsel for applicant has put it, is whether the Public Service Commission had a duty to follow the usual procedure of selection in making the acting appointment complained of or whether they could dispense with it.

Learned counsel for applicant argued that it is not in dispute that in making the acting appointment the Public Service Commission did not consider the merits or qualifications of the applicant or any one else and made the appointment according to section 42 (1) of the Public Service Law, 1967. This section reads as follows:

“ 42 (1) When an office is vacant for any reason or its holder is absent on leave, or incapacitated, another person may be appointed to act in that office under such terms as may be prescribed.

(2) An acting appointment shall be made on the recommendation of the appropriate authority concerned”.

He submitted that this section is applicable to cases where the permanent appointment will be made in due course in the ordinary course of things. This section 42 postulates three eventualities: (a) When the substantive holder is on leave, and naturally the appointment is of itself limited to the duration of the leave; (2) when the substantive holder is incapacitated and again the appointment is limited until the holder regains his capacity and (3) which is the case in hand, whenever a post is vacated for any reason whatsoever, *i.e.* death, retirement, etc. this latter hypothesis or presupposition postulates that the post will not be vacant indefinitely due to extraordinary circumstances. He further submitted that when the law says “ there would be an acting appointment to fill a vacancy” it postulates that this vacancy will have to be filled in the ordinary course of things within a specified period of time or a reasonable period of time. It does not apply when it is clear from the documents, as in the present case, that it will never be filled unless the political situation permits. In this particular case the acting appointment which the interested party replaced, that

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is Mr. Kephalas, was acting from 1963 until 1971 when he retired and this because the holder of the substantive post was a Turk. An acting appointment generally in normal circumstances ends when the substantive appointment is made and there is no indefinite element in the acting appointment. It may be a matter of a few weeks or a matter of a few months but in some time will come to an end. Therefore, this case has to be viewed from its very special circumstances. He also submitted that even if we assume that section 42 does apply to this case and is interpreted widely enough to cover acting appointments of indefinite period, then again, it necessitates a proper selection. There is no dispute that the result of this acting appointment has increased the emoluments of the holder by £76.— per month. So, if an officer gets a post which entails monetary benefits, as well as prestige, why the Public Service Commission did not embark upon the process of selection among qualified officers?

In a matter of public law like the appointment in an acting capacity which is for an indefinite period, the reason must be proper, the organ must act not in abuse of their powers and the only way to ensure it, is to have the usual safeguards of appointment. If they are let loose to do anything they like for an indefinite period in acting appointments, then the door to abuse of powers is thrown wide open as the Court cannot interfere.

Able and extensive arguments were also advanced by learned counsel for the respondents as well as by learned counsel for the interested party in support of their respective case. It is clear from the arguments advanced by counsel for applicant that the applicant is not complaining against the decision of the appropriate authority, in this case the Minister of Justice, to fill in the post by an acting appointment but against the decision of the Public Service Commission who, in making this appointment, applied the provisions of section 42 of Law 33/67 and made in the circumstances of this particular case the acting appointment for an indefinite period without making a selection.

The Public Service Law, 1967 (33/1967) was enacted in order to make provision for the functioning of the Public Service Commission for the appointment, promotion and retirement of public officers, and for conditions of service, disciplinary proceedings and other matters relating to the public service. Under

section 17 of the law, the Commission cannot proceed to fill in a vacancy in any public office except upon the receipt of a written proposal to that effect from the appropriate authority concerned.

In the present case the Commission was moved to take action by the Minister of Justice. In doing so the Commission had to apply the law and, in particular, section 42 which is dealing with acting appointments. There is no express or implied provision in the said section that it is not applicable in cases of acting appointments of indefinite duration. On the contrary, it appears clearly from the wording of this section that acting appointments may be for an indefinite duration in cases of an office being vacant due to the fact that its holder is being incapacitated *i.e.* due to illness or otherwise. Therefore, I see no reason why an acting appointment for an indefinite period cannot be made in the case when an office is vacant for any other reason whatsoever.

What really matters in these acting appointments is only the interest of the public service and the object of making an acting appointment is simply to remedy a temporary necessity and avoid unnecessary difficulties so that the smooth running of the public service as a result of the vacancy created in the relative post will continue. Under section 42, subsection 2, an acting appointment shall be made on the recommendation of the appropriate authority concerned. From the wording of this subsection it is clear that once the appropriate authority recommends any person who is possessed with the necessary qualifications for the post, the Public Service Commission is bound to make such appointment and cannot invite applications from other persons in order to make a selection. There is no power under section 42 for the Commission to take that course.

For the reasons stated above this recourse fails.

In the circumstances I make no order as to costs.

Application dismissed. No order as to costs.

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