1975
June 23
—
NICOS ELLINAS
v.
REPUBLIC
(EDUCATIONAL
SERVICE
COMMITTEE)

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

NICOS ELLINAS,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH
THE EDUCATIONAL SERVICE COMMITTEE,

Respondent.

(*Case No.* 14/72).

Administrative Law—Collective Organ—Duty to keep proper minutes and legal consequences in case of failure—Inadequate recording of recommendation of the Appropriate Authority by respondent Educational Service Committee—Leads to annulment of sub judice *act—Because Court is deprived of ability to control judicially its legality.*

Head of Department—Recommendations—Need to record adequately.

Collective Organ—Minutes of—Adequate recording of.

Minister—Whether a Minister can make recommendations regarding promotions of public officers.

From the minutes of the respondent Educational Service Committee it appeared that in making the *sub judice* promotion to the post of Headmaster, Secondary Education, it took into consideration, along with other factors, the recommendations of the "Appropriate Authority", which is defined in section 2 of the Public Educational Service Law, 1969 (10/69) as meaning the Minister usually acting through the Director-General.

It was contended on behalf of the applicant that the respondent in taking into consideration the aforesaid recommendation has acted contrary to section 35 (2) and (3) of the Law and under a misconception of Law.

The recommendations of the Appropriate Authority were orally made at the meeting of the respondent Committee and no particulars thereof appeared anywhere, nor could counsel for

the respondent either by evidence or otherwise inform the Court as to their contents.

The Court observed that the question of promotions is governed by section 35 of 10 of 1969 (*supra*) and nowhere therein is mentioned that the Appropriate Authority, as defined, may make recommendations in respect of promotions.

Held, (1) Under the principles governing recommendations emanating from Ministers the question whether the taking of the *sub judice* decision was materially affected by the recommendations of the Appropriate Authority or not, is a most significant consideration in determining the legality of such an administrative act (See *Frangoulides (No. 2)* v. *The Republic* (1966) 3 C.L.R. 676 at p. 683 and *HjiSavva and Another* v. *The Republic* (1967) 3 C.L.R. 155 at p. 182).

(2) The consideration, however, of this aspect in the present case, is gravely handicapped by the fact that the way these recommendations were recorded in the relevant minutes, do not have the required clarity that might assist the Court to decide this issue and generally whether the *sub judice* decision was duly reasoned or not.

(3) Collective organs are under a duty to keep proper minutes and the requirement of keeping written records is primarily for purposes of good administration. (See *Kyprianou and Others* (No. 2) v. *The Republic* at p. 187 in this Part *ante* and the Authorities cited therein).

(4) The inadequacy of recording a recommendation deprives the Court of the ability to examine how and why it was reasonably open to the administrative organ to act upon it. (See *Partellides* v. *The Republic* (1969) 3 C.L.R. 480, at p. 484 where the recommendation of the Head of Department was one expressly warranted by Law, whereas in the present case the recommendation of the Appropriate Authority is not so warranted).

(5) I, therefore, find myself unable to control judicially the legality of the *sub judice* act and, therefore, it is hereby declared as *null* and *void.*

Sub judice decision annulled.

Cases referred to:

Frangoullides (No. 2) v. *The Republic* (1966) 3 C.L.R. 676 at p. 683;

HjiSavva and Another v. *The Republic* (1967) 3 C.L.R. 155 at p. 182;

Kyprianou and Others (No. 2) v. *The Republic* (reported in this Part at p. 187 *ante*);

Partellides v. *The Republic* (1969) 3 C.L.R. 480, at p. 484.

Recourse.

Recourse against the decision of the respondent Educational Service Committee to promote the interested party to the post of Headmaster, Secondary Education, in preference and instead of the applicant.

L. Papaphilippou with *A. Skarparis*, for the applicant.

A. Angelides, for the respondent.

Cur. adv. vult.

The following judgment was delivered by:–

A. LOIZOU, J.: By the present recourse the applicant challenges the validity of the promotion of Charalambos Kolnakos to the post of Head Master, Secondary Education.

The *sub judice* promotion was decided upon on the 3rd December, 1971, and in the relevant minute (*exhibit* 3), it is stated:–

> " Further to our decision of the 21st July, 1971 and on the basis of the criteria set out therein, the Committee decides to offer promotion to the post of Head Master, Secondary Education to the following Acting Head Masters, and post them as follows:–
>
> (a) .....
>
> (b) Kolnakos Charalambos at the Gymnasium of Polis Chrysochou".

The aforesaid criteria are to be found in the minutes of the respondent Committee of the 21st July, 1971 (*exhibit* 2) which read:–

> " The Committee having considered all the material and documents before it and having taken into consideration –

(a) the merit of the candidates, as it emanates from the reports of the Inspectors the recommendations of the Appropriate Authority and the impression which the Committee had from its personal interviews with them (see minutes 10, 11, 12.5.71 and 9.7.71),

(b) the qualifications and

(c) their seniority, decides .....

The filling of the remaining posts is postponed to a future meeting of the Committee".

From the aforesaid minutes it appears that one of the factors taken into consideration was the recommendation of the "Appropriate Authority" which is defined in section 2 of the Public Educational Service Law, 1969, Law No. 10/69, as meaning the Minister usually acting through the Director-General of his Ministry. This has given rise to one of the new grounds of law added in the course of the hearing, namely, that the Educational Committee in taking into consideration the recommendation of the Appropriate Authority has acted contrary to section 35 (2) and (3) of the Law and under a misconception of Law.

The question of promotions is governed by section 35 of the Law and nowhere therein is mentioned that the Appropriate Authority, as defined, may make recommendations in respect thereof. Furthermore, the Appropriate Authority does not come within the category of officers that by virtue of the proviso to section 4 (2) are entitled to be present at the meetings of the Educational Committee and express their opinion but without the right of vote.

Whether a Minister could make recommendations or not regarding promotions, was a matter that came up for consideration by the Full Bench of the Supreme Court in the case of *Frangoullides (No. 2)* v. *The Republic* (1966) 3 C.L.R., p. 676, where, at page 683, it is stated:-

"While it may well be that in certain circumstances a Minister could, perhaps, place his views regarding the candidates for a post in a Department of the Ministry in his charge, before the Public Service Commission, (which we do not purport to decide in these proceedings) there is no doubt in our mind that he cannot do so in substitution of the views of the Head of Department (or the Officer

acting for him) as reflected in the annual confidential reports concerning a subordinate officer. The difference between the nature of the office of a Minister and that of a superior officer in the permanent public service, who is the Head of a Department, is so clear under the relative provisions of the Constitution; under the Service Regulations; and in actual practice, that we find it unnecessary to elaborate at length on the point."

In that case, however, it was common ground that the decision of the Commission, the subject matter of that recourse, was materially affected by the contents of the confidential report in question, particularly, the observations of the Minister in his assumed capacity of countersigning officer as Head of Department. That decision was annulled as having been taken under a misconception of the legal position of the Minister regarding annual confidential reports in the Public Service and also without considering the proper confidential reports containing the views of the Head of Department or the officer duly acting for him.

In the present case, the recommendations of the Appropriate Authority were orally made at the meeting of the respondent Committee and no particulars thereof appear anywhere, nor could learned counsel for the respondent either by evidence or otherwise inform the Court as to their contents, though at some stage it was claimed that they referred to the posting and not to the merit of the candidates. This approach was not pursued further, and rightly so, as it could not be substantiated in any way. Therefore, a distinction has to be drawn with the *Frangoullides*' case (*supra*), as there being no evidence as to the contents of the recommendations, it cannot be said for certain that they had, or not, materially affected the decision of the respondent Committee.

Regarding recommendations emanating from a Minister, there is also the case of *HjiSavva and Another* v. *The Republic* (1967) 3 C.L.R., 155 where at page 182, it is stated:–

> " As it is clearly to be derived from the case of *Frangoullides* (*No.* 2) and *The Republic* (1966) 3 C.L.R. 676 the recommendations of a Minister, who is the political Head of a Ministry, cannot be substituted for the recommendations of the public officer who is the Head of a particular Department, and who is the person primarily responsible for the

proper functioning of the branch of public service under him and for making recommendations about those serving in such branch.

The relevant communications of the Minister of Agriculture were addressed by him to the Commission for the purpose of drawing attention to certain special personal considerations affecting the interested party, who was a member of the staff of a Department coming under his Ministry. But such communication did not also, entitle the Commission to take consequent action beyond, or inconsistent with, the proper exercise of its powers, as it has done. The views of the Minister, which he, obviously, felt that he had to place before the Commission, in order to inform it fully of the position as he saw it, could only be acted upon to the extent to which it was possible to do so within the proper limits of the exercise of the relevant competence of the Commission. They could not be taken—and no doubt they were never intended—to be a licence to the Commission to exceed such limits."

From the above principles it may be deduced that the question whether the taking of the *sub judice* decision was materially affected by the recommendations of the Appropriate Authority or not, is a most significant consideration in determining the legality of such an administrative act. The consideration, however, of this aspect in the present case, is gravely handicapped by the fact that the way these recommendations were recorded in the relevant minutes, do not have the required clarity that might assist the Court to decide this issue and generally whether the *sub judice* decision was duly reasoned or not.

The duty of a collective organ to keep proper minutes and the legal consequences in case of such a failure; has been aptly summed up by reference to the authorities on the subject by Mr. Justice Hadjianastassiou in his recent jugment in *Pantelis Kyprianou & Others* (No. 2) v. *The Republic*, Cases No .362/72 and 366/72 (reported in this Part at p. 187 *ante*) where he says :–

" It seems that in the absence of any legislative provision regulating the matter, the non-keeping of minutes by a collective organ does not always (a question to be decided on the merits of each case) vitiate a particular administrative decision, except, I repeat, if the absence of such

minutes or clarity in the minutes tends to deprive the decision of due reasoning. Having gone into the decided cases, it appears that mainly the requirement of keeping written records is primarily for purposes of good administration. (See *HadjiLouca* v. *The Republic* (1969) 3 C.L.R. 570 at p. 574; and *Korai and Another* v. *The Cyprus Broadcasting Corporation*, (1973) 3 C.L.R. 546 at pp. 564–565; also Kyriacopoullos on Greek Administrative Law, 4th ed. Vol. 2 p. 26, and Stassinopoullos on the Law of Administrative Acts, (1951) 223, as well as the Decisions of the Greek Council of State, in Cases 166 (29) and 107 (36)".

Useful reference may also be made to the case of *Partellides* v. *The Republic* (1969) 3 C.L.R. 480 at p. 484, where the inadequacy of recording a recommendation was considered as depriving the Court of the ability to examine how and why it was reasonably open to the administrative organ in that case to act upon it. And this, inspite of the fact that in that case the recommendation of the Head of the Department was one expressly warranted by the Law, whereas in the present case the recommendation of the Appropriate Authority is not so warranted, as already stated.

For all the above, I find myself unable to control judicially the legality of the *sub judice* act and, therefore, it is hereby declared as *null* and *void.*

The argument advanced that this recommendation of the Appropriate Authority has not particularly weighed with the respondent Committee in reaching the *sub judice* decision, in view of the remaining material in the file, cannot be unhesitatingly entertained.

For all the above reasons, the *sub judice* decision is annulled, but in the circumstances I make no order as to costs.

Sub judice decision annulled.
No order as to costs.