IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

KYRIACOS PAPADOPOULLOS,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH
1. THE MINISTER OF INTERIOR,
2. THE DIRECTOR OF LANDS AND SURVEYS,

Respondents.

(*Case No.* 389/74).

Provisional Order—Rule 13 *of the Supreme Constitutional Court Rules* 1962—*Recourse against decision transferring applicant from post of Director District Lands Office Nicosia to post of Registration Officer, Central Offices—Application for provisional order staying* 5 *such decision pending determination of the recourse—Principles governing the grant or not of a provisional order*—Inter alia, *flagrant or glaring illegality and whether the recourse is bound to succeed—Transfer in question not a case of glaring illegality—Application refused on this ground.*

10 *Public Officers—Transfers—Appropriate Authority—Section* 2 *of the Public Service Law,* 1967 (*Law* 33 *of* 1967)—*Transfer of Land Officer from District Lands Office Nicosia to post of Registration Officer, Central Offices—Can be effected by Minister usually acting through the Director–General and not by the Public* 15 *Service Commission.*

This was an application for a provisional order staying the decision to transfer the applicant from the post of Director District Lands Office Nicosia to the post of Registration Officer, Central Offices pending the determination of a recourse against 20 the said decision.

The transfer in question was effected by the Minister acting through the Director–General of the Ministry.

Counsel for the applicant contended that on the facts of the case there was an obvious illegality or flagrant illegality because

the transfer ought to have been made by the Public Service Commission and not by the Minister.

Held, after restating the principles governing the grant of a provisional order:

(1) The argument of counsel that the appropriate authority for effecting the transfer in this case was the Public Service Commission fails, and, I think, that the alternative contention of counsel that the said transfer could be effected by the Head of Department also fails (see s. 48 and s. 2 (definition of "appropriate authority") of the Public Service Law, 1967). The appropriate authority for effecting the transfer in this case is the Minister acting usually through the Director-General of his Ministry. This, therefore, is not a case of a glaring illegality.

(2) In the light of the authorities (vide pp. 92–96 in the judgment *post*) and taking into consideration the hardship to be suffered by the applicant in case I refuse to grant the provisional order and also the difficulties which may be caused to the good administration if I interfere at this stage with the transfer of the two officers, I think once I came to the conclusion that this is not a case of glaring illegality, I would refuse the application of the applicant for a provisional order.

Application dismissed.

Cases referred to:

Nedjati and The Republic, 2 R.S.C.C. 78 at pp. 79, 83;

Georghiades (*No.* 1) v. *The Republic* (1965) 3 C.L.R. 392, at p. 395;

Pavlou v. *Republic* (1971) 3 C.L.R. 120, at pp. 127–128;

Iordanou (*No.* 2) v. *The Republic* (1966) 3 C.L.R. 696 at p. 699;

Sofocleous v. *Republic* (1971) 3 C.L.R. 345, at pp. 351, 352–353.

Application for a Provisional Order.

Application for a provisional order suspending the taking of effect of the decision of the respondents by virtue of which the applicant was transferred from the post of Director of the District Lands Office of Nicosia to the post of Registration Officer, Central Offices, Lands and Surveys Department as from the 1st January, 1975, pending the final determination of a recourse against the validity of such transfer.

K. Talarides, for the applicant.

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

A. Hadjioannou, for the interested party.

Cur. adv. vult.

The facts sufficiently appear in the judgment of the Court delivered by:-

HADJIANASTASSIOU, J.: In these proceedings, under Article 146 of the Constitution, the applicant, Kyriacos Papadopoullos of Nicosia, seeks to challenge the decision of the respondents to transfer him from the post of Director of the District Lands Office of Nicosia, to the post of Registration Officer, Central Offices, Lands and Surveys Department as from the 1st January, 1975.

In the meantime, on the same date of the filing of this recourse, that is to say, December 11, 1974, counsel on behalf of the applicant filed an application under the provisions of Rule 13 of the Supreme Constitutional Court Rules 1962 (which remain in force by virtue of s. 17 of Law 33/64) seeking a provisional order suspending the operation of the administrative act which was communicated to his client by a letter dated November 26, 1974 (*exhibit* 1).

In support of the application, the applicant filed an affidavit sworn by him stating that he is "the holder of the post of Land Officer and was appointed as Director of the District Office of the Land Registry of Nicosia since October 2, 1968. The interested party, Pavlos Polycarpou, is also a Land Officer, but is a junior in that post and is serving in the Central Offices of the Department as a Registration Officer". The affiant further stated that "the duties and responsibilities of the two posts are in many respects different and he is of the view that the Minister of the Interior decided to transfer him on his own initiative without any previous inquiry or conference with any service personnel and without any service needs or requirements; and has given instructions to the Director-General of the Ministry that the latter should convey the instructions of the Minister to the Director of the Lands and Surveys Department to make the transfers attacked in the recourse.

In the said Order (entoli) no reasoning appears, and the said order was conveyed on November 6 and was repeated on November 25, 1974". Finally, the affiant concludes that "once the said transfers were made without any service necessity or reason, but were made by an order of the Minister of Interior, 5 the execution or the putting into effect of the transfers may operate to the detriment of the good and effective running of the respective public services and will be to the detriment of the public interest".

There is no doubt that the Court in a proper case has power, 10 at any stage of the proceedings, on the application of any party, to make a provisional order not disposing of the case on its merits, if the justice of the case so requires. (Rule 13 (1)). The principles to be applied when the Court is dealing with the application to make a provisional order are well-settled and 15 have been expounded in a number of decisions of this Court. According to the late Professor Kyriakopoullos on "Greek Administrative Law", 4th ed. Vol. 'C' at p. 148, it was made clear that the power of making provisional orders has to be used sparingly, and with this in mind, I will refer also to the 20 Decisions of this Court.

The first case decided in Cyprus is the case of *Ahmet Nedjati* and *The Republic*, 2 R.S.C.C. 78, and the Court, in dealing with the question of granting a provisional order in a case of transfer from Famagusta to Paphos, had this to say at p. 79:- 25

" With regard to the merits of this Application, the Court having considered all relevant circumstances in the light of submissions made by Counsel and having in particular examined both the balance of hardship to the applicant, if this Provisional Order is not made, and the difficulty with 30 which the Republic will be confronted if such a Provisional Order as applied for is made, as well as the fact that the basis of the recourse against the transfer involves a very grave question of interpretation of Article 125 of the Constitution, has decided to make a Provisional Order as 35 follows:-

The Republic is hereby prevented from posting or otherwise transferring the applicant to Paphos as directed in the letter of the Chief Customs Officer of the 8th July, 1961, *exhibit* 1, until the final determination of this Case and 40

this Case is fixed for hearing on an early date, that is the 17th October, 1961, at 10.00 a.m.".

In *Georghiades (No. 1)* v. *The Republic* (1965) 3 C.L.R. 392, a case dealing with an application to suspend the emplacement 5 of the interested party in the post of the Director-General, Ministry of Education until the final determination of the recourse, the Court, in dismissing the application for a provisional order took into consideration that serious questions of law were involved; and that the case was not a case where the 10 claim of the applicant was so obviously unfounded as to lead the Court to the conclusion that it was not proper in any case to grant the provisional order applied for. The Court took further into consideration that it was not either a case where the claim of the applicant was clearly bound to succeed, adding 15 that had it been so that could have been a factor militating strongly in favour of the making of the provisional order. Then the Court had this to say at p. 395:-

" It is a cardinal principle of administrative law that where a provisional order is sought in an administrative recourse 20 and where on the one hand the non-making of the order will cause damage, even irreparable, to the applicant but on the other hand the making of such an order will cause serious obstacles to the proper functioning of the administration then the personal interest of the applicant has to 25 be subjected to the general interest of the public and the provisional order should not be granted. It goes without saying that where the non-making of the provisional order will not cause to an applicant irreparable damage such an order will not be made, in any case, on the strength of 30 the application made by applicant for the purpose".

Pausing here for a moment, I think it is fair to state that counsel on behalf of the applicant made it quite clear that this was not a case in which his client would suffer any irreparable harm financially and/or otherwise.

35 In *Pavlou* v. *The Republic of Cyprus* (1971) 3 C.L.R. 120, at pp. 127-128 (a case of acquisition) the Court had this to say:-

" I am in agreement with counsel that in a case where the claim of the applicant is so glaring and where his chances to succeed are so obvious, this would have been a strong 40 factor in favour of the making of the provisional order

applied for. Having considered the material before me and having heard counsel for the Republic, I would be inclined to take the view, irrespective of the fact claimed by the other side that the recourse is out of time, that the applicants have only an arguable case before me, and not a case where their claim is clearly bound to succeed". 5

In *Iordanou (No. 2)* v. *The Republic (1966)* 3 C.L.R. 696, (a case of transfer, the Court had this to say at p. 699):-

> " It is correct that on the face of the recourse there do appear serious allegations by which applicant is challenging 10 his transfer, but they do not amount, on the material before me at present, to such a case of flagrant illegality of the transfer in question, as would make it necessary for this Court to intervene and prevent it from taking effect at this stage. They are matters to be gone into 15 properly at the trial of this recourse".

In *Sofocleous* v. *The Republic* (*Ministry of Education*) (1971) 3 C.L.R. 345, (a case of transfer from one school to another), the Court had this to say at p. 351:-

> " In my opinion it is correct to say that the merits of a 20 recourse for annulment of an administrative act are factors to be taken into consideration in deciding whether or not a provisional order for a stay will be granted. The flagrant illegality of an administrative act is a ground for granting a provisional order even if no irreparable damage has been 25 proved and even when serious obstacles will be caused to the administration".

Then the Court concluded as follows on the question of illegality at pp. 352-353:-

> " It may, therefore, be said with certainty that when an 30 administrative act is flagrantly illegal, a provisional order may be granted. It is, however, a ground to be approached with the utmost caution as it may be tantamount to disposing of the case on its merits, something discouraged by Rule 13 of the Supreme Constitutional Court Rules, 35 though this rule cannot be held as divesting this Court from being the watchdog of legality".

See also Tsatsos on " The Recourse for Annulment before the Council of State", 2nd ed., p. 284 et seq.

The question posed is whether the transfer of the applicant is so flagrantly or glaringly illegal, requiring the Court to grant the interim order because the justice of the case so requires.

Counsel on behalf of the applicant contended that on the 5 facts of the case, remaining uncontradicted, there is an obvious illegality or flagrant illegality, as he put it, because the said transfer ought to have been made by the Commission and not by the Minister; and because he claimed that the post of the Head of the District Lands Registry Office had duties which 10 are entirely different from those of the duties of an officer in charge of registration at the Central Headquarters of the Department.

I have indicated that during the argument of counsel, what he was trying to establish was clearly that he was expecting this 15 Court to dispose of the case on its merits rather than of granting a provisional order. Be that as it may, I think that the argument of counsel has convinced me that in the case in hand, serious issues arise for determination, but having heard all counsel concerned, I have my doubts that this is a case of such 20 glaring illegality and that the recourse is bound to succeed. With this in mind, and having considered carefully the provisions of s. 48 of the Public Service Law 1967, No. 33/67, I am of the view that the administrative act of transfer was not within the competence of the Commission, but of the appro- 25 priate authority referred to in the aforesaid section of our law.

Now the appropriate authority is defined in s. 2 of Law 33/67 to be "a Minister usually acting through the Director-General of his Ministry in respect of his Ministry and any 30 Department under his Ministry ...."; and in subsection 2 of s. 48, it appears that "transfers of officers which do not involve a change in the offices held by them and the duties attached thereto or a change in the place of residence shall be made by the appropriate authority concerned ....". This 35 passage in our law has been embodied from a passage of the Supreme Constitutional Court in the *Nedjati's* case where the Court had this to say at p. 83:-

" In the case of a transfer within one and the same Department not involving the consequences referred to in (a) or 40 (b) above and, even if such consequences are involved, when such transfer is in the nature of a temporary arrange-

ment, then in such a case the abovementioned objects of paragraph 1 of Article 125 are not defeated, but, on the contrary, it is clearly in the public interests and dictated by reasons of practicability and physical possibility that such transfer should be effected by the Minister, Head of Department, or other responsible authority concerned". 5

The consequences referred to in paragraphs (a) and (b) in that judgment appear at p. 82 and I read:-

"(a) Such transfer results in the performance of duties by such public officer not included in the duties laid down in the scheme of service relating to the substantive post which he is holding immediately prior to such transfer; or 10

(b) such transfer definitely necessitates a change of residence of such public officer". 15

For these reasons, I am of the opinion that the argument of counsel that the appropriate authority in this case was the Commission fails, and I think that the alternative contention of counsel, in the light of our law, also fails, *i.e.* that the said transfer could be effected by the Director-General of the Head of the Department. I would reiterate that the appropriate authority in this case where the transfer was made from the Central Office to the District Office—being also interchangeable as the scheme of service shows—remains the Minister acting usually through the Director-General of his Ministry. 20 25

Furthermore, in reading the letters of the Director-General of the Ministry dated November 6 and 25, 1974, (*exhibits* 3 and 4), addressed to the Director of the Lands Department, I do not think that it supports further the argument that the Minister in effecting the said transfer acted by himself only and not as usual through the Director-General of his Ministry. It has been further said by counsel that because the scheme of service shows that whether an officer is interchangeable or not depends on the discretion of the Head of the Department and that it is the Head of the Department who can decide, I think, with respect, it shows that this argument is a matter which this Court will consider more fully at the proper stage of the proceedings. However, I cannot accept as a question of principle that the scheme in question turns the Director of the Department into the appropriate authority regarding the transfer of 30 35 40

this particular applicant. Taking also into consideration that counsel has also referred me to the provisions of Articles 58 and 125 of the Constitution, I repeat, it shows once again that this is a case in which serious issues were raised and have
5 to be considered more fully at a later stage.

In the light of the authorities, and taking into consideration the hardship to be suffered by the applicant in case I refuse to grant the provisional order, and also the difficulties which may be caused to the good administration if I interfere at this stage
10 with the transfer of the two officers, I think once I came to the conclusion that this is not a case of glaring illegality, I would refuse the application of the applicant for a provisional order. However, in view of the nature of the issues raised in this case, I think it is to the interest of all concerned that there
15 should be an early trial.

The Order of the Court, therefore, is that the application is dismissed, but with no order as to costs.

Application dismissed.
No order as to costs.