

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CHRISTAKIS A. ARSALIS,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

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(Case No. 305/71).

Foreign Service—Archivist Class B—Qualifications for appointment
to—Governed by regulation 12(3) of the Foreign Service of the
Republic (Qualifications Required for Appointment or Promotion,
Duties and Responsibilities of Each Post) Regulations, 1966—
5 Requirement of “success in the qualifying examination for the
post of clerk, General Clerical Staff” laid down in paragraph (c)
of the aforesaid regulation 12(3)—Not satisfied if a candidate
comes within the provisions of the decision of the Council of
Ministers, circulated by a Circular of the Ministry of Finance
10 Finance dated 9th December, 1968—In view of the failure to
deposit said decision with the House of Representatives—Proviso
to section 6 of the Foreign Service of the Republic (Amendment)
Law, 1966 (Law 35 of 1966).

15 Hierarchy of texts—Principle of—Circular—An inferior text to that
of a regulation.

Circular—See under “Hierarchy of texts.”

20 When the respondent Public Service Commission met to
consider the filling of a vacancy in the post of Archivist Class
B, they decided that applicant was not eligible for appointment
to the said post on the ground that he had not passed the Govern-
ment Clerical and Other Services Qualifying Examinations as
required by the relevant Scheme of Service*. This scheme of
service is the one provided by regulation 12 of the Foreign
25 Service of the Republic (Qualifications Required for Appoint-
ment or Promotion, Duties and Responsibilities of Each Post)

* Quoted at pp. 263–264 *post*.

Regulations, 1966 paragraph 3(c) of which makes provision for the passing of the said examination.

The applicant was at the material time holding the permanent and pensionable post of Clerical Assistant General Clerical Staff and though the said examination was amongst the qualifications required by the scheme of service for this post he was appointed thereto by virtue of the provisions of a decision of the Council of Ministers, dated 9th December, 1968, to the effect that daily paid employees who were in the service and have completed three years service at any time prior to the 21st January, 1970 were exempted from passing the said examination.

Counsel for the applicant contended:

- (a) That the applicant was exempted from the requirement of passing the said examinations once he had completed 3 years' service by January 21, 1970;
- (b) That the applicant was deemed as having passed successfully the said examinations because he was appointed to the permanent post of Clerical Assistant.
- (c) That the Public Service Commission wrongly and in excess of powers came to the conclusion that the applicant was not eligible to be considered for the post in question.

Held, there is no doubt that the Council of Ministers may make regulations, or amend same, but under the proviso to s. 6 of the Foreign Service of the Republic (Amendment) Law, 1966 (Law 35/66) any such regulations made under sub-paragraph (b), shall be laid before the House of Representatives. It has not been disputed that even if the circular was in the form of a regulation, again in my view, it had to be laid before the House of Representatives before its publication, and therefore, it cannot be said that in view of the mandatory procedure, that the original regulation has been amended, in order to cover the case of the applicant. But there is a further reason, and that is, that a circular is an inferior text to that of a regulation and on the basis of the principle of hierarchy of texts, the regulation prevails. The Commission has not, therefore, acted in excess or in abuse of powers in reaching the conclusion that the applicant was not eligible to become a candidate for the post in question. The application will, accordingly, be dismissed.

Application dismissed.

Recourse.

5 Recourse against the decision of the respondent Public Service Commission to appoint and/or promote and/or second the interested party to the post of Archivist Class B, in the Ministry of Foreign Affairs in preference and instead of the applicant.

L. N. Clerides, for the applicant.

A. Triantafyllides, for the respondent.

Cur. adv. vult.

10 The following judgment was delivered by:—

HADJIANASTASSIOU, J.: The applicant, Christakis A. Arsalis, in this recourse seeks to challenge the decision of the Commission to appoint and/or promote and/or second Mr. Georgios Sergides, the interested party, to the post of Archivist Class B, in the Ministry of Foreign Affairs as being null and void and of
15 no effect whatsoever.

The facts so far as relevant are these:—

The applicant was appointed on a casual assistance basis on May 9, 1966, and was posted to the Archives section of the Ministry of Foreign Affairs. After serving for a number of years in that post, on May 1, 1970, he was promoted to the permanent
20 and pensionable post of Clerical Assistant, General Clerical Staff.

On February 3, 1971, the Director-General of the Ministry of
25 Foreign Affairs, wrote a letter to the Chairman of the Commission requesting the filling of one vacancy in the post of Archivist, Class A, as well as any consequential vacancy that may be created therefrom. (See blue 11).

The post of Archivist Class A is a promotion post for officers
30 serving in the lower post of Archivist Class B. On February 19, 1971, the Commission met for the purpose of filling the post in question, and an extract from the minutes of the meeting of the Commission is in these terms:—

“The Director-General, Ministry of Foreign Affairs,
35 states that none of the officers holding the post of Archivist Class B is qualified for promotion to Class A, in that none of them has passed the exams in General Orders and Financial Instructions & Stores Regulations as required under the relevant scheme of service. In view of this, the Director-General re-

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commends that the post of Archivist, Class A, may be filled by secondment and that of Class B by temporary appointment, until the person to be seconded to the higher post satisfies the requirements of the scheme of service. If this cannot be done, the Director-General requests that a supernumerary appointment may be made to the post of Archivist, Class B, in accordance with the provisions of Section 39 of Law 33/67". 5

Then the Minutes go on:

"After considering the qualifications of all the officers holding the post of Archivist, Class B, as reflected in their Personal Files and in their Annual Confidential Reports, the Commission found that none of these candidates possessed the necessary qualifications for appointment to the post of Archivist, Class A. In view of the above, the Commission decided that— 10

- (a) the post of Archivist, Class A, cannot be filled; and 15
- (b) a supernumerary appointment be made in the lower post of Archivist, Class B, in accordance with the provisions of Section 39 of Law 33/67.

As the post of Archivist, Class B, is a First Entry Post, the Commission decided that the post be advertised and two weeks allowed for the submission of applications". 20

The relevant advertisement was published in the Official Gazette of the Republic of February 26, 1971, under notification No. 328 and 27 applications were submitted to the Commission including that of the applicant. According to the conditions of appointment to the above post, candidates were required to be holders of a leaving certificate of a 6 year secondary school and in addition they ought to have passed the examinations to qualify them for appointment to the post of Clerk in the General Clerical Staff. 25 30

On March 26, 1971, when the Commission met again, and after having considered the qualifications of all the candidates, observed that among the applicants there were persons who had not passed the examinations to qualify them for appointment to the post of Clerk in the General Clerical Staff, as laid down in the Foreign Service (Qualifications for Appointment or Promotion, Duties and Functions of Each Post) Regulations of 1966. Then the Commission added that: 35

"It is a fact that the Council of Ministers, in schemes of 40

5 service which are its absolute responsibility, has approved certain exemptions to the requirement of passing the Government Qualifying Examinations, as a result of which an appropriate note has been inserted in the relevant schemes of service.

10 Under the original Section 10(2)(b) of the Foreign Service Law No. 10 of 1960, the Council of Ministers was empowered to make Regulations to be published in the Official Gazette of the Republic, without further reference to any other Body, prescribing the duties and functions of officers of the Foreign Service.

15 This Section was repealed in 1966 and replaced by Section 6 of Law No. 35/66. By Section 10(2)(b)(i) as amended, the Council of Ministers was empowered to make Regulations prescribing the qualifications required for appointment or promotion for each post in the Foreign Service. Under a proviso of the same section, these Regulations should be deposited with the House of Representatives. If after the lapse of 15 days from the date of such deposit, the House of Representatives by a decision does not amend or cancel in whole or in part the Regulations so deposited, then the said Regulations, after the lapse of the aforesaid time limit, are published immediately in the Official Gazette of the Republic and become effective from the date of such publication. The exemptions approved by the Council of Ministers relating to the Government Qualifying Examinations have not been deposited so far before the House of Representatives in the form of Regulations or otherwise, and, therefore, they cannot be applicable in the case of Archivist, Class B".

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30 In conclusion, the Commission said:-

35 " Bearing in mind the above, the Commission decided that only the following persons, who possessed a leaving certificate of a six-year secondary school and who have also passed the Government Qualifying Examinations, be invited for interview...". See *exh. 1*.

40 On April 23, 1971, the Commission, in the presence of Mr. G. Pelagias, who appeared on behalf of the Director-General, interviewed only eight persons, including the interested party, George Serghides, but excluded the applicant because he had not passed the examinations to qualify for appointment.

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On May 7, 1971, the Commission met for the filling of the post in question in accordance with the provisions of s. 39 of Law No. 33/67, and having considered the merits, qualifications and experience of the candidates interviewed on April 23, 1971, as well as their performance during the interview (personality, alertness of mind, general intelligence and the correctness of answers to questions put to them etc.), as well as the personal files and the annual confidential reports of the candidates already in the service, decided by majority of four votes to one (Mr. D. Theocharis dissenting) that Mr. George Serghides was on the whole the best and that he be seconded to the permanent post of Archivist, Class B w. e. f. 1. 6. 71. (See the minutes, *exhibit 4*). 5 10

On June 1, 1971, the applicant, feeling aggrieved, because of the decision of the Commission, filed the present recourse based on these grounds of law:- 15

“ It is contended, upon the basis of the facts set out in the recourse that respondent’s said decision should be declared null and void, as being contrary to the Constitution and the law and/or as amounting to an abuse or excess of powers, inasmuch as:- 20

(a) Respondents acted on a misconception of material facts that is to say the provisions of the Foreign Service of the Republic (Required Qualifications for Appointment, Duties and Responsibilities of Each Post) Regulations 1966-1970 in regard to the necessary qualifications to be had by candidates applying for appointment to the post of Archivist B. 25

(b) Respondents, by deciding that the applicant was not eligible for appointment and/or promotion to the said post of Archivist B, acted contrary to law i. e. the provisions of the Foreign Service of the Republic (Required Qualifications for Appointment, Duties & Responsibilities of Each Post) Regulations, 1966-1970. 30

(c) Respondents acted in abuse of their powers by ignoring the decision of the Council of Ministers No. 8196, communicated to all Government Departments by the Circular Letter of the Director of the Department of Personnel No. 168 (M.P. 6019/66) dated 22. 10. 1968, whereby the applicant is exempted from the require- 35 40

ment of passing at the examinations for acquiring eligibility to be appointed in the General Clerical Staff.

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5 (d) Respondents acted in abuse of their powers by disregarding the relevant advice which was made available to them by the Hon. Attorney-General of the Republic in the matter.

10 (e) Respondents failed in their paramount duty to select the best candidate by ignoring applicant's experience and versatility in the duties of the post of Archivist B".

On September 15, 1971, a Senior Counsel of the Republic filed his opposition, and alleged that the decision complained of was properly made by the Commission after all relevant facts and circumstances were taken into consideration.

15 On January 31, 1972, (the date of the hearing of this case) counsel appearing on behalf of the applicant applied for an adjournment of the hearing of the case and made the following statement:-

20 "I have informed my learned friend for the other side this morning that in continuation of the advice given by the Attorney-General to the Director-General of the Ministry of Foreign Affairs, regarding the filling of a vacancy in the post of archivist, there is a letter addressed to the same Director-General on the 31st May, 1971, in which letter the
25 Attorney-General appears to have taken a different view of the matter than in his letter of the 5th May, 1971. Because I shall base my whole argument in this case on the lines adopted by the learned Attorney-General of the Republic, I have discussed the matter with my learned friend, and we
30 have agreed to put before the Court a joint application for an adjournment to enable my learned friend to see the Attorney-General and decide about the future of the opposition already filed in this recourse. I am sure that by this request we shall be saving the Court a lot of time and because we shall finally know the opinion of the Attorney-
35 General".

The senior counsel appearing on behalf of the respondent, having agreed to the request of the other side, the case was fixed by consent on February 14, 1972 for mention pending the in-
40 formation required.

On May 3, 1972, Mr. Clerides made the following statement:-

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“ Before I open this case I would like to make a statement to this Court. It appears from the record that the decision of the Public Service Commission challenged by this recourse was taken on the 26th March, 1971. The applicant was not considered by the Commission to fulfil the qualifications set out in the relevant regulations, and he was not considered for promotion to this post. The Attorney-General, on the 31st May, 1971, advised the Minister of Foreign Affairs that the qualifications set out in Regulation 12(3) of the Regulations made under s. 10 of Law 10/60 are deemed to be fulfilled if a public officer has been appointed and he is holding permanently the post of a clerk in the general clerical staff. Since the applicant admittedly has been appointed and is holding the permanent post of a clerk in the general clerical staff, it appears that he fulfils the requirements of the regulation and, therefore, that the Commission should have him as eligible for appointment. As a copy of this opinion has been sent to the Commission, but the Commission did not have a chance to re-examine the case in the light of the said opinion, I suggest that my learned friend should advise the Commission, in the light of this opinion, and further consulting the Attorney-General decide what further course should be taken in these proceedings, because he is in law bound by the opinion of the Attorney-General as indicated in the letter of the 31st May, 1971, and he cannot depart from it whatever the decision of the Commission was”.

Mr. Georghiades, having agreed to the adjournment made this statement:—

“ In spite of the fact that the opinion of the Attorney-General referred to by my learned friend is subsequent to the decision complained of, yet because of the fact that I am bound by his opinions in so far as appearing on his behalf, I consider it necessary to approach not only the Attorney-General, but also the Public Service Commission with a view to finding out whether they are prepared to re-examine their decision in the light of that opinion”.

On June 5, 1972, Mr. Georghiades in asking for an adjournment, made this statement:—

“ I must inform you that the Public Service Commission is not willing to examine the matter, and in view of the fact

that the opinion of the Attorney-General is binding on any counsel who appears on his behalf, the Public Service Commission has decided to appoint a counsel of its own to appear in this case, and the Chairman of the Public Service Commission has asked me to inform Your Honour accordingly”.

Mr. Clerides, having agreed to the adjournment, the case was fixed for hearing on October 18, 1972. It appears from the record that on that date the new counsel appointed to appear on behalf of the respondent, because he was instructed rather late, he was not ready to go on with the case, and the case was finally fixed for hearing as the record shows, on September 28, 1973. Then, for reasons which appear again on record and which I need not repeat here, the case was adjourned once again to enable counsel to file a written application stating the grounds on which he proposed to argue the case of the Commission. There were a number of other adjournments, and finally the case was concluded on June 5, 1975.

It appears that Law No. 35 of 1966, amending the Foreign Service of the Republic Law came into force on July 7, 1966, and shortly afterwards, the Regulations regarding the qualifications of the office of Archivist Class B were published in the Official Gazette, in accordance with section 6(b)(1). According to the scheme of service, under which the interested party was seconded, the post of Archivist Class B is a first entry post, and the qualifications, duties and functions are these:

“ An Archivist Class B performs the usual duties of a clerk which include registration and classification of correspondence, typing, simple accounting duties and any other duties which may be assigned to him.

Qualifications: The following special qualifications are required for the post of Archivist Class B in addition to the general qualifications required for appointment in the public service:

- (a) Leaving certificate from a six-year secondary school;
- (b) Excellent knowledge of the mother tongue and very good knowledge of the English language;
- (c) Success in the examinations for acquisition of the right to be a candidate for the post of clerk in the General Clerical Staff;

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(d) Success, within two years from appointment, in the Government examinations which are required for promotion to the post of Clerk 2nd Grade.

In cases of promotion, in addition to the qualifications required for each post, there might be required success in an examination which will be carried out by the Ministry of Foreign Affairs by virtue of regulations made under section 10(2)(c) of the law". (See *exh.* 8). 5

In the meantime, on May 3, 1971, the Director-General of the Ministry of Foreign Affairs addressed a letter to the Attorney-General seeking legal advice as to the filling of the post of Archivist Class B, and I propose reading it:- 10

" Under the scheme of service for the post of Clerical Assistant General Clerical Staff, candidates for this post should have passed the Government Clerical and other Services Qualifying Examinations. 15

2. By virtue of a decision of the Council of Ministers which was circulated to all Government Departments by a Circular of the Ministry of Finance dated 9th December, 1968, (copy attached) daily paid employees who are in the service and would have completed three years' service at any time prior to the 21st January, 1970, would have been exempted from the said test/examination on the completion of the said three years' service. 20

3. Many daily paid employees took advantage of the benefits afforded by para. 2 above, who, without being successful in the test/examination, have been appointed to permanent posts of Clerical Assistant upon completion of three years' service by 21. 1. 70. Such officers, however, have not been considered by the Public Service Commission as duly qualified candidates for the post of Archivist grade B, because they had not succeeded in the said test/examination. 25 30

4. In view of the above you are requested to advise on the following:- 35

(a) does the decision of the Council of Ministers in para. 2 above not equate the three years' service until 21. 1. 70 with the success in the test/examination?

5 (b) If the reply to the above question is in the affirmative, is it not implied and is it not legally valid that an officer appointed to the permanent post of Clerical Assistant through the completion of three years' service until 21. 1. 70, is considered as having succeeded in the required test/examination and thus be considered as possessing the qualifications required for the post of Archivist Grade B?

10 (c) If the replies to sub-*paras* (a) and (b) are in the negative the result is that a permanent Clerical Assistant with more than 4 years' service cannot be considered as a candidate for the post of Archivist B whilst a graduate of a gymnasium who is not in the service, who has succeeded in the requisite test/examination can be considered as a candidate for the same post. Is this position legally valid?" (see blue 22-23).

20 On May 4, 1971, the Chairman of the Commission, because a copy of that letter was also sent to him for information, addressed a letter to the Attorney-General enclosing a copy of the minutes of the meeting of the Commission dated March 26, 1971, for his own information (see *exh.* 11).

On May 5, 1971, the Attorney-General of the Republic in reply to the Minister of Foreign Affairs said *inter alia*:-

25 "I am of the opinion that the Commission correctly approached the subject under consideration.

30 The qualifications for the post of Archivist are laid down in para. 3 of Regulation 10 B (as same is set out in Regulation 3 of the Foreign Service of the Republic (Qualifications Required for Appointment or Promotion, Duties and Responsibilities of Each Post) Amendment Regulations 1970, which are published in Supplement No. 3 of the Official Gazette of the Republic of the 9th October, 1970). Thus it is apparent that even if it is taken that those Regulations have the same force as the decision of the Council of Ministers, those Regulations by being subsequent in time, prevail over any other decision to the contrary.

40 But the Regulations are superior to the decisions of the Council of Ministers and according to the accepted principle in public law of the hierarchy of documents—Hierar-

chie des textes (see Odent: Contentieux Administratif 1965–1966 pp. 1178, 1188) the Regulations prevail in this case.

The problems arising from the questions mentioned in your letter under reply could be remedied only by amending Regulations”. (See *exh.* 7). 5

On May 18, 1971, the Director–General of the Ministry of Foreign Affairs addressed a new letter to the Attorney–General of the Republic in the following terms:–

“ I have been instructed to refer to your letter reference No. 34(C)1961/2 dated 5th May. 10

2. In your letter reference is made to the Regulations for the post of Archivist Classified Registry and not for the post of Archivist Class B, according to my letter dated 3rd May, 1971 bearing the same number. 15

3. Regulation 12 which relates to the post of Archivist Class B was made on the 11th August, 1966 (pages 760–761 of the 3rd Supplement of the Official Gazette under notification No. 517 dated 11. 8. 66) and therefore, before the decision of the Council of Ministers to exempt certain officers from the qualifying examination. 20

4. In view of the above, I will be obliged if you would let me know whether the advice in your letter dated 5th May, is valid in spite of what is stated in the aforementioned paragraph 3”. 25

On May 31, 1971, the Attorney–General, in reply to the Minister of Foreign Affairs said:–

“ I regret overlooking that your previous letter was referring to Archivist Class B (provision for which exists in Reg. 12) and not to Archivist Classified Registry. 30

3. One of the qualifications for appointment to the post of Archivist Class B is also the provision made in sub–paragraph (c) of paragraph (3) of Regulation 12 whereby it is provided.

‘Success in the qualifying examination for the post of Clerk, General Clerical Staff’. 35

If, therefore, an officer has been appointed permanently

to the post of Clerk, General Clerical Staff, I am inclined to the view that the above prerequisite is satisfied.

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5 4. The above quoted sub-paragraph presupposes that in order to become eligible for appointment for the post of Clerk, General Clerical Staff, there is required the taking of an examination, but it does not state how this provision is carried out, and by whom and in what subjects the examination will be conducted. We should therefore take into consideration the provisions made in this respect.

10 If the requirement for examinations is provided for in the schemes of service then a decision of the Council of Ministers may provide that in certain cases the examination is not necessary and this will not be contrary to the principle of 'hierarchy of documents' to which I referred in my previous letter.

15 Therefore, subject to the above prerequisites the answer to questions (a) and (b) in your letter to me No. 1342/69 dated 3rd May, 1971, should be in the affirmative".

20 Pausing here for a moment, I think that if the administration had properly placed before the Attorney-General all the facts which have been before this Court, i. e. that the Council of Ministers had already appointed the Committee which would carry out the qualifying examinations, and also that the curriculum of the said examinations were published in the Official Gazette of the Republic of January 21, 1967, under Notification No. 55, the Attorney-General might have reached a different view in the circumstances of this case.

25 The question posed in this recourse is whether the applicant did possess the qualifications laid down in the scheme of service of Archivist Class B.

30 There is no doubt that a candidate for the office of Archivist Class B under Regulation 12(3)(c) must have had success in passing the Governmental examinations in order to qualify him for the said post, but in view of the circular dated December 9, 1968, the applicant claimed that he was exempted from that requirement (a) once he had completed 3 years service by January 21, 1970; (b) that because he was appointed to the permanent post of Assistant Clerk, he was deemed as having passed successfully the said examinations; and (c) that the Commission

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wrongly and in excess of powers came to the conclusion that he was not eligible to be considered for the post in question.

On the contrary, the Commission says that in spite of the circular, the applicant was not exempted because the amending law takes away the case of the applicant from the provisions of that circular once the office in question comes under the Foreign Service Law. 5

There is no doubt that the Council of Ministers may make regulations, or amend same, but under the proviso to s. 6 of Law 35/66, any such regulations made under sub-paragraph (b), the regulations shall be laid before the House of Representatives. It has not been disputed that even if the circular was in the form of a regulation, again in my view, it had to be laid before the House of Representatives before its publication, and therefore, it cannot be said that in view of the mandatory procedure, that the original regulation has been amended, in order to cover the case of the applicant. But there is a further reason, and that is, that a circular is an inferior text to that of a regulation and on the basis of the principle of hierarchy of texts, the regulation prevails. I would, therefore, take the opportunity to state once again that if the administration had placed before the Attorney-General all the material to which I have referred earlier in this judgment, I am of the view that in these particular circumstances, he would not have reached the conclusion that once an officer has been appointed permanently to the post of Clerk, General Clerical Staff, he had satisfied the prerequisite referred to in sub-paragraph (c) of paragraph 3 of Regulation 12. 10 15 20 25

For the reasons I have tried to advance, I find myself in disagreement with counsel for the applicant that the Commission acted in excess or in abuse of powers in reaching the conclusion that the applicant was not eligible to become a candidate for the post in question. I would, therefore, dismiss this application, because, I repeat, the Commission properly and correctly approached the matter. But in view of the circumstances of this case, I am not prepared to make an order as to costs against the applicant. 30 35

Application dismissed. No order as to costs.