1977 February 9

[TRIANTAFYLLIDES, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

PANKYPRIOS SYNTECHNIA DIMOSION YPALLILON, AND OTHERS,

Applicants,

and

THE REPUBLIC OF CYPRUS, THROUGH THE COUNCIL OF MINISTERS,

Respondent.

(*Case No.* 314/74).

Recourse for annulment—Article 146 *of the Constitution—Jurisdiction of the Supreme Court—Scheme of service—Made under section* 29 *of the Public Service Law,* 1967 (*Law* 33/67)*—Is delegated legislation made under Article* 54 *of the Constitution—And being an act of legislative nature, it does not come within the ambit of the jurisdiction under Article* 146.

Legitimate interest—Article 146.2 *of the Constitution—Recourse against validity of schemes of service for post of Matron—Legitimate interest of those applicants who were eligible for appointment thereto but did not apply for it because it was reserved only for female candidates by the scheme of service—And no legitimate interest of trade union when both the female and male candidates (the applicants) for the said posts are members of it.*

The first applicant is the trade union of the Cyprus Civil Servants and the other applicants are public officers, all males, who are serving in the Department of Medical Services; they are all eligible for appointment to the post of Matron, which is a "first entry and promotion post".

By this recourse they seek to annul the "scheme of service" for the post of Matron in the Department of Medical Services, which scheme was adopted by the respondent Council of Ministers on April 4, 1974.

At the commencement of the hearing of the recourse counsel for the respondent argued as preliminary objections, two grounds of law in the Opposition, namely that the said scheme of service is not an administrative act within the ambit of the jurisdiction under Article 146 of the Constitution, and, also, that no existing legitimate interest of the applicants had been adversely and directly affected by it in the sense of paragraph 2 of Article 146.

Held, (I) With regard to the first issue:

The matter has been put really beyond any doubt since the enactment of the Public Service Law, 1967 (Law 33/67) section 29* of which provides that the general duties and responsibilities of an office and the qualifications required for the holding thereof shall be prescribed in schemes of service made by decision of the Council of Ministers. A scheme of service made by the Council of Ministers, under section 29 is delegated legislation—in the sense of *Police* v. *Hondrou and Another*, 3 R.S.C.C. 82—made under Article 54 of the Constitution for the purpose of carrying into effect the provisions of Law 33/67, and, in particular, of provisions such as sections 33 and 34 thereof. It follows that, being an act of legislative nature, it does not come within the ambit of the jurisdiction under Article 146. (C.f. the position applicable in Greece, at p. 30 post and relevant Cyprus case-law before the enactment of Law 33/67, vide pp. 31–32 *post*).

Per curiam: Even if I had to decide the said issue before the enactment of the Public Service Law, 1967 (Law 33/67), I would have decided, bearing in mind the essential nature of a scheme of service and the purpose that it is destined to serve, that it is an act of a legislative nature made by the Council of Ministers and, that, therefore, it is not within the ambit of Article 146.

Held, (II) With regard to the second issue:

(1) I do not agree that the individual applicants, Nos. 2 to 8, who, on the basis of the material before me, appear to be all of them persons who were eligible for appointment to the post of Matron and did not apply for it because it was reserved by the scheme of service only for female candidates, are not

* Quoted in full at p. 34 *post*.

persons whose existing legitimate interests have been directly and adversely affected by the said scheme (see, too, in this connection, the decision of the Council of State in Greece in Case 910/67).

(2) Concerning applicant No. 1, which is a trade union, I do agree that, as, admittedly, both the female candidates for the post of Matron as well as the aforesaid individual applicants are members of it and, therefore, in promoting the interests of some of its members it would, inevitably, have to act against the interests of some other of its members, it cannot be treated as possessing a legitimate interest to make the present recourse (see case Nos. 839/57, 643/68 and 18/70 of the Greek Council of State. Case No. 1265/64 of the said council *distinguished*).

Application dismissed.

Cases referred to:

Demetriades and Son and Another v. *The Republic* (1969) 3 C.L.R. 557;

Kourris v. *The Supreme Council of Judicature* (1972) 3 C.L.R. 390, at pp. 400–401, 408–409, 411–412, 443, 461, 462;

Papapetrou v. *The Republic*, 2 R.S.C.C. 61 at pp. 66–67;

Police v. *Hondrou and Another*, 3 R.S.C.C. 82 at p. 85;

Ioannidou v. *The Republic* (1965) 3 C.L.R. 664 at pp. 671–672;

Georghiades v. *The Republic* (1966) 3 C.L.R. 252 at pp. 274–275;

Decisions of the Greek Council of State in Case Nos. 910/67, 839/57, 643/68, 18/70 and 1265/64.

Recourse.

Recourse against the decision of the respondent to adopt the scheme of service for the post of Matron in the Department of Medical Services.

M. Christophides, for the applicants.

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

Cur. adv. vult.

The following judgment was delivered by:

TRIANTAFYLLIDES P.: In this recourse the applicants seek, in effect, to annul the "scheme of service" (*exhibit* 1) for the post of Matron in the Department of Medical Services, which

scheme was adopted by the respondent Council of Ministers, by means of its decision No. 13,178, on April 4, 1974.

The first applicant is the trade union of the Cyprus Civil Servants and the other applicants are public officers, all males, who are serving in the Department of Medical Services; according to their contentions, as set out in their recourse, they are all eligible for appointment to the post of Matron, which is a "first entry and promotion post".

The complaint of the applicants is that the *sub judice* scheme of service is contrary to the Constitution and the law, in that it discriminates against male candidates by being drafted in such terms as to render the post in question accessible only to female candidates.

At the commencement of the hearing of this case counsel for the respondent argued, as preliminary objections, grounds of law (A) and (B) in the Opposition, namely that the said scheme of service is not an administrative act within the ambit of the jurisdiction under Article 146 of the Constitution, and, also, that no existing legitimate interest of the applicants had been adversely and directly affected by it in the sense of paragraph 2 of Article 146.

In relation to the first of the above issues I am inclined to agree with both counsel that if it had to be resolved in the context of the administrative law applicable in Greece I would have had to hold that the present recourse could have been made against the *sub judice* scheme of service, because in Greece the main test by means of which the existence of jurisdiction concerning an administrative recourse is established is not the nature of the act or decision which is being challenged by a recourse, but the nature of the organ from which such act or decision has emanated; thus, an act of general regulatory application, such as the scheme of service in question, emanating from the Council of Ministers, in the Executive Branch of the Government, could apparently be attacked by an administrative recourse in Greece (see Κυριακοπούλου " Ἑλληνικὸν Διοικητικὸν Δίκαιον", 4th ed., vol. A, p. 52, Στ. Ἀδρεάδου " Ἡ Ἀκυρωτικὴ Δικαιοδοσία τοῦ Συμβουλίου Ἐπικρατείας", 1936, vol. A. pp. 128–130, and Γ. Παπαχατζῆ " Μελέται ἐπὶ τοῦ Δικαίου τῶν Διοικητικῶν Διαφορῶν", 4th ed., pp. 43, 44).

In Cyprus the test which has been adopted and consistently applied, in view of the particular wording of paragraph 1 of Article 146 of the Constitution, is that of the nature of the act or decision concerned, but, of course, in determining such nature, account must, also, be taken of the nature of the organ which has made such act or decision (see, *inter alia*, *Demetriades and Son and another* v. *The Republic*, (1969) 3 C.L.R. 557, and *Kourris* v. *The Supreme Council of Judicature*, (1972) 3 C.L.R. 390, 400-401, 408-409, 411-12, 443, 461, 462).

It is correct that in our case-law there are to be found some dicta which might be treated as creating some ambiguity concerning the issue of whether or not a scheme of service can be attacked by a recourse directly, as such, under Article 146:

In *Papapetrou* v. *The Republic*, 2 R.S.C.C. 61, the following were stated by the then functioning Supreme Constitutional Court (at pp. 66-67):-

> " As the executive power relating to the creation of new posts in the public service of the Republic and to the making and amending of schemes of service concerning existing or new posts, is a power relating to public offices and not to the public officers, as holders of such offices, it is not, thus, included among the powers which are entrusted to the Public Service Commission by Article 125 and such power remains vested in the Council of Ministers.
>
> This view regarding the effect of paragraph 1 of Article 125 is clearly consonant with the powers of the Council of Ministers under Article 54 of the Constitution, particularly paragraphs (a) and (d) thereof.
>
> In the opinion of the Court, therefore, the Public Service Commission, in the absence of any organic law on the subject, is bound by all Schemes of Service relating to posts in the public service of the Republic which have either been expressly or impliedly approved by the Council of Ministers, either specifically or generally, and the Public Service Commission cannot deviate from such approved Schemes of Service and must observe their provisions in discharging its duties under the Constitution."

It is to be observed that, though in the above passage a scheme of service was treated as being of the same nature as, or com-

parable to, an organic law, nevertheless, its making was considered to be an exercise of the "executive power" vested in the Council of Ministers under Article 54 of the Constitution.

Subsequently, however, to the *Papapetrou* case there was decided, again by the Supreme Constitutional Court, the case of *Police* v. *Hondrou and another*, 3 R.S.C.C. 82, where (at p. 85) it was held that the expression "executive power" in Article 54 of the Constitution is used in relation to the Council of Ministers in a comprehensive manner so as to include the making of delegated legislation and that the use of that expression does not change the essential nature of the function of making delegated legislation, which is a legislative one.

In *Ioannidou* v. *The Republic*, (1965) 3 C.L.R. 664, the following passage appears in the judgment (at pp. 671–672):–

> " Applicant has challenged, also, in this Case, the relevant scheme of service, as such, and she has complained, in this connection, that the English language has been rated thereby higher as a qualification than the Greek or Turkish languages and that this was contrary to Article 3; a 'very good' knowledge of Greek or Turkish is required, whereas the knowledge of English has to be 'excellent'.
>
> If my opinion, no recourse under Article 146 can be made directly against such scheme because it was published on the 24th January, 1963—when the post was advertised—and this recourse was not filed until the 18th April, 1963, *i.e.* after the lapse of the period laid down by Article 146 (3). Such scheme could also have been challenged through a recourse against the eventual appointment, but this course has not been followed by Applicant.
>
> Even if, however, the said scheme could be challenged by means of this recourse, I would still not find in favour of Applicant for the simple reason that, so long as knowledge of the Greek or Turkish language to a sufficient degree was made a requirement by the relevant scheme of service, there was nothing contrary to Article 3 in requiring knowledge of the English language to the high degree required by the nature of the post in question."

As it appears from the above passage the matter whether the scheme of service could have been attacked by a recourse in

that case was not finally decided, but was left open, because it was held that, in any case, the recourse against the scheme could not have succeeded for other reasons; and the assumption on which the second paragraph of the above passage has been based cannot be of any real help to the applicants in the present case.

In *Georghiades* v. *The Republic*, (1966) 3 C.L.R. 252, the following (at pp. 274–275) were stated:–

> " I, therefore, do not find that *exhibits* 4 and 5—even if they were to be found to allocate duties in a manner different from that in which such duties were distributed under the Chamber—could be said to contravene sections 7 or 16.
>
> Moreover, I have serious doubts as to whether Applicant can be held entitled at all to proceed directly against the validity of *exhibits* 4 and 5, because these schemes of service are not acts directed at him as a subject of administration, and, therefore, they cannot be held to be executory vis-a-vis the applicant, so as to entitle him to have a recourse against them under Article 146.
>
> Be that as it may—and irrespective of whether applicant could be held to be entitled to file a recourse directly against *exhibits* 4 and 5 or whether he could only raise the validity thereof in proceedings against the emplacement of himself or the Interested Party in the relevant posts—having held that such schemes are neither contrary to law nor made in excess or abuse of powers, claim (4) of applicant fails and is dismissed."

So, again, in the above case, the issue of whether a scheme of service could be directly attacked as such by a recourse was not finally resolved.

Even if I had to decide the said issue before the enactment of the Public Service Law, 1967 (Law 33/67), I would have decided, bearing in mind the essential nature of a scheme of service and the purpose that it is destined to serve, that it is an act of a legislative nature made by the Council of Ministers and, that, therefore, it is not within the ambit of Article 146.

In my view the matter has been put really beyond any doubt since the entactment of Law 33/67, section 29 of which reads as follows:-

"29.-(1) The general duties and responsibilities of an office and the qualifications required for the holding thereof shall be prescribed in schemes of service made by decision of the Council of Ministers.

(2) A scheme of service may provide as a prerequisite to appointment or promotion the passing by candidates of an examination."

A scheme of service made by the Council of Ministers, under section 29 is, in my opinion, delegated legislation—in the sense of the *Hondrou* case, *supra*—made under Article 54 of the Constitution for the purpose of carrying into effect the provisions of Law 33/67, and, in particular, of provisions such as sections 33 and 34 thereof. It follows that, being an act of legislative nature, it does not come within the ambit of the jurisdiction under Article 146.

Consequently, this recourse, which has been made under the said Article against a scheme of service, as such has to be dismissed for lack of jurisdiction of this Court to entertain it.

Before concluding the judgment I shall deal, also, briefly with the other preliminary issue which was raised by counsel for the respondent, namely that relating to the legitimate interest of the applicants:

I do not agree that the individual applicants, Nos. 2 to 8, who, on the basis of the material at present before me, appear to be all of them persons who were eligible for appointment to the post of Matron and did not apply for it because it was reserved by the scheme of service only for female candidates, are not persons whose existing legitimate interests have been directly and adversely affected by the said scheme (see, too, in this connection, the decision of the Council of State in Greece in case 910/67).

Concerning, however, applicant No. 1, which is a trade union, I do agree that, as, admittedly, both the female candidates for the post of Matron as well as the aforesaid individual

applicants are members of it and, therefore, in promoting the interests of some of its members it would, inevitably, have to act against the interests of some other of its members, it cannot be treated as possessing a legitimate interest to make the present recourse; this view of mine is based on the relevant case-law of the Council of State in Greece, such as its decisions in cases 839/57, 643/68 and 18/70; the decision of the said Council in case 1265/64 seems to have been reached on the basis of the particular facts of that case, and not only it is distinguishable from the situation in the present case, but, also, it cannot be regarded as having initiated a change in the course of the aforesaid case-law of the Council (as appears to be speculated in Τσάτσου " Ἡ Αἴτησις Ἀκυρώσεως ἐνώπιον τοῦ Συμβουλίου τῆς Ἐπικρατείας", 3rd ed., pp. 56, 57).

I would, therefore, have dismissed, in any event, this recourse, in so far as applicant No. 1 is concerned, for lack of legitimate interest, too.

For all the above reasons this recourse fails and it is dismissed accordingly, but, in the light of all relevant circumstances, I am not prepared to make an order as to its costs against the applicants.

Application dismissed.
No order as to costs.