

1977 February 25

[TRIANTAFYLIDIS, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ANDREAS YERASIMOU,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE EDUCATIONAL SERVICE COMMITTEE,

Respondent.

(Case No. 28/77).

Provisional Order—Rule 13 of the Supreme Constitutional Court Rules, 1962—Principles applicable—No flagrant illegality and no irreparable damage—Application for a provisional order suspending effect of transfer of schoolmaster—Not a proper case in which to grant the provisional order applied for, so as to protect pro tempore his personal interests at the expense of the public interest which is involved in the smooth functioning of the educational service.

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The applicant, a school-teacher, was transferred from the elementary school of Galata to the elementary school of Katydata. After filing a recourse against the decision to transfer him he sought a provisional order, under rule 13 of the Supreme Constitutional Court Rules, suspending the effect of the said decision.

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In support of his application for a provisional order he contended that his transfer was not decided by the respondent Committee, but by the Ministry of Education, which does not possess any competence in the matter, and that consequently, it is flagrantly illegal; and, in this connection, he referred to section 39* of the Public Educational Service Law 1969 (Law 10/69). He, also, argued that his transfer was made contrary

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* Quoted at p. 39 *post*.

to the relevant provisions of regulations 16 and 21 of the Educational Officers (Teaching Staff) (Appointments, Postings, Transfers, Promotions and Related Matters) Regulations, 1972 which have been made under section 76 (3) of Law 10/69.

5 *Held, dismissing the application*, (1) having perused the above legislative provisions, I am not, at this stage, satisfied, on the basis of the material at present before me, that there does appear to exist such a *flagrant* illegality in relation to the complained of transfer of the applicant as would render necessary the making of the applied for provisional order; it is not possible to say, definitely, on the basis of the facts placed till now before me, either that any of the aforesaid provisions has been contravened or that the complained of transfer has not been made in a manner compatible with such provisions; there are matters which have to be elucidated further at the trial of the present case; as for example, whether the *sub judice* transfer was preceded by a temporary one under the said section 39 (2).

10 (2) This is not a case in which to grant a provisional order suspending the effect of the *sub judice* transfer, so as to protect pro tempore his personal interests at the expense of the public interest which is involved in the smooth functioning of the educational service, especially as it has been practically conceded by applicant's counsel that any damage that his client may suffer, if the provisional order is refused, will not be irreparable in the sense that it cannot be compensated for by the payment of damages later on (See case-law concerning the making of provisional orders referred to in *C.T.C. Consultants Ltd. v. Cyprus Tourism Organization*, (1976) 12 J.S.C. 1735).

15 *Per curiam*: I should not be misunderstood as being prepared to hold that in no case can a transfer of a public officer be suspended by means of a provisional order. It is, indeed, possible to do so in a proper case, when there exist special reasons related to either the facts of the specific instance or to the particular legislative provisions applicable thereto (See "Επιθεώρησης Δημοσίου Δικαίου και Διοικητικοῦ Δικαίου", vol. 16 (1972), p. 270, paras. 141-143).

Application dismissed.

Cases referred to:

40 *C.T.C. Consultants Ltd., v. Cyprus Tourism Organization* (1976) 12 J.S.C. 1735 (to be reported in (1976) 3 C.L.R.);

- Artemiou (No. 2) v. The Republic* (1966) 3 C.L.R. 562;
Iordanou (No. 2) v. The Republic (1966) 3 C.L.R. 696;
Iordanou (No. 3) v. The Republic (1966) 3 C.L.R. 705;
Georghiadis v. The Republic (1971) 3 C.L.R. 309;
Sofocleous v. The Republic (1971) 3 C.L.R. 345; 5
Papadopoulos v. The Republic (1975) 3 J.S.C. 299 (to be
 reported in (1975) 3 C.L.R.);
Pelides v. The Republic and Another, 3 R.S.C.C. 13 at p. 17.

Application for provisional order.

Application for a provisional order, under rule 13 of the 10
 Supreme Constitutional Court Rules, 1962, suspending the
 effect of the *sub judice* decision of the respondent Committee
 to transfer applicant, a school-teacher, from the elementary
 School of Galata to the elementary school of Kadydata.

Chr. Kitromilides, for the applicant. 15

A. S. Angelides, for the respondent.

Cur. adv. vult.

The following decision was delivered by:

TRIANTAFYLLIDES P.: The applicant is seeking a provisional 20
 order, under rule 13 of the Supreme Constitutional Court
 Rules, suspending the effect of the *sub judice* decision of the
 respondent Committee to transfer him, as from January 10,
 1977, from the elementary school of Galata to the elementary
 school of Katydata.

The applicant is a school-teacher and this recourse was 25
 filed on January 24, 1977, after the said decision had already
 taken effect.

The main ground on which this application for a provisional 30
 order has been pursued has been that the said decision is obvi-
 ously unlawful, inasmuch as, though the applicant was informed
 orally by the Ministry of Education about his transfer, and was
 asked to comply with it, on January 7, 1977, in fact, according
 to a letter dated January 10, 1977, which is attached to the
 respondent's Opposition in this case, the applicant was officialy 35
 notified, by means of this letter, that he was transferred only
 as from January 10, 1977. It has been contended in this respect
 that his transfer was not decided by the respondent Committee,
 but by the Ministry of Education, which does not possess any
 competence in the matter, and that, consequently, it is flagrantly

illegal; and, in this connection, reference has been made of section 39 of the Public Educational Service Law, 1969 (Law 10/69), which reads as follows:—

5 “ 39.—(1) Τηρουμένων τῶν διατάξεων τοῦ ἐδαφίου (2), μεταθέσεις ἐκπαιδευτικῶν λειτουργῶν ἐνεργοῦνται ὑπὸ τῆς Ἐπιτροπῆς.

(2) Μεταθέσεις ἐκπαιδευτικῶν λειτουργῶν αἱ ὁποῖαι δὲν συνεπάγονται μεταβολὴν εἰς τὰς ὑπ’ αὐτῶν κατεχομένης θέσεις καὶ τὰ συναφῆ πρὸς αὐτὰς καθήκοντα ἢ ἀλλαγὴν τόπου διαμονῆς ἐνεργοῦνται ὑπὸ τῆς ἀρμοδίας ἀρχῆς:

10 Νοεῖται ὅτι εἰς ἐξαιρετικὰς περιπτώσεις ἐπείγουσας φύσεως ἢ ἀρμοδία ἀρχὴ δύναται νὰ προβῇ εἰς προσωρινὴν μετάθεσιν συνεπαγομένην ἀλλαγὴν τόπου διαμονῆς διὰ περίοδον μὴ ὑπερβαίνουσαν τὰς τεσσαράκοντα καὶ δύο ἡμέρας.”

15 (“ 39.—(1) Subject to the provisions of subsection (2), transfers of educational officers shall be made by the Committee.

(2) Transfers of educational 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:

20 Provided that in exceptional cases of urgent nature the appropriate authority may make a temporary transfer involving a change in the place of residence for a period not exceeding forty—two days.”)

25 It has, also, been argued that the transfer of the applicant was made contrary to the relevant provisions of regulations 16 and 21 of the Educational Officers (Teaching Staff) (Appointments, Postings, Transfers, Promotions and Related Matters) Regulations, 1972, which have been made under section 76 (3) of Law 10/69 (see Not. 205, in Supplement No. 3, Part I, to the Official Gazette dated November 10, 1972).

35 Having perused the above legislative provisions, I am not, at this stage, satisfied, on the basis of the material at present before me, that there does appear to exist such a *flagrant* illegality in relation to the complained of transfer of the applicant as would render necessary the making of the applied for provisional order; it is not possible to say, definitely, on the basis of the facts placed till now before me, either that any of the

aforesaid provisions has been contravened or that the complained of transfer has not been made in a manner compatible with such provisions; there are matters which have to be elucidated further at the trial of the present case; as, for example, whether the *sub judice* transfer was preceded by a temporary one under section 39 (2), above. 5

In *C.T.C. Consultants Ltd. v. Cyprus Tourism Organization*, (1976) 12 J.S.C. 1735* I had occasion to refer to our case-law concerning the making of provisional orders under the aforesaid rule 13. I do not propose to review now our case-law all over again, but I should state that I have examined the present application for a provisional order in the light of such case-law and, in particular, in the light of the principles expounded in *Artemiou (No. 2) v. The Republic*, (1966) 3 C.L.R. 562, *Jordanou (No. 2) v. The Republic*, (1966) 3 C.L.R. 696, *Jordanou (No. 3) v. The Republic*, (1966) 3 C.L.R. 705, *Georghiadis v. The Republic*, (1971) 3 C.L.R. 309, *Sofocleous v. The Republic*, (1971) 3 C.L.R. 345 and *Papadopoulos v. The Republic*, (1975) 3 J.S.C. 299**, which are all cases in which applications for provisional orders in relation to transfers were considered and determined. Also, I have considered the present application in the light of the approach adopted in this respect by the Council of State in Greece (see Βεγλερῆ “*Ἡ Συμμόρφωσις τῆς Διοικήσεως εἰς τὰς Ἀποφάσεις τοῦ Συμβουλίου τῆς Ἐπικρατείας*”, 1934, pp. 112-117, and Τσάτσου “*Ἡ Αἴτησις Ἀκυρώσεως ἐνώπιον τοῦ Συμβουλίου τῆς Ἐπικρατείας*”, 3rd ed., pp. 423-431). 10 15 20 25

Bearing all the above in mind I have reached the conclusion that this is not a proper case in which to grant a provisional order suspending the effect of the *sub judice* transfer of the applicant, so as to protect pro tempore his personal interests at the expense of the public interest which is involved in the smooth functioning of the educational service, especially as it has been practically conceded by applicant's counsel that any damage that his client may suffer, if the provisional order is refused, will not be irreparable in the sense that it cannot be compensated for by the payment of damages later on; and, in this respect, it is important to bear in mind that the applicant is not married and that it does not appear that other family obligations of his are seriously affected by his transfer. 30 35

* To be reported in (1976) 3 C.L.R. 40

** To be reported in (1975) 3 C.L.R.

I should not be misunderstood as being prepared to hold that in no case can a transfer of a public officer be suspended by means of a provisional order; the instances referred to in "Επιθεώρησις Δημοσίου Δικαίου καὶ Διοικητικοῦ Δικαίου", vol. 5 16 (1972), p. 270, paras. 141-143, and vol. 19 (1975), p. 277, para. 70, indicate that it is, indeed, possible to do so in a proper case, when there exist special reasons related to either the facts of the specific instance or to the particular legislative provisions applicable thereto; but, this is not so on the present 10 occasion.

Another reason which has militated against my deciding to grant the provisional order applied for is that the applicant may not succeed at all, eventually, in this recourse: He has objected against his transfer and has requested, under rule 22 15 of the aforementioned Regulations, a reconsideration, by the respondent Committee, of the decision to transfer him, but the Committee has resolved to maintain its said decision and he was informed accordingly by a letter dated February 4, 1977, after the filing of the present recourse. The present recourse 20 is not aimed at the determination of his objection, but only at the initial decision to transfer him; so, in the light of, *inter alia*, *Pelides v. The Republic and another*, 3 R.S.C.C. 13, 17, it might be said—and I leave this question open at this stage of the proceedings—that the applicant, once he has applied for its 25 reconsideration, is no longer entitled to challenge the initial decision to transfer him, but only the subsequent final decision of the respondent in the matter, which is not the subject matter of the present recourse.

The last point with which I have to deal is whether I should 30 grant, in this case, an early date of trial; as I have pointed out in the *C.T.C. Consultants Ltd.* case, *supra*, it does not follow, necessarily, that an early date of trial will be granted invariably whenever an application for a provisional order is refused; but, in the present case, I have decided that this case, in view of 35 its nature, should be heard as early as possible.

Regarding the costs of the present application I order that they should be costs in the cause, but in any case not against the respondent.

Application dismissed.