

1980 September 30

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CHARALAMBOS CONSTANTINOU,

Applicant,

v.

THE PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 461/79).

5 *Public Officers—Promotions—Applicant more senior than interested parties—But latter with better qualifications and confidential reports and recommended for promotion by Head of Department—Applicant's seniority outweighed by the other elements pertaining to the candidates—Sub justice promotions reasonably open to the respondent Commission.*

10 *Public Officers—Promotions—Head of Department—Whether he has to comment expressly on all candidates—And whether his recommendations fetter the discretion of the Public Service Commission—Section 4A(3) of the Public Service Law, 1967 (Law 33/67).*

15 *Public Officers—Promotions—Schemes of service—"University diploma or degree" in law—Whether it should be one that entitles its holder to practise law in Cyprus.*

15 *Public Officers—Recourse against promotion—Findings of trial Judge and comparison of the merits of candidates—Whether binding on the Public Service Commission when considering the merits of the same candidates for promotion to another post many years later.*

20 *Administrative Law—Public officers—Recourse against promotion—Findings of trial Judge and comparison of merits of candidates—Whether binding on the Public Service Commission when considering the merits of the same candidates for promotion to another post many years later.*

The applicant in this recourse, a Customs and Excise Officer, 1st Grade, challenged the decision of the respondent Public Service Commission to promote Costas Hji Yiannis and Takis Vovides ("the interested parties") to the post of Assistant Collector of Customs. The Head of Department, who was present at the meeting of the Commission, recommended the interested parties for promotion but did not recommend applicant nor did he comment on him in any way. The applicant was senior to interested party Hji Yiannis by three years and ten months and senior by six years and two months to interested party Vovides. The confidential reports on the interested parties were far better than those on the applicant; and they were better qualified than him. Moreover interested party Hji Yiannis had a diploma in Law which has been treated as constituting an advantage as provided by the relevant scheme of service.

Counsel for the applicant mainly contended:

- (a) That there has been a violation of the principle of equality because the Head of Department did not comment expressly on all candidates but only on those mentioned in the relevant minutes* of the Commission.
- (b) That the Head of Department dictated his views to the respondent Commission and therefore he fettered their discretion.
- (c) That the Diploma in Law for Executive Leadership from La Salle Extension University of the interested party Hji Yiannis ought not to have been treated by the respondent Commission as constituting an advantage under the scheme of service, because it does not entitle its holder to practise law under the provisions of the Advocates Law, Cap. 2, as amended.
- (d) That the comparison of the candidates made by the trial Judge in the case of *Vonditsianos & Others v. The Republic* (1969) 3 C.L.R. p. 83, at p. 91, was not favourable to interested party Vovides as compared with the present applicant who was also the successful

* Quoted at pp. 555-56 *post*.

applicant in that recourse; and that in view of this position the respondent Commission ought not to have found in the present instance interested party Vovides as possessing better merit and as being more suitable for promotion than the applicant.

Held, (1) that there cannot be any question of unequal treatment if a Head of a Department expressly comments on some and does not comment on others; that the inference to be drawn, especially when there is a big number of candidates, as in the present case, is that for those not commented upon there was nothing to be said in favour and it was not his intention to recommend them for promotion or in other instances there is something to be said to explain why and in view of certain circumstances, such as marked seniority, they are not being recommended for promotion or that their seniority or other advantage should be ignored; and that, accordingly, contention (a) must fail.

(2) That the Head of Department did, as he was expected, and authorised under section 44(3) of the Public Service Law, 1967 (Law 33/67) make his recommendations and gave reasons for same which were, in fact, consistent with the material in the file in all respects; and that, accordingly, contention (b) must fail.

(3) That from the scheme of service it cannot be inferred that a Diploma or a Degree in Law mentioned therein should be one that entitles its holder to practise law in Cyprus; and that, accordingly, contention (c) must fail.

(4) That the findings of fact and the conclusions drawn thereon in the *Vonditsianos* case were based on the material that was before the respondent Commission when that *sub judice* decision was taken in December 1967 and considered by the learned trial Judge in that recourse in 1969, whereas in the present case there is fresh material going as far back as 1968, including confidential reports over that period and the recommendations of the Head of the Department which clearly give a new context to the case; that if the argument of counsel was accepted, it would have amounted to making those findings as following the officials concerned for the rest of their career; and that, accordingly, contention (d) must, also, fail.

(5) That the seniority of the applicant was obviously outweighed by the other elements pertaining to the candidates; that having regard to the material before the respondent Commission as a whole, including all relevant factors that under section 44(3) of the Public Service Law, 1967 (Law 33/67) had to be taken into consideration, the *sub judice* decision was reasonably open to the Commission, there has been no wrong exercise of its discretion or abuse or excess of power, nor any misconception of fact, nor has there been taken into consideration any matter that ought not to have been so taken; and that, accordingly, the recourse must fail. 5 10

Application dismissed.

Cases referred to:

Vonditsianos & Others v. Republic (1969) 3 C.L.R. 83 at p. 91.

Recourse. 15

Recourse against the decision of the respondent to promote the interested parties to the post of Assistant Collector of Customs in preference and instead of the applicant.

A. Haviaras, for the applicant.

G. Constantinou (Miss), for the respondent. 20

Interested party *C. Hadjiyiannis*, present.

Cur. adv. vult.

A. LOIZOU J. read the following judgment. The applicant by the present recourse challenges the validity of the decision of the respondent Commission published in the Official Gazette of the Republic on 12.10.1979 (under Notification No. 1854), to promote Costas Hji Yannis and Takis Vovides (hereinafter referred to as "the interested parties") to the permanent post of Assistant Collector of Customs with effect from 15.5.1979 instead of the applicant. 25 30

According to the relevant schemes of service (enclosure 2), this post in the Department of Customs and Excise is a promotion post from the immediately lower one of Customs and Excise Officer, 1st Grade. The qualifications required for promotion are: A good general education not below the standard of a six-year secondary school. Wide practical experience of the department's work. The ability to encourage, manage and control staff and to deal tactfully but firmly with subordinates 35

and members of the public as necessary. Ability to write clear and balanced reports. A very good knowledge of Greek and English or of Turkish and English. A University diploma or degree or other equivalent qualification in commerce, economics, law (including Barrister-at-Law), or accountancy will
5 be an advantage.

The respondent Commission considered the filling of the vacancies in the said post at its meeting of the 1st May, 1979, and its minutes, in so far as relevant, read as follows:

10 "The Commission considered the merits, qualifications, seniority, service and experience of all the officers serving in the post of Customs and Excise Officer, 1st Grade, as reflected in their Personal Files and in their Annual Confidential Reports.

15 The Director of the Department of Customs and Excise stated that, having regard to the merits and abilities of all the candidates, he considered Messrs. Andreas Kousoulides, Stavros Vragas, Antonakis Ayiomamitis, George Kouloumas, Takis Vovides and Costas Hji Yiannis as the
20 best, in fact they were better than the remaining candidates, their services had been most satisfactory and recommended them for promotion.

With regard to Mr. C. Hji Yiannis, one of the officers referred to above, the Director of the Department stated
25 that the officer in question was a very efficient and hard-working officer, he was the Chief Valuation Officer of the Department and that he considered him to be one of the best officers of his grade. Furthermore, Mr. Hji Yiannis had obtained a Diploma in Law for Executive Leadership
30 from La Salle Extension University, which under the relevant scheme of service is considered as an advantage.

The Director of the Department added that Messrs. A. Damianou, M. Tossounis, A. Efstathiou and M. Koulermos who were fairly senior within their grade, possessed insufficient abilities, they could not undertake the duties of the
35 higher post and did not recommend them for promotion.

According to the relevant scheme of service, candidates for promotion to the post of Assistant Collector of Customs

must possess 'a very good knowledge of Greek and English'. The Commission observed that Messrs. Andreas Kousoulides, Stavros Vragas, Antonakis Ayiomamitis, George Kouloumas, Takis Vovides and Costas Hji Yiannis had graduated from a Six-year Secondary School in which both the Greek and English languages were taught. Furthermore, the above officers had passed the English Ordinary and English Distinction Examinations and/or the English Lower and English Higher Examinations of the Cyprus Certificate of Education. Messrs. A. Kousoulides, A. Ayiomamitis, T. Vovides and C. Hji Yiannis had also passed the Greek Higher Exams of the C.C.E. In view of the above, and having regard to their long and satisfactory service in the Government, the Commission was satisfied that the officers in question did possess 'a very good knowledge of Greek and English'.

After considering all the above and after taking into consideration all the facts appertaining to each one of the candidates, and after giving proper weight to the merits, qualifications, seniority, service and experience of these candidates, as reflected in their Personal Files and in their Annual Confidential Reports, and having regard to the views expressed as well as to the recommendation made by the Director of the Department, the Commission came to the conclusion that the following officers were on the whole the best. The Commission accordingly decided that the officers in question be promoted to the permanent post of Assistant Collector of Customs w.e.f. 15.5.79: Andreas Kousoulides, Stavros Vragas, Antonakis Ayiomamitis, George Kouloumas, Takis Vovides, Costas Hji Yiannis".

Before examining the grounds of law on which this recourse has been argued, it is useful to refer to the careers of the parties as appearing in the relevant files.

The applicant entered the Public Service as a Temporary Customs and Excise Officer on the 17th October, 1949, and climbed up the ladder to become Customs and Excise Officer, 1st Grade, on the 1st August, 1970, after passing the relevant examinations. He graduated the Greek Gymnasium of Limassol and he passed the Cyprus Certificate of Education Examinations in English and Greek Higher and Mathematics 'A'. He also

passed the examinations on Financial Instructions and Store Regulations.

Interested party Costas Hji Yiannis entered the Public Service as postman in the Department of Posts on the 1st October, 1956, and soon afterwards joined the Department of Customs and Excise and became eventually on the 1.6.1974 Customs and Excise Officer, 1st Grade. He graduated the English School, Morphou, and he has passed the following examinations:

- (i) Elementary Book-keeping, L.C.C.
- 10 (ii) C.C.E.:
 - English Lower
 - English Higher
 - Greek Higher
 - Mathematics 'A',
 - 15 Geography
- (iii) Department Examination for promotion to the post of Customs and Excise Officer, 1st Grade
- (iv) Financial Instructions and Stores Regulations
- (v) General Orders
- 20 (vi) G.C.E.:
 - English Language (O.L.)
 - Modern Greek (O.L.)
 - British Constitution (A.L.)
 - Economics (A.L.)
 - 25 British Economic History (A.L.)
- (vii) Intermediate Examination in Law, University of London.

During 1974 he received advanced training in Customs and Administration in the Federal Republic of Germany and in 1977 he obtained a Diploma in Law for Executive Leadership, of the La Salle Extension University, U.S.A.

Interested party Takis Vovides became a Temporary Customs and Excise Officer on the 1st April, 1954, and eventually became a Customs Officer, 1st Grade, on the 1st August, 1970. He graduated the Commercial Lyceum of Larnaca and he has passed also the following examinations:

- (i) C.C.E.:
 - English Lower

English Higher	
Greek Higher	
Mathematics 'A'	
Mathematics 'B'	
History	5
Geography	
(ii) L.C.C.:	
Book-keeping Elementary	
Book-keeping Intermediate	
Accounting Higher	10
(iii) General Orders	
(iv) Financial Instructions and Stores Regulations	
(v) Departmental Examinations for promotion to the post of Customs and Excise Officer, 1st Grade.	
(vi) Certificate in the Preliminary Examinations of the German Language.	15

As far as their seniority is concerned, the applicant is senior to interested party Hji Yiannis by three years and 10 months in view of the effective date of their promotion to the post of Customs and Excise Officer, 1st Grade. He is also senior by six years and two months to interested party Vovides by virtue of section 46(2) of the Public Service Law 1967, as these two officers were simultaneously promoted to the post of Customs and Excise Officer, 1st Grade, and their seniority had to be determined according to their previous one, which was their promotion to the post of Customs and Excise Officer, 2nd Grade.

In order to complete the picture of the material factors that have to be taken into consideration under section 44(1) of the Public Service Law and which as seen have been taken into consideration by the respondent Commission, I shall refer to the Annual Confidential Reports of the parties, mainly those prepared on them during the last three years preceding the *sub judice* decision, though it may later prove necessary to refer as well to previous reports in view of the arguments advanced by learned counsel for the applicant.

The applicant for the year 1976 is rated as "excellent" on all ten ratable items and the Reporting Officer's observations therein are that he is "very hardworking and efficient officer

with wide experience in the control of reliefs and temporary importations". The Countersigning Officer expresses the view that he is "a tactful, hardworking and efficient officer who just falls short of 'excellent' ". The same rating and comments by
5 the Reporting Officer are found in the Confidential Report for the year 1977, but the Countersigning Officer expresses the view that he is slightly over-rated. For the year 1978 he is rated as "excellent" on eight ratable items and as "very good" on two. The Reporting Officer describes him as a hardworking
10 and efficient officer and the Countersigning Officer makes no comment. The first two Confidential Reports referred to are by the same Reporting Officer, whereas the last one is by another Officer.

Interested party Costas Hji Yiannis is rated for the year 1976
15 as "excellent" on all ratable items and the Reporting Officer observes that he is "highly experienced and excellent as Chief Valuation Officer of the Department". The Countersigning Officer expresses the view that he is "one of the most brilliant officers in his grade. Tactful and efficient, he possesses marked
20 abilities to organise and control staff. He should go far". For the year 1977 he is once more rated as "excellent" with the same observation as for the previous year by the Reporting Officer. The Countersigning Officer expresses the view that he is "A model of efficiency, courtesy and leadership. Among the
25 top half-a-dozen officers in the whole Department". For 1978 he is also reported upon in the same way as before and the Countersigning Officer expresses the view that he is "the most accomplished officer in his grade. He leads his section in an exemplary manner. Qualified to assume responsibility
30 at top management levels". The Reporting Officer for all three years is the same as the Reporting Officer for the applicant for the first two years.

Interested party Takis Vovides is reported for the year 1976
as "excellent" on all ratable items and the Countersigning
35 Officer expresses the view that he is "A tactful, hardworking, devoted and efficient officer". He is also rated as "excellent" for the year 1977 with no further views expressed by the Countersigning Officer and the same for 1978 with the Countersigning Officer expressing the views that he is "One of the brightest
40 officers in his grade. Tactful, widely experienced and hard-working, he can assume and discharge any duties". The

Reporting Officer is a different one than the Reporting Officers on the other two officers.

The Countersigning Officer is the same in respect of all the parties and he is the Director of the Department of Customs and Excise who attended the meeting of the respondent Commission of the 1st May, 1979, and whose recommendations made in respect of the subject promotions in his capacity as Head of the Department in which the vacancies existed, appear in the minutes of the respondent Commission earlier set out in this judgment.

There is no doubt in my mind that the Confidential Reports on the interested parties are far better than those on the applicant. Moreover, the two interested parties possess superior qualifications to him and interested party Hji Yiannis has a Diploma in Law which has been treated as constituting an advantage as provided by the relevant scheme of service. I have felt that I should deal rather extensively with this aspect of the case in order to see how the performance of the candidates was evaluated during their careers as a whole, a fact relevant to the merit of each candidate. Moreover, this was thought essential as in view of the question of seniority that exists among the candidates, it had to be examined whether all other elements were more or less equal so that the seniority of the applicant ought to have prevailed. In addition to the above, the merit of the candidates had also to be viewed as against the duties and responsibilities and the qualifications required under the relevant scheme of service, coupled with the benefit of the views of the Head of the Department. The grounds of law relied upon on behalf of the applicant are the following:

- (1) That the *sub judice* decision was taken in abuse of power and I understand this to contain the contention that the respondent Commission failed in its paramount duty to select the most suitable candidate for promotion.
- (2) That the respondent Commission acted under a misconception of fact inasmuch as they did not take into consideration the applicant.
- (3) That the respondent Commission did not take into consideration the seniority, experience and qualifications of the applicant which are superior to the interested parties.
- (4) That the respondent Commission wrongly took into

consideration and/or was influenced by qualifications which are not required and/or have no relation whatsoever with the scheme of service.

5 Looking at the material before the respondent Commission as a whole, to which I have referred earlier in this judgment, including all relevant factors that under section 44(3) of the Public Service Law had to be taken into consideration, I have come to the conclusion that the *sub judice* decision was reasonably open to it and there has been no wrong exercise of its
10 discretion or abuse or excess of power, nor any misconception of fact, nor has there been taken into consideration any matter that ought not to have been so taken. The seniority of the applicant was obviously outweighed by the other elements pertaining to the candidates.

15 The argument advanced on behalf of the applicant that there has been a violation of the principle of equality because of the fact that the Head of the Department did not comment expressly on all candidates but only on those mentioned in the minutes, cannot stand. There cannot be, in my view, any question of
20 unequal treatment if a Head of a Department expressly comments on some and does not comment on others. The inference to be drawn, especially when there is a big number of candidates, as in the present case, is that for those not commented upon there was nothing to be said in favour and it was not his intention
25 to recommend them for promotion or in other instances there is something to be said to explain why and in view of certain circumstances, such as marked seniority, they are not being recommended for promotion or that their seniority or other advantage should be ignored.

30 The other argument that the Head of the Department dictated his views to the respondent Commission and therefore it fettered their discretion, is not warranted by the material in the file. The Head of the Department did, as he was expected, and authorized
35 under section 44(3) of the Public Service Law, make his recommendations and gave reasons for same which were, in fact, consistent with the material in the file in all respects.

The next argument advanced by counsel for the applicant was that the Diploma in Law for Executive Leadership from La Salle Extension University of the interested party Hji Yiannis

ought not to have been treated by the respondent Commission as constituting an advantage under the scheme of service, because it does not entitle its holder to practise law under the provisions of the Advocates Law, Cap. 2, as amended.

This cannot stand, inasmuch as from the scheme of service it cannot be inferred that a Diploma or a Degree in Law mentioned therein should be one that entitles its holder to practise law in Cyprus. 5

Finally, counsel for the applicant pointed out to me the findings made in the case of *Vonditsianos & Others v. The Republic* (1969) 3 C.L.R., p. 83, at p. 91, whereby the comparison made by the learned trial Judge in that case was not favourable to interested party Vovides as compared with the present applicant who was also the successful applicant in that recourse and that in view of this position the respondent Commission ought not to have found in the present instance interested party Vovides as possessing better merit and as being more suitable for promotion than the applicant. The short answer to this argument is that the findings of fact and the conclusions drawn thereon in the *Vonditsianos* case were based on the material that was before the respondent Commission when that *sub judice* decision was taken in December 1967 and considered by the learned trial Judge in that recourse in 1969, whereas we have in the present case fresh material going as far back as 1968, including confidential reports over that period and the recommendations of the Head of the Department which clearly give a new context to the case. If the argument of counsel was accepted, it would have amounted to making those findings as following the officials concerned for the rest of their career which, to my mind, were in no way intended to be. 10
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For all the above reasons this recourse is dismissed but in the circumstances I make no order as to costs.

Application dismissed. No order as to costs.