

1981 September 3

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

AGNI N. SOPHOCLEOUS,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE EDUCATIONAL SERVICE COMMITTEE,

Respondent.

(Case No. 258/81).

Provisional order—Flagrant illegality as a ground for suspending effect of administrative act—To be approached with the utmost caution as it may be tantamount to disposing the case on its merits —Recourse of educational officer against transfer—Application for provisional order suspending transfer pending determination of recourse—Not a case of a very obvious and unquestionable illegality—Nature of violations complained of such that a pronouncement on their merits requires investigation into factual aspect of the case a matter which has to be examined at the hearing of the recourse—No material irreparable damage because any financial damage to be incurred can be met by compensation under Article 146.6 of the Constitution—And no moral irreparable damage because it is open to the respondents, under the relevant Regulations, to transfer applicant to a less favourable place.

Educational Officers—Transfers—Elementary education school teachers—Whether they can be transferred to less favourable places if educational needs so demand—Regulation 16 of the Educational Officers (Teaching Staff) (Appointments, Postings, Transfers, Promotions and Related Matters) Regulations, 1972.

Educational Officers—Transfers—Trade union status of Officer—Whether transfer interferes with trade union activities of officer.

The applicant, an Assistant Headmistress in the Elementary Education, who has since 1974 been posted at Strovolos Elemen-

5 tary School, was on June 25, 1981 transferred by the respondent
Committee to Tseri Elementary School, with effect from
September 1981, after taking into consideration the educational
needs. The applicant challenged the above decision by recourse
and, also, applied for a provisional order staying the transfer
pending the determination of her recourse. The applicant was
an active trade-unionist in the Elementary School Teachers'
Organization (POED) having been elected as a general repre-
sentative. Her transfer did not necessarily call for a change
10 of residence and Tseri village, which was only a few miles away
from Strovolos, was served by a regular bus service.

Counsel for the applicant mainly contended:

- 15 (a) That the transfer may interfere with applicant's trade
union activities;
- (b) That the transfer was flagrantly illegal;
- 20 (c) That if the transfer is not suspended applicant and
her family will suffer irreparable damage both material
and moral because she will be humiliated in the eyes
of her colleagues and the people by being transferred
to a rural school.

25 *Held*, (1) that applicant's claim that her transfer may interfere
with her trade union activities, cannot really stand because of
the nature of the office she holds in POED—she is called upon
to vote from time to time at general meetings—and that such
transfer does not call necessarily for a change of residence.

30 (2)(a) That though flagrant illegality of an administrative
act is a ground for granting a provisional order even if no irre-
parable damage will be caused, if not granted, and even where
serious obstacles would be caused to the administration, it
is a ground to be approached with the utmost caution as it
may be tantamount to disposing the case on its merits.

35 (2)(b) That on the face of the material available at this stage
this is not a case of a very obvious and unquestionable illegality;
that the nature of the violations complained of is such that a
pronouncement on their merit is connected with a further inve-
stigation into the factual aspect of the case; that the aggregate
effect of the complaints of the applicant with regard to her
transfer is that there has been a violation of law, a wrong exercise

of discretion, a misconception of fact and an abuse of power; that all these complaints can only be established if the facts of the case in respect of which, or some of which, evidence may have to be called, are examined at the hearing of the recourse proper; that it is inappropriate at this stage to pronounce on the merits of the grounds of law relied upon by the applicant because of their very nature; accordingly the application cannot succeed on the ground of flagrant illegality. 5

(3)(a) That any financial damage to be incurred by the applicant can upon the successful conclusion of her recourse be met by compensation under Article 146.6 of the Constitution; accordingly the contention about material irreparable damage should fail. 10

(3)(b) That though under regulation 16 of the Educational Officers (Teaching Staff) (Appointments, Postings, Transfers, Promotions and Related Matters) Regulations of 1972 transfers are made to more favourable posts for the educational officer concerned that need not be always the case as transfers to less favourable places can be effected if the educational needs call for them in addition to disciplinary transfers; that, therefore, once it was open under the relevant regulation to transfer the applicant, even to a less favourable posting, assuming that that is so in the present case, because the educational needs so demanded, such transfer, should not be allowed to be treated by itself as causing a moral injury to the officer concerned; accordingly the contention about moral irreparable damage should, also, fail. 15
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Application dismissed.

Cases referred to:

- Sophocleous v. Republic* (1971) 3 C.L.R. 345; 30
Papadopoulos v. Republic (1975) 3 C.L.R. 89;
Yerasimou v. The Republic (1978) 3 C.L.R. 36;
Prokopiou and Others v. The Republic (1979) 3 C.L.R. 686;
Michaelides v. The Republic (1980) 3 C.L.R. 430;
Prodromou v. The Republic (1981) 3 C.L.R. 38; 35
Soteriou v. The Republic (1981) 3 C.L.R. 70;
C.T.C. Consultants Ltd., v. Cyprus Tourism Organization (1976)
 3 C.L.R. p. 390.

Application for a provisional order.

Application for a provisional order staying the transfer of the applicant from Strovolos "C" Elementary School to Tseri Elementary School pending the final determination of a recourse
 5 against the validity of such transfer.

A. S. Angelides, for the applicant.

M. Kyprianou, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

10 A. LOIZOU J. read the following judgment. The applicant, an Assistant Headmistress in the Elementary Education posted at Strovolos "C" Elementary School since 1974 has, together with a recourse filed against her transfer from the said school to Tseri Elementary School as from 1st September, 1981, applied
 15 under rule 13 of the Supreme Constitutional Court Rules 1962, for a provisional order staying such transfer until the final determination of her aforesaid recourse.

The relevant facts as they appear in the recourse, the affidavit filed in support of this application and the various documents
 20 produced as exhibits, are these: The applicant, upon her appointment as school-mistress in the Elementary Education, was posted to Galini Elementary School and from 1959–1961 she was transferred to her village Katydata. On her own application and giving as a reason her marriage to her husband who
 25 as a member of the Police Force was—and has been since then—posted in Nicosia, where the matrimonial home was to be set up, she was transferred to Nicosia and has been serving here in various schools ever since. In fact, since 1974 she has been posted at Strovolos "C" Elementary School.

30 The applicant is an active trade-unionist in the Elementary School Teachers' Organization (POED), having been elected at the elections of POED on the 24th May, 1981, for two years as a general representative. The Headmaster of Strovolos "C" Elementary School is the new President of POED, whom
 35 she replaces when he is engaged with his trade union activities.

Whilst on this point it may be said that her claim that this transfer may interfere with her trade union activities, cannot really stand because of the nature of the office she holds in POED—she is called upon to vote from time to time at general

meetings—and that such transfer does not call necessarily for a change of residence. Nor does the fact that she frequently acts for him because of his absence on account of his trade union activities can have by itself a bearing in this case inasmuch as acting for the headmaster of a school is one of the duties that under the relevant scheme of service an assistant Headmaster/mistress is called upon to perform. 5

The *sub judice* transfer of the applicant was effected after a list of vacancies and other requirements (*exhibit 1*) was sent by the appropriate authority to the respondent Committee and the minute of the respondent Committee dated the 25th June 1981, (*exhibit 2*) in so far as relevant reads: “The Educational Service Committee having studied the applications for transfer which were submitted by educational officers of elementary education and having in mind (a) the provisions relating to transfers in the Educational Service Laws 1969–1979, as well as the Educational Officers’ Regulations of 1972 to (No. 2) of 1974; (b) the general and the per school educational needs as they were communicated by the department of elementary education decides the transfers which appear on the attached appendix to these minutes and which will take effect as from the 1st September 1981”. 10 15 20

It is the case for the applicant that her transfer complained of is (a) flagrantly illegal and (b) that if this decision is not suspended she and her family will suffer irreparable damage, both material and moral. 25

It was further contended that the rights of others will not be affected if the provisional order applied for is granted as the vacancy created at Strovolos “C” school by her transfer has not as yet been filled and a provisional stay of her transfer will not cause any obstacles to the proper functioning of the elementary education. 30

In support of this application counsel for the applicant has referred me to several regulations which are claimed to have been flagrantly violated by the respondents in taking the *sub judice* decision. In particular I was referred to regulations 13, 14, 16, 17, 18, 19 and 21 of the Educational Officers’ (Teaching Staff) (Appointments, Postings, Transfers, Promotions and related matters), Regulations of 1972, published in Supple- 35

ment No. 3 to the Official Gazette of the Republic No. 972, dated 10th November 1972 under Notification No. 205. I do not intend to embark on an examination of each and every regulation and the extent to which it is alleged to have been
5 violated.

Suffice it to say that it is the contention of the applicant that her transfer was not effected by the respondent Committee because of the educational needs as verified by the appropriate authority and that the applicant having served in rural areas
10 should not without promotion be transferred to a less favourable post than the one she was holding as her transfer to Tseri village is considered to be.

Counsel for the respondent Committee has answered the arguments advanced on behalf of the applicant the gist of which
15 is that the transfer was effected because of the educational needs as verified by the appropriate authority and that a transfer to even a less favourable post or to a rural area is warranted by regulation 19(c), if the educational needs demand same.

The principle that the flagrant illegality of an administrative
20 act is a ground for granting a provisional order even if no irreparable damage will be caused, if it is not granted, and even where serious obstacles would be caused to the administration, was enunciated in the case of *Sophocleous v. The Republic* (1971) 3 C.L.R. p. 345. This principle is to be found also in the cases
25 of *Papadopoulos v. The Republic* (1975) 3 C.L.R. p. 89; *Yerasimou v. The Republic* (1978) 3 C.L.R. p. 36; *Prokopiou and Others v. The Republic* (1979) 3 C.L.R. 686; *Michaelides v. The Republic* (1980) 3 C.L.R. 430; and recently in the cases
30 of *Prodromou v. The Republic* (1981) 3 C.L.R. 38; and *Soteriou v. The Republic* (1981) 3 C.L.R. p. 70. See also *C.T.C. Consultants Ltd., v. Cyprus Tourism Organization* (1976) 3 C.L.R. p. 390.

As I said in the *Sophocleous case (supra)*, at p. 353 regarding this principle:

“It is, however, a ground to be approached with the utmost
35 caution, as it may be tantamount to disposing the case on its merits, something discouraged by Rule 13 of the Supreme Constitutional Court Rules, though this rule cannot be held as divesting this Court from being the watchdog of legality”.

I consider at this stage inappropriate to pronounce on the merits of the grounds of Law relied upon by the applicant because of their very nature.

What has to be examined in cases where the aforesaid principle is relied upon is the nature of the violations complained of and whether or not a pronouncement on their merit is connected with a further investigation into the factual aspect of the case. 5

An examination of the various violations alleged to have been committed by the respondent Committee in reaching the subject decision shows that this is a case that falls into the aforesaid category of cases rather than in a case of a very obvious and unquestionable illegality on the face of the material available at this stage. The aggregate effect of the complainant's of the applicant with regard to her transfer is that there has been a violation of Law, a wrong exercise of discretion, a misconception of fact and an abuse of power. All these, however, can only be established if the facts of the case in respect of which, or some of which, evidence may have to be called are examined at the hearing of the recourse proper. 10 15

The decision being so, I have come to the conclusion that this application cannot succeed on this ground. 20

I turn now to the second ground, namely that of alleged irreparable damage. In this respect it is relevant to mention that Tseri village which is only a few miles away from Strovolos, is served by a regular bus service and in addition, though I do not attach much importance to this at this stage, there are other school-masters who travel from Nicosia to the same school which the applicant may join, as suggested by counsel for the Republic. Any financial damage to be incurred by the applicant, can upon the successful conclusion of her recourse be met by compensation under Article 146.6 of the Constitution. In all fairness to counsel it has to be stressed that more reliance, however, was placed by him in his concluding address on the moral damage that the applicant is alleged to be likely to suffer from this transfer. 25 30 35

It was urged that she will be humiliated in the eyes of her colleagues and the people by being transferred to a rural village. I do not accept this view, nor that that attitude should be encour-

5 raged by its light acceptance in a judgment of this Court. If
anything, under regulation 16 of the aforesaid regulations,
transfers are made to more favourable posts for the educational
officer concerned but that need not be always the case as transfers
10 to less favourable places can be effected if the educational needs
call for them in addition to disciplinary transfers with which
we are not concerned in this case. Therefore once it was open,
under the relevant regulation to transfer the applicant, even to
a less favourable posting, assuming that that is so in the present
15 case, because the educational needs so demanded, such transfer,
should not be allowed to be treated by itself as causing a moral
injury to the officer concerned. Therefore I am not prepared
to accept this ground also.

15 Once therefore irreparable damage has not been established,
I do not think that I am justified to grant a stay, merely because
the rights of others are, as alleged, not affected, a situation which
I do not know at this stage because the nonposting of another
officer in her place, at Strovolos "C" school does not mean that
20 somebody else will not be placed by the additional transfers
to be made in the near future. But even if that was not so,
that is not a reason by itself for granting a provisional order
for a stay of an administrative act.

25 Finally, the allegation that the granting of a stay in this case
will not cause obstacles to the smooth functioning of the admini-
stration and the elementary education in particular, has not
been established inasmuch as this is a matter connected with
the overall question of transfers including the additional transfers
to be made before the end of this month in the light of the
general educational needs of the Republic.

30 For all the above reasons this application for a provisional
stay is dismissed, but in the circumstances I make no order
as to costs.

35 As I said in the *Sophocleous* case (*supra*) at p. 454 "though
I have not accepted that irreparable damage will be caused to
the applicant, yet in the circumstances of this case I think it
proper to deal with this recourse the soonest possible". And
for that purpose I fix same for directions on the 11th September
1981 at 9.00 a.m.

40 *Application dismissed. No order
as to costs.*