

1982 March 27

[TRIANTAFYLIDES, P]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

GEORGHIOS HADJIANASTASSIGU,

Applicant

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THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent

(Case No 256/80)

5 *Public Service Law, 1967 (Law 33/67)—Section 4(5) of the Law excluding the disqualification period of “twelve months” and “six months” provided for in Article 124 6 of the Constitution—Validly enacted—Is a measure justifiable by the “Law of necessity”*

Public Service Commission—Set up by the Public Service Law 1967—Is not the Commission which was set up pursuant to Article 124 of the Constitution—Its creation by means of Law 33'67 a measure justifiable by the “law of necessity”

10 The sole issue in this recourse was whether in view of the provisions of Article 124 6* of the Constitution section 4(5)* of the Public Service Law, 1967 by means of which there were excluded the disqualifying periods of “twelve months” and

* Article 124 6 of the Constitution provides as follows
“(6)(1)

(2) No person shall be appointed as, or be, a member of the Commission who is, or within the preceding twelve months in the case of the Chairman or six months in the case of any other member, has been—

(a)

(b)

(c) a public officer or a member of any of the armed forces

** Section 4(5) is quoted at p 1177 post

“six months” which are to be found in the above Article, was validly enacted.

Held, that the Public Service Commission, which was created by Law 33/67, is not the Commission which was set up pursuant to Article 124 of the Constitution and which ceased to function due to the abnormal situation which has been prevailing, in many ways, from 1963 onwards; that due to such situation it has been, and it is still, impossible for the said Commission, which was set up under Article 124, to function; that in the circumstances, it may be properly found that the creation by means of Law 33/67 of a new Public Service Commission is a measure justifiable by the “law of necessity”; that section 4(5) of Law 33/67 was modelled on Article 124.6(2)(c), of the Constitution, with the omission, however, from section 4(5) of the “twelve months” and “six months” periods which are to be found in the aforesaid constitutional provision; that such omission was a step which was deemed necessary by the Legislature apparently in order not to exclude from participation in the new Public Service Commission, at times very critical for our country, persons who were otherwise best qualified to serve on it; that the omission in question falls within the scope of the justification by the “law of necessity” and does not undermine in a manner incompatible with such justification, the essential, in view of its mission, independence of an organ such as the Public Service Commission, inasmuch as the said two periods appear to be merely desirable, and not indispensable, elements for the purpose of securing the independence of the Commission; accordingly section 4(5) of Law 33/67 was validly enacted.

Order accordingly.

Cases referred to:

Bagdassarian v. The Electricity Authority of Cyprus (1968)
3 C.L.R. 736 at pp. 743–744;

Koupepidis v. The Republic (1980) 3 C.L.R. 258 at p. 263;

Attorney-General of the Republic v. Ibrahim, 1964 C.L.R. 195;

Ioannides v. The Police (1973) 2 C.L.R. 125;

Messaritou v. The Cyprus Broadcasting Corporation (1972)
3 C.L.R. 100.

Recourse.

Recourse against the decision of the respondent to promote the interested party to the post of Director-General, Ministry of Finance in preference and instead of the applicant.

- 5 *G. Cacoyiannis*, for the applicant.
 Cl. Antoniadis, Senior Counsel of the Republic, for the respondent.
 A. Triantafyllides, for the interested party.

Cur. ady. vult.

- 10 TRIANTAFYLLIDES P. read the following judgment. By means of this recourse the applicant challenges the validity of the decision of the respondent Public Service Commission, dated May 7, 1980, to promote, instead of him, Charalambos Hadji-Panayiotou, an interested party in the present proceedings, to
 15 the post of Director-General of the Ministry of Finance.

The vacancy in the said post was advertised on January 5, 1980, and in respect of it there were submitted six applications, including those of the applicant and of the interested party.

- 20 At its meetings of March 26, 1980, and April 2, 1980, the respondent Commission interviewed five of the candidates, as the sixth one, Fr. Drakos, did not present himself for an interview.

- 25 On April 15, 1980, the Commission, after having considered all the relevant material which was before it reached the conclusion that the applicant and the interested party were on the whole superior to the other candidates and that both of them were suitable for promotion to the post of Director-General of the Ministry of Finance; and then it postponed its final selection to a later meeting.

- 30 Its sub judice decision was reached by majority on May 7, 1980

- 35 It was directed by consent of all the parties to these proceedings that at its present stage the hearing of this case should be confined to the ground of law which relates to the validity of the composition of the respondent Commission. It has been submitted, in this respect, on behalf of the applicant, that the composition of the Commission was, at all material times,

defective and contrary to the Constitution, as, allegedly, the appointment of one of its members, Mr. Antonios Anastassiou, was made contrary to the provisions of Article 124.6 of the Constitution in that at the time of his appointment Mr. Anastassiou was still a public officer, and, in any event, his appointment did not take effect after the expiration of a period of six months from the date when he had ceased to be a public officer.

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The relevant provisions of Article 124.6 of the Constitution are as follows:-

“(6)(1) _____

(2) No person shall be appointed as, or be, a member of the Commission who is, or within the preceding twelve months in the case of the Chairman or six months in the case of any other member, has been -

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- (a) _____
- (b) _____
- (c) a public officer or a member of any of the armed forces;
- (d) _____
- (e) _____”

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On June 20, 1979 (see No. 1198 in the Official Gazette of the Republic of June 29, 1979) the President of the Republic appointed Mr. Titos Phanos as Chairman and Messrs. Antonios Anastassiou, Yiannakis Louca, Loizos Christodoulou and Theodosios Christou as members of the Public Service Commission, with effect as from July 1, 1979.

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Mr. Anastassiou had been the Director-General of the Ministry of Interior until his retirement from the said post which took effect on July 1, 1979 (see No. 1267 in the Official Gazette of the Republic of July 6, 1979). He would normally have retired from the said post in December 1974, but his services were extended, in the public interest, on divers occasions, by the Council of Ministers, prior to July 1, 1979, when he finally retired.

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The aforementioned appointments of the Chairman and of the members of the respondent Commission were effected under

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section 4 of the Public Service Law, 1967 (Law 33/67), the relevant parts of which provide as follows:

5 "4.-(1) There shall be a Public Service Commission consisting of a Chairman and four other members appointed by the President of the Republic.

(5) No person shall be appointed as, or be, a member of the Commission, unless -

(a) -----

(b) -----

10 (c) he is not a Minister or a member of the House of Representatives or of the public service or of a trade union or of an association affiliated to a trade union."

Prior to the enactment of Law 33/67 there was in force, as a stopgap measure, the Public Service Commission (Temporary Provisions) Law, 1965 (Law 72/65), which was repealed by Law 33/67.

15 As regards the effect of Law 33/67 reference may be made to the following passage from the judgment in *Bagdassarian v The Electricity Authority of Cyprus*, (1968) 3 C.L.R. 736, 743-744:

20 "Moreover, in section 5 of Law 33/67, which lays down the powers of the 'Commission' appointed under such Law, no reference at all is made to Article 125 of the Constitution; and though the provisions of such section 5 are in many respects similar to the corresponding provisions in Article 125, nevertheless there arises the following most
25 material, for the purposes of the present case, difference: By reading section 5 of Law 33/67 together with the relevant definitions in section 2 of the Law, and by comparing the position thus resulting with that which results when Article 125 is read together with the relevant definitions in
30 Article 122, one is led inevitably to the conclusion that the 'Public Service Commission' set up, as from the 1st July, 1967, under Law 33/67, possesses competence over members of the 'public service', which is defined in such Law in a manner not including the personnel of the Authority,

whereas under Article 125 the Public Service Commission is entrusted with competence over the personnel of the Authority, in view of the definition of 'public service' in Article 122.

It follows, therefore, that when the sub judice appointment was made, after the promulgation of Law 33/67, there was not in existence a Public Service Commission empowered under Article 125 to make such an appointment, but only a 'Public Service Commission' set up under Law 33/67 and not so empowered." 5 10

The *Bagdassarian* case, supra, as well as other relevant case-law in this respect were referred to in the case of *Koupepides v. The Republic*, (1980) 3 C.L.R. 258, where there were stated the following (at p 263):

"Before proceeding any further, I think that it is proper, at this stage, to mention that the provisions of Article 125.1 of the Constitution, regarding the competence of the Public Service Commission created by Article 124 of the Constitution, are irrelevant for the purposes of deciding on the preliminary issue which I am now examining, because the Public Service Commission created by Law 33/67 is not the same organ as that which was set up pursuant to Article 124 of the Constitution (see, in this respect, *Bagdassarian v. The Electricity Authority of Cyprus*, (1968) 3 C.L.R. 736, *Nicolaou v. The Republic*, (1969) 3 C.L.R. 42, 54, *Iosif v. The Cyprus Telecommunications Authority*, (1970) 3 C.L.R. 225, 229, *Georghiades v. The Republic*, (1970) 3 C.L.R. 257, 263, *Poutros v. The Cyprus Telecommunications Authority*, (1970) 3 C.L.R. 281, 286 and *Theodorides v. Ploussiou*, (1976) 3 C.L.R. 319, 338, 352)." 15 20 25 30

The *Theodorides* case, which is referred to above, is a case which was decided on appeal by the Full Bench of our Supreme Court.

I still adhere to the view that the Public Service Commission, which was created by Law 33/67, is not the Commission which was set up pursuant to Article 124 of the Constitution and which ceased to function due to the abnormal situation which has been prevailing, in many ways, from 1963 onwards. Due to such 35

situation it has been, and it is still, impossible for the said Commission, which was set up under Article 124, to function; in the same way in which it has been, and it is still, impossible for the Supreme Constitutional Court and the High Court of Justice to function as set up under the Constitution.

In the circumstances, it may be properly found that the creation by means of Law 33/67 of a new Public Service Commission is a measure justifiable by the "law of necessity" (see *The Attorney-General of the Republic v. Ibrahim*, 1964 C.L.R. 195, *Ioannides v. The Police*, (1973) 2 C.L.R. 125, and the *Theodorides* case, supra).

It may be noted, at this stage, that Law 33/67 adopts a different approach from that of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law 33/64): Whereas by means of Law 33/64 there were vested expressly in the new Supreme Court, created by it, the jurisdictions of the Supreme Constitutional Court and of the High Court of Justice, which are not now functioning as envisaged by the Constitution due to the prevailing abnormal situation, in Law 33/67 there is not to be found any provision referring expressly to the no longer functioning Public Service Commission, which was set up under Article 124 of the Constitution, and vesting its competence in the new Commission set up by such Law; and the competence of the new Commission, as provided by Law 33/67, is not as extensive as that of the Commission envisaged by the Constitution (compare Articles 122 and 125 of the Constitution with section 5 and the relevant definitions in section 2 of Law 33/67).

In *Messaritou v. The Cyprus Broadcasting Corporation*, (1972) 3 C.L.R. 100, it was held that the Public Corporations (Regulation of Personnel Matters) Law, 1970 (Law 61/70), by means of which there was filled the vacuum which was created due to the exclusion of matters relating to the personnel of public corporations, such as the Cyprus Broadcasting Corporation, from the competence of the new Public Service Commission created by Law 33/67, was validly enacted on the strength of the "law of necessity".

In setting up, by means of Law 33/67, a new Public Service Commission the Legislature proceeded to make such provisions as were deemed necessary to meet the unforeseen and abnormal

situation that had arisen; and in doing so the Legislature appears to have chosen, in so far as such a course was practicable, to follow the guidelines contained in the relevant Articles of the Constitution. Thus, it is obvious that section 4(5) of Law 33/67 was modelled on Article 124.6(2)(c) of the Constitution, with the omission, however, from section 4(5) of the "twelve months" and "six months" periods which are to be found in the aforesaid constitutional provision. 5

In my opinion the omission from section 4(5) of Law 33/67 of the aforementioned two periods was a step which was deemed necessary by the Legislature apparently in order not to exclude from participation in the new Public Service Commission, at times very critical for our country, persons who were otherwise best qualified to serve on it. It was one of the new features required for the purposes of Law 33/67, and such were, also, the limitation of the number of the members of the new Public Service Commission to five and the, already mentioned earlier, restriction of the extent of the competence of such Commission; and these features were obviously introduced as a result of policy decisions which were reasonably within the scope of the justification by the "law of necessity" of the enactment of Law 33/67, just in the same manner as certain new features regarding the administration of justice, such as those in section 11 of Law 33/64, were within the scope of the justification by the "law of necessity" of the enactment of Law 33/64. 10 15 20 25

In particular, the non-inclusion in the provisions of section 4(5) of Law 33/67 of the disqualifying periods of "twelve months" and "six months" which are to be found in Article 124.6 of the Constitution does not, in my opinion, fall outside the scope of the aforesaid justification by the "law of necessity" and does not undermine, in a manner incompatible with such justification, the essential, in view of its mission, independence of an organ such as the Public Service Commission, inasmuch as the said two periods appear to be merely desirable, and not indispensable, elements for the purpose of securing the independence of the Commission. 30 35

In the light of all the foregoing I have reached the conclusion that section 4(5) of Law 33/67 was validly enacted and, con-

sequently, the appointment of Mr. Anastassiou under it, as member of the Public Service Commission, was lawfully made.

Nor could it be held that such appointment is defective since it was made on June 20, 1979, before the retirement of Mr. Anastassiou from the public service on July 1, 1979, because the said appointment, even though made earlier, it was to, and it did, take effect from July 1, 1979, and, therefore, when Mr. Anastassiou became a member of the Public Service Commission he was not a member of the public service.

10 Consequently, the composition of the respondent Public Service Commission was not defective and, thus, I do not have to examine whether or not the sub judice promotion of the interested party could be annulled on this ground.

Order as above.