

1982 July 16

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ANDREAS CHRISTOPHIDES AND ANOTHER,

Applicants.

v.

THE REPUBLIC OF CYPRUS, THROUGH

1. THE MINISTER OF FINANCE,

2. THE PUBLIC SERVICE COMMISSION,

Respondents.

(Cases Nos. 282/81, 376/81).

Public Officers—Promotions—Public Service Commission relying on accusations and complaints against the applicants made by Head of Department which were not investigated departmentally or brought to their knowledge so that they will have a chance to reply to them—And the respondent Commission to have all necessary material including their explanations—By relying on such complaints the Committee assessed the merits of the applicants without a reasonably sufficient inquiry into or knowledge of all material facts—And has thus exercised its discretion in a defective manner which resulted in abuse and excess of powers—Section 45(4) of the Public Service Law, 1967 (Law 33/67) not applicable.

Administrative Law—Discretionary powers—Defective exercise resulting in abuse and excess-of-powers—Public-officers—Promotions—Respondent Commission relying on complaints and accusations against applicants by Head of Department—No inquiry by respondent Commission into.

The applicants were candidates for promotion to the post of Principal Assessor in the Department of Inland Revenue. At the meeting of the Departmental Board, established under section 36 of the Public Service Law, 1967 (Law 33/67) the Head of Department stated, inter alia, that there were heard complaints from auditors and tax-payers with regard to the manner they carry out their work. The report of the Departmental Board was forwarded to the respondent Commission which considered the filling of the above post in the presence of the Head of

Department who expressed his views* on each one of the candidates. The Head of Department stated the following with regard to the two applicants:

“For Mr. Christophides there are certain reservations although as from 1976 he is a Principal Assessor, 1st Grade, yet, only during the last one or two years he took over in charge at Larnaca. Before he was used in certain special cases, but his performance did not give enthusiasm to the Director. Unfortunately now there are against him, as in charge of Larnaca, certain complaints by certain auditors and taxpayers with regard to his behaviour and the way he handles the cases. He acts in an arbitrary manner. The same reservations exist and for Mr. Takis Zembylas as regards the way with which he handles certain cases. He serves at the Headquarters of the Department and many times, as he ascertained, his decisions are arbitrary, otherwise he is hardworking and his output appears to be restricted. He is one of the oldest officials and he succeeded to become Certified Accountant, but after many efforts. There are certain doubts for Mr. Zembylas”.

When the Head of Department withdrew from the meeting the respondent Committee after examining all the elements before it and after taking into consideration the conclusions of the Departmental Board and the views and recommendations of the Head of Department concerning each one of the candidates, decided to promote the interested parties in preference and instead of the applicant. Hence these recourses.

Counsel for the applicants contended that as the above complaints against the applicants were not brought to their knowledge the sub judice promotions must be annulled because there has taken place a contravention of section 45(4)** of Law 33/67 and of the rules of natural justice.

* These views appear at p. 768-70 post.

** Section 45(4) provides as follows:

“45(4) The person preparing a confidential report on a particular officer in which the latter is criticized for negligence, failures or improper behaviour in the performance of his duties must, on the submission thereof, communicate to the officer concerned this part of the report.

Within fifteen days of the communication to him, the officer is entitled to require in writing from the competent authority concerned to strike out or modify this part of the report and the competent authority shall consider the matter and decide thereon”.

Held, (1) that section 45(4) of Law 33/67 has no application to the case in hand because this adverse material on the two applicants complained of by them was not contained in the confidential reports, the preparation and submission of which is governed by the aforesaid section.

(2) That complaints and accusations made against an officer have to be brought to his notice so that such officer will have a chance of replying to such complaints; that, had the complaints made against the two appellants been investigated departmentally prior to being placed before the respondent Commission, then no doubt the Commission would have had before it all necessary material including of course the explanations of the applicants in order to decide properly, and that as such material was not before the Commission the promotions made in preference of the applicants must be annulled on the ground that by relying on such complaints the Commission acted in a manner which amounted in assessing the merits of the officers concerned as candidates without a reasonably sufficient inquiry into or knowledge of all material facts and had thus exercised its relevant discretionary powers in a defective manner which resulted in abuse and excess of powers (*Frangides and Another v. Republic* (1968) 3 C.L.R. 90 adopted).

Sub judice decision annulled.

Cases referred to:

- 25 *Pierides and Others v. The Republic* (1971) 3 C.L.R. 233;
Kyriakopoulou v. The Republic (1973) 3 C.L.R. 1;
Korai v. The Cyprus Broadcasting Corporation (1973) 3 C.L.R. 546;
Petridou v. The Republic (1975) 3 C.L.R. 371;
30 *Frangides and Another v. Republic* (1968) 3 C.L.R. 90.

Recourses.

Recourses against the decision of the respondents whereby the interested parties were promoted to the post of Senior Principal Assessor in the Department of Inland Revenue in preference and instead of the applicants.

R. Michaelides, for the applicant in Case No. 282/81.

Ch. Ierides, for the applicant in Case No. 376/81.

N. Charalambous, Senior Counsel of the Republic, for the respondents.

A. LOIZOU J. read the following judgment. By these two recourses which have been heard together the applicants challenge the promotion to the post of Senior Principal Assessor in the Dept. of Inland Revenue, of Panikos Theocharides, Polyvios Rialas and Savvas E. Savvides, (recourse No. 282/81 though in recourse No. 376/81 only the promotion of interested parties Theocharides and Savvides is challenged), as being null and void and of no effect whatsoever. This post is a promotion post and the respondent Commission at its meeting of the 9th June 1981, decided in view of the Regulations governing the establishment of Departmental Boards under section 36 of the Public Service Law, 1967, (Law No. 33 of 1967 hereinafter to be referred to as the Law), to establish such a Board under the chairmanship of the Director of the Department of Inland Revenue and submitted to it a list of candidates together with their personal files, confidential reports, and the Schemes of Service.

The said Board met on the 13th June 1982, and its minutes are part of the bundle of documents (exhibit 1), attached to the opposition. I need not therefore reproduce it in full, but I shall summarize it to the extent that I consider it relevant for the purposes of this judgment. After stating the names of the candidates and the criteria upon which it would make its selection acting in accordance with rule 6 of the Regulations the Board recommended the following six candidates, in alphabetical order, for promotion to the said post: (1) Zembylas T., (2) Theocharides P., (3) Rialas P., (4) Savvides S., (5) Shamasian P., (6) Christophides. With regard to the two applicants the Board added certain comments with reference to their performance at the post they were serving and their contribution generally to the Department after having heard the views of the Director and the Assistant Director of the Department, who was also a member of the Board they are as follows:

(A) Shamasian P., serves at Headquarters and he is responsible for all Court cases of the Department and in addition to carrying out this work with exceptional ability he gives great assistance to the Legal Department of the Government with the knowledge he possesses on revenue matters.

(B) Rialas P., serves as in charge of the District Income Tax office at Limassol after he served until the Turkish invasion as

in charge of the office in Famagusta, which was the second, in number of staff office, with exceptional ability and with no complaint from auditors or tax-payers. He is excellently, technically qualified and his contribution to the progress of the Department has always been exceptional.

(C) Savvides S. serves at Headquarters in the section of Research and Coordination. He is really an exceptional officer, very hard working with system in his work and he has proved excellent administrative abilities and technical knowledge. His contribution to the systematic prosecution of the work of the Department has been noteworthy.

(D) Theocharides P., serves from the day of its establishment as in charge of the Paphos District Income Tax office without any complaint from auditors or tax-payers. He is in fact the most senior officer of the Department. He served in all the grades of the hierarchy and he is the only one from the candidates who possesses a university degree that is, Bachelor of Business Administration of the American University of Beirut. He possesses excellent technical knowledge and his contribution to the progress of the work of the Department has been exceptional.

(E) Christophides A., serves as in charge of the District Income Tax office Larnaca at which he was posted at the beginning of 1980 and unfortunately his performance at his work has not reached the exceptional grade. Multiple demands of the Department do not appear to be carried out at present and there are heard complaints from auditors and tax-payers.

(F) Zembylas T., good and hard working but he appears to lack administrative abilities which are required by the promotion post. He is in charge of a section of the Nicosia District Office and many complaints are heard from tax-payers and auditors for the manner he carries out his work.

The report of the Departmental Board was forwarded to the respondent Commission, which at its meeting of the 27th June 1981, at which the Director of the Department of Inland Revenue was present, considered the filling of the four vacant posts in question. Its minutes, Appendix 6, of exhibit 1 are as follows:

The head of the Department is recorded to have given his views and recommendations as follows, with regard to the applicants and the interested parties:

“Mr. Andreas Christophides although appearing to have together with Polyvios Rialas the greatest experience, yet, 5
between the two in any event Mr. Rialas is to be preferred. Without any doubt he is the best among the six candidates. Before 1974 he was in charge of the office at Famagusta. After the Turkish invasion he was posted at Limassol where he worked with the late Andreas I. Stavrinides. On the 1st 10
November 1976 he was transferred to Larnaca as in charge of the office there and from the 2nd January 1980 again to Limassol as in charge of that office. He has exceptional service and considerable initiative. There has never been made any complaint either by a tax-payer or an advocate. For Mr. Rialas 15
there are no reservations.

For Mr. Christophides there are certain reservations although as from 1976 he is a Principal Assessor, 1st Grade, yet, only during the last one or two years he took over in charge at Larnaca. Before he was used in certain special cases, but 20
his performance did not give enthusiasm to the Director. Unfortunately now there are against him, as in charge of Larnaca, certain complaints by certain auditors and tax-payers with regard to his behaviour and the way he handles the cases. He acts in an arbitrary manner. The same reservation exist and 25
for Mr. Takis Zembylas as regards the way with which he handles certain cases. He serves at the Headquarters of the Department and many times, as he ascertained, his decisions are arbitrary, otherwise he is hardworking and his output appears to be restricted. He is one of the oldest officials and 30
he succeeded to become Certified Accountant, but after many efforts. There are certain doubts for Mr. Zembylas.

Mr. Savvas Savvides is a Chartered Accountant, young and with sufficient initiative. His work has always proved to be first class. He did not work as in charge in a district until to-day. 35
The cases which he completed were very well and the standard of his work sufficiently high. He helped very much the Director for the preparation for the first time for the Manual of Operation for the staff which contains all the directions. He now serves in the section of Research and Studies together 40

with another Senior Official as second in rank and he shows exceptional zeal and initiative.

5 Mr. Panikos Theocharides, although following the others in seniority, yet, with the exception of Mr. Shamasian he is the oldest of all in the service serving at the headquarters of the Department since 1953. He went on scholarship to the American University of Beirut where he obtained a diploma in Business Administration with very good marks. Later he became Certified Accountant having obtained the title almost 10 within two years. He is an exceptional official with sufficient initiative and a hard-working person. With regard to him he speaks from experience because he knows him since 1956. He is the only one of the candidates who possesses a university diploma.

15 Taking into consideration the totality of the established criteria he recommended Mr. Savvides as more suitable as compared with Mr. Christophides, although Mr. Christophides is more senior and although he has experience in the districts. Mr. Christophides presented the aforementioned weaknesses 20 since 1980 when he took over as in charge at Larnaca District Office. Finally the Director of the Department mentioned that Mr. Savvides serves since April 1981, in the National Guard for six months.

25 After the withdrawal of the Director of the Department of Inland Revenue the Committee carried out a general assessment of the suitability of all candidates for promotion. The Committee for that purpose examined the personal files of the candidates, the Confidential Reports about them and took seriously into consideration the conclusions of the Departmental Board and the views and recommendations of the 30 Director of the Department of Inland Revenue. The Committee observed that in the Confidential Reports, especially of the last years Messrs. Shamasian, Rialas, Savvides and Theocharides were graded as "exceptional", whereas Mr. Christophides as "excellent" until 1979, but his grading was reduced 35 to "very good" during the last year, and Mr. Zembylas as "very good" both in 1979 and 1980.

The Committee took into consideration that Mr. Theocharides is the only one of the candidates who possesses a University 40 diploma.

The Committee also took into consideration the opinion given by the Director with regard to Mr. Christophides and Zembylas regarding the manner with which they carried out their duties and especially in relation to the stand at work of Mr. Christophides towards the tax-payers.

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The Committee noted that the candidates have the following order of seniority:

- (1) Petros Shamasian, possessing the permanent post of Principal Assessor, 1st Grade, as from 15.3.76, and before that the permanent post of Principal Assessor, 2nd Grade, since 15.7.71. 10
- (2) Andreas Christophides, possessing the permanent post of Principal Assessor, 1st Grade, as from 15.3.76 and before that the permanent post of Principal Assessor 2nd Grade as from 1.6.73 and the same post from month to month as from 15.7.71. 15
- (3) Polyvios Rialas, as well as Mr. Christophides follow him on account of age.
- (4) Takis Zembylas, possessing the permanent post of Principal Assessor 1st Grade as from 1.3.77 and before that the permanent post of Principal Assessor 2nd Grade as from 1.11.73 and the permanent post of Assessor as from 1.8.62. 20
- (5) Savvas Savvides possessing the permanent post of Principal Assessor 1st Grade as from the 1.3.77 and the permanent post of Principal Assessor 2nd Grade as from 1.11.73. 25
- (6) Panikos Theocharides, possessing the post of Principal Assessor 1st Grade as from 1.3.79.

In conclusion the Committee having examined all the elements before it, namely the Personal Files of the candidates and the Confidential Reports on them and having taken into consideration the conclusions of the Departmental Board and the views and recommendations of the Director of the Department of Inland Revenue decided that the following are superior to the rest of the candidates on the basis of the totality of the

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established criteria (merit, qualifications, seniority), found them suitable and decided to promote them to the permanent (ordinary budget) post of Senior Principal Assessor Inland Revenue as from 1.7.81:-

- 5 1. THEOCHARIDES Panikos I.
2. SAVVIDES Savvas E.
3. SHAMASIAN Petros.
4. RIALAS Polyvios.

It is obvious from these Extracts from the minutes, and in particular that part of them which says that the respondent Committee took seniority "into consideration the conclusions of the Departmental Board and the views and recommendations of the Director of the Department of Inland Revenue", that the statements of the said Director regarding complaints from auditors and tax-payers that were being heard with regard to the two applicants, were indeed taken into consideration by the respondent Committee and that when they are viewed in the whole context of the decision and in relation to their seniority as against the interested parties they must have affected materially the decision of the respondent Committee.

It has to be examined therefore whether these complaints said to have been made against these officers which do not appear to have been brought to their knowledge should lead to an annulment of the sub judice decision.

Counsel for the applicants have argued that they should have that effect as they offend section 45(4) of the Law and are not born out in any event by the Confidential Reports or from any other source. It was also urged that they offended the Rules of natural justice that such remarks carried the day as against the applicants and that they should have been inquired into before acted upon.

Section 45(4) of the Law requires a person preparing a confidential report on a particular officer in which the latter is criticized for negligence, failure or improper behaviour in the performance of his duties to communicate such part on the submission thereof to the officer concerned.

This section in my view has no application to the case in hand

because this adverse material on the two applicants complained of by them was not contained in the confidential reports, the preparation and submission of which is governed by the aforesaid section.

It is true that in a number of cases it was held that the non-communication of adverse criticism contained in a confidential report does not lead to the annulment of a decision taken on the basis thereof as it refers to views expressed therein or opinion formed regarding the officer and not to statements of concrete facts. (See *Doros Pierides and others v. The Republic* (1971) 3 C.L.R. p. 233; *Kyriakopoulou and The Republic* (1973) 3 C.L.R. p. 1; *Elli Korai v. The Cyprus Broadcasting Corporation* (1973) 3 C.L.R. 546; *Elpis Petridou v. The Republic* (1975) 3 C.L.R. 371.)

This, however, does not bring the question under consideration to an end. The principles governing the case in hand were expounded in *Yiangos Frangides and another v. The Republic* (1968) 3 C.L.R. p. 90, where it was held that complaints and accusations made against an officer have to be brought to his notice so that such officer will have a chance of replying to such complaints. It was further held therein that, had complaints made against an officer, been investigated departmentally prior to being placed before the respondent Commission, then no doubt the Commission would have had before it all necessary material including of course the explanations of the officer concerned, in order to decide properly, and that as such material was not before the Commission the promotions in that case made in preference of that applicant were annulled on the ground that by relying on such complaints the Commission acted in a manner which amounted in assessing the merits of the officer concerned as a candidate without a reasonably sufficient inquiry into or knowledge of all material facts and had thus exercised its relevant discretionary powers in a defective manner which resulted in abuse and excess of powers.

The aforesaid exposition of the Law which I adopt applies to the facts of this case where as already indicated the complaints and accusations made against the two applicants do not appear to have been brought to their knowledge, to have been investigated departmentally and together with the explana-

tions, if any, of the officers concerned to have been placed before the respondent Commission so that it would have had before it all necessary material before exercising its discretion in the case. Moreover these complaints and accusations appear to have materially prejudiced the two applicants.

For all the above reasons the sub judice decision is annulled on the ground of lack of due inquiry and exercise of discretionary power by the respondent Commission in a defective manner which resulted in abuse and excess of power.

10 Having come to this conclusion I need not and in fact I do not consider it proper to examine the other grounds of Law relied upon by the applicants in these applications, as they will inevitably involve the examination of the merits of the various candidates and I do not want, by anything that I may say in
15 connection thereto, to be taken that I am in favour of the one or other approach, in view of the fact that it is now upon to the respondent Commission to reconsider the matter afresh in the light of this judgment.

In the circumstances, however, I make no order as to costs.

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*Sub judice decision annulled.
No order as to costs.*