

1983 November 30

[Pikis, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

JORDANIS TORNARIS,

*Applicant.*

v.

THE REPUBLIC OF CYPRUS, THROUGH  
THE EDUCATIONAL SERVICE COMMISSION  
AND/OR  
THE MINISTRY OF EDUCATION,

*Respondents.*

(Case No. 27/83).

*Public (or Educational Officers)—Promotions—General Inspector of Elementary Education—Applicant and interested party of equal merit but applicant by seven years' senior—Additional qualifications of interested party—Effect—They could not outweigh the advantage enjoyed by the applicant on account of his seniority which is a most consequential factor for promotion ---Sub judice promotion annulled because of the disregard of applicant's seniority.* 5

*Res judicata—Doctrine of—Principles applicable—Annulment of promotion of public officer by the Court in a recourse under Article 146.1 of the Constitution upon finding that applicant strikingly superior to interested party—Respondents could challenge this finding by way of appeal but they had no power to disregard it on a re-evaluation of the self same material—By so doing they acted in breach of their duties under Article 146.5 of the Constitution.* 10 15

The applicant and the interested party were candidates for promotion to the post of General Inspector of Elementary Education. By means of a decision taken on the 22.10.1980 the respondent Commission promoted the interested party to the said post in preference and instead of the applicant. This deci- 20

5 sion was annulled by the Supreme Court, upon a recourse by the applicant, on the main ground that on the material before the Commission the applicant was strikingly superior to the interested party. Following the annulment the Commission re-considered the matter and promoted again the interested party. Hence this recourse.

10 Both the applicant and the interested party possessed the qualifications required by the relevant schemes of service but the interested party was the holder of a Ph. D. whereas applicant's highest qualification was that of M.Sc. They were both of equal merit, on the basis of their confidential reports, but applicant had substantial seniority over the interested party extending to seven years upwards.

15 *Held*, that where the candidates are of equal merit, seniority, especially substantial seniority as in this case, is a most consequential factor for promotion; that the advantage, if any, that the interested party enjoyed over the applicant because of his Ph.D. was so marginal as to make no difference in itself to the claims of the parties for promotion; that certainly, it could not, under any conceivable circumstances, outweigh the advantage enjoyed by the applicant on account of his seniority; accordingly the decision of the respondents must once more be annulled for the same reason that their first decision was annulled, notably, 20 disregard of the seniority of the applicant.

30 *Held*, further, that the sub judge decision is vulnerable to be set aside on the ground of disregard of the decision of the Court in breach of the doctrine of res judicata because since the Court found that the applicant was strikingly superior the only course open to the respondents, if they disputed such finding, was to challenge it by way of appeal; that, certainly, they had no power to disregard it on a re-evaluation of the self same material and by so doing they acted in breach of their duties under Article 146.5, thus deviating from the course of legality.

35 *Sub judge decision annulled.*

Cases referred to:

*Larkos v. Republic* (1982) 3 C.L.R. 513 at p. 518;

*Cleanthous v. Republic* (1978) 3 C.L.R. 320 at pp. 327-328;

*Skarparis v. Republic* (1978) 3 C.L.R. 106;

*Papadopoulos v. Republic* (1982) 3 C.L.R. 1070 at p. 1075;  
*Pieris v. Republic* (1983) 3 C.L.R. 1054;  
*Tornaris v. Republic* (1982) 3 C.L.R. 1165.

### Recourse.

Recourse against the decision of the respondents to promote 5  
the interested party to the post of General Inspector of  
Elementary Education in preference and instead of the applicant.

*C. Anastassiades* for *E. Efstathiou*, for the applicant.

*M. Florentzos*, Counsel of the Republic, for the respondents.

No appearance for the interested party. 10

*Cur. adv. vult.*

PIKIS J. read the following judgment. This is the second  
recourse of Iordanis Tornaris, an Inspector of Elementary  
Education, against the promotion of Antonis Papadopoulos,  
a fellow Inspector to the post of General Inspector of Elementary 15  
Education. Both were candidates for promotion, as well as  
four fellow Inspectors. The first recourse—No. 1/81—decided  
on 21.10.1982, annulled the appointment of Mr. Papadopoulos,  
mainly for the reason that respondents disregarded for no  
apparent or good reason the substantial seniority of Mr. 20  
Tornaris extending to seven years upwards. On the finding  
of the Court, Mr. Tornaris was, on the material before the res-  
pondents, strikingly superior to Mr. Papadopoulos, a superiority  
respondents disregarded in breach of their duty to appoint  
the best candidate for the post judged from the viewpoint of 25  
the criteria set down by law, merit, qualifications and seniority  
(see, s. 35 of Law 10/69, as amended by s. 5(b) of Law 53/79).

The decision of the Court made necessary re-examination  
of the case with a view to filling the posts of General Inspectors  
of Elementary Education. On 25.10.1982, that is, four days subse- 30  
quent to the decision of the Court, the respondents held a meeting  
in order to decide afresh who should be selected for appointment,  
an appointment left in abeyance by the decision of the Court. To  
start with, as the minute of the proceedings before the Educatio-  
nal Service Commission records, the members of the Commission 35  
were apprised of the decision of the Court and a copy was made  
available for their advice and guidance. They correctly acknow-  
ledged their duty to lie in the re-examination of matters relevant  
to selection, from the perspective of the legal and factual reality

obtaining at the time the abortive decision was taken notably the realities of 22 10 1980. The jurisdiction of the Court under Article 146 1 is remedial exercised within the context of separation of powers, by virtue of which the Administration administers and the Court controls in the interests of legality. Once the Administration is rid of the defective decision they must approach the issue afresh with hind-sight in order to avoid errors that rendered the exercise of their powers defective in the first place.

The facts that had emerged before the Commission on 22 10 1980 meriting re-examination in consequence of the decision of the Court, were—

- (a) The confidential reports of the parties
- (b) their qualifications and
- (c) their length of service, the indicator of their seniority.

They also had before them the advice and recommendations of the Head of the Department of Elementary Education namely Mr N. Papaxenophonos designed to guide them in making the best choice possible in the circumstances. Mr Papaxenophonos refrained from recommending by name any of the candidates. Instead, he sought to help the Commission by establishing certain guidelines that should aid them in their task. Firstly he noted that there were only marginal differences between the candidates respecting their merits. A principal consideration was the administrative ability of the candidates, an essential quality for the successful discharge of the duties of General Inspector. An equally important consideration, he told the Commission, was the length of service of the candidates, a serious pointer to educational experience'. Academic qualifications, unlike specific qualifications equipping the candidates with knowledge of modern educational problems, was not a factor to which they should pay distinct consideration.

The Educational Service Commission construed the advice of Mr Papaxenophonos. His statement was more in the nature of an advice rather than a recommendation - as an indirect recommendation for some of the candidates but they left the candidates unnamed. In the end, as one may infer from their decision, they treated the statement of Mr Papaxenophonos as a recommendation for Mr Papadopoulos in preference to Mr Tornaris.

For the applicant it was argued that the new decision of the respondents not only suffers from the same defects as the first decision of the Commission on the subject, but should also be set aside for the additional reason it transcends the decision of the Court by disregarding the finding that applicant was, on the material then available to the Commission, strikingly superior to Mr. Papadopoulos. A finding of this nature estopped them, in the contention of the applicant, from taking any other view of the facts. For the respondents it was submitted that the sub judice decision must be evaluated on its merits.

Unlike the first decision annulled by the Court, the second one was reached after consideration of all relevant facts, including the seniority of the applicant, overlooked or ignored on the first occasion.

On scrutiny of the decision and the reasoning accompanying it, the following emerge:—

- (A) The respondents rightly concluded that applicant and interested party were candidates of equal merit, on the basis of their confidential reports.
- (B) Applicant, it was noted, was senior to the interested party but no reference was made to the magnitude of his seniority. Nor was seniority evaluated in the light of the advice of Mr. Papaxenophontos, as a factor of primary importance to suitability for promotion to the position of General Inspector.
- (C) The interested party was found to have more extensive qualifications in comparison to the applicant. The interested party was the holder of a Ph.D., whereas applicant's highest qualification was that of M.Sc. Here again, whereas the respondents professed to attach great significance to the recommendations of Mr. Papaxenophontos, they failed to appreciate the qualifications of the candidates in accordance with that advice, that is, evaluate their qualifications by reference to the duties of a general inspector. Instead, they did what Mr. Papaxenophontos had enjoined them not to do, that is, they valued their qualifications in accordance with prima facie academic attainment.

In the end, the respondents decided, notwithstanding the absence of proper examination of the value of the qualifications of the parties, firstly that, Mr. Papadopoulos had superior qualifications to Mr. Tornaris and, secondly that, this advantage  
5 more than offset the advantage enjoyed by Mr. Tornaris on account of his seniority. Also, implicit from their decision is that they treated the advice of Mr. Papaxenophontos as favouring the candidature of Mr. Papadopoulos; this was an erroneous construction of what Mr. Papaxenophontos has  
10 said. If his advice disclosed a hidden recommendation, the recommendation was for Mr. Tornaris who excelled in the first two criteria listed by Mr. Papaxenophontos—administrative ability and length of service. Nor could Mr. Tornaris be said to lack behind in terms of qualifications compared to Mr.  
15 Papadopoulos from the viewpoint of the advice of Mr. Papaxenophontos. Mr. Tornaris had extensive qualifications in the field of education, apt to equip him with knowledge of modern methods of education. Therefore, I hold that, to the extent that the respondents treated the advice of Mr. Papa-  
20 xenophontos as a recommendation for Mr. Papadopoulos, they misconceived both the advice, as well as the facts relevant to this advice.

The importance attached by the respondents to the qualifications of Mr. Papadopoulos, was out of all proportion to the weight that might legitimately be ascribed to this factor. As  
25 I had occasion to observe in *Larkos v. Republic* (1982) 3 C.L.R. 513, 518, on a consideration of the relevant caselaw, “The possession of additional qualifications simpliciter to those required by the relevant schemes of service does not specifically  
30 enhance the claims of the holder to promotion. ...” As A. Loizou, J., pronounced in *Cleanthous v. Republic* (1978) 3 C.L.R. 320, 327–328, the possession of additional qualifications to those required by the schemes of service, does not necessarily put the holder in an advantageous position compared to other  
35 candidates. Certainly, additional qualifications do not override, as Triantafyllides, P., held in *Skarparis v. Republic* (1978) 3 C.L.R. 106, the recommendations of a departmental head. In general, additional qualifications are not a factor to which the appointing body is entitled to pay distinct consideration.  
40 They are but one of the factors that paint the picture of a candi-

date's suitability for promotion. In *Papadopoulos v. Republic* (1982) 3 C.L.R. 1070, 1075, it was pointed out that additional qualifications " at the highest, they may confer a marginal advantage but, certainly, they do not specifically enhance the claims of the holder to promotion. Additional qualifications to those laid down in the scheme of service, confer a distinct advantage only where they are specified in the scheme of service as an advantage, not otherwise".

The unmerited significance attached by the respondents to the qualifications of the interested party, led the Commission astray from the path of choosing the candidate most suitable for promotion by reference to the criteria laid down by law. Their misappreciation of the advice of Mr. Papaxenophontos and its misconstruction in all probability, is another weighty consideration that leaves their decision exposed to be set aside. As on the first occasion, the respondents ignored the seniority of the applicant, as well as its value, as indicated by Mr. Papaxenophontos, for the successful discharge of the duties of General Inspector of Education. Where the candidates are of equal merit, as their merits may be gathered from the confidential reports of the parties, seniority, especially substantial seniority as in this case, is a most consequential factor for promotion. It is otherwise where a junior in service has better merits to a senior; seniority is a factor secondary to merit. As respects academic qualifications, all that could be said, having regard to the qualifications possessed by applicant and the interested party, was that both possessed additional qualifications to those required by the scheme of service. The advantage, if any, that Mr. Papadopoulos enjoyed over Mr. Tornaris because of his Ph.D., was so marginal as to make no difference in itself to the claims of the parties for promotion. Certainly, it could not, under any conceivable circumstances, outweigh the advantage enjoyed by the applicant on account of his seniority.

For all the above reasons, the decision of the respondents must once more be annulled for the same reason that their first decision was annulled, notably, disregard of the seniority of the applicant.

Moreover, the decision is vulnerable to be set aside on another equally important ground as well, namely, disregard of the decision of the Court in breach of the doctrine of *res judicata*.

The Administration is bound by the decision of a Court of revisional jurisdiction. The doctrine of *res judicata*, as applied in administrative law, was discussed and analysed by the Full Bench of the Supreme Court in *Pieris v. Republic, Revisional Jurisdiction Appeal No. 298—22.9.1983 (not yet reported)\**. The decision giving rise to *res judicata*, it was observed, must contain an adjudication on the merits, as opposed to a judicial pronouncement resting on the absence of the requisite formalities. Secondly, the point in issue must have been decided on the first occasion directly or by necessary implication. It appears on examination of the judgment of the Court on the first recourse of the applicant—*Tornaris v. Republic* (1982) 3 C.L.R. 1165—that one of the issues in dispute was whether, on the material before the Commission Mr. Tornaris was strikingly superior to Mr. Papadopoulos, as claimed. The Court answered the question in the affirmative and found as a fact that Mr. Tornaris was strikingly superior. This striking superiority was one of the operative reasons for which the decision was annulled. It was a finding that the Court could legitimately make and formed part of the binding part of the judgment of the Court. If the respondents disputed this finding, the only course open to them was to challenge it by way of appeal. Certainly, they had no power to disregard it on a re-evaluation of the self same material. By so doing, they acted in breach of their duties under Article 146.5 They deviated from the course of legality. As we stressed in *Pieris, supra*, *res judicata* is an important doctrine of public policy that aims to inject certainty in the legal process and make fruitful the enjoyment of the rights of citizens. In effect, the Educational Service Commission defied the judgment of the Court while professing to be guided by it. I must remind them that no administrative organ is above the law, but everyone is subject to it.

In the result, the sub judice decision is annulled. The respondents are adjudged to pay the costs of the applicant to be assessed by the Registrar of the Supreme Court.

*Sub judice decision annulled.  
Respondents to pay applicant's costs.*

\* Now reported in (1983) 3 C.L.R. 1054