1983 April 28

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CHARALAMBOS TOOULIAS AND OTHERS,
Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH
1. THE COUNCIL OF MINISTERS AND
2. MINISTER OF INTERIOR AND DEFENCE,
Respondents.

(*Cases Nos.* 440/80, 459/80, 462/80).

Administrative Law—Promotions—Freedom of choice—Not absolute even where the widest possible discretion is vested in the appointing organ which is the case where discretion is bestowed to make appointments at their discretion—Certain rules should be observed one being the comparison of the claims to promotion of eligible officers—Promotions in the army of the Republic—Not reasoned and made without inquiry into the merits of those eligible for promotion—Taken in defiance of every notion of proper administration—Annulled.

Army of the Republic—Officers of—Promotions—Made before the establishment of the Machinery envisaged by Law for effecting such promotions—Army of the Republic Hierarchy and Promotions of Permanent Commissioned and Non-Commissioned Officers, Regulations, 1981 *made under section* 16 *of the Army of the Republic (Composition, Enlistment and Discipline) Law,* 1961 *(as amended by s.* 5 *of Law* 16/62)*—Invalid.*

These recourses were directed against the promotions of the interested parties to the rank of lieutenant-colonels in the Cyprus Army. The Council of Ministers purporting to act in exercise of the powers conferred by section 5(1) of the Army of the Republic (Composition, Enlistment and Discipline) Laws, 1961–1975, approved the promotion of the interested parties who were

named in a submission to the Council by the Minister of Defence, with effect from the 1st September, 1980.

The Ministerial submission which was conveyed to the Council of Ministers for approval, embodied the decision of the Minister to promote the interested parties in purported exercise of the powers delegated or assigned to the Minister, by a decision of the Council of Ministers dated 18.3.1965 whereby the Council delegated to the Minister of Defence its powers under s.5(1) viz., to appoint officers in the army subject to the approval of the Council of Ministers.

The decision of the Minister was laconically expressed for it only stated that the Minister after examining each case approved ("ἐνέκρινε") the promotion of the interested parties. The decision of the Council of Ministers was almost as brief as the decision of the Minister. For the respondents it was submitted that the Minister approved a suggestion for the promotion of the interested parties that originated from the Army Headquarters but no record of this recommendation was traced. Also neither the Council of Ministers nor the Minister attempted an evaluation of the merits of those officers who were eligible for promotion. Though at the time of the sub judice promotions there was a legislative provision in force empowering the Council of Ministers to make promotions (s.16 of Law 8/61 as amended by s.5 of Law 16/62), whereby it was laid down that promotions would be effected in accordance with Regulations to be enacted by the Council of Ministers, such Regulations were introduced in 1981, that is after the sub judice promotions.

Counsel for the respondents submitted that the sub judice promotions were made on the basis of absolute discretion vested in the Council of Ministers, in part delegated to the Minister of Defence.

Held, (1) that it is a settled principle of administrative law that freedom of choice is not absolute, even where the widest possible discretion is vested in the appointing body which is the case where discretion is bestowed to make appointments "κατ' ἐκλογήν" (selection at the discretion); that certain rules must invariably be observed, one being that a comparison must be made of the claims to promotion of eligible officers, with

a corresponding duty to promote those appearing on comparison to be best suitable for promotion.

(2) That the sub judice promotions were taken in defiance of almost every notion of proper administration; both the decision of the Council of Ministers and that of the Minister, are unreasoned; the promotions were made without inquiry into the merits of those eligible for promotion and such material as might fill some of the gaps namely the recommendations of Army Headquarters, is nowhere found; accordingly the sub judice promotions must be annulled.

Held, further, that no promotions could be made in the army pending the establishment of the machinery envisaged by law for effecting such promotions.

Sub judice promotions annulled.

Recourses.

Recourses against the decision of the respondents to promote the interested parties to the post of lieutenant-colonel in the Cyprus Army in preference and instead of the applicants.

M. Christofides, for the applicant in Case No. 440/80.

N. Pelides, for the applicant in Case No. 459/80.

A. Ladas, for the applicant in Case No. 462/80.

A. Vassiliades, for the respondents.

Cur. adv. vult.

PIKIS J. read the following judgment. The Council of Ministers purporting to act in exercise of the powers conferred by s.5(1) of the Army of the Republic (Composition, Enlistment and Discipline) Laws, 1961-1975 decided, on 20.11.1980 to "approve ..... the promotion of the officers ....." named in a submission to the Council by the Minister of Defence dated 14.11.1980. By virtue of this decision, the twenty-two interested parties, officers of the Cyprus Army then serving with the rank of major, were promoted to lieutenant-colonels as from 1.9.1980. The minute of the decision of the Council of Ministers suggests the submission of the Minister was adopted without further inquiry into the suitability of the recommendees for promotion or examination of the merits of any other officer of the Cyprus Army eligible for promotion.

The Ministerial submission conveyed to the Council of

Ministers for approval, embodied the decision of the Minister to promote the interested parties in purported exercise of the powers delegated or assigned to the Minister, by a decision of the Council of Ministers dated 18.3.1965 - No.4545, gazetted on 5.6.1981, whereby the Council delegated to the Minister of Defence its powers under s.5(1) viz., to appoint officers in the army subject to the approval of the Council of Ministers. The delegation was made under the provisions of s.3(1) of the Delegation of Powers Entrusted by Law - Law 23/62, entitling the Council to delegate powers vested in the Council by law to a Minister or another authorised person.

I have advisedly used the word "purported" referring to the powers exercised for, it is the case for the applicants that no power vested in the Council of Ministers under s.5(1) to make promotions in the army and none could, therefore, be delegated to the Minister of Defence or anybody else for that matter. The powers vested in the Council of Ministers under s.5(1) - so this argument ran - were confined to the appointment of officers to the ranks of the Cyprus Army. The delegation to the Minister of Defence was subject to the same qualification; the power delegated subject to the approval of the Council of Ministers, was the power to appoint officers under s.5(1) of the basic law. The power of the Council of Ministers to make promotions in the army, if any, did not derive from any specific provisions of the law but emanated from the residual powers of the Council of Ministers to man the Cyprus Army in a comprehensive and acceptable manner. Consequently, the assumption of power in this case by the Minister in the first place and, the Council of Ministers in the second, to make promotions in the Cyprus Army, was an act in excess of the powers vested in them, either by law or an abuse of the powers vested in them by s.5(1) of Law 8/61, as modified by the aforementioned delegation to the Minister of Defence.

To understand the issues raised for determination in the present proceedings, it is necessary to make detailed reference to the facts of the cases in order to elicit the legal and factual background to the promotion of the interested parties. The factual background to the cases is the subject-matter of the statement of facts accompanying the application and opposition thereto and is evidenced by the material before the Court or

the absence of it. To start with, there is the decision of the Minister of Defence embodied in his submission to the Council of Ministers, laconically expressed, almost as brief as the decision of the Council of Ministers on the subject. Para.1 of the statement of facts supporting the opposition, refers to the background and the context in which the decision was taken. The decision to promote the interested parties was taken by the Minister after examining each case (the cases considered are not specified); following this examination he approved (ἐνέκρινε) the promotion of the interested parties. The word "ἐνέκρινε" (approved), connotes in its ordinary acceptation a course proposed by someone other than the person sanctioning the proposal. (See, Λεξικὸν τῆς Δημοτικῆς Ἑταιρείας Ἑλληνικῶν Ἐκδόσεων, p. 200). Any suggestion that the word "ἐνέκρινε" was used in any sense other than approval, would be untenable in view of the very statement of the respondents in para.1 of the opposition, that the Minister approved a suggestion for the promotion of the interested parties that originated from another quarter, notably the Army Headquarters (Γ.Ε.Ε.Φ.) Consequently, the word "ἐνέκρινε" was used in its ordinary meaning to signify approval or ratification of a course of action recommended by someone else. No record of this recommendation was traced and, apparently, no note of its contents was kept by anyone. Surprising as it may appear, the document setting in motion the machinery for promotions and establishing the basis upon which they were made, is nowhere to be found. How and in what circumstances it was lost, is a matter of conjecture. To speculate about its contents, particularly its reasoning, is totally unprofitable. Evidently, it was not placed before the Council of Ministers, a fact leading to the inference that the Council of Ministers approved the decision of the Minister of Defence without acquainting themselves as to the basis upon which the decision was reached and the reasons in support thereof. Neither the decision of the Council of Ministers, nor that of the Minister is reasoned in any way. And in the absence of the recommendations of the Army General Staff, neither decision can be supplemented in terms of reasoning by recourse to the files either of applicants or interested parties. The inescapable conclusion is that both decisions are devoid of reasoning. And as such cannot stand the test of judicial review.

A factor that complicates the cases further and enlarges the mantle of darkness cast over the decisions, is a note in the file of the interested parties, brief as it could be, suggesting the promotions were made after a report submitted to the Minister of Defence on the performance of the interested parties in the army. Whether this report is the same as that coming from Army Headquarters or another report, it is not known. If it is not the same report, it is missing like the report of the Army Headquarters.

At the time the promotions were made, there were 46 officers serving with the rank of major, prima facie eligible for promotion to the post of lieutenant-colonel, a rung higher in the army establishment. The hierarchy of commissioned officers in the Cyprus Army is specified in s.4(2) of the basic law.

The files of the interested parties and applicants were produced in the course of the hearing and a table was prepared charting the merits of eligible officers from a variety of viewpoints for purposes of comparison. Notwithstanding the assertions in the opposition, set out in paras. 2 and 3 that, promotions were made after examination of the records of the parties, presumably implying thereby comparison of the competing merits of majors to promotion, there is nothing to indicate that either the Council of Ministers or the Minister of Defence attempted any comparison whatever or for that matter examined the files of anyone other than the interested parties. The Council of Ministers had before it nothing other than the submission of the Minister. The impression one is apt to form is that they approved, without further inquiry, the submission of the Minister. No inquiry whatever was made to ascertain who were eligible for promotion and the rival claims to promotion of those eligible. One is driven to a similar conclusion with regard to the premises upon which the Minister rested his decision. Whether the General Army Staff attempted a comparison, is an unknown fact. In the absence of a record of the recommendations or be it a note reproducing the substance of its contents, one cannot predicate what it contained. The one fact that emerges with certainty is that neither the Council of Ministers nor the Minister of Defence attempted an evaluation of the merits of those officers who were eligible for promotion to the rank of lieutenant-colonel.

From the facts detailed above, the inescapable inference is that the allegations contained in paras. 2 and 3 of the opposition, averring the decisions were taken after comparison of the mertis of those eligible, is ill-founded, in fact inconsistent with the facts of the cases. Counsel appearing for the respondents did not seek to suggest otherwise in addressing me. He must have felt constrained by the materials before the Court as indeed they constrained him from suggesting that the sub judice decision was taken after a comparison of the merits of the officers serving with the rank of major in the Cyprus Army. Instead, he sought to rest his case on a basis different from that elicited in the statement of facts accompanying the opposition. He submitted that the appointments or promotions, whatever the case may have been, of the interested parties, were made on the basis of absolute discretion vested in the Council of Ministers, in part delegated to the Minister of Defence. Assuming that as wide a discretion as suggested, vested in the Council of Ministers, there were still insurmountable obstacles in the way of respondents supporting the decision. The submission, if I understood it correctly, is that unfettered discretion was conferred on the Council of Ministers to make promotions in the army, unfettered in the sense that they could do as they pleased. Such a proposition, if accepted, would neutralise judicial control as well as the duty cast on every public authority to observe the rules of sound administration, principles enshrined in Article 146 of the Constitution, forming an aspect of the rule of law that permeates every aspect of our legal system. It is a settled principle of administrative law that freedom of choice is not absolute, even where the widest possible discretion is vested in the appointing body which is the case where discretion is bestowed to make appointments "κατ' ἐκλογήν" (selection at their discretion). Certain rules must invariably be observed, one being that a comparison must be made of the claims to promotion of eligible officers, with a corresponding duty to promote those appearing on comparison to be best suitable for promotion. (See, *Conclusions from Jurisprudence of Greek Council of State* 1929-59, p.350). Without this rule, the door would be cast wide open to by-passing the norm of legality, as well as ignoring the principles of sound administration.

In my judgment, the sub judice promotions are, in the light of the facts analysed above, vulnerable to be set aside. They

were taken in defiance of almost every notion of proper administration. Both the decision of the Council of Ministers and that of the Minister, are unreasoned; the promotions were made without inquiry into the merits of those eligible for promotion and such material as might fill some of the gaps, namely the much talked-about recommendation of Army Headquarters, is nowhere to be found.

But, in the submission of applicants, the sub judice acts are void for more ponderous reasons still. The section of the law, s.5(1), under which the promotions were made, conferred no power on the Council of Ministers to make promotions in the army and, if no power vested in them to make promotions under s.5(1), they could delegate none to the Minister of Defence. Section 19 of the Interpretation Law - Cap.1, laying down what "power to appoint" imports, is of no assistance to the respondents for, evidently, power to appoint does not include power to promote. The concept of promotion is, as they argued, a wholly different one from that of appointment. Therefore, we cannot infer power to promote in virtue of empowerment to appoint. The legislature was aware of this difference and made in s.16 of Law 8/61 (as amended by s.5 of Law 16/62) separate provision for promotions, laying down that promotions would be effected in accordance with regulations to be enacted by the Council of Ministers. Such regulations were introduced in 1981, gazetted on 5th June of the same year under the style "Regulations providing for the Hierarchy and Promotions of Permanent Commissioned and Non Commissioned Officers." It is instructive to note that two of the applicants were promoted, under the new regulations, to lieutenant-colonels. In accordance with these regulations, the procedure for the promotion of permanent officers is different from that provided for in s.5 for the appointment of officers to the ranks of the Cyprus Army.

The concept of promotion signifies ascension of the ladder of hierarchy. According to settled principles of administrative law, ascendance must be made step by step, in the absence of an indication to the contrary. Therefore, even if we were to assume that residual power vested in the Council of Ministers under Law 8/61 to make promotions in the army pending the intro-

duction of regulations, a highly questionable view, such promotions should be effected in accordance with settled principles of administrative law regulating promotions. They require examination of the ability, qualifications, seniority and general performance of all officers eligible for promotion - in this case of all officers serving with the rank of major - with a duty to select those most suitable for promotion. (See, inter alia, *Conclusions from Jurisprudence of Greek Council of State* 1929-59, p.349 et seq.). In the cases under consideration, not even an attempt was made to peruse the service records of those eligible, let alone evaluate their suitability for promotion. Had this exercise been undertaken, one or more of the applicants might have been found entitled to promotion, bearing in mind the material placed before the Court. I shall not probe further into this aspect of the cases for, it is not for the Court but for the appropriate organ of administration to judge their suitability for promotion. All this has been said by way of parenthesis for, as presently advised, I incline to the view that no promotions could be made in the army pending the establishment of the machinery envisaged by law for effecting such promotions.

For all the above reasons, the sub judice decisions are set aside. There will be no order as to costs.

Sub judice decisions annulled. No order as to costs.