

1983 June 10

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION.

NICOLAOS ARSALIDES,

Applicant,

v.

THE CYPRUS TELECOMMUNICATIONS AUTHORITY,

Respondents.

(Case No. 61/82).

IOANNIS HJIOSIF,

Applicant,

v.

THE CYPRUS TELECOMMUNICATIONS AUTHORITY,

Respondents.

(Case No. 80/82).

Subsidiary legislation—Made under an enabling Law—Must be published in the Official Gazette otherwise it is invalid—Section 7 of the Interpretation Law, Cap. 1—General Staff Regulation of the Cyprus Telecommunications Authority—Made in virtue of the provisions of section 43 of the Telecommunications Service Law, Cap. 302 and section 3 of the Public Corporations (Regulation of Personnel Matters) Law, 1970 (Law 61/70)—Not approved by the Council of Ministers and not published in the Official Gazette—They are invalid—Sub judge decisions for the filling of certain posts by the respondent Authority, which were taken thereunder, faulty—Annulled—Sub judge decisions cannot be rendered valid ex post facto by Regulations made after the filing of the recourses.

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Administrative acts or decisions—Cannot be rendered valid ex post facto by legislation enacted after the filing of a recourse chal-

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lenging their validity as such a course would lead to an unconstitutionality—Because it would amount to an interference with the constitutionally safeguarded right of recourse under Article 146 of the Constitution.

- 5 These recourses were directed against the decisions of the respondent Authority to fill in four “first entry and promotion” posts by the promotion of the interested parties in preference to the applicants. The sub judge decisions were taken under the General Staff Regulation of the Cyprus Telecommunications Authority.
- 10 Though the Authority was vested with power to make Regulations “for the better carrying of the Law into effect” in virtue of the provisions of section 43 of the Telecommunications Service Law, Cap. 302 and section 3 of the Public Corporations (Regulation of Personnel Matters) Law, 1970 (Law 61/70) the above Regulations,
- 15 which were made on the 27.7.1977 were not approved by the Council of Ministers and were not published in the Official Gazette. Following the filing of these recourses and the raising of the issue as to the validity of the Regulations, they were approved by the Council of Ministers and published in the Official Gazette; they
- 20 were, also, given retrospective effect as from 21.11.1977.

- Counsel for the applicants mainly contended that the sub judge decisions were invalid as they were taken on the basis of a non-existent Regulation in the sense that the said Regulation was ultra vires the power vested in the Authority by s. 43 of the Law, Cap.
- 25 302 and it was not approved by the Council of Ministers and not published in the Official Gazette of the Republic.

- Held*, (1) that publication in the Official Gazette of the above Regulations made under an enabling Law, is a sine qua non for its validity (see section 7 of the Interpretation Law, Cap. 1);
- 30 that, further, the enabling Laws provide that such Regulations require the approval of the Council of Ministers; that, therefore, the Regulations in virtue of which the sub judge decisions were taken are invalid; accordingly the decisions are faulty.

- (2) That legislation enacted after the filing of a recourse, challenging an invalid or unconstitutional administrative act, cannot render it valid *ex post facto* as otherwise it would lead to an unconstitutionality because it would amount, in effect, to interfering with the constitutionally safeguarded right of
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recourse under Article 146 of the Constitution; accordingly the sub judice decisions must be annulled.

Sub judice decisions annulled.

Cases referred to:

- Bagdassarian v. Electricity Authority of Cyprus* (1968) 3 C.L.R. 736; 5
- Josif v. Cyprus Telecommunications Authority* (1970) 3 C.L.R. 225;
- Poutros v. Cyprus Telecommunications Authority* (1970) 3 C.L.R. 281; 10
- Constantinou v. C.Y.T.A.* (1980) 3 C.L.R. 243;
- Institute of Patent Agents* [1894] 63 L.J. P.C. 74;
- Georgiades v. Republic* (1965) 3 C.L.R. 252;
- Theofylactou v. Republic* (1966) 3 C.L.R. 801;
- Christodoulides v. Republic* (1967) 3 C.L.R. 356 at p. 361; 15
- Alkidas v. Republic* (1967) 3 C.L.R. 191;
- Charalombous and Another v. Cyprus Telecommunications Authority* (1974) 3 C.L.R. 175;
- Republic v. Demetriades* (1977) 3 C.L.R. 213;
- Decisions Nos. 557/61 and 1264/61 of the Greek Council of State.* 20

Recourses.

Recourses against the decision of the respondent to promote the interested parties to the post of "Proistameni Ypiresias 'B'" (Administrative Staff) and "Proistameni Ypiresias 'B'" (Accounting Staff) in preference and instead of the applicant. 25

A. Eftychiou, for applicant in Case No. 61/82.

C. Anastassiades, for applicant in Case No. 80/82.

A. HjiIoannou, for respondents.

Cur. adv. vult. 30

STYLIANIDES J. read the following judgment. The applicants in these two cases are officers of the respondent Authority—the Cyprus Telecommunications Authority. The Authority by its organs, as set out in the General Staff Regulation of the
5 Cyprus Telecommunications Authority, filled in four “first entry and promotion” posts by the promotion of the interested parties in preference to the applicants.

The applicant in Case No. 61/82 challenges the decision for the promotion of all four interested parties, namely,
10 Georghios Hambalis and Yerolemos Yerolemos, who were promoted to “Proistameni Ypiresias ‘B’ ” (Administrative Staff), and Theologhos Kounias and Costas Cleanthous, who were promoted to “Proistameni Ypiresias ‘B’ ” (Accounting Staff), whereas the applicant in Case No. 80/82 challenges only
15 the promotion of Theologhos Kounias.

As both recourses attack the same administrative acts and common points are involved, one judgment for both cases satisfies the interests of justice, as the issues raised are determined.

It is alleged by the applicants that the sub judice decisions
20 are invalid as:-

- (a) They were taken on the basis of a non-existent Regulation in the sense that the said Regulation is ultra vires the power vested in the Authority by s.43 of Law, Cap. 302; that it was not approved by the
25 Council of Ministers and not published in the Official Gazette of the Republic;
- (b) That the posts in question were “first entry and promotion” posts and, therefore, only persons holding a post of the immediate lower grade could be promoted;
- 30 (c) The decisions are faulty for lack of due inquiry and due reasoning;
- (d) They were taken under a misconception of law; and,
- (e) The respondents failed to select the best suitable officers, i.e. the applicants instead of the interested parties.

35 The Authority was established during the colonial administration by the Inland Telecommunications Service Law, Cap. 302. This Law was amended by Laws No. 20/60, 21/60, 34/62, 25/63 and 54/77.

Under Article 122 of the Constitution "public service" includes service under the Cyprus Inland Telecommunications Authority. Under Article 125 of the Constitution the Public Service Commission, established by Article 124, had exclusive powers regarding, inter alia, appointments, promotions and transfers of the officers and servants of the respondent Authority. Due to the events of December, 1963, that Public Service Commission ceased to function properly and in 1967 by Law 33/67 another Public Service Commission, a different one, was set-up, about the constitutionality of some aspects of which I refrain from expressing any opinion as it is unnecessary in this case.

This new Public Service Commission, being an organ created by law, possesses the power laid down therein. Matters concerning the staff of the respondent Authority are outside the ambit of its authority. After the promulgation of Law 33/67 the Public Service Commission, established under the Constitution, which had competence to make, inter alia, appointments and promotions in relation to the personnel of the respondent-Authority, ceased to exist.

Prior to Independence the respondent-Authority in virtue of s.10(1) had statutory power to appoint, etc., a General Manager, a Secretary, and such other officers and servants as might be necessary for the purposes of the Law. This statutory provision, being inconsistent with Articles 122, 124 and 125 of the Constitution, was not saved by Article 188. In 1963, as there was in existence and functioning the Public Service Commission, exercising, under Article 125, exclusively powers regarding the officers and servants of the respondent-Authority, s.10(1) was repealed and substituted by s.4 of The Telecommunications Service (Amendment) Law, 1963. The new section 10(1) reads:-

"There shall be appointed a General Manager, a Secretary and such other officers and servants of the Authority as may be necessary for the purposes of this Law".

After the enactment of Law 33/67 there was no authority competent in relation to personnel matters. (*Bagdassarian v. The Electricity Authority of Cyprus* (1968) 3 C.L.R. 796; *Styllianides v. Cyprus Telecommunications Authority*, (1970) 3 C.L.R. 225; *Vincent Pambros v. The Cyprus*

Telecommunications Authority, (1970) 3 C.L.R. 281). To remedy this situation, and until the people of Cyprus expressed their opinion on the matters, Law 61/70 - The Public Corporations (Regulation of Personnel Matters Law), 1970

5 - was enacted. Section 3(1) conferred to the respective Corporations the power of appointment, promotion, transfer, etc., of their personnel. Subsections 2 and 3 of s. 3 read as follows:-

“3.-(1).....

10 (2) Τηρουμένων τῶν διατάξεων τοῦ ἔδαφίου (3), οἰαδήποτε τῶν ἐν τῷ ἔδαφίῳ (1) ἀναφερομένων ἀρμοδιοτήτων ἀσκεῖται ὑφ’ ἐκάστου Ὁργανισμοῦ συμφώνως πρὸς τὰς διατάξεις τοῦ οἰκείου νόμου ἢ οἰωνδήποτε δυνάμει αὐτοῦ ἐκδοθέντων ἢ ἐκδοθησομένων κανονισμῶν ἢ κανόνων, τὰς ρυθμιζούσας τὸ θέμα ἐν σχέσει πρὸς τὸ ὁποῖον ἀσκεῖται ἡ ἀρμοδιότης.

15 (3) Ὅσακις ὁ οἰκεῖος νόμος δὲν περιλαμβάνῃ διάταξιν ρυθμιζουσαν ἢ χορηγοῦσαν εἰς τὸν Ὁργανισμὸν ἐξουσίαν πρὸς ἐκδοσιν κανονισμῶν ἢ κανόνων ρυθμιζόντων οἰωνδήποτε τῶν θεμάτων ἐν σχέσει πρὸς τὰ ὁποῖα δύναται νὰ ἀσκηθῇ ὑπὸ τοῦ Ὁργανισμοῦ ἀρμοδιότης δυνάμει τοῦ ἔδαφίου

20 (1), ὁ οἰκεῖος νόμος θὰ ἐρμηνεύηται καὶ ἐφαρμόζηται ὡς ἐὰν περιελαμβάνετο ἐν αὐτῷ διάταξις χορηγοῦσα εἰς τὸν Ὁργανισμὸν ἐξουσίαν πρὸς ἐκδοσιν κανονισμῶν ἢ κανόνων ρυθμιζόντων τὸ θέμα τοῦτο”;

(“3.-(1).....

25 (2) Notwithstanding the provisions of sub-section 3, any of the competences referred to in sub-section 1 is exercised by each organisation in accordance with the provisions of the relevant law or under any rules or regulations issued or to be issued by virtue of this law,

30 regulating the matter in respect of which the competence is exercised.

35 (3) When the relative law does not include a provision regulating or granting to the Organisation the power to issue rules or regulations regulating any of the matters in respect of which competence may be exercised by the Organisation by virtue of sub-section (1), the relative law will be construed and applied as if it included in it provisions granting the organisation power to issue rules and regulations regulating this matter”).

The Authority was empowered by s.43 of the basic Law, Cap. 302 (Law No. 67/54), with the approval of the Governor, now Council of Ministers, to make regulations not inconsistent with the provisions of the Law or any other Law in force for the time being, to be published in the Gazette, "for the better carrying of this Law into effect". Without prejudice to the generality of this power, certain matters, which could be regulated, are set out in paragraphs (a), (b), (c) and (d) of that section. 5

Until the enactment of Law 61/70 no regulations relating to appointment, promotion, etc., of the officers or servants of the Authority were made in virtue of the said power. The sub judice promotions were made not by the Board of the Authority but by subordinate organs and in accordance with the General Staff Regulation approved by the decision of the Board of the Authority on 27/7/77. 10 15

This Regulation provides, inter alia, for the classification of the personnel, the terms and conditions of appointment, permanent emplacement, promotion, transfer, disciplinary proceedings and dismissal. The schemes of service for the various post, and particularly for the post for which the sub judice decisions, are also part of this General Regulation. 20

It is common ground that this Regulation was never placed before the Council of Ministers for approval and was never published in the Official Gazette of the Republic. 25

In *Constantinou v. C.Y.T.A.*, (1980) 3 C.L.R. 243, a Judge of this Court ruled that the said Regulation constitutes only "internal rules" of the Authority and, notwithstanding the fault of not being approved by the Council of Ministers and not published in the Gazette, pronounced for their validity. Their description as "internal rules" or "regulations", though not justifiable by their title and contents, does not change their legal position : they are nothing else but regulations. 30

The legislation is usually a skeleton piece of legislation and leaves to be filled up in substantial and material parts by the action of rules or regulations. (*Institute of Patent Agents*, [1894] 63 L.J. P.C. 74). It is a cardinal principle of Law, embodied in s.7 of the Interpretation Law, Cap. 1, that every Law and any public instrument made or issued under any 35

Law or other lawful authority and having legislative effect shall be published in the Official Gazette. Relevant is also Article 82 of the Constitution. This is in accord with justice and common sense. A citizen is presumed to know the Law, and

5 "Law" includes validly made subsidiary legislation. The publication in the Official Gazette is a fundamental obligation of the State and any law making body in order to ensure that the irrebuttable presumption of the knowledge of the Law does not lead to absurdities and to the detriment of the citizen.

10 Subsidiary legislation is made under the authority of an enabling Law. The primary legislative authority in a country is the legislature - during the autocratic days of the colonial administration the Governor and after the establishment of the Republic the House of Representatives. The words "for the

15 better carrying of this Law into effect" in s.43 of Cap. 302 are very wide indeed. The respondent - Authority, in order "to carry the Law into effect " has, inter alia, to appoint personnel, confirm, emplace on permanent or pensionable establishment, promote, transfer, retire and exercise disciplinary

20 control over such personnel. If the aforesaid section did not empower the Authority to make regulations about its personnel, then s. 3 of Law 61/70 confers such power. In any view of the law the approval of the Council of Ministers and the publication in the Official Gazette were sine qua non for the validity

25 of this Regulation.

The judgment of the Judge of this Court in *Constantinou v. C.Y.T.A.*, (supra), is not binding on another Judge of the same Court; for the reasons aforesaid I differ from it.

In view of the aforesaid the sub judge decisions taken at the

30 first step by the Personnel Committee ("Επιτροπή Προσωπικού") established under the said General Regulation, confirmed by the Director-General and, after complaint, reviewed and approved by the Board of the authority, as they purported to have been made and taken under an invalid Regulation, are

35 faulty.

The Regulation, after the issue of its validity was raised and argued before this Court, received the approval of the Council of Ministers and was published in the Official Gazette on 26/7/82 under Notification No. 220. In this publication it is expressly

40 stated that it was made in virtue of s.43.

It was argued by counsel of the respondent that, though the matter was raised before the Court and actually written address was filed by the advocate of the one of the applicants, elaborating on this issue, as the Regulation received the approval of the Council of Ministers and was published in the Official Gazette of 26/7/82 with retrospective effect from 21/11/77, the decisions challenged are valid. 5

I need not embark on the effect of retrospective legislation or whether the Regulation or its material part for this case is substantive or procedural in character. The question that falls for determination is whether by the retrospective operation of this Regulation the fault of the administrative acts challenged was remedied. 10

In *Georghiades v. The Republic of Cyprus* (1966) 3 C.L.R. 252, the sub judge decision was taken by the Greek members of the Public Service Commission established under the Constitution who did not, however, constitute a quorum. The Public Service Commission (Temporary Provisions) Law, 1965 (Law No. 72/65), s. 5, enacted after the judgment had been reserved, provided, in effect, that any decision of the Commission taken between the 21st December, 1963, and the date of the coming into operation of such Law, with a quorum of even less than five members (three if the Chairman is present and four otherwise) should be deemed to have been lawfully taken and to be valid from the point of view of constitution and quorum of the Commission. 15 20 25

Triantafyllides, J., as he then was, said at p. 279:-

“Leaving aside any other question relating to the validity or not of such a retrospective provision as section 5—and I leave such matters entirely open—I am of the opinion that its proper construction is that it could not have been intended, in the absence of express provision to that effect, to be applied to a decision of the Commission which was already sub judge and on which judgment had been reserved in relation, inter alia, to its validity from the point of view of the existence of the proper quorum. 30 35

Moreover, once judgment has been reserved on the validity of a decision of the Commission, as above, there

is no more room for such decision to be "deemed" to be valid, because its validity is to be pronounced upon definitely by way of a judicial decision.

5 Also, if I were to hold the contrary, and find that section 5 was intended to apply even to a decision of the Commission which was sub judice, as above, then section 5 would be, in my opinion, unconstitutional to that extent as contravening the separation of powers under the Constitution and as interfering with the independence of the Judicial Power, 10 by seeking to render valid ex post facto a decision, the determination of the validity of which was already a matter within the province of the Judicial Power. (See in this respect also *Kyriakopoulos on Greek Administrative Law*, 4th Edition, Volume 1, p. 159).

15 I am, thus, of the opinion that Law 72/65, and particularly section 5 thereof, cannot save the validity of the sub judice decisions which were taken by the Commission meeting at the time without proper quorum ."

20 In *Theofylactou v. The Republic of Cyprus*, (1966) 3 C.L.R. 801, the same Judge, after referring to *Georghiades* case, said at p.810:-

25 "I am of the opinion that no different result can be reached with regard to the application of section 5 of law 72/65 to a recourse, such as the present, where judgment had not yet been reserved, when section 5 was enacted, but which has been filed before its enactment and at the 30 time of the filing of which the defect in the constitution of the Commission, which section 5 purports to remedy, had been expressly raised as a ground of invalidity of the sub-judice decision. To apply the said section 5 for the purpose of bringing about, ex post facto, the validity of the said decision, would lead to unconstitutionality, because it would amount, in effect, to interfering with the constitutionally safeguarded right of recourse under Article 146".

35 In *A. Christodoulides v. The Republic of Cyprus, through the Public Service Commission*, (1967) 3 C.L.R. 356, a Full Bench case (Revisional Jurisdiction Appeal No. 25), Josephides, J., in delivering the judgment of the Court said at p.361:-

“The learned trial Judge decided also the question with regard to the defect in the constitution of the Commission at the time of the making of the act. He said:

‘I am of the opinion that no different result can be reached with regard to the application of section 5 of Law 72/65 to a recourse, such as the present, where judgment had not yet been reserved, when section 5 was enacted but which has been filed before its enactment and at the time of filing of which the defect in the constitution of the Commission, which section 5 purports to remedy, had been expressly raised as a ground of invalidity of the sub judice decision’.

The reasons given for that decision by the learned Judge were that if the effect of section 5 was to validate ex post facto a defective decision that would lead to an unconstitutionality because it would amount, in effect, to interfering with the constitutionally safeguarded right of recourse under Article 146 of the Constitution.... We may say that we are in full agreement with that reasoning and the conclusion reached”.

See also *Costas Alkidas v. The Republic*, (1967) 3 C.L.R. 191; *Ioannis Iosif v. The Cyprus Telecommunications Authority*, (1970) 3 C.L.R. 225; *Vincent Poutros v. The Cyprus Telecommunications Authority*, (1970) 3 C.L.R. 281.

In *Demetrios Charalambous and Another v. The Cyprus Telecommunications Authority*, (1974) 3 C.L.R. 175, Triantafyllides, P., distinguished the previous decisions as follows:-

“In the present cases, however, the recourses had not yet been filed at the time when section 4 of Law 61/70 was enacted, after the making of the sub-judice promotion. I can see, therefore, no reason for holding that it would be unconstitutional, as offending against the principle of ‘separation of powers’, to treat section 4 as applicable in relation to the validity of such promotion”.

In Greece—Case No. 557/61—the Greek Council of State decided that a law cannot validate an administrative act otherwise invalid if an application for its annulment had already been filed prior to the enactment of the Law. A different view was expressed in *Case No. 1264/61* and other cases. It is to be

noted that in *Application for Annulment by Tsatsos*, 3rd Edition, (1971), at p.268, the view taken in *Case No. 557/61* is considered the correct one.

5 The decisions of foreign Courts of similar jurisdiction have only persuasive authority. According to the doctrine of precedent (*see The Republic of Cyprus v. Demetrios Demetriades*, (1977) 3 C.L.R. 213)—a judgment of the Full Bench is binding on the members of this Court. Irrespective of the binding authority of *Christodoulides* case (*supra*), I fully agree
10 and I have no reason to express any difference from that decision.

To sum up, the sub judice decisions for the appointment of the interested parties were taken under the General Staff Regulation of the Cyprus Telecommunications Authority.
15 The Authority is vested with power to make regulations “for the better carrying of the Law into effect” in virtue of the provisions of s.43 of The Telecommunications Service Law- Cap. 302, and s.3 of Law 61/70. The publication in the Official Gazette of such Regulation, made under an enabling Law,
20 is a sine qua non for its validity—(Section 7 of the Interpretation Law, Cap. 1).

Furthermore the enabling laws provide that such regulations require the approval of the Council of Ministers and publication in the Official Gazette. As the Regulation, in
25 virtue of which the sub judice decisions were taken, is invalid, the decisions are faulty. The General Regulation, after these recourses were filed and the issue was raised, was approved by the Council of Ministers and was published in the Official
‘Gazette on 26.7.82. It has a retrospective effect as from 21.11.77.

30 Legislation enacted after the filing of a recourse, challenging an invalid or unconstitutional administrative act, cannot render it valid *ex post facto* as otherwise it would lead to an unconstitutionality because it would amount, in effect, to interfering with the constitutionally safeguarded right of
35 recourse under Article 146 of the Constitution.

For the reasons I endeavoured to explain on the first ground raised, the sub judice decisions are not valid.

In view of the aforesaid I deem it unnecessary to deal with the other grounds raised.

In the result the sub judice promotions are declared null and void and of no effect and are hereby set aside.

In the circumstances of these cases I make no order as to costs.

Sub judice decisions annulled.

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No order as to costs.