

1983 May 27

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

NICOS FALAS, —

*Applicant,*

v.

THE REPUBLIC OF CYPRUS, THROUGH  
THE MINISTER OF INTERIOR AND  
THE MINISTRY TO THE PRESIDENT,

*Respondent.*

(Case No. 196/81).

5 *Recourse for annulment—Abatement—Recourse against decision concerning publication of election notifications—Even though a new proper decision for publication cannot be taken since the elections are over, once the monetary interest resulting from the sub judice decision still exists the recourse has not been abated.*

*Administrative act—Meaning and requirements of—Decision of Returning Officer relating to publication of election notifications—An administrative act.*

10 *Administrative acts or decisions—Executory act—Act of execution—Decision concerning publication of election notifications—Taken by Ministry to President and given effect to by Director of the Public Information Office on instructions of the Minister—Act of the Director not executory but an act of execution.*

15 *Elections—Parliamentary elections—Election notification—Publication—Competent organ to decide for the publication the Returning Officer—Section 27(3) of the Election of Members of the House of Representatives Law, 1979 (Law 72/79)—Ministry to the President has no competency in the matter—Therefore any decision taken by any organ other than the Returning Officer was not warranted by Law and was taken arbitrarily by an incompetent organ—No claim for discriminatory*

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*treatment can be based on a decision taken by an incompetent organ—Since there cannot be discriminatory treatment in an unlawful act.*

*Constitutional Law—Equality—Discrimination—Articles 28 and 6 of the Constitution—There cannot be discriminatory treatment in an unlawful act—Decision concerning publication of election notifications in daily but not in weekly newspapers—Reasonable differentiations can be allowed in the application of Article 28 of the Constitution—Differentiation between daily and weekly newspapers a reasonable one—No discrimination or unequal treatment.*

The applicant in this recourse was the editor of “Amohostos” weekly newspaper. In view of the then forthcoming elections of the members of the House of Representatives the Returning Officer for the elections decided to publish certain notifications concerning the elections in the daily newspapers only. The Ministry to the President decided to publish the said notifications in the daily and weekly newspapers, as well as other weekly publications, such as magazines, but not in the newspaper of the applicant. The Director of the Public Information Office (“P.I.O”) acting on the instructions of the Ministry to the President gave the notification for publication to other newspapers but not to the newspaper of applicant. By means of this recourse the applicant prayed for -

- (1) A declaration of the Court that the act and/or decision of the Director of the P I O not to give for publication to the newspaper “Amochostos” the notification for the elections of 1981, while same was given to all daily and weekly newspapers should be declared null and void and of no legal effect whatsoever
- (2) A declaration that the omission of the Director of the P.I.O. to give for publication the notification for the 1981 elections should not have been made.

On the questions -

- (a) Whether the Returning Officer was functus officio, since the elections were over and, therefore, if the recourse succeeded, a new publication of the notification of the elections which already had taken place in 1981 could not be made.
- (b) Whether there was no administrative act in the recourse.

- (c) Whether the act of the P.I.O. complained of was, in the circumstances of the case, an executory act.
- (d) Whether as a result of the decision of the Returning Officer, the applicant can have any complaint for discriminatory treatment.

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*Held*, (1) that although the said decision was only of a short duration, it has produced certain results which still exist (the loss of the profit which results to a newspaper from the publication and which, according to the contention of the applicant, in this case amounted to £11,227.500 mils); that, therefore, the fact that if this recourse succeeds a new proper decision for the publication cannot be taken, is immaterial, because, once the said monetary interest which resulted from the sub judice decision still exists, it is a sufficient ground for the Court to adjudicate on the matter; accordingly this recourse is not by any means abated and the applicant has a legitimate interest which is still existing to pursue it to the end.

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(2) That the act of the Returning Officer is an administrative act, as it satisfies the requirements of the definition of an administrative act in that (a) it is an expression of will; (b) it comes from an administrative organ; (c) it is of unilateral nature and (d) it regulates the legal situation applicable in the particular instance

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(3) That since the decision given effect to was not the decision of the Director of the P.I.O. who gave the notification for publication to the newspapers acting on the instructions of the Minister to the President the act of the Director was not executory but was an act of execution of a decision.

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(4) That the only competent organ to decide for the publication was the Returning Officer (see section 27(3) of the Election of Members of the House of Representatives Law, 1979 (Law 72/79)); that the Ministry to the President had no competency in the matter; that, therefore, any decision taken by any organ other than the Returning Officer was not warranted by law and was taken arbitrarily by an incompetent organ which cannot usurp the function and the discretion of another organ entrusted with such power by the law; accordingly the prayer of the applicant in so far as the decision of respondent 2 is concerned,

cannot be granted, as the applicant cannot base his claim on such decision which, is void, as being unwarranted by law, and taken by an incompetent organ arbitrarily. There cannot be discriminatory treatment in an unlawful act, since there is no equality in this respect. 5

(5) That the decision of the Returning Officer was taken in the exercise of powers vested in him by section 27(3) of Law 72/79 and there is no evidence of any abuse or excess of his said power; that he has set down certain criteria for his choice of the newspapers in which the notification was to be published, which were reasonable and in the circumstances of the case the applicant has failed to establish that the discretion of the Returning Officer was wrongly exercised; that, therefore, the contention of inequality of treatment as a result of the decision of the Returning Officer cannot succeed; that reasonable differentiations are allowed in the application of Article 28 of the Constitution; and that the differentiation by the Returning Officer between daily and weekly newspapers was a reasonable one in the circumstances, and the newspaper of the applicant was not falling within the category of daily newspapers. 10  
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*Application dismissed.*

Cases referred to:

*Christofides v. CYTA* (1979) 3 C.L.R. 99;

*Karapatakis v. Republic* (1982) 3 C.L.R. 88 at p. 93;

*Christodoulides v. The Republic* (1978) 3 C.L.R. 189 at p.192; 25

*Christodoulides v. The Republic* (1978) 3 C.L.R. 193 at pp. 195-197;

*Colocassides Estate Ltd. and Another v. Republic* (1977) 3 C.L.R. 205;

*Phoenicia Hotels v. The Republic* (1978) 3 C.L.R. 94 at p. 98; 30

*Hadjianastassiou v. The Republic* (1982) 3 C.L.R. 672 at p. 674;

*Proestou v. The Republic* (1981) 3 C.L.R. 314 at p. 320;

*Karayianni v. Educational Service Committee* (1979) 3 C.L.R. 371 at p. 378;

*Decisions of the Greek Council of State in Cases 1118/54, 1121/54.* 35

**Recourse**

Recourse against the decision of the Director of the P.I.O. not to give for publication to the newspaper "Amohostos" the notification for the elections of 1981.

5        *L.N. Clerides*, for the applicant.

*S. Georgiades*, Senior Counsel of the Republic, for the respondent.

*Cur. adv. vult.*

SAVVIDES J. read the following judgment. The applicant  
10 in this case is the editor of 'Amohostos' weekly newspaper.  
In view of the then forthcoming elections of the Members  
of the House of Representatives (which took place on the  
24th May, 1981), the Director of the P.I.O. gave notifications  
15 for the said elections for publication to a number of news-  
papers both daily and weekly, as well as to certain weekly  
magazines and other publications, with the exception of the  
newspaper of the applicant. The applicant proceeded and  
published the said notification on his own initiative in his  
aforesaid newspaper on or about the 16th May, 1981.

20        The present recourse which was filed on the 4th June, 1981  
is directed against the Republic of Cyprus through the Mini-  
stry of Interior and the Ministry to the President. The appli-  
cant prays for—

25        (1) a declaration of the Court that the act and/or decision  
of the Director of the P.I.O. not to give for publication  
to the newspaper "Amohostos" the notification for  
the elections of 1981, while same was given to all daily  
and weekly newspapers should be declared null and  
void and of no legal effect whatsoever.

30        (2) A declaration that the omission of the Director of the  
P.I.O. to give for publication the notification for the  
1981 elections should not have been made.

The legal grounds on which the recourse is based, as set  
out in the application, are the following:

35        "(1) The sub judice act and/or decision of the Director  
of the P.I.O. not to give for publication to the applicant

the notification for the elections of 1981 amounts to a manifest violation of Article 28 of the Constitution of the Republic of Cyprus and should, therefore, be declared void and of no legal effect whatsoever.

(2) Also, the omission of the Director of the P.I.O. to give the above notification for publication to the applicant amounts to a manifest violation of Article 28 of the Constitution of the Republic of Cyprus and should not have been made". 5

In his address learned counsel for applicant contended that the applicant was treated in a discriminatory manner vis-a-vis other newspapers in that the notification was published in all newspapers, both daily and weekly, except "Amohostos", which amounts to an arbitrary violation by the respondents of the principle of equality. 10 15

Various points of law were raised, on the other hand, by learned counsel for the respondents in his address. One of such points is that the Returning Officer is now functus officio, since the elections are over and, therefore, if the recourse succeeds, a new publication of the notification of the elections which already had taken place in 1981, could not be made. 20

I shall deal with this contention first. I find such contention untenable on the ground that although the said decision was only of a short duration, it has produced certain results which still exist (the loss of the profit which results to a newspaper from the publication and which, according to the contention of the applicant in this case amounted to £11,227.500 mils). 25  
Therefore, the fact that if this recourse succeeds a new proper decision for the publication cannot be taken, is immaterial because, once the said monetary interest which resulted from the sub judge decision still exists, it is a sufficient ground for the Court to adjudicate on the matter (see *Christophides v. CYTA* (1979) 3 C.L.R. 99, *Karapataki v. Republic* (1982) 3 C.L.R. 88 at p. 93 where other authorities are cited on the point. Also, *Christodoulides v. The Republic through the Minister of Education* (1978) 3 C.L.R. 189 at p. 192 and *Christodoulides v. The Republic through (1) The Minister of Interior and Defence and (2) The Headquarters of the National Guard* (1978) 3 C.L.R. 193 at pp. 195 - 197). Having found that this 30 35

recourse is not by any means abated the applicant has a legitimate interest which is still existing to pursue it to the end and I shall, therefore, proceed to consider the other legal points.

5 Counsel for the respondents contended that there is no administrative act in this recourse. Before examining this contention, I wish to clarify the situation as to the facts which led to the present recourse. In fact, in this case there are two decisions involved. The first one is a decision of the Returning Officer for the elections to publish the said notifications in the daily newspapers only. The second one is a decision taken by the Ministry to the President to publish the notification in the daily and weekly newspapers, as well as other weekly publications, such as magazines, but not including the newspaper of the applicant. There is also the act of the Director of the P.I.O. to give the notification which was sent to him for publication.

20 This recourse was filed both against the Minister of Interior who is the appropriate authority under The Election of the Members of the House of Representatives Law, 1979 (Law 72/79), to carry out the elections, and the Ministry to the President to whose decisions the Director of the P.I.O. gave effect. Having briefly dealt with the facts which preceded the publication, I am coming to examine first whether the decision of the Returning Officer amounts to an administrative act.

25 I find myself unable to accept the contention of counsel for the respondents that it does not so amount. The definition of an administrative act is to be found in all textbooks of Greek Administrative Law and in a number of cases of our Court. In Stassinopoulos "Lessons on Administrative Law" 30 1972 Edition, at page 221 it is stated that:

35 " 'Ορισμός τῆς διοικητικῆς πράξεως.—Ἐπὶ τῇ βάσει τῶν ἐκτεθέντων, ὀρίζομεν τὴν ἀτομικὴν διοικητικὴν πράξιν ὡς δῆλωσιν βουλήσεως προερχομένην ἐκ διοικητικοῦ ὄργανου, καθορίζουσαν δὲ μονομερῶς τὶ δέον νὰ ἰσχύη ὡς δίκαιον ἐν τῇ ἀτομικῇ περιπτώσει. Κατὰ τὸν ὀρισμὸν τοῦτον, ἡ ἔννοια ἀναλύεται εἰς τὰ ἑξῆς στοιχεῖα:

40 α) Ἡ διοικητικὴ πράξις εἶναι δῆλωσις βουλήσεως, β) προέρχεται ἐξ ὄργανου διοικητικοῦ, γ) εἶναι φύσεως μονομερούς, καὶ δ) καθορίζει τὶ δέον νὰ ἰσχύη ὡς δίκαιον ἐν τῇ ἀτομικῇ περιπτώσει".

("Definition of administrative act.—On the basis of what has been stated, we define individual administrative act as an expression of will emanating from an administrative organ, defining unilaterally what must be the Law in the individual case. According to this definition the meaning is analysed in the following elements: 5

a) The administrative act is an expression of will, (b) emanates from an administrative organ, (c) is of a unilateral character and (d) defines what must be the Law as just in the individual case"). 10

Then he goes on to mention that "in the notion of administrative acts, are not included (a) acts which do not contain an expression of will such as material actions; (b) expressions of will of non-administrative but legislative or judicial organs; (c) acts having not a unilateral but a bilateral nature, such as administrative contracts; and (d) acts not containing a definition of law or as they are called non-executory administrative acts that is, either acts preceding the executory act such as circulars and opinions, preparatory acts, calls for apology etc. or acts following the executory act, such as acts of interpretation, acts of execution, confirmatory acts, etc". 15 20

Applying the above-mentioned test to the present case I find that the act of the Returning Officer is an administrative act, as it satisfies the requirements of the definition of an administrative act in that (a) it is an expression of will; (b) it comes from an administrative organ; (c) it is of unilateral nature and (d) it regulates the legal situation applicable in the particular instance. 25

I come next to examine whether the act of the P.I.O. complained of is, in the circumstances of the case, an executory act. The decision given effect to was not the decision of the Director of the P.I.O. He gave the notification for publication to the newspapers acting on the instructions of the Ministry to the President. By a letter sent by the Director-General of the Ministry of Interior on the 23rd June, 1982 in answer to a letter sent to the Minister of Interior by the applicant, dated 21st June, 1982, it was brought to the notice of the applicant that the Ministry of Interior sent the list of the newspapers in which the notice of the elections was to be published in accordance with the decision taken by the Return- 30 35 40



ing Officer who was the appropriate organ under the Law to decide in which newspapers the publication was to be made. The decision of the Returning Officer was that the publication was to be made only in the daily newspapers. It appears from  
 5 *the opposition and the addresses of the parties that the decision for publication to all other newspapers and magazines except the daily ones, was taken by the Ministry to the President under which, according to the Estimates, the P.I.O. functions.*

In Tsatsos "Application for annulment" it is stated at pages  
 10 127, 128, 129:

"59.—Αἱ πράξεις ἐκτελέσεως δὲν εἶναι πράξεις ἐκτελεσταί. Τούτου ἕνεκα τῆς πράξεως ἐκτελέσεως προϋποτίθεται πρᾶξις ἐκτελεστή δεκτικὴ προσβολῆς. Ἡ διὰ πράξεως ἐκτελέσεως ἐκφραζομένη βούλησις δὲν εἶναι ποσῶς αὐθύπαρκτος, ἀλλ' ἀναφέρεται οὐσιωδῶς εἰς τὴν πρᾶξιν, τῆς ὁποίας ἀποτελοῦσιν ἐκτέλεσιν καὶ τὴν ὁποῖαν ἠδύναντο νὰ προσβάλωσιν οἱ ἐνδιαφερόμενοι καὶ τῆς ὁποίας ἡ ἀκύρωσις διὰ παράβασιν τοῦ νόμου ἤθελε καταστήσει ἀδύνατον τὴν πρᾶξιν ἐκτελέσεως. Εἶναι δὲ ἀπαράδεκτος ἡ προσβολὴ τῶν πράξεων ἐκτελέσεως  
 15 ὄχι μόνον ἔπειδὴ οὐδὲν ἀποτέλεσμα παράγουν, ἀλλὰ καὶ διότι, ἐὰν ἐγίνετο τοῦτο δεκτὸν, ἤθελεν ἐπέλθει κατ' οὐσίαν παράτασις, ἐνίοτε μάλιστα ἐπ' ἀπειρον, τῆς προθεσμίας πρὸς ἀσκήσιν τοῦ ἐνδίκου μέσου τῆς αἰτήσεως ἀκυρώσεως κατὰ τῆς ἐκτελουμένης πράξεως, τοῦθ' ὅπερ ἀντίκειται προφανῶς εἰς τὴν ἀρχὴν τῆς ἀσφαλείας τῶν συναλλαγῶν".

("59—Acts of execution are not executory acts. Because of this, for the act of execution an executory act liable to a recourse is presupposed. The expressed will by an act of execution is not by any means self-existent but it  
 20 refers essentially to the act of which they constitute execution and which the interested parties could attack and whose annulment for contravention of the law would make impossible the act of execution. The attack of acts of execution is unacceptable not only because they  
 25 do not produce any result, but also, if this were to be accepted, there would come in substance a postponement, sometimes indefinitely, of the time limit for exercising the legal right of application for annulment of the act of execution, which is obviously contrary to the  
 30 principle of security of transactions").

And in the Conclusions from the Case Law of the Greek Council of State (1929-1959) 240, paragraph dd under the subtitle Πράξεις εκτελέσεως ("Acts of execution")

“Μετὰ τὴν ἔκδοσιν τῆς ἐκτελεστῆς πράξεως, δι’ ἧς ἐπέρχεται τὸ σκοπηθὲν ἔννομον ἀποτέλεσμα, λαμβάνουν συνήθως χῶραν 5 διάφορα μέτρα καὶ ἐνέργειαι τείνουσαι εἰς τὴν ἐκτέλεσιν αὐτῆς. Αἱ τοιαῦται πράξεις ἐκτελέσεως στεροῦνται ἐκτελεστοῦ χαρακτήρος καὶ ἀπαραδέκτως προσβάλλονται αὐτοτελῶς δι’ αἰτήσεως ἀκυρώσεως.

Εἰδικώτερον, πράξεις ἐκτελέσεως συνιστοῦν αἱ πράξεις δι’ 10 ὧν κοινοποιεῖται ἕτερα ἐκτελεστή πράξις, ἢ ἀνακοινοῦνται, ἢ γνωστοποιεῖται τὸ περιεχόμενον αὐτῆς, ἢ παρέχεται ἀπλή εἰδοποίησις ἐν σχέσει πρὸς ταύτην. Ἐπίσης μὴ ἐκτελεστήν πράξιν ἐκτελέσεως ἀποτελεῖ ἡ ἀπλή διαβιβαστικὴ πράξις ἢ ἡ διαταγὴ τῆς Διοικήσεως περὶ ἐκτελέσεως ἑτέρας 15 ἐκτελεστῆς πράξεως ἢ ἡ πρόσκλησις ὅπως συμμορφωθῆ τις πρὸς ὑφισταμένην ἐκτελεστήν πράξιν”.

(“After the issue of an executory act, by which the intended legal result emanates, usually various steps and acts of execution aiming at its execution, take place. These 20 acts of execution lack an executory character and are unacceptably attacked independently by a recourse for annulment.

Particularly acts of execution are constituted of acts by virtue of which another executory act is communicated 25 or its contents are communicated or made known or a simple notice is given in respect of it. Also non-executory act of execution constitutes the simple forwarding act or the order of the Administration about the execution of another executory act or the invitation to someone 30 to conform with an existing executory act”).

I, therefore, find that the above act of the Director of the P.I.O. is not executory but is an act of execution of a decision

As to acts of execution or executory administrative acts, see *Colocassides Estate Ltd. and Another v. The Republic* (1977) 35 3 C.L.R. 205.

It has been common ground for both counsel that the Ministry to the President or any other body, with the exception of the Returning Officer was an incompetent body to take any decision for the publication of the notification to any newspapers. This contention was raised by counsel for respondent in his address and it has been endorsed by counsel for the applicant in his reply.

On the question of publication of notification section 27(3) of the Election of Members of the House of Representatives Law, 1979 (Law 72/79) provides as follows:

“(3) ‘Ο Ήφορος διὰ γνωστοποιήσεως, δημοσιευομένης εἰς τοιαύτας ἐφημερίδας, οἷας θὰ ἔκρινεν εὐλογον, κυκλοφορούσας ἐντὸς τῆς ἐκλογικῆς περιφερείας τοῦλάχιστον ἑπτὰ ἡμέρας πρὸ τῆς ὀρισθείσης διὰ ψηφοφορίαν καὶ τοιχοκολλουμένης εἰς περίοπτον μέρος ἐντὸς τῆς περιφερείας ἐν τῇ ὁποίᾳ ἀναφέρει τὴν ὀρισθεῖσαν ἡμέραν καὶ ὥραν τῆς ψηφοφορίας, γνωστοποιεῖ τὰ ὀνόματα, διευθύνσεις καὶ ἐπάγγελμα τῶν ὑποψηφίων καὶ τῶν προτεινόντων καὶ ὑποστηριζόντων τούτους ὡς καὶ λεπτομερείας τῶν τυχόν δηλωθέντων συνδυασμῶν τὰ ἐκλογικὰ τμήματα καὶ τὰ ὀρισθέντα ἐκλογικὰ κέντρα μετὰ λεπτομερειῶν τῶν εἰς ἕκαστον τούτων κατανεμηθέντων ἐκλογέων”.

(“The Registrar by a notification, published in such newspapers, as he might consider reasonable, circulating within the election area at least seven days before the date fixed for the election and posted in a conspicuous place within the area, in which he states the fixed day and hour of the election, notifies the names, addresses and occupations of the candidates and those proposing them and seconding them and details of any combinations, the election sections and the fixed election centres with details of the electors apportioned at each such centre”).

It is clear from the above that the only competent organ to decide for the publication was the Returning Officer. The Ministry to the President had no competency in the matter. Therefore, any decision taken by any organ other than the Returning Officer was not warranted by law and was taken arbitrarily by an incompetent organ which cannot usurp the function and the discretion of another organ entrusted with such

power by the law. (As to the effect of decisions taken by incompetent organs, see the Cyprus cases, *Phoenicia Hotels v. The Republic* (1978) 3 C.L.R. 94 at p. 98 and *Hadjianastasiou v. The Republic* (1982) 3 C.L.R. 672 at p. 674. Also, Conclusions from the Case Law of the Greek Council of State pp. 105 and 106.) 5

Having reached such conclusion, I find that the prayer of the applicant in so far as the decision of respondent 2 is concerned, cannot be granted, as the applicant cannot base his claim on such decision which, as already found, is void, as being unwarranted by law, and taken by an incompetent organ arbitrarily. There cannot be discriminatory treatment in an unlawful act, since there is no equality in this respect. In the Conclusions from the Case Law of the Greek Council of State (1929 - 1959) p. 158, it is stated: 10 15

“ Έκ τού ὅτι ἡ Διοίκησης δὲν ἐφήρμοσε τὸν νόμον εἰς ἄλλην περίπτωσηι δὲν δημιουργεῖται ἀκυρότης ἐκ τῆς ἐφαρμογῆς τοῦ ἐπὶ τῆς κρινομένης ὑποθέσεως, οὔτε ἡ ἐν τῷ παρελθόντι ἢ ἐναντι ἐτέρων προσώπων, γενομένη μὴ νόμιμος ἐνέργεια τῆς Διοικήσεως δημιουργεῖ καὶ ὑποχρέωσι αὐτῆς ὅπως ἐπαναλάβῃ ὁμοιομόρφως τὴν παράβασιν”. 20

(“Because the Administration did not enforce the law in another case, no annulment is created either by its application in the case under consideration nor its past unlawful act of the administration towards other persons create any obligation for it to repeat likewise the contravention”). 25

(see, also, the cases of the Greek Council of State 1118, 1121/54. Relevant in this connection are also the cases of *Proestou v. The Republic* (1981) 3 C.L.R. 314 at p. 320, and *Karayianni v. Educational Service Committee* (1979) 3 C.L.R. 371 at p. 378 where other authorities on the point are also mentioned). 30

I am lastly coming to examine whether as a result of the decision of the Returning Officer, the applicant can have any complaint for discriminatory treatment. The decision of the Returning Officer was taken in the exercise of powers vested in him by section 27(3) of Law 72/79 and there is no evidence 35

of any abuse or excess of his said power. He has set down certain criteria for his choice of the newspapers in which the notification was to be published, which were reasonable and in the circumstances of the case the applicant has failed to

5 establish that the discretion of the Returning Officer was wrongly exercised. Therefore, the contention of inequality of treatment as a result of the decision of the Returning Officer, cannot succeed. It has been stated time and again, in a number of

10 cases by this Court that reasonable differentiations are allowed in the application of Article 28 of the Constitution. The differentiation by the Returning Officer between daily and weekly newspapers was a reasonable one in the circumstances, and the newspaper of the applicant was not falling within the category of daily newspapers.

15 In the result, this recourse fails but in the circumstances I make no order for costs.

*Recourse dismissed with no order as to costs.*