

1983 May 21

[TRIANTAFYLIDIS, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

YIANNAKIS LOUCA,

Applicant,

v.

THE PRESIDENT OF THE REPUBLIC,

Respondent.

(Case No. 32/82).

5 *Act of Government—Termination of services of member of the Public Service Commission—Under s.4(3) of the Public Service Law, 1967 (Law 33/67) for contravention of section 8 of the Law and for a reason other than such a contravention—An act of Government within the ambit of Article 146 of the Constitution.*

Necessity—Law of necessity—Measures taken thereunder are subject to judicial control and scrutiny.

10 This recourse was directed against the termination of the services of the applicant, a member of the Public Service Commission, by the President of the Republic, under section 4(3) of the Public Service Law, 1967 (Law 33/67).

15 *On the question whether such termination of services of a member of the Public Service Commission for a contravention of section 8 of Law 33/67 is an “act of Government” outside the ambit of the jurisdiction of Article 146 of the Constitution, even assuming that otherwise the termination of the services of a member of the Public Service Commission, under section 4(3), in the public interest, for a reason other than contravention of section 8, could be found to be an “act of Government”.*

20 *Held, that the vesting, by means of section 4(3) of Law 33/67, in the President of the Republic of the right to terminate in the public interest the services of a member of the Public Service Commission is a legislative extension of the powers of the*

President of the Republic under the Constitution which can only be justified by the "law of necessity" in the same context in which the setting up by means of Law 33/67 of a new Public Service Commission, other than the one created by virtue of Article 124 of the Constitution is found to be justified by the "law of necessity"; that measures taken in circumstances allegedly justifying resort to the "law of necessity" are subject to judicial scrutiny and control; that where, by resorting to the "law of necessity", there have been given by means of legislation, such as section 4(3) of Law 33/67, extraconstitutional powers to the President of the Republic to terminate the services of a member of the Public Service Commission which was set up under such Law, thus, unavoidably, entailing some interference by the Executive Power of the State with the security of tenure of an essentially independent organ of the State such as the Public Service Commission, it would be entirely incompatible with the precept of the Rule of Law requiring the exercise of judicial control in connection with the application of the "law of necessity" to hold that a decision of the President to terminate the services of a member of the Public Service Commission - (which has been taken in the course of the application of a by the grace of the "law of necessity" justifiable exceptional legislative measure such as section 4(3) of Law 33/67) - escapes judicial control, to an appropriate extent, under Article 146 of the Constitution, because such decision is an "act of Government"; and that, therefore, the termination of the services of the applicant both for a contravention of section 8 of Law 33/67 and for a reason other than such contravention, cannot be treated as being an act of Government.

Order accordingly.

Cases referred to:

- Louca v. The President of the Republic* (1982) 3 C.L.R. 905;
- Demetriou v. Republic*, 3 R.S.C.C.121 at p. 128;
- Hadjianastassiou v. Republic* (1982) 3 C.L.R. 1173;
- Attorney-Generat v. Ibrahim*, 1964 C.L.R. 195;
- Georghiades v. Republic* (1966) 3 C.L.R. 317;
- PapaPantelis v. Republic* (1966) 3 C.L.R., 515;
- HadjiGeorghiou v. Republic* (1966) 3 C.L.R. 504;
- Georghiades v. Republic* (1966) 3 C.L.R. 252;

Bagdassarian v. Republic (1968) 3 C.L.R. 736;
Poutros v. Cyprus Telecommunications Authority (1970) 3 C.L.R. 281;
Iosif v. Cyprus Telecommunications Authority (1970) 3 C.L.R. 225;
 5 *Messaritou v. Cyprus Broadcasting Corporation* (1972) 3 C.L.R. 100;
Ploussiou v. Central Bank of Cyprus (1973) 3 C.L.R. 539;
Theodorides v. Ploussiou (1976) 3 C.L.R. 319;
Christou v. Republic (1982) 3 C.L.R. 365;
 10 *Aloupas v. National Bank of Greece* (1983) 1 C.L.R. 55;
In re Georghiou (1983) 2 C.L.R.1.

Recourse.

Recourse against the decision of the President of the Republic whereby applicant's services as a member of the Public Service
 15 Commission were terminated.

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

Cl. Antoniadis with *R. Gavrielides*, Senior Counsel of the Republic, for the respondent.

X. Xenopoulos, for the interested parties.

20 *Cur. adv. vult.*

TRIANAFYLLIDES P. read the following judgment. On 1st September 1982 I delivered in this case an interim judgment (see *Louca v. The President of the Republic*, (1982) 3 C.L.R. 905) and I need not repeat its contents which should be deemed to be
 25 incorporated herein.

By means of the said interim judgment I invited further arguments on, inter alia, the following issue: "(4) Is the termination of the services of a member of the Public Service Commission under section 4(3) of Law 33/67" - (the Public Service Law, 1967) - "for a contravention of section 8 of the same Law an 'act of Government' outside the ambit of the jurisdiction of Article 146 of the Constitution, even assuming that otherwise the termination of the services of a member of the Public Service Commission, under the said section 4(3), in
 35 the public interest, for a reason other than contravention of section 8, could be found to be an 'act of Government'".

Regarding the issue of whether the termination of the services

of a member of the Public Service Commission, under section 4(3) of Law 33/67, is "an act of Government" I have had, consequently, the opportunity to hear further arguments; and not only in this case but also in the similar case of *Anastassiou v. The President of the Republic*, (case No. 133/82, which is pending, too, before this Court). 5

It appears that the first occasion on which reference to the notion of an "act of Government", in relation to the extent of the jurisdiction under Article 146 of the Constitution, was made in our case-law was in the case of *Demetriou v. The Republic*, 3 R.S.C.C. 121, 128. 10

In my opinion an "act of Government" is not as such subject to judicial control under Article 146 of the Constitution, in the same way as an "act of Government" escapes judicial control by means of the corresponding to that under Article 146 jurisdictions of the Councils of State in Greece and in France; and, actually, the principle that an "act of Government" cannot be made the subject-matter of a recourse for annulment appears to have, first, originated in France; and in Greece it was given, later, also statutory effect by means of, inter alia, section 46(3) of Law 3713/1928. 15 20

As regards France useful reference may be made, to, among others, *Waline on Droit Administratif*, 9th ed., pp. 217-225, paras. 357-366, *De Laubadere on Droit Administratif*, 4th ed., vol. 1, pp. 235-242, paras. 413-425, *Les Grands Textes Administratifs*, by Debbasch and Pinet, (1970), pp. 369-374, para. 50, *Odent on Contentieux Administratif*, 2nd ed., pp. 298-307, *Vedel on Droit Administratif*, 5th ed., pp. 305-310, *Les Grands Arrêts de la Jurisprudence Administratif*, by Long, Weil and Braibant, 6th ed., (1974), pp. 10, 334, 511, and *Auby and Drago on Contentieux Administratif*, 2nd ed., vol. 1, pp. 91-108, paras. 67-76. 25 30

Also, as regards Greece it is useful to refer to, among others, *Στασινοπούλου, Δίκαιον τῶν Διοικητικῶν Πράξεων* (Stassinopoulos on The Law of Administrative Acts) (1951) pp. 34-38, *Στασινοπούλου, Μαθήματα Διοικητικοῦ Δικαίου* (Stassinopoulos, Lessons of Administrative Law) (1957) pp. 52-53, *Κυριακοπούλου, Ἑλληνικὸν Διοικητικὸν Δίκαιον* (Kyriacopoulos on Greek Administrative Law), 4th Ed. vol. C, pp. 107-110) *Δένδια, Διοικητικὸν Δίκαιον* (Dendias on Administrative Law) 40

- 5th ed., vol. A, pp. 152-159, Στασινοπούλου, Δίκαιον τῶν Διοικητικῶν Διαφορῶν (Stassinopoulos on the Law of Administrative Disputes) (1964), pp. 176-180, Οἰκονόμου, Ὁ Δικαστικὸς Ἐλεγχος τῆς Διακριτικῆς Ἐξουσίας ἐν τῇ Δημοσίᾳ Διοικήσει
- 5 (Economou on The Judicial Control of Discretionary Powers in Public Administration) (1965) pp. 28-29, Δένδια, Διοικητικὸν Δίκαιον-Διοικητικὴ Δικαιοσύνη (Dendias on Administrative Law-Administrative Justice) 2nd ed., vol. C, pp. 269-270, Δελικωστοπούλου, Διοικητικὸν Δίκαιον (Delicostopoulos on
- 10 Administrative Law) (1972) Part A, pp. 151-154, Τσάτσου, Ἡ Αἴτησις Ἀκυρώσεως ἐνώπιον τοῦ Συμβουλίου τῆς Ἐπικρατείας (Tsatsos on The Recourse for Annulment before the Council of State) 3rd ed., pp. 175-186, Δαγτόγλου, Γενικὸν Διοικητικὸν Δίκαιον (Dagtoglou on General Administrative Law) (1977)
- 15 vol. A, pp. 85, 145-146 and Πορίσματα Νομολογίας τοῦ Συμβουλίου τῆς Ἐπικρατείας (Conclusions from the Case-Law of the Council of State) 1929-1959, p. 231.

For instances of "acts of Government" it is pertinent to refer to Εὐρετήριον Νομολογίας Συμβουλίου τῆς Ἐπικρατείας (Digest

20 of the Case-Law of the Council of State) 1961-1970, vol. 1, p. 138, paras. 754-761 and Εὐρετήριον Νομολογίας Συμβουλίου τῆς Ἐπικρατείας (Digest of the Case-Law of the Council of State) 1971-1975, vol. 1, p. 77, paras. 1009-1013.

There emerges, too, from the textbook of Dagtoglou, *supra*,

25 (at p. 146) that though the Greek Constitution of 1975 safeguards, by means of its Article 20(1), general judicial protection, nevertheless "acts of Government", which are still not treated as administrative acts, escape judicial control by an administrative Court.

30 As it is to be derived from Decision 31/1934 of the Council of State in Greece an "act of Government" is patently related to the exercise of the political power vested in the Government ("ἀναγομένου προδήλως εἰς τὴν τῇ Κυβερνήσει ἀνήκουσαν διαχείρησιν τῆς πολιτικῆς ἐξουσίας").

35 It is not, however, really possible to define exhaustively what is an "act of Government", because, from the French and Greek textbooks referred to earlier on in this judgment there seems to exist in this respect divers theories of law and, consequently, the established judicial approach to this matter is to decide on each

occasion whether or not action taken by the Government is an "act of Government". There has, thus, gradually, been created a category of matters (such as action of the Government connected with the relations of the Executive and Legislative Powers, decisions aiming at securing generally the internal and external safety of the country, as well as action taken in the field of international relations) which come within the ambit of the notion of an "act of Government", without such category being exhaustive; it is clear, however, that especially in recent years there is a tendency not to enlarge this category, but rather to restrict it.

Reverting now to the issue of whether the termination of the services of a member of the Public Service Commission can be found to be an "act of Government" there should be observed, first, that though, under the Constitution, the members of the Public Service Commission which was set up by virtue of Article 124 of the Constitution were appointed by the President of the Republic their services were never terminated by him, but under paragraph 5 of the said Article 124, "on the like grounds and in the like manner as a judge of the High Court." On the contrary, under section 4 of Law 33/67 the members of the Public Service Commission which was set up under such Law are appointed and removed from office by the President of the Republic.

As it was pointed out in the interim judgment in the present case, and, later on, also in *Hadjianastassiou v. The Republic*, (1982) 3 C.L.R. 1173, the Public Service Commission which was set up under Law 33/67 is not the same organ as the Commission which was created by virtue of Article 124 of the Constitution and which ceased to function due to the abnormal situation which has been prevailing in Cyprus from 1963 onwards; moreover, the Commission provided for by Law 33/67 is an organ which was created validly in a manner justified by "the law of necessity."

Before going any further I should state, at this stage, that in view of the foregoing I have, eventually, reached now the conclusion that Article 124 5 of the Constitution is not applicable in respect of the termination of the services, for reasons of misconduct, including a contravention of section 8 of Law

33/67, of a member of the "new" - (created under Law 33/67) -
Public Service Commission; and, therefore, the only way in
which such services can be terminated for misconduct is by a
decision of the President of the Republic under section 4(3) of
5 Law 33/67. Also, in my opinion, the temporary substitution
of the provisions of Article 124.5 of the Constitution by the
provisions of the said section 4(3) is justified by the "law of
necessity" on the same grounds as the enactment of Law 33/67;
and what I have just stated disposes, too, of issues (1) and (2)
10 which were raised by the interim judgment which was delivered
in this case on 1st September 1982.

In the present case I am not called upon to pronounce on
whether the appointment of a member of the Public Service
Commission, under Article 124 of the Constitution, by the Pre-
15 sident of the Republic (and up to December 1963, while the
Turkish Cypriots were participating in the Government of the
Republic, by the President and Vice-President of the Republic)
amount to an "act of Government". So, I leave this issue en-
tirely open. Nor do I have to determine now whether an ap-
20 pointment of a member of the Public Service Commission, under
section 4 of Law 33/67, by the President of the Republic, is an
"act of Government".

What has to be decided for the purposes of this case is whether
or not the termination of the services of a member of the Public
25 Service Commission by the President of the Republic, under
section 4(3) of Law 33/67, is an "act of Government"; and,
particularly, whether such termination is an "act of Govern-
ment" when it is a measure taken for an alleged contravention
of section 8 of Law 33/67, as in the present instance.

30 As already stated the vesting, by the said section 4(3), in the
President of the Republic of the right to terminate in the public
interest the services of a member of the Public Service Commis-
sion is a legislative extension of the powers of the President of
the Republic under the Constitution which can only be justified
35 by the "law of necessity" in the same context in which the setting
up by means of Law 33/67 of a new Public Service Commission
is found to be justified by the "law of necessity."

It is well settled that measures taken in circumstances alleged-
ly justifying resort to the "law of necessity" are subject to ju-

dicial scrutiny and control; and reference, in this respect, may usefully be made to, inter alia, *Attorney-General v. Ibrahim*, 1964 C.L.R. 195, *Georghiades v. The Republic*, (1966) 3 C.L.R. 317, *PapaPantelis v. The Republic*, (1966) 3 C.L.R. 515, *Hadji-Georghiou v. The Republic*, (1966) 3 C.L.R. 504, *Georghiades v. The Republic*, (1966) 3 C.L.R. 252, *Bagdassarian v. The Republic*, (1968) 3 C.L.R. 736, *Poutros v. The Cyprus Telecommunications Authority*, (1970) 3 C.L.R. 281, *Iosif v. The Cyprus Telecommunications Authority*, (1970) 3 C.L.R. 225, *Messaritou v. The Cyprus Broadcasting Corporation*, (1972) 3 C.L.R. 100, *Ploussiou v. The Central Bank of Cyprus*, (1973) 3 C.L.R. 539, *Theodorides v. Ploussiou*, (1976) 3 C.L.R. 319, *Christou v. The Republic*, (1982) 3 C.L.R. 365 and *Aloupas v. National Bank of Greece*, (1983) 1 C.L.R. 55.

In my opinion where, by resorting to the "law of necessity", there have been given by means of legislation, such as section 4(3) of Law 33/67, extraconstitutional powers to the President of the Republic to terminate the services of a member of the Public Service Commission which was set up under such Law, thus, unavoidably, entailing some interference by the Executive Power of the State with the security of tenure of an essentially independent organ of the State such as the Public Service Commission, it would be entirely incompatible with the precept of the Rule of Law requiring the exercise of judicial control in connection with the application of the "law of necessity" to hold that a decision of the President to terminate the services of a member of the Public Service Commission—(which has been taken in the course of the application of a by the grace of the "law of necessity" justifiable exceptional legislative measure such as section 4(3) of Law 33/67)—escapes judicial control, to an appropriate extent, under Article 146 of the Constitution, because such decision is an "act of Government".

It is correct that recently in the case of *In re Georghiou*, (1983) 2 C.L.R. 1, it was held that the validity of the appointment of the Deputy of Attorney-General of the Republic, which was made by the President of the Republic by virtue of his powers under the Constitution and in circumstances which, also, justified its making on the strength of the "law of necessity", could not be examined in those proceedings incident-

ally and in an ancillary manner; but, the present case is clearly distinguishable from the *Georghiou* case, supra, because on this occasion the validity of the termination of the services of the applicant by the President of the Republic is the subject-matter in this recourse and its examination is, therefore, not something to be done incidentally and in an ancillary manner for the purposes of the outcome of another proceeding, as in the *Georghiou* case, supra, but for the primary purpose of the determination of the present recourse.

10 For all the foregoing reasons it is no longer necessary or correct to assume (for the purpose of dealing with issue (4) which was referred to at the commencement of this judgment) that the termination of the services of a member of the Public Service Commission, by the President of the Republic, under section 4(3) of Law 33/67, for a reason other than a contravention of section 8 of such Law, could be found to be an "act of Government", because, as already indicated above, such termination, for all the reasons set out hereinbefore, should not be found to be an "act of Government"; and, a fortiori, if the relevant decision of the President of the Republic terminating the services of a member of the Public Service Commission is taken because of contravention of section 8 of Law 33/67 then such decision, in view of its nature, cannot be treated as being an "act of Government".

25 Having disposed of, on the basis of what have already been stated in this judgment, of issues (1), (2) and (4) which were raised by the interim judgment of 1st September 1982, I have decided not to deal as yet with issues (3) and (5) which were, also, raised by the said interim judgment, because such issues relate to matters in respect of which it would not be necessary, or even proper, for me to reach a decision if either I do not possess jurisdiction to entertain this recourse under Article 146 of the Constitution because, contrary to what I have found in this judgment, the termination of the services of the applicant in the present instance is an "act of Government", or because such termination, again contrary to what I have held in this judgment, could not have been validly effected at all under section 4(3) of Law 33/67 but only in the manner prescribed by Article 124.5 of the Constitution.

I shall, therefore, allow this case to remain pending for the period during which an appeal can be made against this judgment by any party to these proceedings and if such an appeal is made I shall await the outcome of the appeal. If no appeal is made I shall then proceed to decide finally about the outcome of this case by dealing, also, inter alia, with the aforementioned issues (3) and (5). 5

Order accordingly.