1984 April 26

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

THRASIVOULOS VLOTOMAS AND OTHERS,

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH
1. THE COUNCIL OF MINISTERS,
2. THE MINISTER OF EDUCATION,

Respondents.

(*Case No.* 500/82).

Schemes of service—Made by Council of Ministers—Is delegated legislation under Article 54 *of the Constitution for the purpose of carrying into effect the provisions of the relevant Law, in this case the Public Educational Service Law,* 1969 (*Law* 10/69)—*And being an act of a legislative nature does not come within the ambit of the juridiction under Article* 146 *and cannot be challenged by a recource thereunder.*

The applicants in this recourse challenged the validity of the schemes of service for the post of schoolmaster/instructor of the Secondary Technical and Vocational Education regarding promotion to scale A10.

Held, that the schemes of service made by the Council of Ministers is delegated legislation made under Article 54 of the Constitution, for the purpose of carrying into effect the provisions of the relevant Law, in the present case the Public Educational Service Law, 1969 (Law 10/69); that being an act of legislative nature, it does not come within the ambit of the jurisdiction under Article 146 and, therefore, such act cannot be challenged by a recourse under the said Article; accordingly the recourse must fail.

Application dismissed.

Cases referred to:

PA.SY.DY v. Republic (1978) 3 C.L.R. 27 at pp. 30, 31;

Ioannou v. Electricity Authority (1981) 3 C.L.R. 280 at p. 295.

Recourse.

Recourse against the decision of the respondents to approve and/or put into operation the schemes of service in connection with the promotion of schoolmasters of Secondary Technical and Vocational Education who teach subjects of practical knowledge from salary scale A.9 to A.10.

A. Eftychiou with *Y. Charalambous*, for the applicants.

R. Vrahimi (*Mrs.*), for the respondents.

Cur. adv. vult.

SAVVIDES, J. read the following judgment. The five applicants are holding the post of schoolmaster in the Secondary Technical and Vocational Education teaching the subject of practical knowledge. Prior to their appointment to such post, they were holding the post of teacher in the Elementary Education and following attendance of a course in practical knowledge, they were seconded to serve in the Secondary Education as teachers of practical knowledge.

As a result of the enactment of the Public Educational Service (Increase of Salaries, Restructuring and Placement of Certain Posts on United Salary Scales) Law, 1981 (Law 12/81)), the applicants raised a claim for their appointment as schoolmasters teaching practical knowledge in the Secondary Technical and Vocational Education, and emplacement on the same scale applicable to schoolmasters who held appointments to such post. Their claim was pursued through the Union of Teachers of Secondary Education (OELMEK) and finally a collective agreement was reached between such Union and the Government on the 23rd April, 1981 which was embodied in a memorandum dated the 4th May, 1981, the material part of which reads as follows:

"....

a. The appointment, retrospectively from the 1st January, 1979, of the 53 teachers on secondment to the post of Master on the combined scales A5 and A7, which scale is combined with the post of Master on scale A8.

Those officers who are in the service on the 30th March, 1981, the date of publication of the Public Educational Service (Increase of Salaries, Restructuring and Placement of Certain Posts on United Salary Scales) Law of 1981

(No. 12 of 1981), on being promoted to the post of Master on scale A8, will be placed, on a temporary basis, on scale A9.

For the purposes of emplacement and re-adjustment of salaries of the affected educational officers on the salary scales of their new post, the provisions of the Public Educational Service (Increase of Salaries, Restructuring and Placement of Certain Posts on United Salary Scales) Law of 1981 (Law 12 of 1981), apply.

b. The gradual creation of 28 additional posts of Master on scale A10 for the purposes of the promotion of the 53 officers to be appointed to the post of Master on the basis of the present agreement: Provided that in case a number of the said teachers would not accept appointment to the post of Master, the number of the additional posts of Master on scale A10 will be reduced accordingly so that the same analogy is preserved, that is, 1:0.9".

As a result of such agreement, the applicants agreed to join the Secondary Education and were offered an appointment as Schoolmasters of Secondary Technical and Vocational Education, for teaching the subject of practical knowledge retrospectively, as from 1.1.1979 and they were emplaced on scale A9 since they belonged to the category of those who had been serving in the Secondary Education before the 30th March, 1981, when Law 12/81 came into operation.

The Council of Ministers after consultations had taken place between the Joint Committee of Personnel and the Unions of Eductionalists, (the Union of Teachers of Secondary Education (OELMEK) and the Union of Teachers of Technical Education (OLTEK) of which the applicants were members as a result of which an agreement was finally reached concerning the schemes of service, by its Decision No. 21526 dated 18.3.1982 approved the schemes of service for schoolmasters/instructors of the Secondary Technical and Vocational Education regarding promotion to scale A10, with effect from such date.

According to the said schemes of service which was made pursuant to the memorandum of agreement mentioned above the qualifications required for promotion to scale A10, were

"(1) To hold for three years, the post of Master/Instructor

on Scale A8 or on the personal Scale A9 after promotion from the salary Scales A5 and A7 and have an educational service of eighteen years on Scales B2–B4, B2–B3, B3–B6 and on Scale A8 or the personal Scale A9.

Note: For the filling of the posts for the first time after the approval of the present Scheme of Service, Masters/Instructors who do not have a three-year service on Scale A8 or the Personal Scale A9 may also be promoted, provided they have a sixteen-year educational service as a whole on Scales A5–A7, on the former scales B2–B4, B2–B3, B3–B6 and on Scale A8 or the Personal Scale A9.

(2) To have a very satisfactory service on the basis of the last two confidential reports.

(3) A certificate of successful completion of post-graduate training in a recognised institution on a subject related to his specialisation or in Paedagogics, is considered an additional qualification.

Note: (a) The posts to be filled are apportioned between Masters/Instructors on the basis of the proportion existing from time to time between Masters/Instructors on Scales A5–A7–A8, to the exclusion of Masters who teach the subject of practical knowledge.

(b) For Masters who were teaching the subject of practical knowledge during the academic year 1980/81, an educational service of eighteen years as a whole is required out of which at least seven years in the teaching of the subject of practical knowledge.

(c) The number of posts intended to be allocated to the Masters teaching the subject of practical knowledge is defined in the Memorandum of Agreement between them and the Government, dated 4.5.1981".

Such decision was communicated to the chairmen of the two ducationalists unions, OELMEK AND OLTEK and copies f the approved schemes of service were forwarded to them or information of their members.

The applicants allege that they took notice of such decision on the 29th October, 1982 and that the notice sent to the Chairmen of their Assocations do not constitute sufficient notice to them, as such unions represented them only for the purpose of negotiating the agreement of 4.5.1981 and not in respect of any other agreement concluded thereafter concerning the schemes of service. As a result, they filed the present recourse, praying for:

"A declaration of the Court that the decision of the respondents whereby on or about the 18th March, 1982, they approved and/or put into operation the schemes of service attached to the recourse as exhibit (c) in connection with the promotion of schoolmasters of Secondary Technical and Vocational Education who teach the subject of practical knowledge, from salary scale 9 to salary scale 10 and in connection with which the applicants took notice on or about the 29th October, 1982, is null and void and of no legal effect whatsoever".

The grounds of law on which this recourse is based are the following:

(1) The sub judice decision was taken in contravention of Articles 6 and 28 of the Constitution in that the applicants are treated in a discriminatory and unequal manner as compared to other educationalists serving in the Secondary Technical and Vocational Education.

(2) The sub judice decision violates the vested rights of the applicants and/or prejudicially affects the normal evolution of their career and/or takes no congnizance of the total period of their service in the Elementary and Secondary Education.

(3) The sub judice decision was taken in violation of Article 57.4 of the Constitution, in that it was not published in the official Gazette of the Republic.

(4) The sub judice decision was taken in excess and/or abuse of powers.

The application was opposed and the legal ground advanced in opposition is that the present recourse is unfounded in that there is no administrative act and/or decision falling within the ambit of Article 146 of the Constitution.

Counsel for applicants by his written address, submitted that the decision of the Council of Ministers is an executory administrative act which can be challenged by a recourse under Article 146 of the Constitution. Counsel contended that the condition in the schemes of service that for promotion from scale A9 to scale A10 a seven years educational service is required in the teaching of the subject of practical knowledge, is unjust and unreasonable and results in the discriminatory and unequal treatment of the applicants as against the rest of the schoolmasters who are serving in the said post and that such treatment violates Articles 6 and 28 of the Constitution. That the period of their service in the Elementary and Secondary Education should have been taken into consideration and that such service is longer than that of schoolmasters who had been appointed in the Secondary and Technical Education. Furthermore, that the vested rights of the applicants which they acquired by the agreement reached between their Union and the Government have been violated.

Counsel for the respondents, on the other hand, submitted that the schemes of service which are made by the Council of Ministers under section 24(1) of Law 10/69 are in the nature of delegated legislation and as such they cannot be challenged by a recourse under Article 146 of the Constitution. She refuted the allegation that there was unequal or discriminatory treatment and alleged that the schemes of service are in line with the agreement reached between the Educationlists' Unions and the Government by which a limited number of posts was provided for the promotion of schoolmasters who had been appointed in the Secondary Education after they had been seconded from the Elementary Education. She concluded that the applicants had no legitimate interest to challenge the decision of the Council of Ministers.

The question as to whether the making of schemes of service is an administrative act within the ambit of Article 146 of the Constitution, has been considered in the case of *Pankyprios Syntechnia Dimosion Ypallilon* v. *The Republic* (1978) 3 C.L.R. 27, in which Triantafyllides, P. had this to say at pp. 30, 31:

> "At the commencement of the hearing of this case counsel for the respondent argued, as preliminary objections, grounds of law (A) and (B) in the Opposition, namely

that the said scheme of sercice is not an administrative act within the ambit of the jurisdiction under Article 146 of the Constitution, and, also, that no existing legitimate interest of the applicants had been adversely and directly affected by it in the sense of paragraph 2 of Article 146.

In relation to the first of the above issues I am inclined to agree with both counsel that if it had to be resolved in the context of the administrative law applicable in Greece I would have had to hold that the present recourse could have been made against the sub judice scheme of service, because in Greece the main test by means of which the existence of jurisdiction concerning an administrative recourse is established is not the nature of the act or decision which is being challenged by a recourse, but the nature of the organ from which such act or decision has emanated, thus, an act of general regulatory application, such as the scheme of service in question, emanating from the Council of Ministers, in the Executive Branch of the Government, could apparently be attacked by an administrative recourse in Greece (see Κυριακοπούλου "Ἑλληνικὸν Διοικητικὸν Δίκαιον", 4th ed., vol. A, p. 52, Στ. Ἀνδρεάδου "Ἡ Ἀκυρωτικὴ Δικαιοδοσία τοῦ Συμβουλίου Ἐπικρατίας", 1936, vol. A. pp. 128–130, and Γ. Παπαχατζῆ "Μελέται ἐπὶ τοῦ Δικαίου τῶν Διοικητικῶν Διαφορῶν", 4th ed, pp. 43, 44).

In Cyprus the test which has been adopted and consistently applied, in view of the particular wording of paragraph 1 of Article 146 of the Constitution, is that of the nature of the act or decision concerned, but, of course, in determining such nature, account must, also, be taken of the nature of the organ which has made such act or decision (see, inter alia, *Demetriades and Son and another* v. *The Republic*, (1969) 3 C.L.R. 557, and *Kourris* v. *The Supreme Council of Judicature*, (1972) 3 C.L.R. 390, 400–401, 408–409, 411–12, 443, 461, 462)".

And after reviewing our case law on the matter, he concluded as follows at pp. 33, 34:

"Even if I had to decide the said issue before the enactment of the Public Service Law, 1967 (Law 33/67), I would have decided, bearing in mind the essential nature of a scheme

of service and the purpose that it is destined to serve, that it is an act of a legislative nature made by the Council of Ministers and, that, therefore, it is not within the ambit of Article 146.

In my view the matter has been put really beyond any doubt since the enactment of Law 33/67, section 29 of which reads as follows:

'29.-(1) The general duties and responsibilities of an office and the qualifications required for the holding thereof shall be prescribed in schemes of service made by decision of the Council of Ministers.

(2) A scheme of service may provide as a prerequisite to appointment or promotion the passing by candidates of an examination'.

A scheme of service made by the Council of Ministers, under section 29 is, in my opinion, delegated legislation—in the sense of the *Hondrou* case, supra—made under Article 54 of the Constitution for the purpose of carrying into effect the provisions of Law 33/67, and, in particular, of provisions such as sections 33 and 34 thereof. It follows that, being an act of legislative nature, it does not come within the ambit of the jurisdiction under Article 146.

Consequently, this recourse, which has been made under the said Article against a scheme of service, as such has to be dismissed for lack of jurisdiction of this Court to entertain it".

The decision in the *Pankyprios Syntechnia Dimosion Ypallilon* v. *Republic* (supra) was followed by A. Loizou, J. in *Ioannou* v. *Electricity Authority* (1981) 3 C.L.R. 280, where at page 295, he had this to say:

"As against the nominations the applicant filed recourse No. 328/78, both as against the selection made by the Authority under Relief A and as against the classification of the post made by it under Relief B. The complaint of the applicant emanates from the fact that these posts were graded as different by the Authority and were given different salary scales with the result that the one given to him was

lower than the rest. All posts were classified on salary scale 0.5, whereas that for which the applicant was nominate and later appointed was classified on scale 0.6.

An objection has been taken on behalf of the respondent Authority that Relief B in Recourse No. 328/78 does not lie as the act and/or decision complained of therein is not an executory act or decision in the sense of Article 146 of the Constitution.

It was held in the case of *PASYDY* v. *Republic (through The Council of Ministers)* (1978) 3 C.L.R., p. 27, following *Papapetrou* v. *The Republic*, 2 R.S.C.C. 61, that the schemes of service are acts of a legislative nature and not acts of an executive or administrative nature in the sense of Article 146 of the Constitution. Also that schemes of service constitute delegated legislation in the sense of *Police* v. *Hondrou & Another*, 3 R.S.C.C. 82, made by the Electricity Authority of Cyprus for the purpose of carrying into effect the provisions of the Electricity Development Law, Cap. 171, and Law 61 of 1970. I fully agree with this submission and dismiss Relief B as such classification is tantamount to a scheme of service".

I fully adopt the opinion expressed in the said decisions that the schemes of service made by the Council of Ministers is delegated legislation made under Article 54 of the Constitution. for the purpose of carrying into effect the provisions of the relevant Law, in the present case Law 10/69. Being an act of legislative nature, it does not come within the ambit of the jurisdiction under Article 146 and, therefore, such act cannot be challenged by a recourse under the said Article.

Having reached such conclusion, I find it unnecessary to deal with the other legal grounds advanced by this recourse.

In the result the recourse fails and is hereby dismissed with no order for costs.

Recourse dismissed with no order as to costs.