1985 May 9

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

IOANNIS PREZA AND ANOTHER,

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE EDUCATIONAL SERVICE COMMISSION,

Respondent.

(Case No. 335/84).

Administrative Law—Administrative acts or decisions—Executory act—Meaning—Composite administrative act—Educational Officers—Promotions—Decision of respondent adopting certain criteria for the selection of candidates for promotion—And excluding applicants from consideration—And which decision was communicated to the applicants—Amounts to an executory act—And can be made the subject of this recourse—Process for the filling of the vacant posts starting from the moment the respondents met to consider the applications and culminating with the appointment of the candidates finally selected, sub judice act part of a composite administrative act—Component parts of a composite administrative act lose their character after final act has been completed—Composite act, of which sub judice act formed part, finalized by the appoinments made—Therefore after final act was completed, the sub judice act, which was a component part of the final act, lost its executory character and the recourse has been deprived of a subject matter. 5 10 15

The applicants were candidates for promotion to the post of Assistant Headmaster, Secondary Education. At its meeting of the 7th June, 1984 the respondent Com- 20

mittee decided to adopt certain criteria* for eligibility for promotion and on the basis of these criteria 154 candidates were selected for personal interview. The applicants, who were not amongst those invited for an interview, wrote to the respondent inquiring as to the reason why they have not been invited for an interview. The respondent Committee, in reply, informed the applicants that the reason they were not selected for an interview was that they were not falling within any of the categories of candidate, set up by its decision dated 7th June, 1984. As a result applicants filed the present recourse.

The process for selection of the candidates for promotion to the said posts has been finalised by the appointment of candidates for the filling of the vacant post by publication in the official Gazette of the Republic of the 5th October, 1984, of the names of the candidates appointed.

Counsel for respondent raised the preliminary objection that the sub judice decision was of a preparatory character and as such not amenable by a recourse under Article 146 of the Constitution. She further contended that assuming that the said act was of an executory character, such act being part of a composite administrative act, merged in the final act and it has lost its executory character; and that what the applicants should have challenged after the finalisation of the act was the final act.

On the preliminary objection:

Held, (1) that an executory act—or decision—is an act by means of which the "will of the Administration is made known on a given matter, and which aims at producing a legal situation concerning the citizen affected"; that in the circumstances of the present case and bearing in mind the fact that by its decision of the 7th June, 1984 by which the respondent Committee adopted certain criteria for the selection of candidates for appointment whereby a number of candidates satisfying the necessary qualifications fixed by the scheme of service were excluded from consideration and which decision was communicated

* The criteria are quoted at pp. 1011-1012 post.

to the applicants by the letter sent to them that they were not selected for an interview as they were not satisfying any of the criteria decided by the respondent Committee, amounts to an executory act because the said decision produced a certain definite legal situation directly affecting those concerned as by such decision they have been completely excluded from consideration as candidates. 5

(2) That the process for the filling of the vacant posts started from the moment the respondent Committee met to consider the applications submitted for the filling of the posts and culminated with the appointment of the candidates who were finally selected and whose names were published in the official Gazette of the Republic; that, therefore, the sub judice decision was part of a composite administrative act; that the component parts of a composite administrative act lose their executory character after the final act has been completed; that in the present case the composite administrative act of which the sub judice act formed part has finalized by the appointments made; that, therefore, after the final act was completed, the sub judice act and or decision which was a component part of the final act, has lost its executory character and as a consequence this recourse has been deprived of a subject matter; and that, accordingly, it must be dismissed. 10 15 20 25

Application dismissed.

Cases referred to:

Papanicolaou (No. 1) v. *Republic* (1968) 3 C.L.R. 225 at p. 230;

Kolocassides v. *Republic* (1965) 3 C.L.R. 542 at p. 551; 30

Chryssafinis v. *Republic* (1982) 3 C.L.R. 320;

Payiatas v. *Republic* (1984) 3 C.L.R. 160 at pp. 186, 187, 188;

Vassiliou and Others v. *Republic* (1969) 3 C.L.R. 417 at p. 425; 35

Papadopoullos v. *Republic* (1983) 3 C.L.R. 1423;

Decision of the Greek Council of State No. 812/1933.

Recourse.

Recourse against the decision of the respondent to exclude applicants from being candidates for selection for promotion to the post of Assistant Headmaster of Secondary Education.

A. S. Angelides, for the applicants.

E. Papadopoulou (Mrs.), for the respondent.

Cur. adv. vult.

SAVVIDES J. read the following judgment. Both applicants are educationalists serving as teachers in the Secondary Education.

By letter dated 3rd May, 1984, the Ministry of Finance informed the respondent Educational Service Committee of its approval for the filling of 26 posts of Assistant Headmaster as from 1st September, 1984. On the 4th May, 1984 the respondent Committee decided to advertise the vacancies in the said posts which, according to the scheme of service, were first entry and promotion posts. A notice was, accordingly, published in the official Gazette of the Republic, on the 11th May, 1984. The applicants submitted applications for the said posts.

The respondent Committee met on 7th June, 1984 to consider the applications submitted. At such meeting it decided to reject the applications of a number of applicants as submitted out of time and also the applications of two candidates who, in the opinion of the Committee, did not possess the necessary qualification. The Committee decided to adopt the following criteria for eligibility for promotion:

> "On the basis of merit, qualification and seniority, the Committee selected the applicants included in the attached annex and who are considered as the most prevailing.
>
> *Category 'A':* Those applicants who, until 31.8.84, will complete over 30 and 1/12 years of service and have an average grade of 34 marks in the last two

service reports or an average grade of 33 marks in the last two service reports and they have also a post-graduate study abroad of at least one year's duration.

Category 'B': Those applicants who until 31.8.84 will complete 25 and 1/12 to 30 years of service and have an average grade of 34,5 marks in the last two service reports or an average of 33,5 marks on the last two service reports and they have also a post graduate study abroad of at least one year's duration.

Category 'C': Those applicants who will complete until 31.8.84 20 and 1/12 to 25 years of service and have an average grade of 35 marks in the last two service reports or an average grade of 34,5 marks in the last two service reports and they have also a post graduate study abroad of at least one year's duration.

Category 'D': Those applicants who will complete until 31.8.84 16 and 1/12 to 20 years of service and have an average grade of 35,5 marks in the last two service reports or an average grade of 34,5 marks in the last two service reports and they have also a post graduate study abroad of at least one year's duration.

Category 'E': Those applicants who will complete until 31.8.84 up to 16 years of service and have an excellent grading in the last two service reports or have an average grade of 35 marks in the last two service reports and at least one year's post graduate studies abroad.

The Committee decided to invite the above applicants for a personal interview on the 18, 19, 20, 21, 22, 23 and 25th June, 1984."
(See copy of the minute annexed to the opposition as Annex 'D').

On the basis of the above decision, out of the 390 candidates only 154 were selected by the respondent Committee for personal interview. The applicants who were not amongst those invited for an interview, wrote to the respondent inquiring as to the reason why they have not been invited for an interview. The respondent Committee, in

reply informed the applicants that the reason they were not selected for an interview was that they were not falling within any of the categories of candidate, set up by its decision dated 7th June, 1984. As a result, applicants filed the present recourse whereby they pray for a declaration of the Court that:

A. The decision of the Educational Service Committee to exclude them from being candidates for selection for promotion to the vacant posts of Assistant Headmaster of Secondary Education and/or to interview only a number of those educationalists who possessed the qualifications required by the schemes of service to the exclusion of the applicants is void, unlawful and of no legal effect.

B. The decision of the respondent not to call the applicants for an interview so that they might be considered together with the other candidates for selection for the posts of Assistant Headmaster be declared null and void.

C. The act and/or decision of the respondent which was communicated to the applicants whereby the applicants had been excluded from the process for selection for the filling of the vacant posts of Assistant Headmaster of Schools of Secondary Education and/or whereby the applicants had been considered as unfit even as candidates for selection for the said posts, is null and void, unlawful and of no legal effect and,

D. The acts and/or decisions of the respondents should not be affirmed.

The recourse is based on the following grounds of law:

(a) The sub judice decision was taken in violation of the principles of equal treatment and of equality safeguarded under the Constitution.

(b) The respondent did not in fact exercise its jurisdiction lawfully as they have omitted to carry out a due or sufficient inquiry for ascertaining the claim of the applicants for promotion and they proceeded to an illegal evaluation of the candidates for promotion by fixing criteria which are vague and beyond those provided by the scheme

of service and/or in violation of the Law and the principles emanating from the case Law.

(c) By excluding the candidature of the applicants at this stage, the respondent acted in violation of the basic principles of administrative Law and jurisprudence for the selection of the best candidates from all available candidates and/or acted arbitrarily and in real misconception of fact as it had not taken into consideration and it had not given due weight to merit, qualification, experience and the whole career of the applicants which should have been the basis of their decision after comparing all candidates who satisfy the necessary qualifications and needs for the filling of the said post in accordance with the scheme of service.

(d) The sub judice decision lacks due or sufficient reasoning and/or the reasoning is vague and uncertain and is in contrast with the real facts and the material contained in the personal files of the applicants and the other candidates who were invited for an interview by the respondent.

(e) The respondent acted under a misconception of Law and fact as it ignored and/or did not take into consideration and/or did not give due weight to the qualifications of the applicants, their merit, professional conduct, knowledge, ability, honesty, willingness, initiative, ability for taking decisions and other qualifications notwithstanding the fact that the persons who were called for an interview were lacking of similar qualifications.

(f) The respondent acted in abuse and/or in excess of power, as it has not taken into consideration and/or ignored the striking superiority of the applicants as against those called for an interview and their specialised knowledge and the specialised performance of duties attached to the post.

(g) The respondent in the process of selection followed a procedure which is not contemplated and/or is contrary to the Law.

The application was opposed. By her opposition counsel for respondent raised a preliminary objection that the sub judice act and/or decision is void of executory character and it cannot be subject to a recourse under Article 146 of the Constitution.

Alternatively, she contended that the sub judice act and/or decision is correct and legal and it was taken in accordance with the provisions of the relevant legislation and in the proper exercise of the discretionary powers of
5 the respondent Committee and after all material facts and circumstances of the case were taken into consideration.

It emanated from the addresses of both counsel and from a statement made by counsel for respondent in the course of the hearing that the process for selection of the
10 candidates for promotion to the said posts has been finalised by the appointment of candidates for the filling of the vacant post by publication in the official Gazette of the Republic of the 5th October, 1984, under Notification No. 1995 of the names of the candidates appointed. The
15 validity of such decision has been challenged by unsuccessful candidates by the filing of a recourse which is pending before the Court.

Counsel for respondent in support of her preliminary objection submitted that the sub judice decision was of a
20 preparatory character and as such not amenable by a recourse under Article 146 of the Constitution. She further contended that assuming that the said act was of an executory character, such act being part of a composite administrative act, merged in the final act and it has lost its
25 executory character. What the applicants should have challenged, counsel added, after the finalisation of the act was the final act.

Counsel for the applicants, on the other hand, in answering the contentions of counsel for respondent, sub-
30 mitted that the sub judice act and/or decision is a final decision in so far as the applicants are concerned, because by such decision applicants have been completely excluded from the process of selection and appointment to the vacant posts. Therefore, counsel added, the sub judice deci-
35 sion to exclude the applicants was a final decision of an executory character in so far as the applicants are concerned as by such decision they had been finally and absolutely excluded from promotion.

As to the definition and nature of an executory act there
40 is a series of cases of this Court. Useful reference may be

made to *Panos Papanicolaou (No. 1)* v. *The Republic* (1968) 3 C.L.R. 225 in which Triantafyllides, J. (as he then was), at page 230, said:

"An executory (εκτελεστή) act—or decision—is an act by means of which the 'will' of the Administration is made known on a given matter, and which aims at producing a legal situation concerning the citizen affected (see the Conclusions from the Jurisprudence of the Council of State in Greece 1929-1959 pp. 236-237); and the executory nature of an act is closely linked to the requirement, under paragraph 3 of Article 146, that a person can make a recourse only if an existing legitimate interest of his has been adversely and directly affected by the act complained of.

Thus, acts of a 'preparatory nature' are not executory acts (see Conclusions etc., supra, p. 239); they merely, prepare the ground for the making of executory acts."

In *Kolocassides* v. *The Republic* (1965) 3 C.L.R. 542 the Court of Appeal affirmed the decision of the first instance Court where Triantafyllides, J., as he then was, stated at p. 551:

"An administrative act (and decision also) is only amenable within a competence, such as of this Court under Article 146, if it is executory (εκτελεστή) in other words it must be an act by means of which the 'will' of the administrative organ concerned has been made known in a given matter, an act which is aimed at producing a legal situation concerning the citizen affected and which entails its execution by administrative means (see Conclusions from the Jurisprudence of the Council of State in Greece 1929-1959, pp. 236-237).

I am quite aware that in Greece this attribute of an act, which may be the subject of a recourse of annulment, is specifically stated in the relevant legislation (section 46 of Law 3713 as codified in 1961) but in my opinion such express provision was only intended to reaffirm a basic requirement of administra-

tive Law in relation to the notion of proceedings for annulment and, therefore, such requirement has to be treated as included by implication, because of the very nature of things, in our own Article 146, though
5 it is not expressly mentioned."

(See also *Chrysafinis* v. *The Republic* (1982) 3 C.L.R. 320 at pp. 326, 327 and *Payiatas* v. *The Republic* (1984) 3 C.L.R. 160 at pp. 186, 187, 188).

In the Conclusions from the Case-Law of the Council of
10 State in Greece 1929-1959 at p. 237, executory acts are defined as being:

«... ἐκεῖναι δι' ὧν δηλοῦται βούλησις διοικητικοῦ ὀργάνου, ἀποσκοποῦσα εἰς τὴν παραγωγὴν ἐννόμου ἀποτελέσματος ἔναντι τῶν διοικουμένων καὶ συνεπαγομέ-
15 νη τὴν ἄμεσον ἐκτέλεσιν αὐτῆς διὰ τῆς διοικητικῆς ὁδοῦ. Τὸ κύριον στοιχεῖον τῆς ἐννοίας τῆς ἐκτελεστικῆς πράξεως εἶναι ἄμεσος παραγωγὴ ἐννόμου ἀποτελέσματος, συνισταμένου εἰς τὴν δημιουργίαν, τροποποίησιν ἢ κατάλυσιν νομικῆς καταστάσεως, ἤτοι δικαιω-
20 μάτων καὶ ὑποχρεώσεων διοικητικοῦ χαρακτῆρος παρὰ τοῖς διοικουμένοις».

("... these acts by which the will of the administrative organ is declared, intending the creation of a legal consequence towards the subjects involving its direct
25 execution by administrative means. The main element of the meaning of the executory act is the direct creation of a legal result, consisting of the creation, amendment or abolition of a legal situation, i.e. rights and obligations of an administrative character of the sub-
30 jects").

In the circumstances of the present case and bearing in mind the fact that by its decision of the 7th June, 1984 by which the respondent Committee adopted certain criteria for the selection of candidates for appointment whereby a
35 number of candidates satisfying the necessary qualifications fixed by the scheme of service were excluded from consideration and which decision was communicated to the applicants by the letter sent to them that they were not selected for an interview as they were not satisfying
40 any of the criteria decided by the respondent Committee,

amounts to an executory act. The said decision produced a certain definite legal situation directly affecting those concerned as by such decision they have been completely excluded from consideration as candidates.

Useful reference in this respect may be made to Case 327/68 which was one of three cases dealt together by this Court in *Emmanuel Vassiliou and Others* v. *The Republic* (1969) 3 C.L.R. 417 in which at page 425 of the judgment, we read: 5

> "Regarding Case 327/68, which challenges only the validity of the priority list in question, it has been submitted that the list in question was not an executory act and, therefore, no recourse could be made against it, as such, under Article 146. 10
>
> Bearing in mind the fact that this list was decided upon as a final priority list, crystallizing the rights of candidates to be, then, appointed, and that it was not only published as such, but that it was, also, actually, relied upon for the purpose of making the relevant appointments, I cannot but find that the list was indeed an executory act which could be challenged by recourse, in that it produced a certain definite legal situation directly affecting those concerned." 15 20

(see also *Papadopoullos* v. *The Republic* (1983) 3 C.L.R. 1423). 25

I come now to consider whether the sub judice decision is an executory act in the process of a composite administrative act. There is no doubt in my mind that the process for the filling of the vacant posts started from the moment the respondent Committee met to consider the applications submitted for the filling of the posts and culminated with the appointment of the candidates who were finally selected and whose names were published in the official Gazette of the Republic. Therefore, the sub judice decision was part of a composite administrative act. 30 35

It is well settled by our Case-Law, following in this respect the Greek Jurisprudence that the component parts of a composite administrative act lose their executory character after the final act has been completed.

In Tsatsos on Recourse for Annulment before the Greek Council of State (Αἴτησις Ἀκυρώσεως ἐνώπιον τοῦ Συμβουλίου Ἐπικρατείας) Third Edition pp. 152, 153, it reads:

«Πρὸ τῆς περατώσεως τῆς συνθέτου διοικητικῆς ἐνεργείας ἑκάστη ἐκ τῶν βαθμιαίως συναρμολογουμένων πράξεων διατηρεῖ τὸν ἐκτελεστὸν αὐτῆς χαρακτῆρα καὶ εἶναι προσβλητὴ κεχωρισμένως.

Ἀφ' ἧς ὅμως ἡ σύνθετος διοικητικὴ ἐνέργεια περατωθῇ, ἀποβαίνει ἀπαράδεκτος ἡ προσβολὴ δι' αἰτήσεως ἀκυρώσεως τῆς ἀρχικῆς ἢ μεμονωμένης τῶν ἐνδιαμέσων πράξεων, αἵτινες ἀποβάλλουσι πλέον τὸν αὐτοτελῶς ἐκτελεστὸν αὐτῶν χαρακτῆρα. Προσβλητὴ ἐφεξῆς εἶναι μόνον ἡ ὅλη σειρὰ τῶν οὕτω διὰ τοῦ ἀποτελέσματος, εἰς ὅ ἀπέβλεψαν, συνεχομένων πράξεων. Προσβαλλομένης δὲ τυχὸν μόνης τῆς τελικῆς πράξεως θεωρεῖται συμπροσβαλλομένη ἡ ὅλη σύνθετος διοικητικὴ ἐνέργεια καὶ τοῦτο διότι μετὰ τὴν περάτωσιν τῆς συνθέτου διοικητικῆς ἐνεργείας αἱ προηγηθεῖσαι τῆς τελικῆς μερικώτεραι καὶ πρότερον αὐθύπαρκτοι πράξεις ἀπόλλυσι τὴν αὐτοτέλειαν αὐτῶν.»

("Before the completion of the composite administrative act, each of the gradually adopted acts retains its executory character and it can be attacked separately.

But when the composite administrative act is completed the attack by an application for annulment of the original or separately the intermediate acts which lose their self executory character is unacceptable. Amenable to a recourse hereafter is only the whole line of such continuous acts, the result to which they aimed. But only the final act being attacked, the whole composite administrative act is also considered as being attacked and this because after the completion of the composite administrative act which preceded the final, partial and self-existent acts lose their independence").

In *Panos Papanicolaou (No. 1)* (supra) at p. 232 we read the following in the judgment of the Court:

"... therefore as it has been stated already, it can

be attacked by recourse, on its own, so long as the said composite action has not yet been completed by a final act (see Kyriacopoulos 4th Ed. Vol. C pp. 98, 99, and also the Decisions of the Greek Council of State 1156/1937, Vol. 1937 III p. 951 at p. 954, and 1336/1950, Vol. 1950 A p. 1076 at p. 1077)."

In *Emmanuel Vassiliou and others* v. *The Republic* (supra) at p. 425, Triantafyllides J. (as he then was) had this to say on the effect on the executory nature of an act, which is part of a composite administrative act, of the completion of the final act:

"On the other hand, there is no doubt that such list was part of the composite administrative action which resulted in the said appointments.

Once this is so, I am of the opinion that, after the appointments were made, the list lost its executory nature and, therefore, Case 327/68, which was filed before the appointments, could not be proceeded with thereafter, as it was deprived of a subject-matter that could be attacked by recourse, viz. the list as an executory act.

In this respect useful reference might be made to the Conclusions from the Jurisprudence of the Greek Council of State (1929-1959) p. 244. Also, to Decision 648(56) of the Greek Council of State; in that case the facts were different from those of our Case 327/68, but it is useful illustration of a situation where an originally executory act lost, due to subsequent developments, its executory nature."

In the decision of the Greek Council of State in Case 812/1933, we read the following:

«Έφ' ὅσον ὅμως ἐπῆλθεν ἤδη καὶ ἡ τελευταία πρᾶξις τοῦ διορισμοῦ τῶν ἐκλεγέντων, δὲν δύναται πλέον παραδεκτῶς νὰ προσβληθῶσι κατ' ἰδίαν αἱ ἐνδιάμεσοι διοικητικαὶ ἐνέργειαι, αἵτινες ἔπαυσαν πλέον ἔχουσαι αὐτοτελῆ ὑπόστασιν, μόνον δὲ διὰ τῆς προσβολῆς τῆς περὶ διορισμοῦ πράξεως τοῦ Ὑπουργοῦ ἠδύνατο νὰ προστατευθῇ ὁ αἰτῶν, ἐπικαλούμενος καὶ τυχὸν ἐλαττώματα τῶν ἐνδιαμέσων διοικητικῶν ἐνεργειῶν, τούτῳ

δὲ τῷ λόγῳ ἀπορριπτέα καθίσταται ἡ ὑπὸ κρίσιν αἴτησις».

("But since the last act of the appointment of those selected has already happened, is not possible any more to acceptably attack in particular the intermediate administrative acts, which have ceased to have an independent basis, but only with a recourse against the act of the Minister to make the appointments could the applicant be protected by invoking any defects of the composite administrative acts, and for this reason the sub judice application is dismissed").

It is an undisputed fact in the present case that the composite administrative act of which the sub judice act formed part has finalized by the appointments made. Therefore, in the light of the authorities referred to hereinabove, after the final act was completed, the sub judice act and/or decision which was a component part of the final act, has lost its executory character and as a consequence this recourse has been deprived of a subject matter.

Having reached the above conclusion I find it unnecessary to examine the other issues raised by this recourse.

In the result, this recourse fails and is hereby dismissed but in the circumstances I make no order for costs.

Recourse dismissed.
No order as to costs.