1985 February 16

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

ANDREAS CHRISTODOULIDES AND OTHERS,

Applicants,

v.

THE REPUBLIC OF CYPRUS, AND/OR
THE EDUCATIONAL SERVICE COMMISSION AND/OR
THE COUNCIL OF MINISTERS AND/OR
THE MINISTER OF FINANCE AND/OR
THE MINISTER OF EDUCATION,

Respondents.

(Case No. 207/83)

Time within which to file a recourse—Under Article 146.3 of the Constitution can be examined by the Court ex proprio motu.

Constitutional Law—Article 29 of the Constitution—Creates an obligation for "any competent public authority" to reply to written requests or complaints—Non-competent organs under no duty to act when written requests are addressed to them—Their failure to reply cannot qualify as an omission in the sence of Article 146.1 of the Constitution —An applicant has no legitimate interest to pursue a recourse against a failure of a competent organ to reply when he proceeds by a recourse in respect of the substance of the matter for which a reply is sought.

Administrative Law—Administrative acts or decisions—Executory act—Refusal or omission of respondents to place applicants on an equal salary basis with those promoted on a date subsequent to the date of promotion of applicants—It creates legal results and is an executory administrative decision—Cannot be confirmatory of any previous act since

there is no previous act in existence—Applicants possess a legitimate interest in the sense of Article 146.2 of the Constitution.

Circulars—Cannot be made the subject of a recourse—But if in the application of a circular containing an illegal view regarding the meaning of the Law an administrative executory act is issued then the affected persons may attack such executory acts.

Public Educational Service (Increase of Salaries, Reconstruction and Placement of Certain Posts on Unified Salary Scales) Amendment Law, 1981, (Law 12/81)—And Public Educational Service Law, 1969 (Law 10/69)—Circular fixing the salaries of promoted employees, made under the above Laws—Not ultra vires the above Laws—But has to be applied in conjunction and subject to the specific provisions of the first Law—Though respondents failed to do so with the result that the emoluments of newly promoted Officers were found to be higher than those of officers much senior the latter cannot claim increase of their emoluments on the principle of equality, safeguarded by Article 28 of the Constitution, because there can be no right to equal treatment on an illegal basis.

Equality—Principle of equality—Article 28 of the Constitution —No right to equal treatment on an illegal basis.

In March 1983 Assistant Headmasters of Secondary Education, were informed that educational officers who were promoted after them to the post of Assistant Headmaster by the Educational Service Commission though much junior to them received a higher salary than them. In view of this they wrote to the respondent Commission on the 19.3.83, and to the Ministers of Education and Finance on the 22.3.83, complaining about the difference in salary between themselves who were promoted before the 1.1.80 and those promoted to the same post after this date, i.e. after the date of the coming into force of the Public Educational Service (Increase of Salaries, Reconstruction and Placement of Certain Posts on Unified Salary Scales) Amendment Law, 1981, (Law 12 of 1981) by virtue of which all educational officers were placed on the new unified salary scales which was published on

30.3.82 with retrospective effect as from 1.1.79. In reply on the 29.3.83, the Chairman of the Educational Service Commission wrote * to them, inter alia, that the matter did not come within its competence but concerned the Minister of Finance. The Minister of Finance by his letter** dated 19.5.1983 informed them that "it is a fact that persons who were recently promoted by the Educational Service Commission to the post of Assistant Headmaster of Schools of Secondary Education are receiving a higher salary than that received by Assistant Headmasters promoted to this post previously"; and that "this problem arose mainly due to the introduction in the Educational Service as from 1st January, 1980, of the Regulations which apply to the Public Service in respect of the fixing of the salary of a promoted employee". The Minister of Finance, also, stated that "a similar problem has also arisen in Elementary Education and the matter has been submitted to the Council of Ministers for consideration and decision. I shall revert on the matter immediately after the reaching of the decision by the Council of Ministers."

. Hence this recourse which was directed against the refusal or omission of the respondents to put applicants on an equal salary basis with those promoted after the 1.1.1980.

Counsel for the respondents raised the following preliminary objections:

(a) That the recourse was out of time.

(b) That the sub judice decisions were not of an executory character but were instead informatory or confirmatory acts, and as such outside the ambit of Art. 146 of the Constitution.

(c) That the applicants did not possess the necessary legitimate interest to be entitled to file the present recourse because, the Regulations in question do not affect the applicants at all but were directed at and applied only to those promoted after the 1.1.1980 and not to those already holding the post in question.

* The letter is quoted at pp. 364-365 post.
** The letter is quoted at pp. 366-367 post.

Counsel for the applicants mainly contended:

(1) That the circular or "regulations" (as it is referred to throughout the correspondence exchanged) was ultra vires the enabling laws, that is the Public Educational Service Law, (Law 10 of 1969) and Law 12 of 1981, in that the aforesaid laws do not provide for a differentiation of salaries of persons holding the same posts; and since the circular in question was only based on regulations referring to the Public Service, it was not subsidiary legislation, it was thus without any legislative authorisation and, therefore, ultra vires the law.

(2) That the circular or "regulations" was unconstitutional as contrary to Article 28, as it was discriminatory and contrary to the principles of equality since it made an unreasonable and arbitrary distinction between those newly promoted and those already in the service.

Held, (1) on the preliminary objections:

(1) That though counsel for the respondents has put forward no arguments at all in support of his contention that the recourse is out of time the Court will nonetheless deal with it since the matter of time can, in any case, be examined by the Court ex proprio motu; that since the recourse is against the refusal or omission of the respondents to put them on an equal salary basis, with those promoted after the 1.1.80 to the post of Assistant Headmaster, as per letters of their advocate dated 22.3.83, that is, their recourse is against the letters/decisions of the respendents dated 29.3.83 and 19.5.83 it is in respect of both of which well within time.

(2) (a) That the applicants by their recourse do not attack the decision of the respondents in respect of the promotions in question but attack their refusal or omission to place them, as per their request, on an equal salary basis as those promoted, which is an entirely different matter; that the original act of the promotion was not directed at the applicants but at those promoted and thus does not concern or affect them directly, whereas the present one under attack, which is quite distinct from the former, does so, and cannot be confirmatory of any previous act since there is no previous act in existence.

(2) (b) That since the respondent Commmission were not competent to deal with this matter they were not under a duty to act and cannot be held to have committed an omission and their letter of the 29.3.83 can be no more than of a mere informatory nature; and that, therefore, the recourse against it should fail (see Article 29 of the Constitution and *Kyriacou* v. *C.B.C* (1965) 3 C.L.R. 482 at pp. 494-5).

(2) (c) That Article 29.1 of the Constitution creates an obligation for "any competent public authority" to reply to written requests or complaints and "to have them attended to and decided expeditiously" "and in any event within a period not exceeding thirty days"; that the Minister of Education, being a non-competent organ, since he transmitted the applicants' request or complaint to the competent authority, was under no duty to act any further and thus his failure to reply cannot qualify as an omission under Article 146 and the recourse against him must, also, fail.

Held, further, that even if he were to be assumed or found that he had concurrent power with the Minister of Finance to deal with this matter and as a result of his failure to reply was in breach of Article 29, since the applicants in this case have proceeded by the present recourse in respect of the substance of the matter for which a reply is sought, they would no longer continue to have any existing legitimate interest and thus not be entitled to a separate decision of the Court in respect of such failure to comply with Article 29 (see *Phedias Kyriakides* v. *Republic*, 1 R.S.C.C. 66 at p. 77).

(3) That, as regards the letter of the Minister of Finance of the 19.5.83 this must be regarded as a communication of an executory administrative decision because he was the competent organ in this case, he was under a duty to act and any act or omission of his would thus create legal results as required by Article 146.

(4) That since the application of the circular to the new promotions resulted in an inequality of salary between those newly promoted and the applicant and this was also admitted by the respondent Minister of Finance in his

letter of 19.5.83, the subsequent refusal of the Minister of Finance to put the applicants on an equal salary basis establishes for them the necessary legitimate interest as required by Article 146.2.

Held, further, that though generally circulars cannot be the subject of a recourse since of a non executory character, nevertheless, it is accepted that "if in the application of a circular containing an illegal view regarding the meaning of the Law an administrative executory act is issued", then the affected persons may attack such executory acts.

Held, (II) *on the merits of the recourse:*

(1) That the circular in itself when read in the light of the Law, is of a general application, contains general directives on the salaries of promoted employees and is not different from or contrary to or in conflict with the provisions of the Law; that as such it is, therefore, neither illegal nor invalid; that, however, it must always be applied in conjunction with and subject to the specific provisions of the Law.

(2) That the respondents when applying the provisions of the circular failed to do so in conjunction with the provisions of section 6(2) of the Law and of paragraphs 2(c) and (d) of part B of the Schedule thereto which provide specifically that:

(a) those newly promoted cannot be placed in a more advantageous position salarywise than those already serving in such post, and that

(b) any individual cases creating such anomalies must be referred to the Minister of Finance for consideration; that the result of such illegality is that a situation has been created where the emoluments of newly promoted officers are found to be higher than those of officers much senior (in terms of service) in the post, a fact which creates a situation of inequality, which is also admitted by the respondent Minister in his letter of 19.5.83; that the inequality which has arisen is the result of the respondents having acted contrary to law; that the applicants cannot

succeed on their ground of equal treatment under Article 28 of the Constitution because there can be no right to equal treatment on an illegal basis; accordingly the recourse must fail.

Application dismissed.

Cases referred to:

Kyriakou v. *C.B.C* (1965) 3 C.L.R. 482 at pp. 494-495;

Vassiliades and Another v. *District Officer Larnaca* (1976) 3 C.L.R. 269 at p. 282;

Kyriakides v. *Republic*, 1 R.S.C.C. 66 at p. 77;

Sami v. *Republic* (1973) 3 C.L.R. 92 at p. 99,

Voyiazianos v. *Republic* (1967) 3 C.L.R. 239 at p. 273;

Shiamassian v. *Republic* (1973) 3 C.L.R. 341 at pp. 352-353.

Recourse.

Recourse against the refusal and/or omission of respondents to reinstate the applicants in terms of salary and/or grade due to their having been surpassed by other educational officers who were junior to the applicants and who having been promoted to the same post, i.e. Assistant Headmaster are receiving higher salary than the applicants.

A. S. Angelides, for the applicants.

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

Cur. adv. vult.

A. Loizou J. read the following judgment. By the present recourse the applicants seek:

"(a) A declaration of the Court that their having been surpassed as regards salary and/or grade by other educational officers of the same post or salary scale, who were much more junior to the applicants from the aspect of service and who having been promoted to the same post or salary scale with the applicants, are receiving a higher salary than the applicants,

contrary to the principles of equality, is null, illegal, unconstitutional and without any effect whatsoever.

(b) A declaration of the Court that the refusal or omission of the respondents to re-instate in terms of salary the applicants by removing the inequality against them created as a result of the promotions of new Assistant Headmasters is null, and illegal, unconstitutional and without any effect whatsoever;

(c) a declaration of the Court preventing the affirmation. wholly or in part of the act and/or omission of the respondents and of each of them separately."

The applicants who are 66 in number, are all Assistant Headmasters of Secondary Education. During March, 1983, they were informed that educational officers who were promoted after them to the post of Assistant Headmaster by the Educational Service Commission though much junior to the applicants, received a higher salary than them.

In view of this, the applicants, through their lawyer, wrote to the respondent Commission on the 19.3.83, and to the Ministers of Education and Finance on the 22.3.83, complaining about the difference in salary between themselves who were promoted before the 1.1.80 and those promoted to the same post after this date, i.e. after the date of coming into force of the Public Educational Service (Increase of Salaries, Reconstruction and Placement of Certain Posts on Unified Salary Scales)—Amendmend Law, 1981, (Law 12 of 1981) by virtue of which all educational officers were placed on the new unified salary scales which was published on 30.3.82 with retrospective effect as from 1.1.79. In reply, on the 29.3.83, the Chairman of the Educational Service Commission wrote to them, inter alia, as follows:-

"(a) The salary of those newly promoted was fixed according to the regulations in force on 'Fixing of Salary of a promoted employee in the Public Service' which also apply to the cases of members of the Public Educational Service;

(b) The re-adjustment of the old salaries of the mem-

mers of the Public Educational Service on the new salary scales (as is also the case of your clients) was done on the basis of Law 12 of 81 and the regulations on the readjustment of salaries of public servants.

Consequently, the Commission is of the view that the matter raised does not come within its competence but concerns the Minister of Finance."

The Minister of Finance, on the other hand, replied on the 19.5.83, stating, inter alia, as follows:-

"2. It is a fact that persons who were recently promoted by the Educational Service Commission to the post of Assistant Headmaster of Schools of Secondary Education are receiving a higher salary than that received by Assistant Headmasters promoted to this post previously. This problem arose mainly due to the introduction in the Educational Service as from 1st January, 1980, of the Regulations which apply to the Public Service in respect of the fixing of the salary of a promoted employee. In accordance with these regulations an employee receives upon promotion a raise in his earnings at least equal to one increment on the scale of the post to which he is promoted. Another reason which contributed to the creation of the problem was the old structure of the salaries of the Educational Service and especially the small difference which existed at the tops of the salary scales of the posts of Master and Assistant Headmaster.

3. . . . . .

4. In relation it should be mentioned that the difference which has resulted in the salaries of the holders of the post of Assistant Headmasters will disappear when they reach the top of the scale of their post or when they are promoted to the post of Headmaster, whereupon the relevant regulations for the fixing of the salary of a promoted employee will be applied in their case too.

5. In any case, a similar problem has also arisen

in Elementary Education and the matter has been submitted to the Council of Ministers for consideration and decision I shall revert on the matter immediately after the reaching of the decision by the Council of Ministers"

As a result, the applicants filed the present recourse on the 23 5 83 which is based on the following grounds of Law:

1 "Law 12 of 1981 as amended and/or the regulations regulating the salaries of promoted employees and/or any decision of the Council of Ministers and/or any Minister is unconstitutional as being contrary to the principles of equality seniority and Natural Justice and upsetting vested rights.

2. The regulations or decisions of the Council of Ministers regulating the salaries of promoted employees are ultra vires the Law and/or unconstitutional and/or not of a regulatory nature and/or invalid and of no legal effect

3 The act, omission or refusal of the respondents is contrary to Article 29 of the Constitution and/or is the result of the application of a law, regulation or circular which is unconstitutional or invalid"

Before considering, however, the grounds of law, I shall deal first with the preliminary objections put forward on behalf of the respondents

Their first preliminary objection is that the recourse is out of time Though counsel for the respondents has put forward no arguments at all in support of this, I shall nonetheless deal with it, since the matter of time can, in any case, be examined by the Court ex proprio motu The applicants have argued on this point, and I fully agree, that their recourse is against the refusal or omission of the respondents to put them on an equal salary basis, with those promoted after the 1 1.80 to the post of Assistant Headmaster, as per letters of their advocate dated 22 3 83; that is, their recourse is against the letters/decisions of the respondents dated 29.3.83 and 19 5 83 in respect of both of which they are well within time.

The second preliminary objection put forward is that the sub judice decisions are not of an executory character but are instead informatory or confirmatory acts, and as such, outside the ambit of Art. 146 of the Constitution.

The applicants have argued that the acts or omission complained of are not confirmatory of any previous acts or of an informatory nature but create direct and specific rights which have been adversely affected and are thus of an executory character.

Quite correctly the letters of the respondents are not of a confirmatory nature. The applicants by their recourse do not attack the decision of the respondent in respect of the promotions in question but attack their refusal or omission to place them, as per their request, on an equal salary basis as those promoted, which is an entirely different matter. The original act of the promotion was not directed at the applicants but at those promoted and thus does not concern or affect them directly, whereas the present one under attack, which is quite distinct from the former, does so, and cannot be confirmatory of any previous act since there is no previous act in existence.

In order, however, to determine whether they produce direct legal results and are executory, as opposed to informatory, and as to their exact nature, I must deal with each one separately.

As regards the letter of the Educational Service Commission of the 29.3.83: The respondent Commission were not by law under a duty to act or had any power or competence to deal with the applicants' request.

Section 6 of Law 12 of 1981, reads as follows:

«6.-(1) Τηρουμένων των διατάξεων του εδαφίου (2), ο μισθός των εκπαιδευτικών λειτουργών αναπροσαρμόζεται συμφώνως προς τας διατάξεις του Παραρτήματος.

(2) Εν τη τοιαύτη αναπροσαρμογή ο Υπουργός Οικονομικών κέκτηται εξουσίαν όπως άρη οιασδήποτε ανωμαλίας αίτινες δυνατόν να προκύψωσι περιλαμβανομένων ανωμαλιών εις περιπτώσεις προαγωγής εκ-

παιδευτικού λειτουργού εις θέσιν μεταξύ της 1ης Ιανουαρίου, 1979 και της ημερομηνίας δημοσιεύσεως του παρόντος Νόμου εν τη επισήμω εφημερίδι της Δημοκρατίας.

"6. (1) Subject to the provisions of sub-section 2. the salary of educational officers is readjusted in accordance with the provisions of the Schedule

(2) Upon such readjustment the Minister of Finance has power to remove any anomalies which may result including anomalies in cases of promotion of an educational officer to a post between the 1st January, 1979, and the date of publication of the present law in the Official Gazette of the Republic").

And in paragraphs 2(c) and (d) of Part B of the Schedule to the aforesaid law it is stated:

«(γ) Εφ' όσον υπάρχει οιοσδήποτε εκπαιδευτικός λειτουργός του οποίου ο μισθός επί της τελικής κλίμακος του ευρίσκεται εφ' οιουδήποτε σημείου της προς τα κάτω επεκτάσεως της τελικής κλίμακος της θέσεώς του ο μισθός οιουδήποτε διορισθησομένου εις την αυτήν θέσιν προσώπου καθορίζεται υπό του Υπουργού Οικονομικών εις τρόπον ώστε τούτο να μη τίθεται μισθολογικώς εις πλεονεκτικωτέραν θέσιν έναντι οιουδήποτε εκπαιδευτικού λειτουργού ήδη κατέχοντος την αυτήν θέσιν, το ούτω δε διοριζόμενον πρόσωπον αρχίζει κερδίζον προσαύξησιν ανά εξάμηνον περίοδον υπηρεσίας μέχρις ότου φθάση τόν αρχικόν μισθόν της κλίμακός του·

Νοείται ότι

(δ) Η υποπαράγραφος (γ) της παρούσης παραγράφου εφαρμόζεται και εις τας περιπτώσεις προαγωγής εκπαιδευτικού λειτουργού, εάν ο μισθός τον οποίον δικαιούται νά λάβη ο εκπαιδευτικός λειτουργός επί τη προαγωγή του ειναι ίσος ή χαμηλότερος του σημείου επί της επεκτάσεως της κλίμακος εις το οποίον ευρίσκεται ο ήδη κατέχων την αυτήν θέσιν

εκπαιδευτικός λειτουργός. Εν εναντία περιπτώσει ο εκπαιδευτικός λειτουργός λαμβάνει επί τη προαγωγή του τον μισθόν τον οποίον δικαιούται να λάβη επί τη τοιαύτη προαγωγή του».

("(c) Where there is any educational officer whose salary on his final scale is on any point of the downwards extension of the final scale of his post, the salary of any person to be appointed to the same post is fixed by the Minister of Finance in such a way that such person will not be placed salarywise in a more advantageous position in respect of any educational officer already holding the same post, and the so appointed person starts earning increments every six-monthly period of service until he reaches the starting point of his final scale:

Provided that

. . . . . .

(d) Sub-paragraph (c) of this paragraph applies also in the cases of promotion of an educational officer, if the salary which the educational officer is entitled to receive on his promotion is equal to or lower than the point on the extension of the scale on which the educational officer already holding the post is. Otherwise the educational officer receives on his promotion the salary which he is entitled to receive on such promotion of his").

Therefore, the respondent Commission quite correctly stated in their letter that they were not competent to deal with this matter but that the appropriate authority was the Minister of Finance. As stated in the case of *Andreas Kyriakou* v. *The Cyprus Broadcasting Corporation and Another*, (1965) 3 C.L.R. 482 at pp. 494-5:-

"It would be a paradox to hold that a competent public authority to which a written request or complaint has been addressed, on a matter outside its competence, is bound to reply as laid down in Article 29. The purpose of Article 29 is not to just promote correspondence between the citizens and public authorities but to ensure that requests or complaints by

citizens are dealt with expeditiously by the appropriate authorities and that such authorities make known, giving also due reasons, to those concerned, whatever decisions they reach. It is obvious that a non-competent public authority to which a request or complaint has been addressed, and with which it cannot, therefore, deal, cannot be expected to give a duly reasoned reply in relation thereto as required under Article 29. Its duty is, however, to transmit such request or complaint to the competent authority, if any, or to inform the writer thereof which is the competent authority, if any. (See Svolos and Vlachos on the Greek Constitution Volume II (1955) p. 173).

See also: *Nicos Vassiliades & Another* v. *The District Officer of Larnaca,* (1976) 3 C.L.R. 269 at p. 282.

Consequently, the respondent Commission not being under a duty to act cannot be held to have committed an omission and their letter of the 29.3.83 can be no more than of a mere informatory nature. The recourse against it should, therefore, fail.

As regards the Minister of Education, the same principles apply as above in the sense that he was under no duty to act nor did he have any power or competence to deal with the matter. Upon receipt of the applicants' request, he forwarded it to the appropriate authority, i.e. the Minister of Finance. The applicants' complaint against him is his omission to act in that he failed to reply to their request as provided by Article 29 of the Constitution.

Article 29.1 creates an obligation for "any competent public authority" to reply to written requests or complaints and "to have them attended to and decided expeditiously" "and in any event within a period not exceeding thirty days". But on the authority of *Andreas Kyriakou* v. *The C.B.C.* (supra) the Minister of Education, being a non-competent organ, since he transmitted the applicants' request or complaint to the competent authority, was under no duty to act any further and thus his failure to reply cannot qualify as an omission under Article 146 and the recourse against him must also fail. But even if he were to be assumed or found that he had concurrent power

with the Minister of Finance to deal with this matter and as a result of his failure to reply was in breach of Article 29, since the applicants in this case have proceeded by the present recourse in respect of the substance of the matter for which a reply is sought, they would no longer continue to have any existing legitimate interest and thus not be entitled to a separate decision of the Court in respect of such failure to comply with Article 29 on the authority of *Phedias Kyriakides* v. *Republic*, 1 R.S.C.C. 66 where at p. 77 it is stated:-

"In the opinion of the Court paragraph 2 of Article 29 gives, inter alia, an aggrieved person a right of recourse to a competent court in respect of the failure to furnish him with a reply in accordance with paragraph 1 of such Article. It is clear that, where the competent public authority, which has failed to reply as above, is one of those referred to in paragraph 1 of Article 146, then this Court is the competent court in question and proceedings lie before it under Article 146 in respect of such failure itself to reply.

Where, however, a person who has not received a reply as provided under Article 29, has proceeded under Article 146 in respect of the substance of the matter for which a reply had been sought then it cannot be said that such a person continues any longer to have 'any existing legitimate interest', as provided by paragraph 2 of Article 146, unless as a result of such failure itself he has suffered some material detriment which would entitle him to a claim for relief under paragraph 6 of Article 146 after obtaining a judgment of this Court under paragraph 4 of the same Article.

Therefore such a person cannot, as a rule, claim under Article 146 a distinct and separate decision of this Court in respect of the failure to comply with Article 29 when he has proceeded in respect of the substance of the matter for which a reply had been sought."

As regards the letter of the Minister of Finance of the 19.5.83: This must be regarded as a communication of an executory administrative decision. He was the competent organ in this case, he was under a duty to act and any act or omission of his would thus create legal results as required by Article 146.

The final preliminary objection of the respondents is that the applicants do not possess the necessary legitimate interest to be entitled to file the present recourse because, as counsel for the respondents has argued, the regulations in question do not affect the applicants at all but are directed at and apply only to those promoted after the 1.1.80 and not to those already holding the post in question.

The applicants on their part have quite correctly argued that the application of the circular to the new promotions resulted in an inequality of salary between those newly promoted and the applicants. This is also admitted by the respondent Minister of Finance in his letter of 19.5.83.

So, the subsequent refusal of the respondent Minister of Finance to put the applicants on an equal salary basis establishes for them the necessary legitimate interest as required by Article 146.2.

Having disposed of the preliminary objections, I now come to the grounds of law and I would consider it more convinient if I dispose first the question of whether the circular under attack is ultra vires the law.

The applicants have argued that the circular or "regulations" (as it is referred to throughout the correspondence exchanged) is ultra vires the enabling laws, that is the Public Educational Service Law, (Law 10 of 1969) and Law 12 of 1981, in that the aforesaid laws to not provide for a differentiation of salaries of persons holding the same posts; and since the circular in question is only based on regulations referring to the Public Service, it is not subsidiary legislation, it is thus without any legislative authorisation and, therefore, ultra vires the law.

The respondents on the other hand have argued that the regulations (as they refer to them) are not ultra vires

since in accordance with section 44 of Law 10 of 1969:

> "The emoluments of educational officers include their salary and such allowances as may be prescribed."

From which it can be concluded that such emoluments may be regulated by regulations, which regulations will only affect future cases of promotions and not persons already holding particular posts.

At the outset I doubt whether the aforesaid "regulations" are regulations in the strict and legal sense of the word. I believe that to term them as a circular or directive of the administration containing guidance as to how the salaries of promoted employees should be fixed, would be a more appropriate description. And though generally circulars cannot be the subject of a recourse since of a non executory character, nevertheless, it is accepted that "if in the application of a circular containing an illegal view regarding the meaning of the Law" "an administrative executory act is issued", then the affected persons may attack such executory acts. (See *Sami* v. *Republic* (1973) 3 C.L.R. 92 at p. 99). And in this case the circular can so be challenged.

It is clear from perusing the provisions of Law 12 of 1981 that there are specific and detailed provisions as to how the law is to be applied. And such provisions must be followed. Any directives, circulars or regulations purporting to clarify such provisions and which contain different or conflicting provisions to those of the Law, since contrary to the Law, can only be illegal and invalid.

In this instance the provisions of section 6 of Law 12 of 1981 are clear and also of paragraphs 2(c) and (d) of Part B of the Schedule to the law. (See above).

As regards the said circular, this provides as follows:-

> "Salary of a promoted member of the Public Educational Service.
>
> (1) A member promoted to a post of which the salary is fixed (πάγιος) receives such salary.

(2) The salary of a member promoted to a post on a salary scale (hereinafter referred to in the present regulation as "the new post") is fixed as follows:-

(a) If the previous salary of the member as specified in para (3) (b) is the same or lower than the lowest point of the scale of the new post, he receives the salary of the lowest point on the scale of his new post.

(b) If the previous salary of the member as specified in para (3) (b) is higher than the lowest point of the scale of his new post, he receives his said previous salary, even if he is outside an incremental step on the scale of his new post and he proceeds to the next step of the scale as soon as he earns the difference between his previous salary and the salary of his new post.

3. For the purpose of the present Regulation.

(a) . . . . . .

(b) "previous salary of the member" includes—

(i) his immediately before his promotion salary; and

(ii) any pensionable benefit paid to the member immediately prior to his promotion:

Provided that such benefit is not taken into consideration if his new post carries a pensionable benefit; and

(iii) any incremental amount on the scale of his previous post which he earned by service until the date of his promotion; and

(iv) if by the date of his promotion the member served on the highest point of the scale of his previous post or, depending on the case, on a fixed salary, for a time exceeding one year, an amount which has the same ratio as between one proper increment on the scale of his new post, as it stands, and the one half of such service of

his exceeding the one year by twelve months, provided that this amount under no circumstances may be higher than the amount of one increment on the scale of his new post; and

(v) an amount equal to one increment of the scale of his new post.

(c) .....

(d) .....

Note:

For the purposes of para 3(b) (iv) of the present regulation, service on the highest point of a scale also includes service on the highest point of any old salary scale on the condition that under no circumstances the amount which is considered as earned by such service may be higher than the amount of one increment on the scale of his new post."

As it can be seen, the circular in itself when read in the light of the Law, is of a general application, contains general directives on the salaries of promoted employees and is not different from or contrary to or in conflict with the provisions of the Law. As such it is, therefore, neither illegal nor invalid. However, it must always be applied in conjunction with and subject to the specific provisions of the Law. Consequently, this ground that the circular is ultra vires must fail.

What, however, transpires from the facts before me is that the respondents when applying the provisions of the circular failed to do so in conjunction with the provisions of section 6(2) of the Law and of paragraphs 2(c) and (d) of part B of the Schedule thereto which provide specifically that:

(a) those newly promoted cannot be placed in a more advantageous position saralywise than those already serving in such post, and that

(b) any individual cases creating such anomalies must be referred to the Minister of Finance for consideration.

It is not before me whether the cases of those promoted after the applicants were in fact referred to the respondent Minister of Finance, at the relevant time, to decide on the matter of their salary, but what is clear is that

(a) the Minister is aware of the matter but has taken no action to remedy the situation; and

(b) that the newly appointed officers were undeniably placed in a more advantageous position which is wrong and contrary to law.

The result of such illegality is that a situation has been created where the emoluments of newly promoted officers are found to be higher than those of officers much senior (in terms of service) in the post, a fact which creates a situation of inequality, which is also admitted by the respondent Minister in his letter of 19.5.83. This brings me to the second ground of law put forward by the applicants, that is that the circular is unconstitutional as contrary to Article 28, as it is discriminatory and contrary to the principles of equality since it makes an unreasonable and arbitrary distinction between those newly promoted and those already in the service.

Counsel for the respondents rejects that there is any such discrimination by stating that the differentiation made is not arbitrary but a reasonable one and which in any case will disappear when the old officers are promoted themselves to the higher post of Headmaster, whereupon the provisions of the circular will apply in their case too.

That there is an inequality is admitted by the respondent Minister and as I have already pointed out such inequality is the result of the respondents having acted contrary to law. However, in the circumstances, and in the light of legal authority on the matter, I am of the opinion that the applicants cannot succeed on this ground either, for a claim for equal treament under Article 28 because there can be no right to equal treatment on an illegal basis. In the case of *Praxitelis Voyiazianos* v. *The Republic*, (1967) 3 C.L.R. 239 at p. 273, the following is stated:

"In view of the above circumstances, I am of the

opinon that no question of unequal treament of, or discrimination against, the Applicant could arise, at all, contrary to Article 28, or Article 6, of the Constitution. There can be no right to equal treatment on an illegal basis; because in earlier cases the Respondent took an erroneous view of the law, applicant in this recourse cannot be held to be entitled to the same error on the part of the respondent. The applicant had no legitimate interest to expect an illegal decision of respondent in his favour."

See also *Betros Shamassian* v. *Republic* (1973) 3 C.L.R. 341 at pp. 352-3.

Before concluding, it ought to be pointed out that the decision challenged by this recourse is not the respondents' original decision by which the salaries of those newly promoted were determined and from which the situation complained of has resulted, but the respondent's failure or omission, as communicated to the applicants by the letter of 19.5.83, to accede to their request to remedy the situation.

For the reasons stated above, this recourse must fail and is hereby dismissed.

In the circumstances, therefore, there will be no order as to costs.

Recourse dismissed.
No order as to costs.