1986 February 15

[LORIS, J.]

ANDREAS MAKRIS,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE EDUCATIONAL SERVICE COMMISSION,

Respondent.

(Case No. 568/83).

Educational Officers—Promotions—Scheme of Service—The Court does not interefere with it's interpretation by the appointing organ, if such interpretation was reasonably open to it.

Schemes of Service—Nature of—Act of Legislative content—It cannot be challenged directly by a recourse under Article 146 of the Constitution—But it can be challenged through a recourse against the eventual appointment.

Constitutional Law—Constitution, Article 28—Equality.

The applicant by means of the present recourse impugns the decision of the Educational Service Commission, whereby the interested party was promoted to the post of Inspector B (Special Lessons of Elementary Education) for Gymnastics in preference and instead of the applicant.

The relevant scheme of service approved by the Council of Ministers on the 16.12.82 provides in paragraphs 1 and 2 hereof for certain academic qualifications; it further provides in paragraph 3 a requirement of "Educational Service for at least two years in the Post of Headmaster A in Elementary Education or a total of 21 years educational service, out of which at least five in teaching of Special Lessons". Note 1 inserted immediately after paragraph 2 provides that "Educationalists who possessed the

qualifications for the previous post of Inspector Special Lessons of Elementary Education or will acquire same within three years from the approval of these Schemes of Service will be eligible as candidates for this post."

It should be noted that the previous post of Inspector Special Lessons of Elementary Education was governed by a Scheme of Service approved by the Council of Ministers on 3.12.66 required, apart from other qualifications, ten years' educational service.

The respondent Commission decided that the applicant did not satisfy the requirement of paragraph 3 of the said scheme of service of the 16.12.82.

The applicant contents that the Commission ought to have construed the said note 1 in the scheme of service as introducing a relaxation not only as regard the qualifications of paragraphs 1 and 2 thereof, but also as regards the requirement in paragraph 3. He further contents that, if the interpretation given to the Scheme of Service is correct, such scheme infringes the principle of equality safeguarded by Article 28 of the Constitution. Counsel for the respondent raised an objection to the effect that the Court is not entitled to examine the alleged unconstitutionality because a scheme of service is in effect delegated legislation made under Article 54 of the Constitution and, therefore, cannot be challenged under Article 146 of the Constitution.

Held, dismissing the recourse (1) It is up to the appointing authority to interpret a Scheme of Service. This Court will not interfere, if satisfied that it was reasonably open to such authority to interpret and apply the Scheme of Service in the way it did. In this case the interpretation given by the respondent Commission was reasonably open to it.

(2) A scheme of service is an act of a legislative nature and, therefore, cannot be challenged directly by a recourse under Article 146 of the Constitution. It is, however, abundantly clear that it can be challenged through a recourse against the eventual appointment. It follows that the Court is entitled to examine the issue of constitution-

ality of the Scheme of Service in question in this case.

(3) Article 28 of the Constitution does not convey the notion of exact arithmetical equality but it safeguards only against arbitrary differentiations. It does not exclude reasonable distinctions. The scheme in question introduced new qualification and provided for more years of educational service as a requirement for appointment. Note 1 relaxed the qualification, but not the new period of service. The Court is unable to agree with the contention of applicant's counsel. The Council of Ministers were perfectly entitled to act as they did. No one has a right to demand the non alteration of an existing Scheme of Service.

(4) As the applicant does not satisfy paragraph 3 of the Scheme of Service, he has no legitimate interest to challenge by means of a recourse the sub judice promotion.

Recourse dismissed.
No order as to costs.

Cases referred to:

Papapetrou v. *The Republic,* 2 R.S.C.C. 61;

Neofytou v. *The Republic,* 1964 C.L.R. 280;

Georghiades and others v. *The Republic* (1967) 3 C.L.R. 653;

Kyriacou and Others v. *The Republic* (1975) 3 C.L.R. 37;

Makrides v. *The Republic* (1983) 3 C.L.R. 622;

Republic v. *Xinari and Others* (1985) 3 C.L.R. 1922;

Ayios Andronikos Development Co. v. *The Republic* (1985) 3 C.L.R. 2362;

PASYDY v. *The Republic* (1978) 3 C.L.R. 27;

Vlotomas and Others v. *The Republic* (1984) 3 C.L.R. 423;

Police v. *Hondrou,* 3 R.S.C.C. 82;

Demetriades and Son and Another v. *The Republic* (1969) 3 C.L.R. 557;

Philippou and Others v. *The Republic* (1970) 3 C.L.R. 129;

Lanitis Farm Ltd. v. *The Republic* (1982) 3 C.L.R. 124;

Nicosia Race Club v. The Republic (1984) 3 C.L.R. 791;

Vassiliades and Another v. *The Republic* (1985) 3 C.L.R. 1296;

Ioannidou v. *The Republic* (1965) 3 C.L.R. 664, and on appeal (1966) 3 C.L.R. 480;

Republic v. *Arakian and Others* (1972) 3 C.L.R. 294;

Papadopoulou v. *The Republic* (1984) 3 C.L.R. 332;

Panayides v. *The Republic* (1972) 3 C.L.R. 135;

Papassavas v. *The Republic* (1967) 3 C.L.R. 111;

Paraskevopoulou v. *The Republic* (1980) 3 C.L.R. 647.

Recourse.

Recourse against the decision of the respondent to promote the interested party to the post of Inspector B (Special Lessons of Elementary Education) for Gymnastics in preference and instead of the applicant.

A. Panayiotou, for the applicant.

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

Cur adv. vult.

LORIS J. read the following judgment. The applicant by means of the present recourse impugns the decision of the respondent Educational Service Commission, published in the Official Gazette of the Republic on 21.10.83 whereby the interested party was promoted to the post of Inspector B (Special Lessons of Elementary Education) for Gymnastics, in preference to and instead of the applicant.

The applicant was one of the six candidates for the aforesaid post, which is a first entry and promotion post.

The respondent E.S.C. at its meeting of 22.4.84 (vide

minutes in Appendix "Γ" attached to the opposition) having examined the qualifications of all candidates in the light of the relevant Scheme of Service (vide Appendix "D" attached to the opposition) which was approved by the Council of Ministers on 16.12.1982, decided that the applicant as well as another candidate, who is not a party to the present proceedings, did not possess the required qualification envisaged by paragraph 3 of the aforesaid Scheme of Service, in that he did not have "Educational Service for at least two years in the Post of Headmaster A in Elementary Education or a total of 21 years educational service, out of which the last five in the teaching of Special Lessons."

As a result of their aforesaid finding the E.S.C., excluded the applicant from the final consideration of the remaining candidates, which resulted in the appointment of the interested party.

The present recourse turns on the construction placed by the E.S.C. on Note (1) (Σημ. 1) which appears in the aforesaid Scheme of Service immediately after the 2nd paragraph under the Heading "Required qualifications".

The aforesaid Note 1 reads as follows:

«Σημ. (1) 'Εκπαιδευτικοί πού είχαν τά προσόντα γιά τήν προηγούμενη θέση 'Επιθεωρητή Ειδικών Μαθημάτων Στοιχειώδους 'Εκπαιδεύσεως ή θά τά άποκτήσουν μέσα σέ τρία χρόνια άπό τήν έγκριση τών σχεδίων τούτων μποροῦν νά εἶναι ὑποψήφιοι γιά τή θέση αὐτή».

ENGLISH TRANSLATION

"Note (1) Educationalists who possessed the qualifications for the previous post of Inspector Special Lessons of Elementary Education or will acquire same within three years from the approval of these Schemes of Services will be eligible as Candidates for this post."

It must be noted here that the previous post of Inspector Special Lessons of Elementary Education, was governed by the Scheme of Service approved by the Council of Mini-

sters on 3.2.1966 (vide Appendix E attached to the opposition).

The complaint of the applicant is to the effect that the respondent E.S.C. construed Note (1) appearing in the Scheme of Service—Appendix D—as referring to paragraphs 1 and 2 of the Scheme only, thus covering only the Academic Qualifications required, whilst in his submission Note (1) should be construed to cover paragraph 3 of the Scheme as well, in which case the years of prior educational service required, would have been reduced to ten as envisaged by the Scheme of Service of 3.2.66 (Appendix E).

Learned Counsel for applicant submitted further that if the construction placed on *Note 1* of the Scheme of Service in Appendix "D", by the E.S.C. were to be upheld then he maintained that the Scheme of Service of 16.12.82 (Appendix D) would be unconstitutional as infringing the "principle of equality" protected by Article 28.1 of the Constitution, because an arbitrary distinction at the expense of the applicant would be made by adopting different criteria at least so far as the years of service were concerned.

I propose examining these two main points submitted in the sequence they were made.

Construction of the relevant Scheme of Service by E.S.C.

It was laid down as early as 1961 by the then Supreme Constitutional Court in the case of *Papapetrou* v. *The Republic*, 2 R.S.C.C. 61 and reiterated thereafter in great number of cases (vide *Neofytou* v. *Republic*, 1964 C.L.R. 280, *Georghiades and others* v. *Republic* (1967) 3 C.L.R. 653; *Kyriakou & others* v. *Republic* (1975) 3 C.L.R. 37, *Makrides* v. *Republic* (1983) 3 C.L.R. 622 and even recently by the Full Bench of this Court in R.A. 402—*Republic* v. *Xinari & others*—judgment delivered on 27.8.85—still unreported)* that it is up to the appointing authority—in the present case the E.S.C.—to interpret and apply the relevant Scheme of Service in the circumstances of each particular case, and this Court will not interfere with an appointment made by such authority, if satisfied that it was

* Reported in (1985) 3 C.L.R. 1922.

reasonably open to it to interpret and apply the Scheme of Service in the way in which it was done.

In the present case having examined the Scheme of Service set out in Appendix D and having carefully considered the crucial Note 1, I have come to the conclusion that the interpretation placed upon this Scheme of Service by the respondent E.S.C. was reasonably open to it. I hold the view that Note 1 refers to paragraphs 1 and 2 of the "qualifications required" in Appendix "D" and covers only academic qualifications. *Note* 1 cannot cover paragraph 3 thereof, which is next in order to the Note (a) as the Note refers to the Academic qualifications and not to the years of service referred to in paragraph 3 and (b) it was inserted before paragraph 3 whereas if it were intended to cover the years of service as well (para. 3) it could be inserted after paragraph 3.

This submission therefore fails and is accordingly dismissed.

Alleged unconstitutionality of the Scheme of Service.

As already stated earlier on in the present judgment it was further submitted on behalf of the applicant that if Note 1 in Appendix "D" would be interpreted in the way the E.S.C. interpreted it, then such Scheme of Service would be unconstitutional as infringing the "principle of equality" protected by Article 28.1 of the Constitution because an arbitrary distinction at the expense of the applicant would be made, by adopting different criteria so far as the years of service were concerned, whilst the same criteria of Appendix E were adopted in Appendix D in respect of Academic Qualifications.

Before examining this issue I feel that I should make an observation first and then determine the matter raised by the defence, notably whether I am entitled to examine the alleged unconstitutionality of the Scheme of Service being in effect delegated legislation made under Article 54 of the Constitution and therefore an act which cannot be challenged by a recourse under Article 146 of the Constitution.

First the observation: the question of alleged unconsti-

tutionality of the Scheme of Service in quite vague and was raised hypothetically (if the decision of the E.S.C. is upheld.... then the Scheme of Service is unconstitutional) I feel that I should repeat here what was stated recently by the Full Bench of this Court in R. A. 388 *Ayios Andronikos Development Co.* v. *The Republic*—Judgment delivered on 20.11.85—still unreported:* "the question of unconstitutionality must be raised with sufficient clarity and in quite unequivocal terms."

Now the objection taken by the defence:

It is true that there is ample authority that the schemes of service are acts of legislative nature and not acts of an executive or administrative nature in the sense of Article 146 of the Constitution *(Papapetrou* v. *The Republic,* 2 R.S.C.C. 61, *PASYDY* v. *Republic* (1978) 3 C.L.R. 27; *Vlotomas & others* v. *Republic* (1984) 3 C.L.R. 423). Therefore they cannot be challenged directly by a recourse under Article 146 of the Constitution.

Independently of the Schemes of Service it is well settled that regulatory acts of a legislative content, whether issued by the Council of Ministers or other administrative organ cannot be directly challenged as not satisfying the prerequisites of Article 146 of the Constitution. *(Police* v. *Hondrou,* 3 R.S.C.C. 82, *Sophoclis Demetriades & Son and Another* v. *The Republic* (1969) 3 C.L.R. 557, *Demetrios Philippou & others* v. *The Republic* (1970) 3 C.L.R. 129).

At the same time it was repeatedly clarified that the position is different where the application of a regulatory act in a particular case is being impugned *(Lanitis Farm Ltd.* v. *The Republic* (1982) 3 C.L.R. 124 at p. 132, *Nicosia Race Club* v. *The Republic* (1984) 3 C.L.R. 791 at p. 797).

Thus in the case of *Vassiliadou & Another* v. *The Republic* (1985) 3 C.L.R. 1296 it was held that Regulation 6(3) of the Streets and Building Regulations "is a regulatory act, the constitutionality and legality of which can be examined in a recourse against a decision based on the said regulation."

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* Reported in (1985) 3 C.L.R. 2362.

And in order to revert to "schemes of service", although they cannot be challenged directly by a recourse, as stated above, it is abundantly clear that they can be challenged through a recourse against the eventual appointment; thus in the case of *Ioannidou* v. *The Republic* (1965) 3 C.L.R. 664 at p. 672 (a case which has been approved by the Full Bench of this Court on Appeal—(1966) 3 C.L.R. 480) it was stated that the scheme of service "could also have been challenged through a recourse against the eventual appointment, but this course has not been followed by applicant."

In the light of the above authorities I hold the view that I am entitled to examine the alleged unconstitutionality of *Note 1* of the Scheme of Service with particular reference to its application to the alleged arbitrary distinction at the expense of the applicant.

The "Principle of Equality"

Before examining the facts allegedly infringing the "principle of equality" which is safeguarded by Article 28.1 of the Constitution, I shall confine myself in making brief reference to the case of the *Republic* v. *Nishan Arakian and others* (1972) 3 C.L.R. 294 decided by the Full Bench of this Court where at pages 298 - 299 extensive reference is made to the "principles of equality" and the authorities on this topic. It is clear that Article 28.1 of the Constitution does not convey the notion of exact arithmetical equality but it safeguards only against arbitrary differentiations and does not exclude reasonable distinctions.

It is the submission of the learned counsel for applicant that *Note 1* contains a non-justifiable distinction between academic qualifications and years of service; whilst it introduces a relaxation to the academic qualifications envisaged by the scheme of service in Appendix D (16.12. 1982) by introducing in the alternative the relevant provisions of Appendix E (3.2.66) as regards qualifications, it leaves unaffected the years of service required by the Scheme of Service in Appendix D (21 years of service required) whilst the old scheme of Service in Appendix E requires only 10 years of educational service; this is allegedly dis-

criminatory in favour of the interested party and against the applicant in the present recourse.

Having given to the matter my best consideration I am unable to agree with the submission of learned counsel for applicant. The Scheme of Service in Appendix "D" approved by the Council of Ministers on 16.12.82 provides in paragraphs 1 and 2 thereof for certain academic qualifications. Note 1 inserted immediately after paragraph 2 provides a relaxation to the said academic qualifications allowing as well the former academic qualifications envisaged by the Scheme of Service approved by the Council of Ministers on 3.2.1966 (Appendix E). Paragraph 3 of the scheme of service of 16.12.1982 requires 21 years educational service. To this paragraph Note 1 does not apply.

The former scheme of service of 3.2.66 required 10 years of educational service.

I fail to see any arbitrary differentiation or unjustified distinction. The new scheme of service provides for more academic qualifications than the old one and for more years of educational services. By virtue of Note 1 it introduces a relaxation to the new academic qualifications but the relaxation is not extended to the years of service. I hold the view that it was perfectly legitimate for the Council of Ministers to act as they did. As stated in the case of *Papadopoulou* v. *The Republic* (1984) 3 C.L.R. 332 at pages 337-338: "No one has a right to demand the non alteration of a scheme of service. It is settled beyond doubt that the appropriate authority has a discretion in the matter. They may alter existing schemes or introduce an altogether new scheme of service. They are the arbiters in the matter. This is a salient rule of administrative law that reflects the need to ensure that the administration enjoys the necessary freedom to model specifications for the manning of the public service, in this case the Educational service, on the needs of the service and present state of scientific and cultural knowledge, as well as the availability of personnel to meet these requirements, a social consideration. Any other approach would stultify progress and make for a static state of affairs."

Having gone through the material before me I find no discrimination in favour of the interested party; on the contrary it is evident—and it is so maintained by the respondent Commission, that the relaxation of the academic qualifications enabled both the applicant and the interested party to contest the post. If the applicant has lesser years of educational service than the interested party it cannot and should not be attributed to the Scheme of Service.

For the reasons stated above it was open to the E.S.C. to consider the applicant as not possessing the qualifications required under paragraph 3 of the Scheme of Service set out in Appendix "D". In the circumstances the applicant has no existing legitimate interest adversely and directly affected in the sense of Article 146.2 of the Constitution. (*Panayides* v. *The Republic* (1972) 3 C.L.R. 135, *Papasavvas* v. *The Republic* (1967) 3 C.L.R. 111, *Paraskevopoulou* v. *Republic* (1980) 3 C.L.R. 647).

In the result present recourse fails and is accordingly dismissed. No order as to its costs.

Recourse dismissed.
No order as to costs.