

1986 December 22

[SAVVIDES. J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

MARIOS IERONYMIDES AND OTHERS.

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION.

Respondent.

(Case No. 843/85).

Administrative Law—Administrative act—Appointments of Public Officers—Annulment of—Reconsideration of matter of appointment—Principles applicable—Persons, who were not among the original candidates, are not eligible to be considered for appointment—They lack a legitimate interest to challenge the appointment made as a result of such reconsideration—Whereas persons, who were among the original candidates and who were later appointed to the post in question, should be considered for appointment, if such appointment will have retrospective effect from a date prior to such persons appointment to the post in question—Exclusion of such persons from being considered for appointment amounts to a misconception of law and fact and to lack of due inquiry. 5 10

Executory act—Confirmatory act. 15

Lègitimate interest—See, also, Administrative Law, ante.

Legitimate interest—Public Officers—Appointments—Annulment of—Reconsideration of matter—New appointment—Recourse filed by an unsuccessful candidate, who was, also, a candidate for the original appointment, withdrawn—New decision giving to such new appointment retrospective effect— 20

The applicant in the said recourse has no legitimate interest to challenge such new decision.

5 *Collective organs—Change in composition —In reconsidering matter following annulment of a decision the organ cannot rely on the findings and views of the persons of which the same organ was composed when the original decision was taken.*

10 In 1981 there was a number of vacancies in the post of Attaché in the Ministry of Foreign Affairs. The interested party and the applicants, with the exception of applicants 2 and 4, were among the candidates for appointment. Applicants 3, 5 and 8 were among the six candidates who were found as the most suitable for promotion and, as a result, they were offered appointment as from 15 1.9.81. Applicants 3 and 5 accepted such appointment, but applicant 8 requested that her appointment should commence as from 2.10.81. The request was granted.

20 The interested party filed recourse 356/81, as a result of which the Court annulled the appointment of one of the interested parties in such recourse, namely G. Evriviades (See *Kapsou v. The Republic* (1983) 3 C.L.R. 1136).

In the meantime applicants 1, 2, 4 and 6 were appointed to the said post as from 15.9.83.

25 As a result of the said annulment of the appointment of Evriviades the respondent Commission re-examined the matter on the basis of the situation prevailing in 1981 and decided to appoint to the post the interested party as from 1.7.84. The decision was published in the Official Gazette of 31.8.84. In reaching this decision the Commission did not 30 consider applicants 1 and 6, who were among the candidates of 1981 and were later appointed as from 15.9.83.

35 The interested party requested that his appointment be made with retrospective effect as from 1.9.81. His request was turned down and as a result the interested party filed a recourse to this Court, which, however, was withdrawn, when the Commission undertook to reconsider the matter of retrospectivity. Finally the Commission decided that the appointment be made with retrospective effect as from

1.9.81. The decision was published in the Official Gazette of 19.7.85.

The recourse is directed against the decision published on 19.7.85. It should be noted that no one challenged the decision published on 31.8.84.

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Held, annulling the sub judice decision: (1) When an appointment to a post is annulled by this Court, the respondent Commission in reconsidering the filling of the post has to take into consideration the legal and factual situation that existed at the time when the annulled decision was taken. It follows that applicants 2 and 4, who were not among the candidates of 1981 for the post in question, were not eligible for appointment and, therefore, they do not have a legitimate interest to challenge the appointment of the interested party.

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(2) The sub judice decision consists of two parts. The first part reconfirms the decision of 31.8.84 to appoint the interested party to the post in question. The second part gives retrospective effect to the appointment. The first part cannot be challenged by a recourse, because of its confirmatory nature.

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(3) Applicants 3, 5 and 8 were offered appointment as from 1.9.81 and, therefore, no legitimate interest of theirs has been affected as the appointment of the interested party was not effected with effect prior to 1.9.81.

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(4) Applicant 7 was never appointed to the post and he was a candidate for appointment in 1981. He is the only applicant who had a legitimate interest to challenge the appointment of the interested party as from 1.6.84 published on 31.8.84. He filed a recourse, which he later withdrew. It follows that since he did not insist on his challenge to the appointment of the interested party, he has no legitimate interest to complain now against the retrospectivity of such appointment.

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(5) From the moment when the respondent Commission decided to re-consider the matter of retrospectivity the legitimate interest of applicant's 1 and 6 comes into play. Bearing in mind the legal and factual situation existing in

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(2) The sub judge decision violates the accepted principles of administrative law and/or the case law and the principles of natural justice.

(3) The sub judge decision is not duly reasoned.

The facts relevant to the present case date back since 1981. In 1981 there was a number of vacancies in the post of Attaché in the Ministry of Foreign Affairs. The interested party and the applicants, with the exception of applicants 2 and 4, were amongst the candidates who applied for appointment to such post and were amongst those who were considered by the respondent Commission and were called for an interview. Applicants 3, 5 and 8 were amongst the six candidates who were found by the respondent as the most suitable candidates for appointment to the post and were offered appointment to such post from 1.9.1981. Applicants 3 and 5 accepted such appointment as from the aforesaid date, whereas applicant No. 8 requested that her appointment should commence as from 2.10.1981 due to the fact that she could not come to Cyprus before such date.

The interested party filed recourse No. 356/81 challenging such decision in which judgment was delivered on the 20th January, 1983. (See *Kapsou v. Republic* (1983) 3 C.L.R. 1136), whereby his recourse against four of the interested parties in that case was dismissed but was successful concerning the appointment of another candidate, namely, E. Evriviades, whose appointment as a result was annulled.

In the meantime new vacancies were created in the post of Attaché in the Foreign Service in 1983 as a result of which applicants 1, 2, 4 and 6 were appointed as from the 15th September, 1983. Applicants 1 and 6 were amongst the candidates for appointment in 1981 but were not so appointed and did not challenge the appointment of those candidates who were appointed as from the 1st September, 1981.

As a result of the annulment of the appointment of Evriviades, the Public Service Commission met on the 27th March, 1984, to consider the filling of the post which

became vacant. In the relevant minutes of the meeting of the 27th March, 1984, we read the following:

5 “The Commission having examined the material facts from the file concerning the filling of the post, including the minutes of the meeting of the 29th May, 1981 (subject 2) in which the comments and opinion of the Director-General of the Ministry of Foreign Affairs are recorded as well as the evaluation by the Public Service Commission of the performance of the candidates before it, in the course of the interviews, 10 decided to adjourn the further examination of the matter for 29.3.84.”

15 The respondent Commission met on the 29th March, 1984, and after stating that it found it unnecessary to consider for the promotion in question applicants Nos. 1 and 6, since they were appointed to that post by a later decision of its own, proceeded to select the interested party for appointment, on the basis of the situation prevailing in 1981, taking into consideration mainly his performance at 20 the interview, but also the material contained in his application, his qualifications and the fact that he was serving as a casual public officer.

25 By letter dated the 3rd April, 1984, the interested party was informed accordingly and was offered appointment to the post of Attaché in the Foreign Services of the Republic to which he replied by letter dated the 20th April, 1984, accepting his appointment but requesting that it should be effected retrospectively as from the date when the appointment of Evriviades was annulled, i.e. the 1st 30 September, 1981. The respondent sought the advice of the Attorney-General on the matter which was given by one of the Senior Counsel of the Republic on the 13th May, 1984 and was to the effect that retrospective effect to the appointment could not be given.

35 The respondent met on the 25th May, 1984 and after having taken into consideration the opinion expressed by the office of the Attorney-General decided that the request of the interested party for retrospective appointment could not be accepted and fixed the date of his appointment as 40 the 1st July, 1984. The interested party persisted in his

claim and on the 24th July, 1984, he submitted a long letter to the respondent through the Director-General of the Ministry of Foreign Affairs repeating his claim that his appointment should be given retrospective effect. The respondent Commission by letter dated the 1st August, 1984, informed the interested party that it had decided to appoint him as from the 1st June, 1984, in accordance with the terms of service embodied in the offer made to him on the 3rd April, 1984. His appointment was published in the official Gazette of the Republic of the 31st August, 1984 under Not. 2033.

As a result the interested party filed a recourse in the Supreme Court challenging the refusal of the respondent to give retrospective effect to his appointment. In the course of the hearing of such recourse counsel appearing for the respondent advised the respondent that in the special circumstances of the case the claim of the interested party for retrospective appointment should be reconsidered. In view of that, the interested party withdrew his recourse.

The respondent Commission in the light of the new advice given by the Senior Counsel of the Republic who was representing it in the recourse, met on the 29th May, 1985, re-examined the claim of the interested party and decided that his appointment should be given retrospective effect as from the 1st September, 1981, the date of the appointment in such post of Evriviades whose appointment had been annulled by the Supreme Court in Recourse No. 356/81. A notification to that effect was published in the official Gazette of the Republic of the 19th July, 1985, under Not. 1946, hence the present recourse.

From what emanates from the above facts there were two different administrative acts concerning the appointment of the interested party to the post of Attaché in the Ministry of Foreign Affairs. The first, the one that was published in the Gazette of the 31st August, 1984, whereby the interested party was appointed in the post as from the 1st June, 1984, and the second, the one that was published in the Gazette of the 19th July, 1985, annulling the previous one to the extent of the date of the appointment of

the interested party and giving retrospective effect to his appointment as from the 1st September, 1981.

5 The decision of the respondent which was published in the Gazette of the 31st August, 1984, was never challenged by any of the applicants. It is the decision published on the 19th July, 1985, that is being challenged by the applicants. In any event only applicant No. 7 would have had a legitimate interest to challenge the former decision.

10 Having narrated the facts, I come now to consider the issues before me and I shall deal first with the preliminary objections raised by the interested party who handled the case in person, as to whether the applicants or any one of them has a legitimate interest to challenge the sub judice decision and whether the present recourse is time barred.

15 It has been held time and again by this Court that when an appointment to a post is annulled by the Supreme Court the Public Service Commission in reconsidering the filling of the post has to take into consideration the legal and factual situation that existed at the time when the annulled decision was taken which in the present case is the 1st September, 1981, the date of the appointment of Evriviades, whose appointment was annulled.

25 Therefore, the only candidates who could be considered for the filling of such post were those who were eligible candidates on the 1st September, 1981 and no new candidates. Applicants 2 and 4 who were not in the picture in September, 1981 and were not amongst the eligible candidates, have no legitimate interest to challenge the appointment of the interested party to such post. Their recourse, therefore, fails.

35 The decision of the respondent which was published on the 19th July, 1985 bearing in mind all the surrounding circumstances of the case consists in fact of two parts. The first part refers to the decision concerning the appointment of the applicant, published on the 31st August, 1984, to the post of Attaché and the second the decision giving retrospective effect to such appointment as from the 1st September, 1981 instead of the 1st June, 1984. The first

part is nothing more than merely confirmatory of the appointment of the interested party to the post which he was already holding and as such it could not be challenged by a recourse once the original act of his appointment was not challenged by any of the applicants within the 75 days time limit prescribed by the Constitution. (See minutes of the meeting of 29.5.85 from which it is obvious that only the date of the appointment of the interested party was reconsidered). The second part of the decision embodies in fact a new decision that of giving retrospective effect to his appointment which is an executory administrative act by itself and as such it can be challenged by a recourse by any person who has a legitimate interest affected by such decision.

Having reached the conclusion that applicants 2 and 4 have no legitimate interest to challenge the sub judice decision I shall proceed to examine the position of the remaining applicants.

As already mentioned applicants 1, 3, 5, 6, 7 and 8 were amongst the candidates eligible for appointment in 1981, applicants 3, 5 and 8 were amongst the successful candidates to whom an appointment was offered as from the 1st September, 1981, which was accepted by applicants 3 and 5 whereas applicant 8 requested that her appointment should commence as from the 2nd October, 1981. Evriviades whose appointment was annulled was also appointed as from the 1st September, 1981. This is the real and factual situation concerning the said three applicants and the interested party. The appointment of the interested party was effected retrospectively as from the 1st September, 1981. Bearing in mind the fact that the offer for appointment to the said three applicants was made to commence as from the 1st September, 1981, the same date from which appointment was offered to the interested party, I have come to the conclusion that no legitimate interest of these applicants is affected by the appointment of the interested party as his appointment was not effected with retrospective effect prior to the 1st September, 1981. Therefore, the recourse of applicants 3, 5 and 8 also fails.

Applicant No. 7 was a candidate for appointment in 1981, but was never appointed to the said post, and is now holding, since 1.3.1984, the post of Civil Defence Officer. He was therefore the only applicant who would have had a legitimate interest to challenge the appointment of the interested party as from 16.1984 which was published on the 31st August, 1984. In fact, he did challenge the above decision by recourse No 589/84, which he later withdrew. So, therefore, since he did not insist on his claim against the appointment of the interested party, he has no legitimate interest to complain now against the retrospectivity of his appointment. As a result, his recourse also fails.

Applicants 1 and 6 were appointed since 1983 and were holding the same post as the one offered to the interested party. As already found they had no legitimate interest to challenge the part of the decision concerning the appointment of the interested party as from the 1st June, 1984 as such appointment was subsequent to their own. They were however, entitled to challenge the retrospective effect given to his appointment as by such decision the interested party was given an advantage over them that of nearly two years seniority.

Having found as above, I shall now examine whether the sub-judice decision of the respondent is defective.

The respondent in dealing with the real and factual situation that existed in 1981 considered whether applicants 1 and 6 who were candidates in 1981 should be taken into consideration for the filling of the vacant post. According to the minutes of the 29th March, 1984 it was found unnecessary that they should be taken into consideration if the re-examination of the case in view of the fact that they had already been appointed, since 1983. The Public Service Commission could have proceeded as it did so far as the appointment of the interested party was to take effect as from 16.1984 as such appointment did not affect any legitimate interest of the said applicants. From the moment however, that it decided to reconsider the date of the appointment of the interested party for the purpose of giving retrospective effect to it then the legitimate interest of ap

plicants 1 and 6 comes into play and, therefore, in the course of such re-examination bearing in mind the legal and factual situation prevailing on the 1st September, 1981, the respondent had to take into consideration as eligible candidates applicants 1 and 6 and not to exclude them. 5

In the light of my above findings I have come to the conclusion that the respondent Commission by excluding applicants 1 and 6 from consideration when it decided to appoint the interested party retrospectively acted under a misconception of law and fact and failed to carry out a due inquiry into the matter. 10

Before concluding, and since the matter is going back to the respondent for reconsideration as a result of this decision, I wish to observe that the respondent is not entitled, when reconsidering the appointment in question, to take into consideration the findings of the Commission in 1981, in view of its different composition. The evaluation of candidates is a subjective element, connected with the persons of which the respondent, being a collective organ, is composed, and the respondent in its present composition, cannot rely on the findings and views of the persons of which the same organ was composed in 1981. (See the judgment of the Full Bench in *Republic v. Safirides* (1985) 3 C.L.R. 163 and the cases of *Nicolaou & Another v. Republic* (1985) 3 C.L.R. 931 and *Papaleontiou v. Republic* (1985) 3 C.L.R. 1929). 15 20 25

In the result the prayer of applicants 2, 3, 4, 5, 7 and 8 fails and is hereby dismissed whereas applicants' 1 and 6 prayer succeeds and the appointment of the interested party to the post of Attaché in the Ministry of Foreign Affairs with retrospective effect as from the 1st September, 1981 is hereby annulled. 30

In the circumstances I make no order for costs.

Sub judice appointment of interested party annulled. No order as to costs. 35

A P P E N D I X

List of Applicants

1. Marios Ieronymides.
2. Stavros Amvrosiou.
- 5 3. Leonidas Markides.
4. Antonis Toumazis.
5. Alekos Zenon.
6. Phaedon Anastassiou.
7. Panayiotis Katsouras.
- 10 8. Popi Avraam.