

1987 September 25

[A LOIZOU, DEMETRIADES, LORIS STYLIANIDES, KOURRIS, JJ]

GEORGHIOS PAPALEONTIOU,

*Applicant,*

v

THE EDUCATIONAL SERVICE COMMISSION,

*Respondents*

*(Revisional Jurisdiction Appeal No 415)*

5 *Legitimate Interest — Constitution, Art 146 2 — Principles applicable — The relevant requirement must be satisfied both at the time of filing the recourse and at the time of hearing — Requirement satisfied if at such material times, applicant's existing interest, though not yet directly and adversely affected, is bound to be so affected, eventually — Educational Officers — Sub judice promotions of interested parties affecting appellant's seniority — In the circumstances, appellant possesses legitimate interest to challenge such promotions*

10 *Educational Officers — Promotions — The Public Educational Service Law, 10/69, sections 2, 14 and 35(i) — No officer can be promoted in another post, «unless . . . there exists a vacant post» (Section 35(1)) — The Educational Service Commission cannot fill a vacant post, unless it receives a written request from the Authority concerned (Section 14) — «Public Educational service» includes service at the post of Inspector (Section 2) — Promotion of the two interested parties to the post of General Inspector Elementary Education — Decision taken following an annulment of promotions to such post — One of the annulling decisions set aside upon appeal after sub judice promotions — As a result at the time, when the sub judice decision was taken, there existed only one vacant post of Inspector — Sub judice promotions annulled*

20 The appellant and interested party Papadopoulos were promoted on 22 10 80 to the post of General Inspector, Elementary Education with effect from 1 11 80

25 The aforesaid promotion of the appellant was annulled by this Court in *Karageorghis v The Republic* (1982) 3 C.L.R. 435 The promotion of Papadopoulos was, also, annulled by this Court in *Tomaris v The Republic* (1982) 3 C.L.R. 1165.

As a result the respondent Commission reconsidered the matter, but once again decided to promote the appellant and interested party Papadopoulos

with effect from 1 11 80 The promotion of the appellant was challenged by Karageorghis and the promotion of Papadopoulos by Tomans Both recourses succeeded and the aforesaid promotions were annulled (See Karageorghis v The Republic (1983) 3 C L R 1211 and Tomans v The Republic (1983) 3 C L R 1292)

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The present appellant, however, as interested party in the recourse by Karageorghis lodged an appeal (Revisional Jurisdiction Appeal No 350) from the judgment in *Karageorghis v The Republic* (1983) 3 C L R 1211

On 22 12 83, that is before the expiration of the time allowed for appeal against the aforesaid judgment, the respondent Commission reconsidered the matter and decided to promote with effect as from 1 11 80 to the aforesaid post Tomans and Papadopoulos

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The appellant challenged the said decision of 22 12 83 by recourse 565/83 This is an appeal from the judgment dismissing such recourse (*Papaleontiou and Another v The Republic* (1985) 3 C L R 1929)

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It is obvious that in taking the sub judice decision the Commission acted on the assumption that the promotion of the present appellant had been annulled judicially (*Karageorghis v The Republic* (1983) 3 C L R 1211) This judgment was set aside in R A 350 (*Papaleontiou v Karageorghis and Another* (1987) 3 C L R 751) and the promotion of Papaleontiou with effect as from 1 11 80 affirmed

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Held, allowing the appeal (1) No educational officer is promoted to another post, «unless there is a vacant post» (Section 35(1) of Law 10/69) «Public Educational Service» includes service in the post of Inspector (Section 2 of same law) Moreover, the Educational Service Commission cannot proceed to fill any vacancy, except upon the written request of the Authority concerned (Section 14 of said law) In this case the request was for the filling of two, not three posts of Inspector In view of the result of R A 350, at the time the sub judice decision was taken, there was only one vacant post to be filled It follows that the sub judice promotions cannot survive judicial scrutiny

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(2) The question now is whether the present appellant who was promoted to the post of inspector as from 1 11 80, possesses legitimate interest to challenge the promotion of the two interested parties to the same post as from the same date There is no dispute that by filling two posts instead of one the seniority of the appellant is adversely affected

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(3) A citizen cannot contest the validity of every administrative act, unless he possesses legitimate interest The criterion is the existence of a direct relationship and affectation of an interest, material or moral, of the applicant, otherwise the recourse is deprived of its admissibility

The Court must be satisfied that the legitimate interest of the applicant is adversely and directly affected by the challenged act

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5 The requirements of Article 146 2 must be satisfied at the time of the filing and hearing of the recourse, but such requirements are satisfied, if at the said material times it is clear that the existing interest of an applicant, though not yet adversely and directly affected, is unavoidably bound to be so affected eventually. The decision of an administrative court regarding the issue of legitimate interest has to be reached in the light of the circumstances of the particular case. The seniority will rightly be taken into consideration at the time of the filling of a higher post. Seniority preexists and is not acquired at the time of such filing. In the present case the seniority of the appellant would be affected and as admitted is affected by the promotion of two persons to one vacant post.

*Appeal allowed Sub judice  
decision annulled No order  
as to costs*

15 *Cases referred to*

*Papaleontiou v The Republic* (1987) 3 C L R 751.

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

*Panayides v The Republic* (1973) 3 C L R 378.

*Decision 3679/75 of the Greek Council of State*

20 **Appeal.**

25 Appeal against the judgment of the President of the Supreme Court of Cyprus (Tnantafyllides, P.) given on the 1st August, 1984 (Revisional Jurisdiction Case No. 565/83\*) whereby appellant's recourses against the promotion of the interested parties to the post of General Inspector of Elementary Education was dismissed.

*A.S. Angelides*, for the appellant.

*A. Vassiliades*, for the respondents.

*E. Efstathiou with M Tsangandes*, for interested party Tomaris.

*A. Pandelides*, for interested party Papadopoulos.

*Cur. adv. vult.*

30 A. LOIZOU J.: The Judgment of the Court will be delivered by Mr. Justice Stylianides.

STYLIANIDES J.: This appeal is directed against the judgment of the President of this Court exercising original revisional

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\* Reported in (1985) 3 C.L.R. 1929

jurisdiction whereby the recourse of the appellant challenging the validity of the promotion of Papadopoulos and Tomaris (interested parties) to the post of General Inspector of Elementary Education was dismissed.

The history of this case goes back to 1980. The appellant and the interested parties were inspectors of elementary education. The Educational Service Commission was requested on 31/5/80 to fill a post of General Inspector-Elementary Education; a further request for the filling of a second same post was made on 9/9/80. On 22/10/80 the Commission promoted George Papaleontiou, the appellant, and A. Papadopoulos to the aforesaid posts with effect 1/11/80. This decision was published in the Official Gazette on 7/11/80.

Candidates Karageorghis and Tomaris were aggrieved. Karageorghis instituted Recourse No. 371/80 prior to the publication in the Official Gazette of the said decision and Recourse No. 483/80 after the publication. By means of those recourses he challenged the promotion of both Papaleontiou and Papadopoulos. On 14/3/81 he withdrew the recourses in so far as they related to the act of promotion of Papadopoulos. The recourses were tried together and on 5/5/82 Judge Hadjianastassiou annulled the promotion of Papaleontiou (see *Karageorghis v. The Republic* (1982) 3 C.L.R. 435).

Tomaris, another Inspector, filed Recourse No. 1/81 whereby he sought the annulment of the promotion of both Papaleontiou and Papadopoulos. The promotion of Papadopoulos was annulled on 21/10/82 (*Tomaris v. The Republic* (1982) 3 C.L.R. 1165). Hadjianastassiou, J., in a well-considered judgment found as a fact that Tomaris was strikingly superior to Papadopoulos. The striking superiority of the applicant was one of the operative reasons for which the decision was annulled.

No appeals were taken against the aforesaid annulling decisions of Judge Hadjianastassiou. On 11/5/82, a few days after the judgment in Recourses No. 371/80 and 483/80, the Educational Service Commission promoted again Papaleontiou to the post of General Inspector retrospectively from 1/11/80. Karageorghis by Recourse No. 258/82 challenged the validity of the decision for the promotion of Papaleontiou in preference to him.

On 25/10/82, a few days after the decision of the Court in

Recourse No. 1/81, the Respondent Commission promoted Papadopoulos again to the remaining vacant post of General Inspector. This promotion was impugned by Tomaris by means of Recourse No. 27/83.

- 5 The decision of 11/5/82 for the promotion of Papaleontiou was annulled by Demetriades, J., on 26/11/83 (see *Karageorghis v. The Republic* (1983) 3 C.L.R. 1211). The decision to promote Papadopoulos was annulled by Pikis, J., in the Recourse of Tomaris No. 27/83 on 30/11/83 (see *Tomaris v. The Republic* 10 (1983) 3 C.L.R. 1292) on the grounds that the Commission disregarded the seniority of the applicant, that the sub judice decision was vulnerable to be set aside on the ground of disregard of the decision of the Court in breach of the doctrine of res judicata, because, since the Court found in Recourse No. 1/81 that 15 the applicant Tomaris was strikingly superior, the only course open to the respondents, if they disputed such finding, was by challenging it by way of appeal; that certainly they had no power to disregard it on a reevaluation of the self same material and by so doing they acted in breach of their duties under Article 146.5, thus 20 deviating from the course of legality.

The respondents did not appeal against either of the two annulling decisions of the Court. The present appellant, interested party in Recourse No. 258/82, who took part in the proceedings before the trial Judge on his own and was represented by counsel, 25 being entitled, lodged on 27 December, 1983, Revisional Appeal No. 350.

The Respondent Commission on 22/12/83, long before the expiration of the time allowed for appeal, having taken into consideration that the «Supreme Court by the new decisions in 30 Recourse No. 258/82 and 27/83 annulled the aforesaid promotions of Papaleontiou decided on 11/5/82 and Papadopoulos on 25/10/82» proceeded to the filling of the two vacant posts of General Inspector - Elementary Education- and promoted Tomaris and Papadopoulos. The appellant on 27/12/ 35 83 filed Recourse No. 565/83 against the decision of the respondents taken on 22 December, 1983. This recourse was dismissed in *Papaleontiou and Another v. The Republic* (1985) 3 C.L.R. 1929. The applicant took this present revisional jurisdiction appeal against the judgment in Recourse No. 565/83.

It is plainly obvious that the Respondent Commission took the sub judice decision on 22 December, 1983, on the assumption that the earlier promotion of the appellant had been annulled judicially.

The Supreme Court in Revisional Appeal No. 350 5  
(*Papaleontiou v. Karageorghis and Another*, still unreported)\*, set aside the annulling first-instance judgment and confirmed the promotion of Papaleontiou on 11/5/82 with effect 1/11/80 under Article 146.4 of the Constitution.

On 22/12/83, therefore, there was only one vacant post, the 10  
one resulting from the annulment of the promotion of Papadopoulos in the recourse of Tomaris. It is plainly obvious that the Respondent Commission would not have made two promotions to the post of General Inspector of Elementary Education if the earlier promotion of the appellant to such post 15  
had not been annulled on 26 November, 1983, in Recourse No. 258/82 by the first-instance judgment, which was reversed on appeal. The Commission laboured on the wrong assumption and misconception that the said earlier promotion of the appellant had 20  
been annulled judicially.

Under Section 35(1) of The Educational Service Law, 1969 (10 of 1969) no educational officer is promoted to another post unless - (a) there is a vacant post. «Educational officer» means a person holding post in the Public Educational Service. «Public Educational Service» includes service at the post of Inspector. (See 25  
definition Section 2 of Law 10/69.)

Under Section 14 of the same statute (Law 10 of 1969) the respondent Educational Service Commission shall not proceed to fill any vacancy except upon the receipt of a written proposal to that effect from the appropriate authority concerned. In the 30  
present case the proposals by the appropriate authority were to fill two posts of Inspector General. The Commission in excess of power filled three posts. This is sufficient ground for annulment of the sub judice decision.

The sub judice decision to promote the interested parties to the 35  
post of General Inspector Elementary Education is faulty and cannot survive judicial scrutiny. It is the product of misconception

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\* Reported in (1987) 3 C.L.R. 1238.

that at the material times, 22/10/83 and 1/11/80, there were two vacant posts and further it is contrary to law and in excess of power. The Educational Service Commission were requested in 1980 to fill two posts. Since by the Revisional Appeal No. 350 the promotion of the appellant on 11/5/82, with effect 1/11/80, was confirmed, at the material time, there was only one post to be filled. It is not for this Court to say which of the two interested parties would have been promoted to the vacant post. The Commission would have exercised its own discretionary power subject to the law and the operative part of the annulling decision of the Court.

Counsel for the respondents and counsel for the interested parties submitted, however, that the appellant has no legitimate interest after his, as they called it, «reinstatement» by the decision of the Full Bench in Revisional Appeal No. 350.

Counsel for the appellant on the other hand submitted that his client continues to have legitimate interest, as by the promotion of the two interested parties, instead of one, his seniority in the service is affected and, therefore, he continues to possess legitimate interest. To this argument counsel for the respondent and the interested party Papadopoulos replied that the Civil Servant and educationalist have only a prospect of promotion and no vested right to any further advancement in their career in the service and thus the seniority is not a present legitimate interest but a factor to be taken into consideration in the future. Interested party Papadopoulos was appointed by the Public Service Commission to the post of Director, Primary Education. This appointment was challenged by the present appellant in Recourse No. 371/84. The Court annulled and declared the said appointment null and void and of no effect whatsoever under Article 146.4 of the Constitution (*Georghios Papaleontiou v. The Republic of Cyprus through the Public Service Commission, Case No. 371/84, judgment of 30/5/87 still unreported*\*).

One of the grounds of annulment was that in a Revised Table showing the seniority of the candidates, amongst whom were the appellant and both interested parties, the appellant was given the sixth place, as holder of the post of Inspector B, and the erroneous

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\* Reported in (1987) 3 C.L.R. 751

seniority of the candidates in the educational service was a factor that was taken into consideration.

There is no dispute that by the filling of two posts instead of one the seniority of the appellant is adversely affected.

The point that falls for consideration is whether or not the appellant continues to have a legitimate interest. An applicant to file or pursue a recourse must be possessed of legitimate interest, existing at the time of the filing of the recourse and until the end of the case. 5

Paragraph 2 of Article 146 reads as follows:- 10

«Such a recourse may be made by a person whose any existing legitimate interest, which he has either as a person or by a virtue of being a member of a Community, is adversely and directly affected by such decision or act or omission.»

A recourse is admissible by an administrative Court only if the applicant possesses a direct present concrete legitimate interest. Though traditionally a recourse for annulment of an administrative decision is very widely open it is not an action popularis open to every citizen. A citizen cannot contest the validity of every administrative act unless he possesses legitimate interest. Had it been otherwise, the influx of the recourses would paralyse administrative justice and the judicial control would have become illusory; furthermore, for practical reasons, the administration would also be handicapped in the due performance of its function. 20  
The criterion is the existence of a direct relationship and affectation of an interest, material or moral, of the applicant; otherwise the recourse is deprived of its admissibility. A recourse for annulment requires in respect of the applicant a legitimatio ad causum (Fleiner Administrative Law 8th Edition pages 212 and 243; Odent Contentieux Administratif Fascicule IV pages 1280-1281; Tsatsos The Recourse For Annulment Before the Council of State, 3rd Edition page 30). 25 30

«Legitimate interest» which is not synonymous with «right» must be adversely and directly affected by the decision attacked. For this Court to have competence to inquire and determine the validity of the sub judice decision there must be a legal relationship of the applicant with the challenged act. The Court must be satisfied that the legitimate interest of the applicant is adversely and directly affected by the challenged act. 35



It is quite correct that the requirements of Article 146.2 must be satisfied at the time of the filing and hearing of a recourse, but such requirements are satisfied if at the said material times it is clear that the existing interest of an applicant, though not yet adversely and  
5 directly affected is unavoidably bound to be so affected eventually (Conclusions from the Jurisprudence of the Greek Council of State, 1929-1959, page 260). The decision of an administrative court regarding the issue of legitimate interest has to be reached in the light of the circumstances of the particular case.

10 Useful guidance for the determination of the point raised may be found in *Papasavvas v. The Republic* (1967) 3 C.L.R. 111 and *Petrakis Panayides v. The Republic* (1973) 3 C.L.R. 378. In *Papasavvas* case it was held by the President of this Court that a Dental Officer, 1st Grade, had legitimate interest to challenge the  
15 omission of the respondent Public Service Commission to correct the date of birth of the interested party, who was the Senior Dental Officer, as he had an interest in the matter of the legality of the interested party's continuing service in the post of Senior Dental Officer. It was common ground that the issue of the correct age of  
20 the interested party had been raised in connection with the proper date of her retirement from service on her attaining the age of 55 years. When that took place the post of Senior Dental Officer would fall vacant. The applicant, when the post fell vacant, would be one of the candidates and would stand a chance to gain both  
25 moral and material advancement through promotion to Senior Dental Officer. Triantafyllides, P., referred to the French case of Charles (reported in Collection Lebon, Volume 1955 page 379) where it was held by the French Council of State that public officers may challenge illegal appointments which prejudice them  
30 by retarding irregularly their advancement. Though the applicant would not be the only candidate for promotion to the post of Senior Dental Officer, Triantafyllides, P., concluded at p. 124:-

35 «.... I have reached the conclusion that the Applicant possesses a legitimate interest in the matter of the legality of the Interested Party's continuing service in the post of senior Dental Officer; such interest is an existing one, because the Applicant has been qualified for such post at all material times, and it has been adversely and directly affected by the refusal of the Respondent Commission to examine the matter of the

proper date of birth, and, consequently, of the lawful date of retirement, of the Interested Party.»

In *Panayides case*, a Full Court case, the appellant challenged the decision to give retrospective effect to the promotion of the interested party. At page 383-384 it was said:-

«... It could be said that he was entitled to do so, in view, especially, of what was stated by Stassinopoulos on the Law of Administrative Disputes. (1964) p. 200, to the effect that a legitimate interest of a public officer is involved in the proper application of provisions relating to the branch of the public service to which he belongs; but in a later decision of the Council of State in Greece, No. 570/1970, there appears to have been stressed that merely a general interest of a public officer in connection with compliance with provisions applicable to the branch of the public service to which he belongs does not suffice to vest in him a personal legitimate interest enabling him to make a recourse against promotions of colleagues of his. As, however, the appellant is a Port Officer, 2nd Grade, and as in the above decision of the Council of State in Greece there has been made express reference to the possibility of a legitimate interest being involved if an officer is affected adversely from the point of view of seniority, we are of the opinion that the appellant had a legitimate interest so as to entitle him, under Article 146 of the Constitution, to challenge the decision of the 26th March, 1971, by means of which retrospective effect was given to the promotion of the interested party, because such retrospectivity could adversely affect the appellant's seniority after his own promotion to the post of Port Officer, 1st Grade.»

The seniority is one of the three factors on which the claim of persons in the Public Service for promotion or appointment are based. The seniority was rightly stated by counsel for the respondents and the interested party will be taken into consideration at the time of the filling of the higher post. Seniority preexists and is not acquired at the time of such filling. In the present case the seniority of the appellant would be affected, and as admitted is affected by the promotion of two persons to one vacant post.

In Case No. 3679/75 the Greek Council of State held that a member of the gendarmerie who was not promoted continued to

possess legitimate interest, though he was promoted retrospectively, as a junior to him, a member of the gendarmerie, was promoted to the same rank before the appellant and thus he gained seniority over the applicant.

- 5 In all the circumstances of the present case, as the promotion of the two interested parties adversely affects the appellant's seniority, the appellant has an existing legitimate interest enabling him to pursue this appeal.

In view of what we have said the appeal succeeds.

- 10 Before concluding, we would like to point out that the problems created in this case would have been avoided, had the revisional jurisdiction of this Court been administered in one tier and not in two tiers with inevitable lapse of time in between them.

- 15 In the result the sub judge decision of the promotion of the two interested parties is hereby declared null and void and of no effect whatsoever, but, in all the circumstances of the case, we make no order as to costs.

*Appeal allowed.  
No order as to costs.*