1987 October 6

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CHRISTOULLA THEOPHANOUS,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
1. THE EDUCATIONAL SERVICE COMMISSION,
2. THE MINISTRY OF EDUCATION,

Respondents.

(Case No. 577/86).

Educational Officers — Transfers — The Educational Officers (Teaching Staff) (Appointments, Postings, Transfers, Promotions and Related Matters) (Amendment) Regulations 1985 — Reg. 23(1) — Whether ultra vires the law — Question answered in the negative — Whether the Educational Service Commission entitled to adopt a uniform guide and weight numerically the various criteria referred to therein — Question answered in the affirmative — Reg. 14(2) — Whether ultra vires the law — Question answered in the negative.

Subsidiary legislation — Retrospectivity of — In the absence of a specific authority in the enabling law, such legislation cannot be given retrospective effect — Reliance on past events for the purpose of formulating a prospective rule does not contravene the said rule — Reg. 14(2) of the Educational Officers (Teaching Staff) (Appointments, Postings, Promotions, Transfers and Related Matters) (Amendment) Regulations, 1985 does not have retrospective effect

Natural justice — No-one can be a Judge in his own cause — Transfers of Educational Officers — Objections in respect of — Regulations giving competence to determine objections to the organ that took the decision — Do not violate the aforesaid rule of natural justice.

The applicant was serving at the material time as a teacher of French at Ayios Georghios Gymnasium at Lamaca.

The respondent Commission considered the evaluation of the various criteria set out in regulation 23(1) and the weight to be attached to such criteria. As a result it set up a formula whereby the importance of such criteria was weighted numerically and then duly adjusted to reflect the liability to transfer of educationalists in the service of the Republic. On the basis of such

evaluation, a table was compiled by the E S C of the educationalists subjec to transfer and in the exercise of the powers vested in it under paragraph 3 o Regulation 24 The applicant's name was included in such table

The applicant objected to the inclusion of her name in the table of transferable educationalists for reasons of health Her objection was rejected on the ground that the case was not covered by Regulation 22(a)

On 5 6 1986 the Commission decided to transfer the applicant from Ay Georghios Gymnasium Larnaca to Paralimni Gymnasium

The applicant objected to such transfer on account of health and family reasons, contesting also the calculation of her units On 24 6 86 she was heard by the respondent in support of her objection, which was rejected on 17 7 86

Hence this recourse The main grounds on which the applicant relied were as follows (a) The system adopted for the determination of the transferability of educationalists has no sanction in law and is ultra vires the law (b) Regulation 14(2), referring to the place of residence of educationalists, has retrospective effect and is therefore ultra vires the enabling law, (Law 4/85) which does not contain any provision for the making of any regulation with retrospective effect

(c) Violation of the rules of natural justice in that the applicant was not afforded the opportunity of having been heard further in support of her objection before the objection was dismissed, and in that the objection of the applicant was decided by the same organ against the decision of which the objection was made

Held, dismissing the recourse (1) The decisions in *Aristides v The Republic (1986) 3 C L R 466* and *Kilaniotis v The Republic (1986) 3 C.L R 1797* should be distinguished from the present case, because the issue in those cases concerned the validity of Reg 23(2)* whereas this case concerns the validity of Reg 23(1) of the aforesaid Regulations

(2) The respondent Commission was entitled to adopt the weighting system, which it adopted, of the various criteria referred to in Reg 23(1) The adoption of a uniform guide in their evaluation is a safeguard to equal treatment of all educationalists in matters of transfer (*Tingindou v The Republic* (1987) 3 C L R 1181 adopted)

(3) In the absence of specific authorisation by the statute, the administrative authority cannot give retrospective operation to the rule or other statutory instrument made by it This rule does not prevent the subordinate law-making body from relying on past activities or events for the purpose of

* Quoted at p 1579-1580

formulating or enforcing a prospective rule (A passage from Basu's Commentary on the Constitution of India, 5th Ed Vol I at p 277 adopted) In virtue of Reg 14(2)* there has been reliance on past events for the purpose of formulating a prospective rule (*Tingindou v The Republic* (1987) 3 C L R 1181 adopted)

(4) The facts of this case do not justify the complaint that no opportunity was given to the applicant to expound the reasons of her objection

(5) There is no merit either in the contention that there has been a violation of the principle that no one can be a judge in his own cause We are not dealing in the present case with a hierarchical recourse from one organ to another, but with the decision of one and the same organ which is lawbound when an objection is made and certain facts are brought to its knowledge to consider whether such objection is well founded or not

Recourse dismissed
No order as to costs

Cases referred to

Anstides v Republic (1986) 3 C L R 466,

Kilaniotis v Republic (1986) 3 C L R 1797,

Tingindou v Republic (1987) 3 C L R 1181

Recourse.

Recourse against the decision of the respondents to transfer applicant from Lamaca to Paralimni

A.S. Angelides, for the applicant.

P. Clerides, for the respondents.

Cur. adv vult.

SAVVIDES J. read the following judgment. The applicant, a secondary education teacher, challenges by this recourse the validity of her transfer from Larnaca to Paralimni.

The applicant was serving at the material time as a teacher of French at Ayios Georghios Gymnasium at Larnaca. She is married to an educationalist who was also serving at Larnaca, and is the mother of two children attending schools at Larnaca.

As a result of the decision of the Supreme Court in the case of *Aristides v. The Republic* (1986) 3 C.L.R. 466 whereby paragraph

* Quoted at p 1582

(2) of Regulation 23 of the Educational Officers (Teaching Staff) (Appointments, Postings, Transfers, Promotions and Related Matters) (Amendment) Regulations 1985 was declared ultra vires, the respondent E S C held two meetings on the 29th April, 1986 and 10th May, 1986, and considered the evaluation of the various criteria set out in regulation 23(1) and the weight to be attached to such criteria As a result it set up a formula whereby the importance of such criteria was weighted numerically and then duly adjusted to reflect the liability to transfer of educationalists in the service of the Republic On the basis of such evaluation, a table was compiled by the E S C of the educationalists subject to transfer and in the exercise of the powers vested in it under paragraph 3 of Regulation 24 The applicant's name was included in such table

The applicant objected to the inclusion of her name in the table of transferable educationalists for reasons of health Her objection on this ground, as well as similar objections of other educationalists were considered by the respondent at its meeting of 19 5 1986 and rejected on the ground, as recorded in the minutes, that their cases were not covered by Regulation 22(a), in that reasons of health relating to the transport of educationalists from their place of residence to their place of work do not amount by themselves to a ground for transfer under the provisions of Regulation 22(a)

On 5 6 1986 the Commission decided to transfer the applicant from Ay Georghios Gymnasium Larnaca to Paralimni Gymnasium

The applicant objected to such transfer on account of health and family reasons, contesting also the calculation of her units On 24 6 1986 she was heard by the respondent in support of her objection, which was rejected on 17 7 1986 The reasons given in the minutes of the respondent in which a number of objections by other educationalists were disposed of, are as follows -

> «*Theophanous Christoula* She objects to her transfer Her transfer was decided on the basis of her serial order on the table of those transferable in accordance with the regulations The reasons of health which she invokes have been considered by the Commission, subsequent to the opinion of the Medical Board, that they do not fall within the provisions of Reg. 22(a) (min 19 5 1986) »

As a result the applicant filed the present recourse

The main grounds upon which the applicant challenges the validity of her transfer are, as expounded by her counsel, briefly the following:-

(a) The system adopted for the determination of the transferability of educationalists has no sanction in law and is ultra vires the law. Counsel further contended that the numerical evaluation of the criterial besides being ultra vires, hinders the proper exercise by the respondent Commission of its discretion. In expounding on his contention on ultra vires, counsel submitted that such numerical evaluation was vested under regulation 23(2) in the Council of Ministers and not in the respondent Commission. After the decision in *Aristides* case (supra) to the effect that Regulation 23(2) is ultra vires the law, the respondent could not adopt a procedure which is based on such regulation.

(b) Regulation 14(2), referring to the place of residence of educationalists, has retrospective effect and is therefore ultra vires the enabling law, (Law 4/85) which does not contain any provision for the making of any regulation with retrospective effect. In the absence of any provision in the law enabling retrospectivity, the weight to be attached to the factor «place of residence» could not have any bearing on the years of service prior to the enactment of such regulations but only on years of service from then on. In support of his argument that the intention of the legislator was not to give any retrospectivity in the evaluation of the «place of residence» of an educationalist counsel sought to refer to the provisions of a new bill in this respect laid before the House of Representatives and the explanatory report of the objects of such bill by the Attorney-General which is annexed to the bill.

By his written address in reply counsel for applicant raised the additional ground that the respondent in reaching the sub judice decision have acted in violation of the rules of natural justice in that:-

(a) The applicant was not afforded the opportunity of having been heard further in support of her objection before the objection was dismissed.

(b) The objection of the applicant was decided by the same organ against the decision of which the objection was made.

In support of his first main ground of law counsel for the applicant sought to rely, inter alia, on the decision of Triantafyllides, P. in *Aristides v. The Republic* (1986) 3 C.L.R. p.

466 which was followed by me in *Kilaniotis v The Republic* (1986) 3 C L R 1797 Neither of these cases lends any assistance in the present case as the question which arose in both of them was the validity of paragraph (2) of regulation 23 purporting to empower the Council of Ministers to weigh the importance of the criteria laid down by paragraph (1) of regulation 23 What we are concerned with in the present case is not paragraph (2) of Regulation 23 but paragraph 1 of such regulation which provides as follows -

«23.-(1) Η Επιτροπη κατα τη διενέργεια των μεταθέσεων σύμφωνα με τους Κανονισμούς 19, 20 και 21 θα ακολουθεί σειρά προτεραιότητας η οποία θα καθορίζεται από τα πιο κάτω κριτήρια:

(α) Τη δυσμένεια της θέσεως στην οποία ειναι τοποθετημένος ένας εκπαιδευτικός λειτουργός και που καθορίζεται από·

(ι) την απόσταση του τόπου εργασίας από την εδρα

(ιι) τη χρονική περίοδο υπηρεσίας σε σχολεία εκτός έδρας

(ιιι) τον τύπο του σχολειου προκειμένου για εκπαιδευτικούς λειτουργούς δημοτικης εκπαιδευσης

(ιν) το αν ο τόπος εργασίας βρίσκεται σε αστικη ή αγροτική περιοχή, όπως επίσης τις κλιματολογικές συνθήκες του τόπου εργασίας και τις συνθήκες συγκοινωνίας του τόπου εργασίας με την εδρα

(β) τα έτη υπηρεσίας που ένας εκπαιδευτικος λειτουργός υπηρετησε σε δημόσια σχολεία της Δημοκρατίας

(γ) τη σύνθεση της οικογένειας ενός εκπαιδευτικού λειτουργού.

The English translation of which is as follows -

(«23 -(1) The Commission in effecting the transfers in accordance with Regulations 19,20 and 21 shall follow the order of priority which will be determined by the following criteria·-

(a) The disadvantages of the post in which an educational officer is posted which are decided on the basis of

(i) the distance of the place of work from the place of residence;

(ii) the period of service in schools away from the place of residence;

(iii) the type of school in cases of educational officers of elementary education;

(iv) whether the place of work is situated in an urban or rural area, as well as the climatological conditions of the place of work and the means of transport from the place of work to the centre.

(b) The years of service that an educational officer has served in public schools of the Republic.

(c) The composition of the family of an educational officer).»

The question of the validity of the numerical evaluation by the E.S.C. of the criteria laid down by Regulation 23(1) was considered recently by Pikis, J. in the case of *Olga Tingiridou v. The Republic* (1987) 3 C.L.R. 1181. Useful reference may be made to the following opinion in the said judgment at pp. 1186-1187:-

«The criteria laid down by Reg. 23(1) are objective in the sense that they relate mainly to verifiable factors applicable to all educationalists. It can be validly presumed that the legislature intended to make the transfer of educationalists subject to objective criteria in the interest of uniformity of treatment; a salutary objective it must be added more so as we are concerned with a branch of the public service with thousands of officers. The importance of the various factors and their interaction is rightly left to the discretion of the competent authority. As the law stands, it is very much for the respondents to evaluate these criteria and attach to them such importance as the determining factors for transfer as they may deem appropriate in the light of the needs of the service and their experience in that area. The first question I must ask myself is whether it would be incompetent for the respondents to adopt the weighting system they did for the determination of an individual application for transfer. My answer is unhasitatingly no; the law leaves the application of the relevant criteria to the respondents including power to evaluate their impact as they may judge appropriate. Is the

system invalidated because of the generality of its application? In the first place, the legislature intended that transfers should be made on the basis of objective considerations. Secondly and more importantly, uniformity of treatment of the employees of the Administration is not only a desirable objective but in the case of Cyprus a mandatory one in view of the provisions of Art. 28.1. of the Constitution. The adoption of a uniform code for the determination of the liability of educationalists to transfer, in accordance with the criteria laid down by the law, was not only permissible but, in my judgment, salutary too. Adherence to a preordained code closes the door to favouritism and just as importantly to a semblance of favouritism, equally damaging to the image of the Administration and faith in its impartiality. If the weight attached to the criteria provided by law was unreasonable, any decision founded thereon might be vulnerable to be set aside on that account. No such suggestion was made in this case nor does the system evolved appear to me in any way unreasonable or irrelevant to the needs of the educational service.»

I share the above views and I adopt them for the purposes of the present case.

I find that the adoption of a uniform guide in the evaluation of the various criteria set out in Regulation 23(1) on the basis of which the preparation of tables determining the transferability of educationalists was made is a safeguard to equal treatment of all educationalists in matters of transfer.

In the result the submission of counsel for applicant that the adoption of a uniform system for the evaluation of the importance of the criteria laid down in Regulation 23(1) is outside the ambit of the enabling law fails. Also the submission that the adoption of such system deprives the respondent Commission from the free exercise of its discretion cannot be maintained. Under Regulation 22(a) health reasons of an educationalist or members of his family are grounds to be taken into consideration and there is nothing in the regulations depriving the E.S.C. when dealing with a genuine objection against a transfer to exercise its discretion in modifying its decision by taking into consideration the exceptional personal circumstances of an objector subject however to the prevalence of the needs of the service and the principle of equal treatment.

I shall next deal with the other main ground raised by counsel for applicant that Regulation 14(2) is ultra vires the enabling law as it gives retrospective effect to the provisions contained therein. Regulation 14(2) provides as follows:-

«(2) Σαν έδρα των εκπαιδευτικών λειτουργών κατά τη διάρκεια των ετών υπηρεσίας τους πριν από την εφαρμογή των Κανονισμών αυτών, θα θεωρείται η μόνιμη κατοικία που είχαν κατά τα έτη αυτά. Η διαπίστωση της μόνιμης κατοικίας θα γίνεται από την αρμόδια αρχή μετά από έρευνα του περιεχομένου δηλώσεως των ενδιαφερομένων εκπαιδευτικών λειτουργών που θα πρέπει να υποβληθεί μέσα σε δυο μήνες μετά από την έναρξη της ισχύος των Κανονισμών αυτών:

Νοείται ότι υπηρεσία σε δημόσια σχολεία της Δημοκρατίας στη διάρκεια των σχολικών ετών 1974-76 εκτοπισθέντος εκπαιδευτικού λειτουργού που κατείχε θέση στη δημόσια εκπαιδευτική υπηρεσία στις 20 Ιουλίου, 1974 θα θεωρείται ως υπηρεσία εκτός έδρας.»

The English translation is as follows:-

(«As place of residence of the educational officers during their years of service before the application of these Regulations will be considered their permanent home which they had during those years. The ascertainment of the permanent home will be made by the appropriate authority after an inquiry in the contents of the statement of the educational officers concerned which must be submitted within two months from the coming into force of these Regulations:

Provided that service in public schools of the Republic during the school years 1974-1976 by a displaced educational officer who possessed a post in the public educational service on the 20th July, 1974 will be considered as service away from the place of residence)».

The answer to this question may be found in Basu's Commentary on the Constitution of India, 5th Ed. Vol. 1 in which at p. 277 we read the following:-

«What is meant by this rule is that, in the absence of specific authorisation by the statute, the administrative authority cannot give retrospective operation to the rule or other

statutory instrument made by it. It does not prevent the subordinate law-making body from relying on past activities or events for the purpose of formulating or enforcing a prospective rule.»

Useful reference in this respect may be made to the judgment in *Tingiridou* case (supra) as follows:-

«The first was that Reg. 14(2) is ultra vires the enabling law in that contrary to the provisions of the statute a retrospective legislative measure was enacted thereby. Retrospectivity derives, as counsel submitted, from the fact that the seat of educationalists is discerned by reference to events that occurred prior to the enactment of the law. This is, with respect, a fallacious understanding of the principle of retrospectivity. A law is not made retrospective merely because its application is made dependent on past events. The law becomes retrospective only if it upsets rights that crystalysed and vested under the law before the enactment of the impugned legislation. I find this ground to be devoid of merit and as such it is dismissed.»

In the circumstances of the present case I have come to the conclusion that reliance on past events was clearly made for the purpose of formulating or enforcing a prospective rule and as such Regulation 14(2) is not ultra vires the enabling law and it does not violate the principle of non retrospectivity. Therefore, the submission of counsel for applicant in this respect also fails.

Before concluding on this issue, I wish to mention that the lengthy argument advanced by counsel for applicant on a Bill introduced for enactment into law by the House of Representatives and the reasons and objeccts given by the Attoreny-General for the introdution of such bill, is both irrelevant and inadmissible. Such bill was a matter for future consideration by the House of Representatives and, therefore, a matter of speculation and not a matter which could have any bearing on the application of the existing legislation at the time when the sub judice decision was taken.

Finally, I shall deal briefly with the additional ground raised by counsel for applicant in his address in reply, that of the violation of the rules of natural justice. I find no merit in such contention.

In the present case the applicant besides filing a written objection and giving her reasons in support thereof, was also

afforded the opportunity to attend the meeting of the respondent Commission for the examination of objections and make her oral representations.

I find no merit either in the contention of counsel for applicant that by the determination of the applicant's objection by the same organ which took the original decision there has been a violation of the principle that no one can be a judge in his own cause. We are not dealing in the present case with a hierarchical recourse from one organ but with the decision of one and the same organ which is lawbound when an objection is made and certain facts are brought to its knowledge to consider whether such objection is well founded or not.

Before concluding I wish to mention that in view of the result reached as above, I find it unnecessary to deal with the objection raised by counsel for the respondents in his written address that in view of the fact that subsequently to the sub judice decision, and more particularly on 22.8.1986, the applicant requested the respondent Commission that if her transfer to Paralimni could not be reconsidered her husband be also transferred there. This, in counsel's submission, amounts to an unconditional acceptance by the applicant of the decision for her transfer and has deprived her of any legitimate interest to challenge the sub judice decision. There is no material before me in support of such objection as to what exactly transpired between applicant and respondent and what were the circumstances surrounding the alleged acceptance of the sub judice act which would enable me to decide that such acceptance, if any, was a free and voluntary one.

For all the above reasons this recourse fails and is hereby dismissed. It is with great reluctance that I decided not to make an order for costs.

Recourse dismissed.
No order as to costs.