

1987 September 17

[SAVVIDES J]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CHRYSOSTOMOS P ROUSSIS AND OTHERS,

Applicants,

v

THE REPUBLIC OF CYPRUS, THROUGH
THE EDUCATIONAL SERVICE COMMISSION,

Respondent

*(Cases Nos 411, 412, 413, 434, 443, 519
520, 668, 679, 685, 686, 687, 695/84)*

*Recourse for annulment — Practice — Same administrative act challenged by two
recourses filed by the same applicant — Dismissal of second recourse as
regards interested parties who are the same as the interested parties of the
first recourse*

*Educational Officers — Appointments/Promotions — Request for filling of 5
vacancies existing at the time of such request as well as of vacancies expected
to occur by reason of impending promotions — Whether such course can be
followed — In the circumstances, the question is answered in the affirmative*

*Educational Officers — Promotions — Qualifications — Additional qualifications 10
envisaged as an advantage in the scheme of service — Special reasons should
be given for disregarding them*

*Educational Officers — Appointments/Promotions — First entry and promotion 15
post — Decision to fill vacancies from within the service — Once such
decision was taken the Commission had to apply the three criteria (Merit,
Qualifications, Seniority) laid down by section 35(2) of the Public Educational
Service Law 10/69, as amended by section 5(6) of Law 53/79*

*Educational Officers — Promotions — Seniority — Meaning of — Doubt raised
whether there was confusion between seniority and overall length of service
— Ground of annulment*

*Administrative Law — General principles — Validity of administrative act should be 20
judged in accordance with the position prevailing at the time it was taken to
the exclusion of subsequent events*

The applicants challenge, by these recourses, the decision to promote to the post of Assistant Headmaster in the Secondary Education, the interested parties instead of and in preference to them.

5 By letter dated 3rd May, 1984, addressed to the respondent a request was made, by the Ministry of Education, for the filling as from 1.9.1984 of 15 vacancies in the post of Assistant Headmaster in the Secondary Education (a first entry and promotion post) as well as 11 consequential vacancies in the same post which were to result from the filling of an equal number of vacancies in the post of Headmaster.

10 The respondent met on 7.6.1984 and after considering the applications submitted and excluding those candidates not satisfying the necessary prerequisites, proceeded to group the prevailing candidates under five categories (according to their years of service, their qualifications and general assessment in the last two service reports).

15 The Commission then decided to invite the candidates included in the aforesaid categories to an interview. Finally, the Commission, after assessing the performance of the candidates at the interviews and hearing the recommendations of the Department proceeded to the selection of 22 candidates, amongst whom the interested parties, for promotion to the post
20 of Assistant Headmaster as from 1.9.1984.

It must be noted that the scheme of service provides that «an additional title of studies, with preference to Paedagogics or subjects relating to the administration and organisation of schools, is considered an additional qualification.»

25 The Court, after dismissing some of the recourses either in whole or as regards certain interested parties on the ground that the sub judice act in each of such recourses had also been challenged as regards the same interested parties by another recourse by the same applicant, which was still pending.

30 Held, annulling the sub judice decision: (1) In the present case none of the applicants has been prejudicially affected by the fact that the procedure for the filling of the consequential vacancies had started before the posts became actually vacant. (*Republic v. Pericleous and others* (1984) 3 C.L.R. 577 and *Iordanous v. The Public Service Commission* (1985) 3 C.L.R. 2502 distinguished).

35 (2) Although the posts in question were first entry and promotion posts, it is obvious from the sub judice decision that the respondent decided to fill the posts from those candidates already in the service and proceeded as in the case of promotions. It follows that the Commission had to abide by the criteria laid down by Law (Section 35(2) of Law 10/69 as amended, i.e. Merit
40 Qualifications, Seniority).

(3) The five categories in which the candidates were separated were based on the years of service of the candidates, their assessment in the last two service reports and their qualifications. The seniority however of the candidates, does not appear to have been taken into consideration in preparing these lists and separating the candidates into the said categories. Neither does it appear later on, especially in the minutes of 18 7 84 when the sub judge decision was taken, and the reasons given for selecting each one of the interested parties, whether the seniority of the candidates was duly considered as provided by the Law 5

(4) Seniority has to be calculated as from the date the candidates were holding their last posts, grades or scales and not from the date of entering the service (see s 37 of the Law). In this case a doubt has been raised whether seniority in the aforesaid sense was confused in the minds of the members of the Commission with the length of service 10

(5) Moreover certain applicants were not treated as possessing additional qualifications on the ground that their post graduate studies did not relate to Paedagogics or School Administration. Having regard to the wording of this provision any additional title of studies should be considered an advantage, but special preference should be given to those possessing titles in relation to the subjects mentioned therein. Special reasons should have been given by the respondent why such additional qualifications were disregarded 15 20

*Sub judge decision annulled
No order as to costs*

Cases referred to

- Republic v Penclous and Others* (1984) 3 C L R 577, 25
- Iordanous v Public Service Commission* (1985) 3 C L R 2502.
- Papaioannou v Republic* (1987) 3 C L R 474

Recourses.

Recourses against the decision of the respondent to promote the interested parties to the post of Assistant Headmaster in the Secondary Education in preference and instead of the applicants. 30

E. Efstathiou, for applicant in Case No. 411/84.

A. S. Angelides, for applicants in Cases Nos. 412/84, 413/84, 434/84, 443/84, 679/84, 686/84, 695/84.

A. Markides, for applicants in Cases Nos. 519/84 and 520/84. 35

Ch. Ierides, for applicant in Case No. 685/84.

Chr Trantafyllides, for applicant in Case No 668/84

R Petndou (Mrs), for respondent

Cur adv vult

SAVIDES J read the following judgment The applicants
5 challenge, by these recourses, the decision of the respondent,
dated 18 7 1984 to promote to the post of Assistant Headmaster
in the Secondary Education, the interested parties instead of and
in preference to them

10 The promotion of 15 interested parties is challenged in total,
who, however vary from recourse to recourse The 15 interested
parties are as they appear on a list drawn up by counsel for the
applicants, the following

- 1 Phaedra Papacosta
- 2 Elengo Rangou
- 15 3 Elpida Hailou
- 4 Ellada Constantinidou
- 5 Makanos Papachnstoforou
- 6 Mana Zavrou
- 7 Michael Karpasitis
- 20 8 George Theofilou
- 9 Michael Yerolemou
- 10 Ioannis Ioannides
- 11 Stavros Mestanas
- 12 Ekateni HadjiDemetrou
- 25 13 Vera Korfiotou
- 14 Petros Petrou
- 15 Geoghia Mikellidou

All cases were heard together as presenting common questions
of law and fact

30 The facts which led to the sub judice decision are briefly as
follows

All parties were serving, at the material time, as teachers in the
Secondary Education By letter dated the 3rd May, 1984,
addressed to the respondent a request was made, by the Ministry
35 of Education, for the filling as from 1 9 1984 of 15 vacancies in the
post of Assistant Headmaster in the Secondary Education (a first
entry and promotion post) as well as 11 consequential vacancies

in the same post which were to result from the filling of an equal number of vacancies in the post of Headmaster. The vacancies were advertised in the official Gazette of the Republic on 11.5.1984 and the last date for submitting applications was fixed as the 26th May, 1984. The promotions to the post of Headmaster were effected on 6.6.1984. 5

The respondent met on 7.6.1984 and after considering the applications submitted and excluding those candidates not satisfying the necessary prerequisites, proceeded to group the prevailing candidates under five categories (according to their years of service, their qualifications and general assessment in the last two service reports) and decided to invite them to personal interviews, held from the 18th to the 25th of June. By letters of the Ministry of Education dated 16.6.1984 and 16.7.1984, the vacancies to be finally filled were fixed to 22. 10 15

At its meeting of 2.7.1984, the respondent assessed the performance of the candidates at the interviews and postponed further consideration of the matter. On the 18th July, 1984, after the recommendations of the Departments of Secondary and Technical Education were submitted the respondent proceeded to the selection of 22 candidates, amongst whom the interested parties, for promotion to the post of Assistant Headmaster as from 1.9.1984. The promotions were advertised in the daily press on the following day, that is, the 19.7.1984. 20

Recourses Nos. 411, 412, 413, 434, 443, 519 and 520 were filed against the above decision. In the meantime, one of the candidates to whom promotion was offered by the above decision did not accept such offer and as a result the respondent met again on 31.8.1984 and decided to offer promotion to Zoe Kanthou as from 1.9.1984 and to Nitsa Papadopoulou as from 1.10.84 as Mrs. Kanthou was due to retire on such date. The promotions were finally advertised in the official Gazette of the Republic dated 5.10.1984 as a result of which recourses Nos. 668, 679, 685, 686, 687 and 695/84 were filed. 25 30

Before proceeding any further I consider it pertinent to clarify the position of certain of the applicants in the above recourses. 35

Recourse No. 679/84 has been filed by six applicants, that is Andreas Papandreou, Alekos Leptos, Constantinos Yiangoullis, Andreas Georghiou, Anna Georghiou and Charalambos

Timotheou Two of the above applicants that is A Papandreou and C Yiangoullis had already filed recourses Nos 443 and 412/84 respectively, by which the same administrative act is challenged also the relief sought is the same and the interested parties whose
5 promotion is challenged are the same The same administrative act cannot be challenged twice by the same applicant and therefore, I consider Recourse No 679/84 as violating the principle «no bis vexare pro eadem causa» and I dismiss same in so far as applicants Papandreou and Yiangoullis are concerned

10 I come now to the position of applicant Ourania Protopapa This applicant challenged originally the sub judge decision by recourse No 413/84 After the publication of the sub judge promotions in the official Gazette of the Republic on 5 10 1984, this applicant filed a new recourse, No 687/84, challenging the
15 same promotions, but with the addition of Nitsa Papadopoulou in the list of interested parties to whom as explained earlier promotion was offered on 31 8 1984, as from 1 10 1984, after one of the candidates to whom promotion was originally offered did not accept such offer However, by a statement filed by all
20 counsel for the applicants after the close of the hearing of the recourses which purported to eliminate the list of interested parties, the recourse against N Papadopoulou was withdrawn Since the remaining interested parties as well as the decision challenged are the same as in Case No 413/84 I consider recourse
25 No 687/84 as futile and I therefore dismiss same accordingly

Applicant Thekla Ioannidou first challenged the sub judge decision by recourse No 434/84 and later on when the promotions were advertised in the official Gazette of the Republic she filed recourse No 686/84 Both recourses are directed
30 against the same decision that of 18 7 1984 also the promotion of the same interested party is challenged by both recourses For the same reasons as explained above I dismiss the second recourse of this applicant, that is recourse No 686/84

Lastly, applicant Georghios Stavrou, is challenging, by recourse
35 No 695/84, besides the promotion of certain of the interested parties who were promoted by the decision of 18 7 1984 (the sub judge decision) the promotion of Zoe Kanthou and Nitsa Papadopoulou, who were promoted by the decision of 31 8 1984, as stated above Since, however, the names of these two
40 interested parties were not finally included in the common

statement of counsel for the applicants eliminating the list of the interested parties, I consider this part of the recourse as abandoned

I will now proceed to consider the issues raised in the recourses

The arguments of counsel may be separated in two groups for purposes of convenience. In the first group there may be included general and procedural grounds and in the second group all arguments regarding comparison of the parties. I shall begin with the first group 5

The first ground to be considered is the filing of consequential vacancies. As stated earlier, in the letter of the 3rd May, 1984, requesting the filling of the vacancies, only 15 out of the 26 posts to be filled were vacant on that date, the remaining being consequential vacancies, which became actually vacant on the 6th June, 1984, upon the promotion of a number of Assistant Headmasters to the post of Headmaster, that is, after the request for the filling of the vacancies in question was made and the expiry of the last date for the submission of applications. Finally, however, only 22 vacancies were filled by the sub judge decision 10
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Counsel argued relying on the case of *The Republic v Pencleous and others* (1984) 3 C L R 577, that the request for the filling of the consequential vacancies could not have been made before the posts became actually vacant and were advertised so as to enable other candidates who acquired the qualifications required by the scheme of service in the meantime to submit applications. Further, counsel argued that the promotions to the post of Headmaster which were effected on 6 6 1984, were later revoked, on 9 2 1985, and since revocation acts retrospectively the promotions of seven of the interested parties were made to posts which were not vacant at the time of the sub judge decision 20
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The case of *The Republic v Pencleous* (supra) sets down the date at which a candidate for appointment or promotion should possess the qualifications required by the scheme of service for the post. Thus in the case of first entry and promotion posts as it is the case here, such date is the one prescribed in the relevant advertisement for the submission of applications. The above case however, deals with normal and not consequential vacancies. There is provision in the law that no officer shall be promoted to any post unless a vacancy exists in such post. There is no 35

provision, however to the effect that the procedure for the filling of a post cannot be started earlier although a positive provision that it can be so started in the case of promotion posts which are to be vacated is to be found in Regulation 24 of the 1972 Regulations (now renumbered as Regulation 23 by paragraph 3 of the 1985 Regulations)

10 In the case of *Jordanous v The Public Service Commission* (1985) 3 C L R 2502, I annulled the promotion of the interested parties which was effected as a result of a consequential vacancy on the ground that the applicant who did not possess the qualifications of the scheme of service at the time the request for the filling of the posts was made, but acquired them later, before the filling of the posts was made, was wrongly not considered for promotion

15 The present case should be differentiated both from the cases of *Pencleous* and *Jordanous* (supra) The former case did not set down any rule with regard to consequential vacancies and in the latter the applicant was not considered as qualified for promotion and thus his position was affected In the present case none of the applicants has been prejudicially affected by the fact that the procedure for the filling of the consequential vacancies had started before the posts became actually vacant (See also, in this respect, the case of *Papaloannou v The Republic* (case No 495/85, in which judgment was delivered by me on 3rd April, 1987, not yet reported)*

20 As to the part of the argument of counsel referring to the subsequent revocation of the promotions to the post of Headmaster which were made on 6 6 1984 I find no merit in it The validity of the sub judice decision should be judged in accordance with the position prevailing at the time it was taken, to the exclusion of any subsequent events In any case, the promotions to the post of Headmaster were again reconsidered after their revocation, and effected again retrospectively, as from 6 6 1984 so that no gap was left This ground is, therefore, dismissed

35 The next argument of counsel for the applicant is that the sub judice decision was based on criteria outside the Law, in that the respondent defined categories of candidates on the basis of extraneous criteria

* Reported in (1987) 3 C L R 474

Although the posts in question were first entry and promotion posts, it is obvious from the sub judge decision that the respondent decided to fill the posts from those candidates already in the service and proceed as in the case of promotions.

Section 35(2) of the Law (No. 10/69) as amended by section 5
(b) of Law 53/79, provides that:

«(2) κατά την εξέτασιν των διεκδικήσεων των εκπαιδευτικών λειτουργών προς προαγωγή λαμβάνονται δεόντως υπ' όψιν η αξία, τα προσόντα και η αρχαιότης συμφώνως προς διαδικασίαν ήτις 10
καθορίζεται.»

((2) In considering the claims of educational officers for promotion the merit, qualifications and seniority of the candidates are duly taken into consideration in accordance with the prescribed procedure). 15

No procedure as contemplated by section 35(2) of the law had been prescribed by the time of the sub judge decision but nevertheless the respondent had to abide by the three criteria laid down by the Law.

Having carefully considered the contents of the sub judge decision in the light of the minutes of the meetings that led to it I wish to make the following observations. 25

It is mentioned in the minutes of the meeting of 7.6.1984 under paragraph (c), p. 2, that «On the basis of merit, qualifications and seniority, the Commission selects the candidates who appear in the attached appendix who are considered as prevailing». 30

Then five categories appear, based on the years of service of the candidates, their assessment in the last two service reports and their qualifications. The seniority however of the candidates, does not appear to have been taken into consideration in preparing these lists and separating the candidates into the said categories. 35
Neither does it appear later on, especially in the minutes of 18.7.1984, when the sub judge decision was taken, and the reasons given for selecting each one of the interested parties, whether the seniority of the candidates was duly considered as 40
provided by the Law. A doubt is, therefore, raised in this respect whether seniority in its legal definition and length of service were confused in the minds of the members of the respondent

Commission. Seniority has to be calculated as from the date the candidates were holding their last posts, grades or scales and not from the date of entering the service (see s. 37 of the Law). It seems from the comparable tables that certain of the applicants are senior to certain of the interested parties and all other factors being more or less equal they should have been preferred on account of the seniority.

It also appears that although certain applicants possess additional qualifications they were not treated as possessing same because, as counsel for the respondent stated, their post-graduate studies did not relate to Paedagogics or School Administration, as provided by the scheme of service. The scheme of service in this respect provides that «an additional title of studies, with preference to Paedagogics or subjects relating to the administration and organisation of schools, is considered an additional qualification. Having regard to the wording of this provision any additional title of studies should be considered an advantage, but special preference should be given to those possessing titles in relation to the subjects mentioned therein. Amongst the interested parties there are persons who did not possess any additional titles while certain of the applicants possessed such titles. In these cases special reasons should have been given by the respondent when such additional qualifications were disregarded.

For the above reasons the sub-judice decision has to be annulled.

Having reached such conclusion I find it unnecessary to embark on the merits of each candidate compared to the others so as not to prejudice the outcome of the decision of the respondent when re-examining the case and thus interfere with the free exercise of its discretion on the matter.

In the result recourse No. 679 so far as applicants / Papandreou and C. Yiangoullis are concerned, and recourse Nos. 686 and 687/84 are dismissed. The remaining recourses, that is Nos. 411, 412, 413, 434, 443, 519, 520, 668, 685, 695 as well as recourse No. 679, as far as it concerns applicants A. Leptos, A. Georghiou, Anna Georghiou and Ch. Timotheou succeed and the

sub judice decision in so far as the interested parties hereinabove referred to are concerned is hereby annulled. There will be no order for costs.

*Sub judice decision
annulled No order
as to costs.*

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