1987 December 10

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ANDREAS HJIVASSILIOU,

Applicant,

v.

THE CYPRUS ORGANISATION OF ATHLETICS,

Respondents.

(Case No. 22/87).

Public Corporation — The Cyprus Organisation of Athletics — Appointments — Appointment to post of Director-General of the Organisation — Scheme of Service made by the Respondents and approved by the Council of Ministers, pursuant to Reg. 5(1) of the Cyprus Organisation of Athletics (Structure and Terms of Service) Regulation, 1975 — The Cyprus Organisation of Athletics Law, 41/69, section 19 — Reg. 5(1) does not constitute a sub-delegation as the legislative authority delegated by section 19 to the Council of Ministers and exercisable in the manner provided by sub-section 3 of section 19, but a regulation of a subject of executive power — It follows that the scheme in question is not ultra vires the law — Reg. 5(1) encompasses the post of Director-General as well.

Public Corporations — The Cyprus Organisation of Athletics — Appointments — Qualifications — Due inquiry — Lack of.

Natural Justice — Bias — Collective organs — Test applicable.

Public Corporations — Appointments — Personal knowledge of the abilities of candidates by members of appointing body — Principles applicable.

Executive act — Approval by Minister of Education pursuant to s. 14(1) of the Cyprus Organization of Athletics Law 41/69 of the decision of the Organization to appoint the interest party to the post of Director - General — The approval bestows retrospectively executory character to such decision — Therefore, the recourse was rightly directed against such decision.

On 4th November, 1986, the Ag. Director-General of the respondent Organisation moved it to fill the vacant post of Director-General. An advertisement in the daily press elicited only two applications, one from the

Ag Director-General interested party and one from the applicant The Board of the respondents considered the applications for appointment on 2 12 86 They decided to call the candidates to an interview as an aid to the assessment of their capabilities The two candidates were invited to an interview on 16 12 86 The minutes of the respondents indicate that the acting Director-General took part at the meeting of 2 12 86 and participated in the decision taken Following the interviewing of the candidates on 16 12 86 the respondents decided that the interested party was the best of the two candidates, and chose him for the post of Director-General of the Organization

Hence this recourse

Held, annulling the sub judice decision (1) This recourse is directed against the aforesaid decision of 16 12 86, which was later approved by the Minister of Education pursuant to section 14(1) of Law 41/69 The act of the approval is a process entailing the bestowal retroactively of an executory character on the decision of those trusted with power to appoint, K O A Hence, the objections to the justiciability of the recourse cannot be sustained

(2) The scheme of service for the sub judice post was made by the respondent Organisation with the approval of the Council of Ministers, pursuant to Reg 3(1) of the aforesaid Regulations Applicant complained that the scheme is ultra vires the law in that it was not enacted in the manner provided by s 19(3) of the Law However Reg 5(1) was enacted in such a manner This regulation did not entail sub-delegation of legislative authority but regulation of a subject of executive power Schemes of service constitute, as can be deduced from the decisions of the Supreme Constitutional Court in *Theodoros G Papapetrou v Republic*, 2 R S C C 61 and *Ishin v Republic*, 2 R S C C 16 aspects of executive power, as such they are par excellence amenable to regulation by the executive branch of public authority Of course, the power is usually exercised by public instrument in the interest of certainty of the administrative process, when this occurs the scheme takes legislative form and must conform to statutory norms

The submission that the power conferred by Reg 5 is confined to the introduction of schemes of service for personnel other than the Director-General cannot be upheld, because the plain provisions of Reg 5 leave no doubt that the power conferred thereby is all embracive and encompasses every member of the staff of the Authority, including the Director-General

(3) To safeguard the independence and impartiality of collective organs, rules have been evolved designed to ensure that standards are observed compatible with independent exercise of discretionary powers

If confidence of the public in the Administration is apt to be impaired owing to the peculiar relationship of anyone of the members of a collective organ to the subject matter of the decision, the decision is deemed to be fraught with bias The test is not that of actual bias but of the appearance of bias

In this case, the participation of the Acting Director-General in the preparatory stages of the administrative act defied the independence of the collective organs and exposed its deliberations to the charge of bias.

(4) The inescapable inference deriving from the minutes of the decision is that respondents treated the eligibility of the interested party under the scheme of service, a foregone conclusion.

Clause 2 of the scheme of service reads: At least six years experience in a responsible position; out of which at least three years shall entail administrative and/or supervisory experience.

In the light of the relevant material before the Commission, concerning the career of the interested party is is unclear whether he had the three-year experience, envisaged by the scheme of service deriving from the exercise of administrative or supervisory experience.

Sub judice decision annulled.
No order as to costs.

Cases referred to:

Vassiliou v. Republic (1982) 3 C.L.R. 220;

Protoyeros v. Republic (1987) 3 C.L R. 2025,

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

Ishin v. Republic, 2 R.S.C.C. 16;

Kallouris v. The Republic, 1964 C.L R. 313;

Anisminic v. Foreign Compensation Commission [1969] 1 All E.R. 208,

R. v. Sevenoaks [1975] 1 All E.R. 220;

R. v. Edmundsbury BC [1985] 3 All E.R. 234;

Republic v. Pericleous (1984) 3 C L.R. 577;

Angelidou and Others v. The Republic (1982) 3 C.L.R. 520.

Recourse.

Recourse against the decision of the respondent to promote the interested party to the post of Director-General of the Cyprus Organisation of Athletics in preference and instead of the applicant.

N. Papaefstathiou, for the appliant.

M. Christofides, for the respondent.

Cur. adv. vult.

* *(See, Greek Administrative Law by Kyriacopoulos, General Part, 4th Ed., Tome B, pages 101-103).*

PIKIS J. read the following judgment. In August 1986 the post of Director-General of the Cyprus Organisation of Athletics (hereafter referred to as K.O.A. - the acronym of the name of the Organisation in Greek), became vacant. Charalambos Koukoularides, headmaster of secondary education, a qualified instructor of Physical training, was appointed Acting Director-General of the Organisation. It does not appear from the material before the Court why the respondents failed or omitted to fill the post and chose instead the stop gap procedure of making an acting appointment. Had they done so there would have been no room for the charges of bias, made by the applicant founded on the participation of Mr. Koukoularides in the decision making process. Be that as it may we shall proceed to recount the events that led to the filling of the post by the appointment of Mr. Koukoularides, the interested party in these proceedings.

On 4th November, 1986, the Ag. Director-General moved the respondents to fill the vacant post of Director-General - a submission that was duly accepted - whereupon the post was advertised. An advertisement in the daily press elicited only two applications, one from the interested party and one from Mr. Hadjivassiliou who had served on an acting basis as Director-General of the Organisation for a period of more than two years between 1982 and 1984. The Board of the respondents considered the applications for appointment on 2/12/86. They decided to call the candidates to an interview, as an aid to the assessment of their capabilities. The two candidates were invited to an interview on 16/12/86. The minutes of the respondents indicate that the Acting Director-General took part at the meeting of 2/12/86 and participated in the decision taken. Following the interviewing of the candidates on 16/12/86 the respondents decided that the interested party was the best of the two candidates; and chose him for the post of Director-General of the Organisation. It is apparent from the reasons given for their decision that the successful performance of Mr. Koukoularides at the interview was one of the principal reasons for his choice in preference to Mr. Hadjivassiliou. The decision was submitted to the Minister of Education for approval, pursuant to the provisions of s. 14(1) of the Cyprus Organisation of Athletics Law 41/69*. Approval was given on 20/12/86 rounding the process of appointment of the interested party to the post of Director-General.

* (Amended by Laws 22/72, 2/73, 51/77, 79/80 and 87/85)

The present proceedings were instituted on 15/1/87 and are directed against the decision of the respondents of 16/12/86. Respondents objected to the justiciability of the subject matter of the recourse arguing that it was directed against a non executory act. They contended that the decision of 16/12/86 was not executory and on that account inamenable to judicial review under Article 146.1 of the Constitution. Only the decision of the Minister had the attributes of an executory act, a decision no longer open to review because of the effluxion of the 75-day period stipulated by para. 3 of Article 146. Applicant refuted the validity of the above submission and argued that the approval of the Minister could not be separated from the decision of the respondents of 16/12/86. Ministerial approval merely fledged the decision of K.O.A. into an executory one. The confirmation of the Minister simply added the missing link to the genesis of the executory act to appoint the interested party to the post. The submission made on behalf of the applicant finds support in Greek jurisprudence* which establishes that approval by a body other than that trusted by statute with decision making, is a complementary act, providing the confirmation required by the Statute. Approval furnishes the external support required for the validation of the decision. I am wholly in agreement with the above understanding of the nature of the act of approval, a process entailing the bestowal retroactively of an executory character on the decision of those trusted with power to appoint, K.O.A. Hence, the objections to the justiciability of the recourse cannot be sustained. We shall proceed to examine the merits of the complaints allegedly invalidating the appointment of the interested party.

Marshalling as comprehensively as I can the grounds upon which the decision is challenged, they can be summarised as follows:-

(A) Invalidity of the scheme of service under which the applications were invited and the appointment was made. In the submission of applicant the scheme of service is ultra-vires the provisions of s.8(4) and s. 19(3) of the law.

(B) Lack of the attributes of impartiality of the Board of the respondents occasioned by the participation of the Director-General at its meetings of 4/11/86 and 2/12/86.

* *See, Greek Administrative Law by Kyriacopoulos, General Part 4th Ed. Tome B. pp. 101-103.*

(C) Inadequacy of the inquiry into the qualifications of the interested party. On examination of the minutes of the respondents it emerges that they presumed that the interested party had the requisite qualifications for appointment; no reference is made to any inquiry to ascertain whether he possessed the qualifications required by the scheme of service. The omission is not fatal to the decision provided the assumption made is indisputably supported by the material in the file of the case*. According to the applicant the material in the file relevant to the qualifications of Mr. Koukoularides did not have that effect. In particular, the material did not establish that he possessed the qualifications envisaged by para. (b) and para. (d) of the scheme of service. A big question mark, it was argued, hangs over the length of administrative and supervision experience of the interested party.

(D) The reasoning supporting the choice of the interest party is in part unsound; the part based on personal knowledge of the members of the capabilities of the candidates.

(E) Abuse of power arising from alleged disregard of the superior merits of the applicant.

Below, we shall deal with the contentious issues in the order elicited above:-

(i) *Validity of the scheme of service:* Section 8(4) of the law provides that the structure of the Organisation, terms of service of personnel and matters associated therewith, as well as the Code for the discipline of personnel, are subject to regulation. Power to regulate these matters is assigned to the Council of Ministers by s. 19 of the law subject to approval by the House of Representatives in the manner envisaged by subsection 3. In exercise of the rule making power entrusted to them the Council of Ministers enacted the Cyprus Organisation of Athletics (Structure and Terms of Service) Regulations of 1975 promulgated, after approval by the House, on 28/2/75**. In accordance with Reg. 5(1) the duties and responsibilities of the personnel of the Organisation, as well as the qualifications necessary for appointment, fall to be defined by schemes of service made by K.O.A. and approved by the Council

* *(See, inter alia, Republic v Vassiliou (1982) 3 C.L.R. 220 and, Protoyeros v. Republic (1987) 3 C.L.R. 2025*

** *(Regulatory Administrative Act 42/75 - No. 42).*

of Ministers. Counsel for the applicant argued that the schemes of service made under the provisions of this Regulation were ultra-vires the law in that they were not enacted in the manner laid down in s. 19(3). It is axiomatic in law that a body vested with competence to make subsidiary legislation cannot sub-delegate the exercise of the power. The law making power of the delegate must derive directly from the enabling enactment and be confined within the four corners of the authorisation. By delegating power to the board of the respondents, be it subject to the approval of the Council of Ministers, to make the scheme of service, the delegate body exceeded, it was argued, the terms of their mandate by sub-delegating authority to another body to regulate aspects of it. I cannot sustain the submission. Because, the assignment to the respondents of responsibility to make the schemes of service did not entail sub-delegation of legislative authority but regulation of a subject of executive power. Schemes of service constitute, as can be deduced from the decisions of the Supreme Constitutional Court in *Theodoros G. Papapetrou v. Republic** and *Ishin v. Republic***, aspects of executive power; as such they are par excellence amenable to regulation by the executive branch of public authority. Of course, the power is usually exercised by public instrument in the interest of certainty of the administrative process; when this occurs the schemes take legislative form and must conform to statutory norms.

Another objection taken to the validity of the schemes of service is the following: The power conferred by Reg. 5 is confined to the introduction of schemes of service for personnel other than the Director-General. The submission was founded on the distinction made between the position of the Director-General and other employees in s.2, the definition section of the law, and the absence of any reference to the Director-General in Reg. 5. I cannot uphold this submission either for the plain provisions of Reg. 5 leave no doubt that the power conferred thereby is all embracive and encompasses every member of the staff of the Authority, including the Director-General.

(ii) *Participation of Mr. Koukoularides at the preparatory stages of the decision-making process:* The attributes of impartiality of the Administration are fundamental to the efficacy of the

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* (2 R.S.C.C. 61).
** (2 R.S.C.C. 16).

administrative process and the sustenance of public confidence in its mission. To safeguard the independence and impartiality of collective organs, rules have been evolved designed to ensure that standards are observed compatible with independent exercise of discretionary powers. Deeds compromising the necessary impartiality in the eyes of right thinking members of the community make decisions taken assailable for maladministration. Sound administration is grounded on the independence of judgment of collective organs.

Greek jurisprudence has evolved the following test to determine the impartiality of collective orgnans*.

> Is the relationship of anyone of its members to the subject raised for decision such as to create doubts about the moral freedom of the member or members to bring independent judgment to bear on the subject under review? The measure turns again on the reaction of right-thinking members of the community.

If confidence of the public in the Administration is apt to be impaired owing to the peculiar relationship of anyone of the members of a collective organ to the subject matter of the decision, the decision is deemed to be fraught with bias. The test is not that of actual bias but of the appearance of bias. These principles were adopted and found expression in *Georghios Michael Kallouris and The Republic***. Triantafyllides. J., as he then was, indicated that the prinicple at issue is an aspect of the rules of natural justice aimed to ensure sound standards of administration.

In England too, where a body of administrative law is of late systematically developed***, kindred rules have been evolved to underpin the independence of administrative bodies. The decision of *Glidewell, J., in R. v. Sevenoaks**** is of especial interest because it suggests that the criterion by reference to which the impartiality of public bodies is tested is not the judicial one for bias, with the focus on the reactions of the reasonable man, but a more formal one associated with the quality of the acts of members

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** (See, Conclusions derived from the Greek Council of State 1929-59, p.111).*

*** 1964 C.L.R. 313.*

**** (Especially after the decision in Anisminic v. Foreign Compensation Commission [1969] 1 All E.R. 208; see, also, Vassiliou v. Republic (1982) 3 C.L.R. 220).*

***** [1975] 3 All E.R. 226 - see, also, R. v. Edmundsbury BC [1985] 3 All E.R. 234.*

of the body before the decision is taken. If the relationship of any member to the subject matter is such as to objectively prevent him from taking part in the decision-making process, participation in the decision entails an impropriety inconsistent with the proper exercise of the power.

Whichever test we apply in this case, we arrive at the same conclusion, namely that the participation of the Acting Director General in the preparatory stages of the administrative act defied the independence of the collective organs and exposed its deliberations to the charge of bias. Right-thinking members of the community, duly acquainted with the history of the appointment would, to my comprehension doubt the independence of judgment of the decision-making body. The Ag. Director-General, a person with a vital personal interest in the decision, was first allowed to move the machinery for filling the vacant post and more significantly still took part in the decision, choosing one of the means of testing the candidates.

Adequacy of the inquiry into the qualifications of the interested party: The inescapable inference deriving from the minutes of the decision is that respondents treated the eligibility of the interested party under the scheme of service, a foregone conclusion. The applicant doubted the validity of his assumption or, more accurately, suggested through his counsel that the material in the file of the case did not necessarily establish that the interested party had the requisite administrative experience or experience in the supervision of personnel, required by clauses 2 and 4 of the scheme of service. Clause 2 of the scheme of service requires (Appendix 1 to the Opposition):-

> «Εξαετής τουλάχιστο πείρα σε υπεύθυνη θέση, από την οποία τριετής τουλάχιστο διοικητική ή/και επoπτική πείρα.»
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> «At least six years experience in a responsible position; out of which at least three-year shall entail administrative and/or supervisory experience.»

The case for the applicant is that the material in the file does not prove that the interested party had the administrative experience or experience in supervision, envisaged by the scheme of service. In the context of the scheme, administrative experience connotes experience acquired from the exercise of administrative duties deriving from the management of a department or section of an

authority or organisation. The alternative, supervisory experience, connotes experience gained from the supervisory of personnel or a subordinate department. The material before the respondents did not, in the submission of applicant, satisfy this requirement either. Furthermore, it was suggested that the material was also inconclusive with regard to the qualifications required by clause 4 of the scheme of service, requiring managerial, organisational and administrative ability. Unlike clause 2, clause 4 focussed on ability, not experience.

Examination of the material before the respondents reveals that interested party served as a teacher of physical training upto the year 1977. Discharge of those duties did not of itself suggest acquisition of administrative or supervisory experience in the sense of clause 2. Thereafter, the interested party was promoted and served for a period between 1977 and 30/4/79 as Assistant Headmaster of a secondary school. The exercise of these duties does ordinarily entail the exercise of administrative duties and supervision of personnel, and a safe assumption could be made that corresponding experience was gained during that interlude. The precise length of service in that capacity is unspecified. No inquiry was made to ascertain its duration. No assumption could have been made about the length of the interested party's service in that position.

On 7/4/79 the interested party was appointed adviser to the President of the Republic on security matters (security adviser); a presidential appointment made by instrument. The duties of security adviser are nowhere identified or detailed. In the absence of such information no one could presume that they involved the exercise of administrative duties or the supervision of personnel. The position of an adviser does not ordinarily entail any duties other than rendering advice. Evidently, the interested party had not severed his links with the educational service for while still engaged as adviser he was, in the year 1984, promoted to headmaster secondary education. Nonetheless he continued carrying on the duties of adviser until 1986. In March 1986, following the termination of his appointment as adviser to the President, he assumed duties of Headmaster secondary school that he carried out until his appointment as Ag. Director-General of K.O.A. at the end of August. Undoubtedly, during the period of his service in the above two capacities, he did exercise administrative duties and supervised personnel.

In the light of the above, it is unclear whether he had the three-year experience, envisaged by the scheme of service, deriving from the exercise of administrative or supervisory duties*. The testimonials given the interested party by the President of the Republic through the Director of his Office, did not bridge the gap in that they did not establish that he carried out administrative duties or that he supervised personnel during his service as security adviser to the President. They did satisfy, however, the requirements of clause 4 of the scheme of service because they spoke of his initiative, devotion, hard work, administrative and organisational abilities.

In the light of the above, the absence of any inquiry by the respondents into the qualifications of the interested party with a view to ascertaining his eligibility under clause 2, cannot be bridged by the material in the file. An inquiry is necessary and they must address themselves to that question when they are seized of the matter anew.

KNOWLEDGE OF THE ABILITIES OF THE CANDIDATES BY MEMBERS OF K.O.A. — Personal knowledge: The principle appears to be that personal knowledge of the abilities of a candidate by members of the appointing body may be relied upon as an aid to the assessment of the qualities of the candidates. But it should not be relied upon in substitution of the objective data bearing on their worth. This proposition finds support in the decision of Triantafyllides, P., in *Angelidou and Others v.* Republic**. Nonetheless, a note of caution must be added. Members of a collective organ must never personalise the exercise of their functions. Personal knowledge must as a rule derive from knowledge of the way the candidate carried out his official duties.

I need not probe this aspect of the case further in view of the conclusions already reached. For similar reasons, I shall refrain from giving consideration to submissions relevant to the merits of the candidates.

** The material date for determining whether a candidate possesses the requisite qualifications is the time limited for the submission of applications — see, Republic v. Pericleous (1984) 3 C.L.R. 577.*

*** (1982) 3 C.L.R. 520.*

In the result the sub judice decision is annulled. It is declared to be wholly void pursuant to the provisions of article 146.4(b) of the Constitution.

Let there be no order as to costs.

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Sub judice decision annulled. No order as to costs.