

1988 January 16

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

IOANNA PANAYIOTOU HADJICHARALAMBOUS,

Applicant.

v.

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

Respondents.

(Case No. 36/84).

Administrative act—Legality of—It must be examined on the basis of the legal regime prevailing at the time it was taken—Appointments of educational officers on contract for a limited duration—Decisions in respect of periods 1980/81 and 1981/83 annulled—Sub judice decision relates to the period 1983/84—It is a new and independent decision and, therefore, should be judged on the basis of the legal regime prevailing at the time it was taken, and not that prevailing at the time the annulled decisions had been taken.

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The applicant was appointed on a special contract to the post of Instructress in Gold-smithing-Silver-smithing at the Technical School of Nicosia for eight periods per week as from the 6th October, 1976 and at the Professional School Larnaca, for ten periods per week as from the 28th February 1977. This special contract of the applicant was renewed successively until August 1980.

For the reasons appearing in *HadjiCharalambous v. The Republic* (1981) 3 C.L.R. 309, the interested party was appointed for the period 1980/1981 to the post instead of the applicant.

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Upon the annulment of the decision on the ground of misconception, the interested party was once more appointed but her appointment for the period 1981-1983 was annulled in *HadjiCharalambous v. The Republic* (1986) 3 C.L.R. 2703.

5 In the meantime the Full Bench of this Court gave its judgment in the case of *Papakyriacou v. Republic* (1983) 3 C.L.R. 870 in which the following was held:

10 "That the Council of Ministers had no power under s. 27(1) of Law 10/69 to decide who should be appointed, be it by renewal of contract; that their powers were confined to deciding the mode of filling a vacant post by permanent, temporary, or by appointment on contract and not by selection of the candidate for the post thus to be filled".

15 Notwithstanding the second annulment, the respondent Commission decided in the light of *Papakyriakou v. Republic*, supra to re-appoint for the period 1983/1984 the interested party to the post in question on the ground that her qualifications were superior to those of the applicant.

20 One of the issues that arose for determination was whether the respondent Commission ought to have ignored the legal position as it was expounded by the Full Bench of this Court in the *Papakyriacou* case supra or not.

25 Held, *dismissing the recourse*: (1) The sub judice decision of the 11th October 1983 was a new and independent decision in respect of appointment for the school year 1983-1984, for which there had not been an annulling decision, unlike the decisions taken in respect of the years 1980-1981 and 1981-1983 which decisions were the subject of the two recourses of HadjiCharalambous and with which the respondent Commission ought to have complied with. It follows that the law applicable was the law as it stood at the time the sub judice decision was taken. The legality of the sub judice decision has to be examined by this Court on the basis of such factual and legal regime and not of that that prevailed at the time when the two other separate and independent acts were to be considered as a result of their respective annulment.

35 (2) It is obvious that the interested party had better qualifications than the applicant and therefore the decision of the respondent Commission was reasonably open to it;

*Recourse dismissed.
No order as to costs.*

Cases referred to:

HadjiCharalambous v. Republic (1981) 3 C.L.R. 309;

HadjiCharalambous v. Republic (1986) 3 C.L.R. 2703;

PapaKyriacou v. Republic (1983) 3 C.L.R. 870;

Pieris v. Republic (1983) 3 C.L.R. 1054;

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Tornaris v. Republic (1983) 3 C.L.R. 1292;

Savva v. Republic (1984) 3 C.L.R. 1391.

Recourse.

Recourse against the decision of the respondent to appoint on contract for the year 1983-1984 the interested party to the post of Instructress in Technical Education in preference and instead of the applicant. 10

A. S. Angelides, for the applicant.

G. Erotocritou (Mrs.), Senior Counsel of the Republic, for the respondent. 15.

Chr. Mitsides, for the interested party.

Cur. adv. vult.

A. LOIZOU J. read the following judgment. By the present recourse the applicant seeks: 20

(a) A declaration of the Court that the refusal and/or omission of the respondents to appoint her on contract to the post of Instructress in Gold-smithing and Silver-smithing in spite of the judg-

ments of the Supreme Court in recourses 412/80 and 384/81, is null and void and of no effect whatsoever and that what was omitted ought to be done:

5 (b) A declaration of the Court that the act or decision of the respondents dated 5th November, 1983, to appoint on contract for the year 1983-1984 Christina Markidou hereinafter called the interested party instead of the applicant, is null and void and of no the effect whatsoever;

10 (c) Declaration of the Court that the omission of the respondents to reinstate and/or appoint on contract the applicant and/or to comply with the judgments of the Supreme Court in recourses 412/80 and 384/81, is contrary to Law.

The facts of the case are simply these. The applicant between the years 1964-1973 did at first her apprenticeship and then
15 worked as a Gold-smith - Silver-smith at the work-shop of Mr. Constantinides in Nicosia, and between the years 1973-1976 she worked on her own. From September 1966 to June 1970 she attended a cycle of lessons of the Apprenticeship Scheme organized by the Ministry of Labour and Social Insurance and upon its successful completion she was awarded a certificate of specialization
20 in Silver - smithing - Gold - smithing.

The applicant was appointed on a special contract to the post of Instructress in Gold-smithing - Silver-smithing at the Technical School of Nicosia for eight periods per week as from the 6th October, 1976, and at the Professional School Larnaca, with ten periods per week as from the 28th February 1977. This special contract of the applicant was renewed successively for employment until August 1980.
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For the reasons appearing in my judgment reported as *Ioanna Panayiotou HadjiCharalambous v. The Republic* (1981) 3 C.L.R
30 309, the interested party was appointed to the post instead of the applicant.

Upon the annulment of that decision on the ground of misconception and the case was re-examined the applicant was once more not appointed and by the judgment of the learned President of the Court in recourse No. 384/81 delivered on the 28th May, 1983, reported as *Ioanna Panayiotou HadjiCharalambous v. The Republic* (1986) 3 C.L.R. 2703 that second decision of the respondents was annulled. 5

In the meantime the Full Bench of this Court gave its judgment in the case of *Papakyriakou v. The Republic* (1983) 3 C.L.R. 870, in which the following was held: 10

"That the Council of Ministers had no power under s 27(1) of Law 10/69 to decide, who should be appointed be it by renewal of contract; that their powers were confined to deciding the mode of filling a vacant post by permanent, temporary, or by appointment on contract and not by selection of the candidate for the post thus to be filled: that, therefore, the Council of Ministers in deciding who should be appointed exceeded their powers and their suggestion for filling the post by the renewal of existing contracts ought to be disregarded by the respondents; that far from disregarding them, the respondents approved the recommendation of the Council of Ministers in this respect and appointed officers who have served during the preceding year on a contractual basis; that they acted contrary to the provisions of the law, notably s. 5 (1), making them in the absence of provision to the contrary the sole judges of who should be appointed. This duty they failed to carry out completely. They failed to exercise any discretion in the matter. They merely rubber stamped the decision of the Council of Ministers; accordingly the appeal must be allowed". 15
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The misconception in the first *HadjiCharalambous* case was that the selection of the interested party was made not because of a comparison of her respective merits and qualifications, with those of the applicant, but because of a misconception as to the effect of an agreement between the Professional Organization of Secondary School Teachers and the Government which was approved by the Council of Ministers. In the second case the 30
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learned President concluded that as no appeal was filed against the first judgment he was of the opinion that the *HadjiCharalambous* case was binding on the respondent Commission when it re-examined the case of the applicant on the 16th October, 1981. In fact, as it appears from the statement of the facts in the second *HadjiCharalambous* case the interested party was reappointed once again on contract instead of the applicant retrospectively as from the 23rd October, 1980. The learned President then held that: -

10 "Even though the respondent Commission has stated in its minutes for the 16th October 1981 that it appointed on contract the interested party instead of the applicant because it found the interested party to be better qualified than the applicant it seems to me that had the Commission felt bound, as it ought to have
15 felt bound, by the aforementioned decision of the Council of Ministers and the judgment in the *HadjiCharalambous* case, supra, to reappoint the applicant on contract and, also, had the Commission not taken erroneously the view that it could not decide itself to renew the appointment on contract of the appli-
20 cant, it would not have appointed the interested party on contract instead of the applicant".

In re-examining the case of the applicant after the annulment of their decision by the judgment of the learned President, the respondent Commission at its meeting of the 11th October 1983,
25 decided, as it appears from their relevant minute (Appendix B), the following:

"B. The Secondary Education.

4. Appointments on contract.

(a) Markidou Christina (PMP 6983)

30 Instructress for Gold-smithing".

The Commission in view of the memorandum of the Head of

Technical Education No. 502.83 and dated 6th October, 1983, decided to appoint on contract the aforesaid Instructress from 1st September 1983 - 31st August 1984 for ten periods at the Technical School Nicosia.

The Educational Service Commission has in mind the judgment of the Supreme Court regarding Instructress Ioanna Hadji-Charalambous (PMP 6345) but believes that the judgment of the Supreme Court in Appeal 293 is the one that has to be applied to the present case. Miss Markidou is chosen for this post on account of higher qualification. 5 10

It may be noted here that Appeal No. 293 referred to in the said minute, is that case of *Papakyriakou v. The Republic* herein-above cited.

Furthermore the aforesaid letter of the Director of Secondary Education dated 6th October, 1983, (Appendix A), informs the respondent Commission that there is a vacancy for ten periods for the subject of Silver-smithing and Gold-smithing in the first Technical School Nicosia and requests that they arrange the posting of the necessary staff. 15

A comparison of the qualifications of the applicant and the interested party may complete the factual background of the case. The applicant attended (a) for four years the Phaneromeni Gymnasium, (b) apprenticeship training from September 1967 to June 1970, certificate of completion of the lessons in the specialization of Silver-smithing - Gold-smithing, (c) apprentice to Silver-smith with Nicos Constantinides 1964-1967, (d) employee by Nicos Constantinides Silver-smith 1967-1973, (e) self-employed at Nicos Constantinides silver-smith 1973-1976. 20 25

The interested party (a) graduated the Larnaca Gymnasium, (b) Diploma of the State Institute of Florence (Diploma Di Licenza Dal Corso Di Magistero), three year course, (c) Diploma of the State Insitute of Art for Teaching gold-smithing. 30

It is obvious that the interested party had better qualifications than the applicant and therefore the decision of the respondent Commission was reasonably open to it, having been taken in the exercise of its administrative discretion.

5 There is, however, the last question to be resolved, namely whether the respondent Commission ought to have ignored the legal position as it was expounded by the Full Bench of this Court in the *Papakyriakou case* (supra) or not. On this point extensive argument has been advanced by counsel on both sides, who referred me inter alia, to the case of *Pieris v. The Republic* (1983) 3
 10 C.L.R. 1054 at p. 1065; *Tornaris v. The Republic* (1983) 3 C.L.R. 1292 at p. 1299; *Savva v. The Republic* (1984) 3 C.L.R. 1391, at p. 1395 and to the textbook by Vegleris "The Compliance of the Administration with the Decisions of the Council of
 15 State" at p. 99, as well as to Kontoyiorga - Theoharopoulou "Consequences of the Annulment of the Administrative Act as against the Administration", p.257.

To my mind the Law applicable was the Law at it stood on the day the decision was taken as the sub judge decision of the 11th
 20 October 1983, was a new and independent decision in respect of appointment for the school year 1983-1984, for which year there had not been an annulling decision, unlike the decision taken in respect of the years 1980-1981 and 1981-1983 which decisions were the subject of the two recourses, *Hadji Charalambous* (supra), and with which the respondent Commission ought to have
 25 complied with. That this is so it is clear from the fact that the applicant in respect of the two periods for which the decision of the respondent Commission was annulled had instituted in the District Court of Nicosia proceedings under Article 146(6) of the
 30 Constitution for compensation and indeed compensation was paid for the year 1980-1981, whilst the civil action for the years 1981-1983 is still pending.

The sub judge decision therefore, had to be examined in the light of the legal and factual situation prevailing at the time it was
 35 taken as same was explained or expounded in the judgment of

the Full Bench of this Court in the *Papakyriakou* case and naturally its legality has to be examined by this Court on the basis of that factual and legal regime and not that that prevailed at the time the two other separate and independent acts were to be considered as a result of their respective annulment. - 5

That the sub judice decision was a separate and independent act not the subject of an annulling decision of this Court before it was challenged by the present one, is further established by the fact that the contracts of employment offered to the interested party were yearly contracts since 1981. 10

For all the above reasons the recourse is dismissed but in the circumstances there will be no order as to costs.

*Recourse dismissed.
No order as to costs.*