

1983 April 29

[MALACHTOS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

VEDAT ERTAY,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE COUNCIL OF MINISTERS.

Respondent.

(Case No. 56/83).

Administrative Law—Executory acts—Only executory acts can be attacked by a recourse under Article 146.1 of the Constitution—An “act” or “decision” in the sense of this Article means an act or decision falling in the domain of public law and not of private law—Alleged omission to employ applicant in the Public Service pursuant to an undertaking given by respondents—Falls in the domain of private law and is not of an executory nature—It cannot be made the subject of a recourse under the above Article.

The applicant was a Turkish Cypriot citizen of the Republic and a teacher of Turkish Literature in secondary education. Up to 1967 he was employed in Turkish secondary education schools in Cyprus when he left for Turkey, where he worked in various private schools. In 1980 he emigrated to the United Kingdom where he stayed till July, 1982. By application dated 29th September, 1981, to the High Commissioner of the Republic in the United Kingdom, the applicant was asking to be informed as to whether if he returned to Cyprus he could secure employment in the Government Service.

The Cyprus High Commissioner after consulting the Ministry of Interior by letter dated 8th July, 1982 informed the applicant as follows:-

“With reference to your wish to return and settle down in Cyprus I inform you that when you return to Cyprus arrangem-

ents will be made for your employment by the Government of the Republic of Cyprus”.

The applicant upon receiving the letter returned to Cyprus and when he was informed by the respondents that no arrangements could be made for his employment in the Government Service as there were no vacant suitable posts he filed the present recourse for a declaration that the refusal and/or omission of the respondent to offer him employment in the Government Service was null and void. 5

On the preliminary objection raised by the respondents that no executory administrative act or omission was attacked by the recourse and that the subject of the recourse did not fall in the domain of public law but in the domain of private law: 10

Held, that only executory acts can be attacked by a recourse under Article 146.1 of the Constitution and not all acts emanating from an administrative organ acting as such; that executory administrative acts are acts by means of which there is expressed the will of the Administration aiming at the production of a legal result concerning the citizen and which entails its immediate execution by administrative means—(see Conclusions from case Law of the Greek Council of State 1929 pages 236 to 237); that the word “act” or “decision” in Article 146.1 of our Constitution, means an act or decision falling in the domain of Public Law only and not of Private Law; that the alleged omission of the respondents to employ the applicant in the Public Service, falls in the domain of private law and, therefore, is not of an executory nature; that, consequently, it cannot be the subject-matter of a recourse under Article 146.1 of the Constitution. 15 20 25

Application dismissed. 30

Cases referred to:

Colocassides v. The Republic (1965) 3 C.L.R. 542 at p. 551;

Pavrides v. The Republic (1977) 3 C.L.R. 421 at p. 425;

HjiKyriacou v. HadjiApostolou and Others, 3 R.S.C.C. 89;

Valana v. The Republic, 3 R.S.C.C. 91. 35

Recourse.

Recourse against the refusal of the respondent to offer applicant employment in the Public and/or Government Service.

P. Ioannides, for the applicant.

5 *N. Charalambous*, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

MALACHTOS, J. read the following judgment. The applicant is a Turkish Cypriot citizen of the Republic and a teacher of
10 Turkish Literature in secondary education. Up to 1967 he was employed in Turkish secondary education schools in Cyprus when he left for Turkey, where he worked in various private schools. In 1980 he emigrated to the United Kingdom where he stayed till July, 1982. By application dated 29th September,
15 1981, to the High Commissioner of the Republic in the United Kingdom, the applicant was asking to be informed as to whether if he returned to Cyprus he could ensure employment in the Government Service. The High Commissioner remitted the application to the Ministry of Interior which asked for more particulars about the applicant. The said particulars were given by
20 letter dated 3rd February, 1982, of the High Commissioner to the Ministry. By letter dated 20th February, 1982, the Ministry of Interior was informing the High Commissioner that if the applicant returned to Cyprus, arrangements would be made for his employment in the Service of the Government of the Republic. The Cyprus High Commissioner by letter dated 8th July,
25 1982, informed the applicant accordingly. This letter reads as follows:

30 “With reference to your wish to return and settle down in Cyprus I inform you that when you return to Cyprus arrangements will be made for your employment by the Government of the Republic of Cyprus.”

The applicant soon after he received the above letter returned to Cyprus and visited the Ministry of Interior for the relevant
35 arrangements as well as the Ministries of Foreign Affairs and Education to which he was referred to, without any result.

The respondent authority put forward the allegation that no arrangements could be made for his employment in the Govern-

ment Service as there was no vacant suitable post in the Public Service to which the applicant could be appointed.

As a result, the applicant filed on the 10th February, 1983, the present recourse claiming:

A declaration of the Court that the refusal and/or omission of the respondents to offer to the applicant employment in the Public and/or Government Service, is null and void and of no legal effect and that whatever has been omitted should have been performed. 5

The legal grounds on which the application is based, as stated therein, are the following: 10

1. The respondents unlawfully and arbitrarily refused and/or omitted to comply with their undertaken obligation to employ the applicant in the Public and/or Government Service, thus flagrantly violating their categorical promise by which they were bound to the applicant. 15

2. The respondents are acting in excess and/or abuse of power disregarding a recognised and/or vested right of the applicant for employment in the Public and/or Government Service.

3. The respondents are exercising their discretionary powers in a defective manner. 20

4. The right of the applicant for equal treatment under Article 28 of the Constitution has been flagrantly violated.

5. The respondents omitted to take into account substantial elements and, in particular, the fact that the applicant returned to his mother land after being given categorical and unreserved assurance that he would be employed by the Government of the Republic, and/or took into account elements which could not legally affect their judgment and/or decision, and 25

6. The refusal and/or omission of the respondents lacks of any and/or legal reasoning. 30

On the other hand, the respondents based their opposition on three legal grounds, namely,

(a) that no executory administrative act or omission is attacked by the recourse; 35

(b) that the subject of the recourse does not fall in the domain of public law but falls in the domain of private law; and

(c) that the respondents did not omit any legal action which were bound to perform.

- 5 On the 16th of April, 1983, when this recourse came on for hearing, counsel for the parties were heard only on the legal grounds on which the opposition is based, in accordance with the directions of the Court and the consent of both sides.

10 Counsel for the respondent authority submitted that in the present case there is no omission on behalf of the respondent authority of any legal action which it was bound to perform. So, the alleged omission is not of an executory nature in the sense of Article 146.1 of the Constitution. He further submitted that the proper organ for appointments in the Public Service is
15 the Public Service Commission and its functions are regulated by the Public Service Law of 1967 (Law 33/67) and so the respondents had no authority to appoint the applicant. He also submitted that even if we accept that there is a contractual obligation on behalf of the respondents to appoint the applicant his
20 remedy is in the domain of private law.

Counsel for the applicant, on the other hand, submitted that the refusal of the respondents to appoint the applicant in the Government Service amounts to a nugatory act, and/or omission, which can be attacked by a recourse under Article 146.1 of the
25 Constitution. The respondents by their letter dated 8th July, 1982, bound themselves to employ the applicant who acted upon their express will and returned to Cyprus for this purpose.

It is a fundamental principle of administrative law that only
30 executory acts can be attacked by a recourse under Article 146.1 of the Constitution and not all acts emanating from an administrative organ acting as such.

Executory administrative acts are acts by means of which there is expressed the will of the Administration aiming at the production of a legal result concerning the citizen and which
35 entails its immediate execution by administrative means. (See Conclusions from Case Law of the Greek Council of State 1929 to 1959 pages 236 to 237).

The above principles have been adopted by this Court in, inter alia, *Colocassides v. The Republic* (1965) 3 C.L.R. 542 at page 551 and *Pavlidis v. The Republic* (1977) 3 C.L.R. 421 at page 425.

In *Achilleas HjiKyriakou and Theologia HadjiApostolou and Others*, 3 R.S.C.C.89 and *Savvas Yianni Valana and The Republic*, 3 R.S.C.C.91, it was held by the Supreme Constitutional Court that the word "act" or "decision" in Article 146.1 of our Constitution, meant an act or decision falling in the domain of Public Law only and not of Private Law. 5 10

Article 146.1 of our Constitution is as follows:

"1. The Supreme Constitutional Court shall have exclusive jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, an act or omission of any organ, authority or person, exercising any executive or administrative authority is contrary to any of the provisions of this Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person". 15

Applying the above principles to the facts of the present case, I came to the conclusion that the alleged omission of the respondents to employ the applicant in the Public Service, falls in the domain of private law and, therefore, is not of an executory nature. 20

Consequently, it cannot be the subject-matter of a recourse under Article 146.1 of the Constitution. 25

In the result, this recourse fails and is dismissed.

On the question of costs I make no Order.

Recourse dismissed. No order as to costs.