1965
May, 27,
June 19,
Oct. 22, 29,
1966
Jan. 22,
Feb. 1, 17

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

YIANNAKIS GEORGHIADES

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH THE DISTRICT OFFICER, LIMASSOL

Respondent.

(Case No. 322/62).

YIANNAKIS GEORGHIADES *and* THE REPUBLIC OF CYPRUS THROUGH THE DISTRICT OFFICER LIMASSOL

Municipal Corporations—Municipal Employees—Appointment by the municipal council to the office, inter alia, of Treasurer of the Municipality—Appointment and salary subject to the approval of the Commissioner (now the District Officer) —The Municipal Corporations Law, Cap. 240 section 67(1)(b),(3) and (4)—Vacancy, inter alia, in the said office to be filled within two months of its occurrence—Sub-section (b) of section 67, supra—Respondent's failure to take action under section 67 of the said Law in relation to the applicant's appointment (and salary) to the office of Treasurer of the Municipality of Limassol—The District Officer's (respondent's) omission is a wrongful omission—Because it is an omission contrary to the letter and spirit of section 67 as a whole read together with section 69 of Cap. 240 (supra)—And, further, because in the circumstances of this case is an omission in excess or abuse of powers, vide infra.

Section 67 of the Municipal Corporations Law, Cap. 240—By section 67, when read together with section 69 of the statute, it is not intended to grant a power to the District Officer to control sufficiency or redundancy of the personnel of a Municipality—But only to control the fitness of persons appointed to the five key offices set out in sub-section(1) and the propriety of the salaries of those five as well as of other employees of the Municipality.

Vacancy—Vacancy in any of the five offices enumerated in sub-section (1) of section 67 has to be filled within two months of its occurrence—Section 67(6) of Cap. 240, supra—Failure to act within this statutory period of two months does not absolve the organ concerned of the duty to act even after

1965
May, 27,
June 19,
Oct. 22, 29,
1966
Jan. 22,
Feb. 1, 17

—

YIANNAKIS GEORGHIADES
and
THE REPUBLIC OF CYPRUS THROUGH THE DISTRICT OFFICER LIMASSOL

the expiration of such period — Which period is provided for by way of directive.

See further under Administrative Law, infra.

Municipal Corporations—The Municipal Corporations Law, Cap. 240, section 67—Which section has been operative at the material times by virtue, inter alia, of the Municipalities Laws (Continuation) Law, 1961 (Law No. 10 of 1961) and subsequent Laws extending the operation of the said Law No. 10 of 1961 up to the 31st November 1962, as well as the Municipalities Law, 1964 (Law No. 64 of 1964) section 21.

Administrative Law—See, also, under Municipal Corporations above—Omission in the sense of Article 146 of the Constitution—Omission as distinct from negative decision—A decision taken by an administrative organ not to exercise for the time being the powers vested in such organ, in this case by section 67 of Cap. 240 (supra), amounts to an omission and not to a decision taken in the course of the exercise of such powers—In administrative law an omission may not only consist of failure on the part of an authority to respond when called upon to act, but, also, of an express refusal not to exercise the powers or discretion vested in such authority.

Administrative Law—Discretionary powers—Excess or abuse of powers in the sense of Article 146, paragraph 1, of the Constitution—Undue delay—Undue delay by an administrative authority to take the relevant decision, in this case by the respondent to approve or not under section 67(3) and (4) the applicant's appointment (and salary) to the office of Treasurer of the Municipality of Limassol, may render (and in this case has rendered) the omission both contrary to the letter and spirit of section 67 as well as an omission in excess or abuse of powers—Such omission on behalf of the respondent was held also to be a wrongful omission and in excess or abuse of powers because of the invalidity of the reason which the respondent has given in relation thereto, as follows: (a) because the reason given has not been established;(b) or because of a mistake of law in that the reason given for omitting to deal with the matter in question is beyond the scope of the powers or discretion granted by law, in this case by section 67 (supra); and (c) because, in any event, an administrative officer, in this case the Respondent District Officer, in discharging his duties under the law, in in this case under section 67 of Cap. 240, supra, has to exercise

his own discretion in the matter and decide for himself, without being found to adhere, as he appears to have mistakenly thought, to any line hierarchically laid down for him—When a discretionary power is vested by legislation in an administrative organ the exercise of such discretion cannot be assumed or regulated—except with regard to legality—by any hierarchically superior organ, unless there is express provision to the contrary.

Administrative Law—Hierarchical control—Discretionary powers —Unless there is an express provision to the contrary and except with regard to legality any hierarchically superior organ cannot assume or regulate discretionary powers vested by legislation in an inferior organ.

Administrative Law—Composite act—Consisting of two or more executory acts—They can, therefore, be challenged by a recourse under Article 146 of the Constitution on their own—It follows that in the instant case the applicant quite properly made his recourse against the respondent District Officer only, though his appointment was made by the Municipality.

Constitutional and Administrative Law—Article 29 of the Constitution—Collateral claim thereunder for the failure of the respondent to reply to a letter of counsel for applicant—In the circumstances of this case, the applicant is not entitled to separate relief under Article 29, having proceeded against the omission itself of the respondent District Officer to deal with the subject matter of the aforesaid letter.

Constitutional and Administrative Law—The rule of non retrospectivity of administrative acts or decisions — It may yield to a decision of an administrative court — Compliance with a decision of an administrative court enables, in a proper case, the avoidance of the rule against retrospectivity of administrative acts or decisions.

Section 67 of the Municipal Corporations Law, Cap. 240, provides:

> "67(1). The council (viz. the municipal council) may, and when required by the Commissioner (now the District Officer) so to do shall, appoint fit persons, not being members thereof, to all or any of the following principal offices, that is to say, the office of–
> (*a*) town clerk (*b*) treasurer (*c*).....(*d*).....

(*e*).....:

(2).....

(3) Every appointment under this section shall be subject to the approval of the Commissioner (now the District Officer) and shall not take effect until it is approved by him.

(4) Every person appointed under this section shall hold office.....and shall receive such salary as the council with the approval of the Commissioner (now District Officer) shall appoint:

Provided:.....

(5).....

(6) A vacancy in any of the offices enumerated in subsection (1) of this section shall be filled, in accordance with the provisions of this section, within two months of its occurrence".

Section 69 of Cap. 240 *(supra)* provides.

"69(1). The Council may appoint fit persons, not being members thereof, to such subordinate offices as they think necessary for the purposes of this Law.

(2) The provisions of subsections (2) (4) and (5) of section 67 of this Law shall apply to every appointment made, and to every person appointed, under this section".

Article 29 of the Constitution provides:

"29.1. Every person has the right individually or jointly with others to address written requests or complaints to any competent public authority and to have them attended to and decided expeditiously; an immediate notice of any such decision taken duly reasoned shall be given to the person making the request or complaint and in any event within a period not exceeding thirty days.

(2) Where any interested person is aggrieved by any such decision or where no such decision is notified to such person within the period specified in paragraph 1 of this Article, such person may have recourse

to a competent court in the matter of such request or complaint".

In this recourse the applicant complains, in effect, against the failure of the respondent to take appropriate action under section 67 of Cap. 240 *(supra)* in relation to his appointment as Treasurer of the Limassol Municipality. The salient facts of this case are shortly as follows:-

At its meeting of the 19th September, 1960, the Greek Municipal Council of Limassol appointed applicant to the office of Treasurer as from the 1st October, 1960. Such appointment was in due course communicated to the respondent by letter of the 5th October 1960. Further correspondence followed and on the 16th May, 1961, the Mayor of Limassol wrote again to the respondent complaining that the matter of the applicant's appointment, and salary, had not yet been dealt with and requesting that it should be attended to without further delay. On the 20th May, 1961, the respondent wrote to the Mayor stating that the matter was being "studied by government". On the 13th June, 1961, the respondent wrote to the Mayor, informing him that "government is of the opinion that no permanent appointment ought to be made before the separation of the Municipalities and before are ascertained the real needs of each Municipality in terms of personnel, in view of the expected operation".

On the 16th June, 1961, the Mayor wrote to the respondent protesting against the said letter of the 13th June, and pointing out that the ground given therein for the postponement of appropriate action on the part of the respondent was not well founded; he ascribed the conduct of respondent to party-political reasons. He also drew attention to the fact that the appropriate authority, for the purpose of exercising the powers under section 67 *(supra)*, was the respondent and not the government of the Republic.

The Mayor reverted to the matter by his letters of the 27th June, 1961, and 16th November, 1961. On the 20th November, 1961, the respondent wrote back that government had nothing further to add; on the question of whether or not the District Officer himself had authority himself to approve or not the appointments of municipal employees, the respondent referred the Mayor to Articles 54 and 58 of the Constitution (Article 54 deals with the

powers of the Council of Ministers and Article 58 deals with the powers of a Minister).

The Mayor raised again the matter by a number of letters dated the 14th February, 1962, 16th March, 1962, 6th April, 1962, 3rd July, 1962, 20th August, 1962 and 30th October, 1962. On the 12th November, 1962 the respondent replied to the Mayor stating that the matter was "being studied by the government".

On the 28th November, 1962, counsel for applicant wrote a letter to the respondent, asking that he should be told, the soonest possible, the final decision of the respondent in this matter. No reply was received to this letter, and this recourse under Article 146 of the Constitution was filed on the 31st December, 1962.

The learned Justice in granting the application:-

Held, (1)(*a*) with regard to the issue raised whether there exists in this case a decision of the respondent refusing the approval of the applicant's appointment and salary, or only an omission to deal with the question of such approval under the relevant legislation, on the totality of the material before me I have come to the conclusion that respondent is only guilty of an omission to exercise his powers under section 67 of Cap. 240 *(supra)* in relation to applicant's appointment and salary.

(*b*) It has been urged upon the Court by counsel for applicant that the letter of the respondent of the 13th June, 1961, *(supra)* is a decision in the matter. But, in my opinion, when the said letter is viewed in the context of the whole history of events in this case, it is obvious that it is not a decision taken in the course of the exercise of the powers of respondent under section 67 *(supra)*, but only a decision not to exercise such powers for the time being; in other words it amounts to an omission in the sense of Article 146 of the Constitution, and not to a decision.

(2) It is hardly necessary to stress that in administrative law an omission may not only consist of failure on the part of an authority to respond, when called upon to act, but, also, of an express refusal to exercise the relevant powers vested in such authority.

Ozturk and the Republic, 2 R.S.C.C. 35, *Marcoullides and the Greek Communal Chamber,* 4 R.S.C.C. 7 and *Vafeadis and The Republic,* 1964 C.L.R. 454, *all three cases distinguished.*

2(*a*) The omission of the respondent to deal, under section 67 of Cap. 240 *(supra)*, with the appointment and salary of the applicant, is, in my opinion, contrary to law, and particularly to the letter and spirit of section 67(b) *(supra)* which lays down a time limit of two months for the filling of a vacancy in the office, *inter alia,* of the Treasurer of a Municipality.

(*b*) Failure to act within the said statutory period of two months under section 67(*b*) *(supra)* did not absolve any organ concerned of the duty to take due action, even after the expiration of such period, which is provided for by way of directive (see *Aspri and the Republic,* 4 R.S.C.C. 57, at page 60).

(*c*) In any case, even in the absence of a provision such as sub-section (*b*) of section 67 *(supra)*, the delay of the respondent in dealing with the matter of the appointment and salary of the applicant is so unjustifiably long that it renders clearly the relevant omission of the respondent, both an omission contrary to the spirit of the said section 67, as a whole, as well as an omission in excess or abuse of powers.

(3) Further to the above, the aforesaid omission of respondent is wrongful, and in abuse of powers, because of the invalidity of the reason which he has given in relation thereto, being the one set out in respondent's aforesaid letter of the 13th June, 1961, viz. that goverment was of the opinion that no permanent appointments ought to be made before the separation of the Municipalities and before the ascertainment of the real needs of each Municipality in terms of personnel, in view of such expected separation:-

(*a*) This reason given in the said letter of the 13th June, 1961, as above, is so unsupportable, in the light of the circumstances of this case, that it leads to the conclusion that the respondent in omitting to deal with the matter in question was guilty of abuse or excess of powers. Separate Municipal administration, Greek and Turkish,

had been functioning *pro tempore* in Limassol, *inter alia*, for a long time before the aforesaid letter of the 13th June, 1961, was written by respondent, so that he ought to have been in a position to evaluate the needs in personnel of such separate Municipal administrations and in any case there could have hardly been any doubt about the need for the appointment of a Treasurer, especially in view of the provisions of section 67 *(supra)*.

(*b*) On the other hand, such a consideration as the one set out in the said letter of the 13th June, 1961, *(supra)* is, also, beyond the scope of the powers granted under section 67 of Cap. 240 *(supra)* to the respondent. When one reads together the provisions of sections 64 and section 69 of Cap. 240 it becomes obvious that it could not have been intended to grant thereunder a power to a District Officer to control the sufficiency or redundancy of the personnel of a Municipality, but only to control the fitness of persons appointed to five key posts set out in sub-section (1) of section 67 *(supra)* and the propriety of the salaries of those five, as well as of other, employees. Had it been intended to enable a District Officer to control appointments according to the needs in personnel of a Municipality then he would have been granted the right to approve all appointments and not only the five specified in subsection (1) of section 67.

(*c*) Moreover, it has not been established to my satisfaction by respondent that there indeed existed such a definite policy decision of the government of the Republic as stated in the said letter of the 13th June, 1961, of the respondent, so as to make him put off action in the *sub judice* matter.

(*d*) But, even if I were to accept the existence of such a definite policy of the government—which I do not—then again the respondent, in discharging his duties under section 67, had to exercise his own discretion in the matter and decide for himself without being bound to adhere to any line hierarchically laid down for him, as he appears to have mistakenly thought. Where a discretionary power is vested by legislation in an administrative organ the exercise of such discretion cannot be assumed by or regulated—except with regard to legality—by any hierarchically superior organ, unless there exists express provi-

sion to that effect. So, to the extent to which respondent failed to act, due to higher instructions, he was in error, on this ground too.

(4) As I have found that the respondent is guilty of an omission, I have also considered whether such an ommission exists down to the date of the determination of this case, in the light of the legislation in force and developments in the meantime.

Section 67 of Cap. 240 (which law ceased to be in force on the 31st December, 1962) has been incorporated in, and is in force by means of, section 21 of the Municipal Corporations Law, 1964 (Law No. 64 of 1964 enacted on the 1st December, 1964) and the status of the applicant as a municipal employee has been preserved under such law (vide my ruling in this case of the 19th June, 1965, in (1965) 3 C.L.R. 356).

Therefore, the omission complained of existed on the date of the filing of this recourse and continued right down to the determination of this recourse.

(5) The applicant could properly make this recourse against the District Officer only, though his appointment as such was made by the Municipality of Limassol. I have reached the conclusion that he could do so because, in the relevant matter both the acts of the Municipality and of the District Officer are executory in themselves, forming a composite administrative action, and, therefore, they can be challenged on their own, and the omission to do either of them can also be attacked by recourse on its own.

(*6*)(*a*) For the above reasons this recourse succeeds. It is now up to respondent to perform whatever he has omitted to do viz. to decide whether to approve or not the appointment and salary of applicant.

(*b*) He is to bear in mind for his guidance in this respect, that compliance with a decision of an administrative Court enables, in a proper case, the avoidance of the rule against retrospectivity of administrative acts or decisions (*vide* Conclusions from the Jurisprudence of the Greek Council of State 1929-1959. p. 197).

(7) There has been, in this case, a collateral claim

of applicant under Article 29 of the Constitution, for failure of the respondent to reply to the letters of counsel for applicant *(supra)*. I would say very little on this point: I have come to the conclusion that applicant is not entitled, in the light of the circumstances of this case, to separate relief, having proceeded against the omission itself of the respondent to deal with the subject matter of the said letter of counsel on behalf of applicant *(vide Kyriakides and the Republic,* 1 R.S.C.C. 66, at page 77, *followed)*.

Omission complained of declared wrongful; whatever has been omitted by the respondent in this respect, should have been performed. Costs against respondent in favour of applicant.

Cases referred to:

Ozturk and the Republic, 2 R.S.C.C. 35, *distinguished;*

Marcoullides and the Greek Communal Chamber, 4 R.S.C.C. 7, *distinguished;*

Vafeadis and the Republic, 1964 C.L.R. p. 454 *distinguished;*

Celaleddin and others and the Council of Ministers, 5 R.S.C.C. 102, at p. 105;

Aspri and the Republic, 4 R.S.C.C. 57, at p. 60, *followed;*

Kyriakides and the Republic, 1 R.S.C.C. 66, at p. 77, *followed;*

Yiannakis Georghiades and the District Officer of Limassol, ruling in this case, (1965) 3 C.L.R. 356.

Recourse.

Recourse against the failure of respondent to take appropriate action under section 67 of the Municipal Corporations Law, Cap. 240, in relation to applicant's appointment as Treasurer of the Limassol Municipality.

Chr. Demetriades for Applicant.

A. Frangos, Counsel of the Republic, for the Respondent.

Cur. adv. vult.

The following order was given by:—

TRIANTAFYLLIDES, J.: As this recourse has not been, and could not have been, brought against the District Officer personally, but against him as an organ of the Republic exercising executive or administrative authority, in the sense of Article 146, it is hereby directed that the description of Respondent should be treated as amended to read:—

"The Republic of Cyprus through the District Officer, Limassol".

I am satisfied that this amendment is a necessary one for the sake of proper form and the interests of justice in general and ordering it at this stage does not prejudice either party to this recourse in any way.

The following judgment was delivered by:—

TRIANTAFYLLIDES, J.: In this recourse the Applicant complains, in effect, against the failure of Respondent to take appropriate action under section 67 of the Municipal Corporations Law, Cap. 240, in relation to his appointment as Treasurer of the Limassol Municipality.

The aforesaid provision of Cap. 240 has been operative at the material times by virtue of, *inter alia*, the Municipalities Laws (Continuation) Law 1961 (Law 10/61)—and subsequent Laws extending the operation of Law 10/61—as well as, the Municipalities Law 1964 (Law 64/64).

The salient relevant facts are as follows:—

Applicant has been, since about 1944, performing the duties of Assistant Treasurer of the Limassol Municipality.

At its meeting of the 19th September, 1960, the then Greek Municipal Council of Limassol appointed Applicant to the post of Treasurer as from the 1st October, 1960. Such appointment was communicated to the Respondent by letter of the 5th October, 1960. Then followed some correspondence and the appointment of Applicant was confirmed at a further meeting of the Municipal Council, on the 24th November, 1960, and this was conveyed to Respondent by letter dated the 8th December, 1960 *(exhibit 1)*.

Under section 67, sub-section (3) of Cap. 240, any appointment to the post of, *inter alia*, Treasurer "shall be subject

to the approval of the Commissioner"—now the District Officer—"and shall not take effect until it is approved by him".

Under sub-section (6) of the same section, a vacancy in the post of, *inter alia*, the Treasurer, "shall be filled, in accordance with the provisions of this section, within two months of its occurrence".

Also, under sub-section (4) of section 67 the salary of a person appointed to the post of, *inter alia*, the Treasurer, requires the approval of the District Officer.

On the 30th January, 1961, the Mayor of Limassol, Mr. Partasides, wrote *(exhibit 2)* to the Director-General of the Ministry of Interior—under which comes the Respondent District Officer—complaining that the matter of the approval of the appointment of Applicant was still pending and requesting urgent action. Copy of this letter was sent to the Respondent, too.

On the 16th May, 1961, the Mayor wrote again *(exhibit 3)* to the Respondent, complaining that the matter of Applicant's appointment, and salary, had not yet been attended to and requesting that it should be dealt with without further delay.

On the 20th May, 1961, the Respondent wrote *(exhibit 4)* to the Mayor stating that the matter was being "studied by Government".

On the 13th June, 1961, Respondent wrote *(exhibit 5)* to the Mayor, informing him that "Government is of the opinion that no permanent appointment ought to be made before the separation of the Municipalities and before are ascertained the real needs of each Municipality in terms of personnel, in view of the expected operation".

On the 16th June, 1961, the Mayor wrote *(exhibit 6)* to the Respondent, protesting against the letter of the 13th June, 1961, and pointing out that the ground given therein for the postponement of appropriate action on the part of Respondent was not well founded; he ascribed the conduct of Respondent to party-political reasons. He also drew attention to the fact that the appropriate authority, for the purpose of exercising the powers under section 67, was the Respondent and not the Government of the Republic.

On the 27th June, 1961, the Mayor wrote *(exhibit 7)* direct-

ly to the President of the Republic asking for his intervention in the matter and describing the relevant conduct of Respondent "as unacceptable and scandalous".

On the 16th November, 1961, the Mayor wrote again *(exhibit 8)* to Respondent, asking him once again that he, Respondent, himself should reach his own decision in the matter of Applicant's appointment and salary, under section 67.

On the 20th November, 1961, Respondent wrote back *(exhibit 9)*, stating that Government had nothing further to add; on the question of whether or not the District Officer himself had authority to approve or not appointments of municipal employees, the Respondent referred the Mayor to Articles 54 and 58 of the Constitution. (Article 54 deals with the powers of the Council of Ministers and Article 58 deals with the powers of a Minister).

On the 14th February, 1962, the Mayor wrote *(exhibit 10)* to the Minister of Interior, raising again the pending matter of the approval of the appointment and salary of Applicant and requesting the Minister and the Council of Ministers to take appropriate action.

On the 16th March, 1962, the Mayor wrote again *(exhibit 11)* to the Minister of Interior, reminding him of this pending matter and asking that it should be expedited.

On the 6th of April, 1962, the Mayor applied *(exhibit 12)* to the Council of Ministers, asking that the necessary approval for the appointment and salary of Applicant be granted.

On the 3rd July, 1962, the Mayor wrote once again *(exhibit 13)* to the Minister of Interior, confirming a previous conversation of his with the Minister on the 1st June, 1962, during which the Minister had told the Mayor that the matter of the approval, *inter alia*, of the appointment and salary of Applicant would be settled after the 14th June, 1962, on the return from abroad of the President of the Republic. The Mayor requested that the matter be expedited.

On the 20th August, 1962, the Mayor, once again, wrote *(exhibit 14)* to Respondent, protesting that no approval had yet been granted in the matter, complaining that the proper functioning of the Municipality was, thus, being hampered

and pointing out that other District Officers in Nicosia and Famagusta, were granting the necessary approvals for the appointments and salaries of municipal employees.

On the 30th October, 1962, the Mayor wrote *(exhibit 15)* to the Minister of Interior, referring to his letter of the 3rd July, 1962, and reminding him that the matter had not yet been dealt with.

On the 12th November, 1962, the Respondent replied *(exhibit 16)* to the Mayor, referring to the letter of the Mayor, dated the 20th August, 1962, and stating that the matter was "being studied by the Government".

On the 28th November, 1962, counsel for Applicant wrote *(exhibit 17)* to the Respondent, asking that he should be told, the soonest possible, the final decision of the Respondent in this matter and pointing out that vital interests of his client were being prejudiced. No reply was received to this letter, and this recourse was filed on the 31st December, 1962.

When this Case came up for hearing on the 27th May, 1965, counsel for Respondent raised a preliminary objection to the effect that the subject-matter of the recourse had disappeared in the meantime due to the expiration of Cap. 240, prior to the enactment of Law 64/64. This contention was rejected by a ruling of the 19th June, 1965;* its contents need not be repeated in this judgment. The hearing continued on the 22nd and 29th October, 1965. At the hearing of the 22nd October, 1965 the Court had to rule on certain amendments of the Statement of Case, which was prepared after Presentation in this Case; this ruling does not have to be repeated herein either.

On the 22nd January, 1966, it was directed that the hearing be re-opened, because, in considering its reserved judgment, the Court found it necessary to inquire further into the question of exactly what developments had taken place in the matter between the time the recourse was filed and the time it came up for determination before the Court; this course was adopted in view of the alternative contention of Applicant that Respondent is, *inter alia*, guilty of an omission to approve the appointment and salary of Applicant, and it

*Ruling published in (1965) 3 C.L.R. 356.

appeared from the record of proceedings of the 20th March, 1965, (when this Case came up for Mention) that there might have been developments relevant to the sub judice issue of *omission*.

Thus, the hearing was reopened on the 1st February, 1966; it transpired that the said developments consisted, first, of a letter of counsel for Applicant, dated the 5th March, 1965 *(exhibit 24)*, calling upon the Respondent to approve the appointment and salary of Applicant, and of the reply of the respondent to such letter, dated the 19th March, 1965, *(exhibit 25)* by which Respondent, *inter alia*, still refused to exercise his relevant powers in the matter, this time putting forward the reason that due to the cessation of the existence of the Municipal authority which had decided on the appointment of Applicant, the relevant decision to appoint him had also ceased to exist (*vide* paragraph 2 of *exhibit 25)*; Respondent proceeded to add in his said letter that, otherwise, with the enactment of Law 64/64, no impediment existed to his taking action in the matter, but he stated that—for reasons which he explained in such letter—he would not be prepared to approve Applicant as the proper person for the post of Treasurer.

Respondent does not appear to have communicated even a copy of this letter *(exhibit 25)* to the Limassol Municipality, by way of a step taken by him in the matter under his relevant powers; it was merely a reply given to counsel for Applicant. Such letter *(exhibit 25)* is already the subject-matter of another recourse, by Applicant against Respondent, No. 106/65, in which proceedings have been stayed pending the outcome of the present proceedings.

Secondly, counsel for Applicant and Respondent have filed, by consent—as a result of the reopening of the hearing of the Case—some documents relating to a correspondence, previous to *exhibits 24 and 25*, which was exchanged between the Respondent and the Limassol Municipality; the said documents have been marked as *exhibit 26(a) (b) (c)*.

By means of *exhibit 26(a)*, dated the 12th December, 1964, the Respondent had written to the Limassol Municipality pointing out that the post of Treasurer, *inter alia*, was vacant and asking the Municipal Commission, which had just been appointed, to consider the filling of such post. From the minutes of the Commission, *exhibit 26(b)*, it appears that on

the 4th January, 1965, the Commission met and decided that it was premature to deal with the matter, in view of these proceedings pending before the Court. It replied accordingly to the Respondent, by a letter which is *exhibit 26(c)*, on the 28th Janaury, 1965.

In the light of all the foregoing I have now to decide in this Case whether there exists a *decision* of Respondent, refusing the approval of the appointment and salary of Applicant, or only an *omission* to deal with the question of such approval under the relevant legislation.

On the totality of the material before me I have come to the conclusion that Respondent is only guilty of an *omission* to exercise his powers, under section 67 of Cap. 240, in relation to the appointment and salary of Applicant.

It has been urged upon the Court, by counsel for Applicant, that *exhibit 5*, the letter of Respondent of the 13th June, 1961, is a *decision* in the matter. In this connection attention was drawn to *exhibit 9*, in which Respondent describes *exhibit 5* as a decision.

But, in my opinion, when *exhibit 5* is viewed in the context of the whole history of events in this Case, it is obvious that it is not a decision taken in the course of the exercise of the powers of Respondent under section 67, but only a decision not to exercise such powers for the time being; in other words, a refusal to exercise statutory powers, which amounts to an *omission*, in the sense of Article 146, and not a *decision*. It is hardly necessary to stress, I think, that an omission, in Administrative Law, may not only consist of failure on the part of an authority to respond, when called upon to act, but, also, of an express refusal to exercise the relevant powers vested in such authority.

In support of the allegation that *exhibit 5* is really a decision and not an omission, counsel for Applicant has referred me, *inter alia*, to three decided cases: The first one is that of *Ozturk and The Republic* (2 R.S.C.C. p. 35): I consider that this case is different from the present one, because the Respondent there, the Public Service Commission, had embarked upon exercising its relevant powers and it was found that an "act" had resulted, through the deadlock which supervened amongst its members, preventing it to reach a decision with the necessary majority. The second case is

that of *Marcoullides and The Greek Communal Chamber* (4 R.S.C.C. p.7): That is again different because in that case there existed a decision not to appoint the Applicant, and not merely an omission to decide whether to appoint her or not. Lastly, counsel has referred me to *Vafeadis and The Republic* (1964 C.L.R. p. 454): There, the refusal of the Respondent was not a refusal to exercise the relevant powers—as in this Case—but a refusal to transfer Applicant *i.e.* a refusal decided in the exercise of the relevant powers.

The omission of Respondent to deal, under section 67 of Cap. 240, with the appointment and salary of Applicant, is in my opinion, contrary to law, and particularly to the letter and spirit of sub-section (6) of section 67, which lays down a time limit of two months, for the filling of a vacancy in the office of Treasurer of a Municipality.

As it appears from the relevant correspondence, such as *exhibit 14*, the vacancy in the post of Treasurer existed since the 1st October, 1960, and it is clear that as early as the 5th October, 1960, the Respondent was notified of the appointment of Applicant. Then the matter was again brought before the Municipal Council on the 24th November, 1960, the relevant decision was confirmed, and a letter was written accordingly to Respondent on the 8th December, 1960, *(exhibit 1)*.

Even after the lapse of the two months' period, as from the 1st October, 1960, a duty remained to act in accordance with the requirements of s.67 of Cap. 240—and as soon as possible. Failure to act within the statutory period laid down in sub-section (6) of section 67 did not result in absolving, any organ concerned, of the duty to take due action, even after the expiration of such period, which is provided for by way of a directive (*vide Aspri and The Republic*, 4 R.S.C.C. p. 57 at p. 60).

In any case, even in the absence of a provision such as subsection (6), the delay of respondent in dealing with the matter of the appointment and salary of Applicant is so unjustifiably long that it renders clearly the relevant omission of Respondent, both an omission contrary to the spirit of section 67, as a whole, as well as an omission in excess or abuse of powers.

Further to the above, the omission of Respondent is wrong-

ful, and in abuse or excess of powers, because of the invalidity of the reason which he has given in relation thereto:

Such reason is the one set out in Respondent's letter of the 13th June, 1961, *(exhibit 5)* viz. that Government was of the opinion that no permanent appointments ought to be made before the separation of the Municipalities and before the ascertainment of the real needs of each Municipality in terms of personnel, in view of such expected separation.

This reason, given in *exhibit 5*, as above, is so unsupportable, in the light of the circumstances of this Case, that it leads to the conclusion that the Respondent in omitting to deal with the matter in question was guilty of abuse or excess of powers. Separate Municipal administrations, Greek and Turkish, had been functioning *pro tempore* in Limassol, *inter alia*, for a long time before *exhibit 5* was written by Respondent, so that Respondent ought to have been in a position to evaluate the needs in personnel of such separate Municipal administrations; the fact that separate Municipal administrations were functioning at the time is conceded by counsel for Respondent (and see also in this respect the review of relevant legislation made in *Celaleddin and others and The Council of Ministers*, 5 R.S.C.C. p. 102 at p.109). Surely Respondent could not have needed until the time this recourse was filed, on the 31st December, 1962, to appreciate the needs in personnel of the separate Municipal administrations and, *in any case*, there could have hardly been any doubt about the need for the appointment of a Treasurer, especially in view of the provisions of section 67 of Cap. 240.

Such a consideration, such as the one set out in *exhibit 5*, is, also, beyond the scope of the powers granted, under section 67 of Cap. 240, to Respondent. When one reads together the provisions of section 67 and section 69 of Cap. 240 it becomes obvious that it could not have been intended to grant thereunder a power to a District Officer to control the sufficiency or redundancy of the personnel of a Municipality, but only to control the fitness of persons appointed to five key posts set out in sub-section (1) of section 67 and the propriety of the salaries of those five, as well as of other, employees. Had it been intended to enable a District Officer to control appointments according to the needs in personnel of a Municipality then he would have been granted the right to approve all appointments and not only the five specified in section 67(1).

Moreover, it has not been established to my satisfaction, by Respondent, that there indeed existed such a *definite policy decision* of the Government of the Republic, as stated in *exhibit 5*, so as to make him put off action in the *sub judice* matter. No directive given to Respondent for the purpose has been produced and no copy of any relevant decision of the Council of Ministers or of the Minister of Interior has been placed before the Court. On the other hand, it is not in dispute that during the very same period the District Officers of Nicosia and Famagusta approved quite a number of appointments—and salaries—of municipal employees.

Even if I were to have arrived at a different conclusion and accept the existence of such a definite policy—which I do not—then again Respondent, in discharging his duties under section 67, had to exercise his *own discretion* in the matter and decide for himself without being bound to adhere to any line hierarchically laid down for him, as he appears to have mistakenly thought. Where a discretionary power is vested by legislation in an administrative organ the exercise of such discretion cannot be assumed by or regulated—except with regard to legality—by any hierarchically superior organ, unless there exists express provision to that effect (*vide Kyriakopoulos* on Greek Administrative Law, 4th edition, volume II pp. 35-36). So, to the extent to which Respondent failed to act, due to higher instructions, he is in error, on this ground too.

As I have found that Respondent is guilty of an omission I have also considered whether such an omission existed down to the date of the determination of this Case, in the light of the legislation in force and developments in the meantime:

Section 67 of Cap. 240 has been incorporated in, and is in force by means of, section 21 of Law 64/64 and the status of Applicant as a municipal employee has been preserved under such Law (*vide* the ruling of the 19th June, 1965* in this Case).

Also, the omission of Respondent has continued in fact right down to the determination of this recourse. His letter, *exhibit 25*, cannot, in view of its paragraph 2, be considered to be a decision in the matter—even though he indicates that

*Published in (1965) 3 C.L.R. p. 356.

he would not have been, otherwise, ready to approve the appointment of Applicant; moreover, *exhibit 25* cannot be considered as a decision under section 67 of Cap. 240—or the corresponding section 21 of Law 64/64—because it was not addressed officially to the Limassol Municipality, as a step taken in the course of the exercise of the relevant powers under section 67.

Concerning the ground contained in paragraph 2 of *exhibit 25*, as to why at that time Respondent could not proceed to deal with the appointment or salary of Applicant, it need only be stated that such ground is not a valid one for the reasons already explained in the ruling of the 19th June, 1965,* in the present Case.

Regarding *exhibit 26* I would only say that it does not in any way cure the omission of the Respondent but on the contrary it shows that he himself concedes the need for the filling of the post of Treasurer.

So, the omission of Respondent which existed on the date of the filing of this recourse has continued right down to the determination thereof and is, also, a wrongful one still for the reasons already explained.

It is, thus, declared that the omission of Respondent to deal with the question of the appointment and salary of Applicant under section 67 of Cap. 240 is wrongful, as contrary to law and in abuse or excess of powers, and ought not to have been made; whatever has been omitted by Respondent in this respect should have been performed.

I have considered in this Case whether Applicant could properly make this recourse against the District Officer only, though his appointment as such was made by the Municipality. I have reached the conclusion that he could do so because, in the relevant matter both the acts of the Municipality and of the District Officer are executory in themselves, forming a composite administrative action, and, therefore, they can be challenged on their own, and the omission to do either of them can also be attacked by recourse on its own. Nor was it necessary in the circumstances to join the Limassol Municipality as a Respondent; actually the Court gave it an opportunity to appear in the proceedings if it so wished, but

*Published in (1965) 3 C.L.R. p. 356.

it did not choose to do so.

For all the above reasons this recourse succeeds. It is now up to Respondent to perform whatever he has omitted to do viz. to decide whether to approve or not the appointment and salary of Applicant. He is to bear in mind, for his guidance in this respect, that compliance with a decision of an administrative Court enables, in a proper case, the avoidance of the rule against retrospectivity of administrative acts or decisions (*vide* Conclusions from the Jurisprudence of the Greek Council of State 1929-1959, p. 197).

There has been, in this Case, a collateral claim of Applicant, under Article 29 of the Constitution, for failure of Respondent to reply to the letter of counsel for Applicant, *exhibit 17*, I would say very little on this point: I have come to the conclusion that Applicant is not entitled, in the light of the circumstances of this Case, to separate relief, having proceeded against the omission itself of Respondent to deal with the subject-matter of *exhibit 17*, (*vide Kyriakides and The Republic*, 1 R.S.C.C. p. 66 at p. 77).

On the question of costs I do think that, in the circumstances, the only proper order is to award the costs of this recourse against Respondent and in favour of Applicant.

Omission complained of declared wrongful; whatever has been omitted by respondent in this respect, should have been performed. Order as to costs as aforesaid.