

[STAVRINIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE
CONSTITUTION
SOPHOCLES DEMETRIADES AND SON AND
OTHERS,

Applicants,

and

THE REPUBLIC OF CYPRUS, THROUGH
THE MINISTER OF HEALTH AND ANOTHER,

Respondents.

(Case Nos. 219/65, 253/65).

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Pharmacy and Poisons Law, Cap. 254 (as amended by Law 59/62) section 4A—Decision of the Minister of Health not to amend the Second Schedule thereto—Constitutes an exercise of the discretion vested in him under section 4A(2) and (3) of the said Law—Not an “omission” within Article 146, paragraph 1, of the Constitution—Such decision does not amount either to a “decision” or “act” “of any organ, authority or person exercising executive or administrative function” within Article 146, paragraph 1, of the Constitution—On the contrary, it amounts to an exercise of legislative power—Therefore, it is not amenable to the jurisdiction of this Court under Article 146 of the Constitution.

Administrative and Constitutional Law—Recourse under Article 146 of the Constitution—“Omission” within Article 146, paragraph 1—Meaning and scope—“A decision, act or omission of any organ, authority or person exercising executive or administrative function,” within the said paragraph 1—Meaning and scope of the expression—Jurisdiction of the Court under Article 146—Notice of the Minister of Health under section 4A(3) of the Pharmacy and Poisons Law, Cap. 254 (as amended by Law 59/62) showing intended amendments etc. etc. of the Second Schedule thereto is an exercise of legislative power—And not “a decision, act . . . of an organ, authority or person exercising executive or administrative function” within Article 146, paragraph 1, of the Constitution—It follows, that the decision complained of not to give such notice is outside the jurisdiction of this Court on a recourse under Article 146 of the Constitution—Cf. Article 54(g) of the Constitution—See, also, under Pharmacy and Poisons Law, above.

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Recourse under Article 146 of the Constitution—“Omission” within paragraph 1—Jurisdiction of the Court under Article 146—“Decision act or omission of an organ, authority or person exercising executive or administrative function”—Meaning and scope—See above.

Legislative power—Legislative function—Exercise of—See above.

Executive or administrative function within Article 146, paragraph 1, of the Constitution—See above.

Administrative (or executive function)—See above.

Ministers—Minister of Health—Decision of the Minister of Health under section 4A of Cap. 254 (supra) amounting to an exercise of legislative power—And not to “a decision of an organ exercising executive or administrative function” within Article 146, paragraph 1, of the Constitution—See, also, above.

Words and Phrases—“Omission” in paragraph 1 Article 146 of the Constitution—“Decision act or omission of an organ authority or person exercising executive or administrative function” within Article 146, paragraph 1 of the Constitution—Meaning and scope—See, also, above.

Drugs—See above.

Pharmacy—See above.

Poisons—See above.

By these recourses the Applicants complain against the decision of the Respondent Minister of Health refusing their respective applications for amendment of the Second Schedule to the Pharmacy and Poisons Law, Cap. 254 (as amended by Law 59/62, *supra*) by the inclusion therein of certain drugs in which the Applicants were respectively interested. Alternatively the Applicants challenged the “omission” on the part of the Minister to proceed with the aforesaid amendment of the Second Schedule. It should be noted that no person other than a pharmacist is entitled to sell to the public drugs not specified in the aforementioned Schedule.

Section 4A of the Pharmacy and Poisons Law, Cap. 254 (as amended, *supra*) provides:

“(1) Save as hereinafter provided no person other than a pharmacist shall sell any drugs to the public.

(2) Notwithstanding anything in the preceding subsection contained, any person may sell to the public any of the drugs specified in the Second Schedule, on condition that.....

Provided that the Minister (i.e. the Minister of Health) may, on the advice of the Board and subject to the procedure hereinafter described, from time to time amend, vary, revoke or replace the said Second Schedule (3)(a).

The Minister, on the advice of the Board (i.e. the Pharmacy and Poisons Board), shall prepare a notice for publication in the Official Gazette of the Republic showing the intended amendment, variations, revocations or replacements in the Second Schedule (b)..... (c)..... (d)..... (e).....”.

It was objected by the Respondents, *inter alia*: (1) that the Court has no jurisdiction to entertain the recourses because the Minister's decision complained of does not fall within the meaning of “decision” act or omission of any organ, authority or person exercising executive or administrative function under paragraph 1 of Article 146 of the Constitution; (2) that there was no omission on the part of the Respondent Minister to proceed with the amendment sought as there was no corresponding legal duty imposed on the Minister to that effect.

Paragraph 1 of Article 146 of the Constitution reads 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 the Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person.”

Dismissing the recourses, the Court:-

Held, 1. As to the issue of the alleged “omission” on the part of the Respondent Minister of Health to proceed with the amendment of the said schedule sought by each of the Applicants:

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(1) It is clear from the documents produced that upon application by each of the Applicants to the Minister of Health for amendment of the Second Schedule to the Pharmacy and Poisons Law, Cap. 254 (as amended by law 59/62) by the inclusion therein of the products in which they are respectively interested, a specific decision was in fact taken by him "on the advice of the Pharmacy and Poisons Board (the "Board" referred to in section 4A(2) and (3), *supra*), against the amendment sought by those Applicants; and that each of those decisions constituted an exercise by the Minister of the discretion vested in him under section 4A(2) and (3) of the said Law. It follows that, in so far as the Applicants in each case rely on "an omission to proceed" with the amendment of the said Schedule, they must fail.

(2) Clearly "omission" in Article 146, paragraph 1, of the Constitution (*supra*) means an omission to do something required by law, as distinct from the non-doing of a particular act or the non-taking of a particular course where such non action is a result of an exercise of a discretion.

Held, II. As to the issue of jurisdiction of the Court to deal on a recourse under Article 146 with the decision complained of:

(1) Following the reasoning in the case *Police v. Hondrou*, 3 R.S.C.C. 82, I hold that a notice of the Minister of Health under section 4A(3) of the Pharmacy and Poisons Law Cap. 254 (as amended by Law 59/62, *supra*) would equally be an exercise of legislative power.

(2) It follows that a decision not to give such notice is not a decision "of an organ, authority or person exercising executive or administrative function" within Article 146, paragraph 1, of the Constitution (*supra*) and therefore is not amenable to the jurisdiction of this Court under Article 146 of the Constitution.

*Applications dismissed.
No order as to costs.*

Cases referred to:

Police and Hondrou, 3 R.S.C.C. 82, reasoning followed.

Recourse.

Recourse against the decision of the Respondent not to proceed with the amendment of the Second Schedule to

the Pharmacy and Poisons (Amendment) Law, 1962 (Law 59 of 1962) by adding therein certain items.

A. Triantafyllides, for the Applicants in case No. 219/65.

J. Mavronicolas, for the Applicants in case No. 253/65.

L. Loucaides, Counsel of the Republic, for the Respondents.

Cur. adv. vult.

The following Judgment* was delivered by:—

STAVRINIDES, J.: By the earlier of these applications the court is asked to declare

(a) that “the decision of the Respondents not to proceed with the amendment of the Second Schedule to Law 59 of 1962 by adding therein Pastilles Valda, Rennie Tablets, Optrex Eye Lotion, Kruschen Salts, is *null* and *void* and of no effect whatsoever”;

(b) in the alternative “that the omission of the Respondents to proceed with the aforesaid amendment or cause the same to be effected by adding in the said Second Schedule the aforesaid goods ought not to have been made and whatever has been omitted should have been performed.”

The application

“is based on the following grounds of law:

1. The decision and omission complained of are contrary to the rights of the Applicants as same are safeguarded by art. 25 of the Constitution. They are also discriminatory against Applicants.

2. S. 4A of Law 59 of 1962 and the Second Schedule thereto are unconstitutional contrary to arts. 25, 6 and 28 of the Constitution.

3. The limitations or restrictions imposed by the said s. 4A and the said Second Schedule are not authorised or envisaged by art. 25. These also result in discrimination against Applicant.

4. The decision and omission complained of have been taken or made in abuse of power.”

* For final decision on appeal see (1969) 12 J.S.C. 1525 to be published in due course in (1969) 3 C.L.R.

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The later application asks in parallel terms for relief in respect of a similar "decision" or "omission" of "the Respondents" in relation to a product known as "the 'Algon' Tablet". It is based on the same grounds of law as the earlier one; and both applications were opposed on the same grounds of law, *viz.*:

"1. That the court has no jurisdiction to entertain this recourse because Respondent's decision complained of does not fall within the meaning of 'executive' or 'administrative' act under art. 146 of the Constitution.

2. That there was no omission on the part of Respondent to proceed with such amendment as there was no corresponding legal duty imposed on the Minister to that effect. Such amendment was left within the Minister's discretion.

3. That in any event, Respondent's decision complained of was lawfully taken in the proper exercise of the Minister's discretion having due regard to the general scope of the Law, the nature of the goods, the public health and the public interest.

4. That the said decision does not contravene any provision of the Constitution."

Accordingly by agreement of the parties, and with the approval of the court, the applications were heard together in so far as paras. 1 and 2 of the grounds of law relied upon in each opposition were concerned; the points raised by those paragraphs (hereafter "point 1" and "point 2" respectively) being treated as preliminary points of law for decision before the hearing of the applications and being argued without any other question being gone into.

It is convenient to deal first with point 2. Law 59 of 1962, entitled "The Pharmacy and Poisons (Amendment) Law, 1962", amended the Pharmacy and Poisons Law, Cap. 254, in various respects, two amendments being of relevance to these cases—the repeal of sub-s. (3) of s. 4 and the insertion, immediately after that section, of a new section, 4A. Sub-section (3) read:

"(3) Nothing in this section shall be deemed to make it unlawful for any person to sell any non-poisonous drug when such drug is sold in its original container

and condition as received by the seller or to require any such person to be registered as a pharmacist.”

So far as relevant, s. 4A provides (according to the translation prepared in the Ministry of Justice):

“(1) Save as hereinafter provided no person other than a pharmacist shall sell any drugs to the public.

(2) Notwithstanding anything in the preceding subsection contained, any person may sell to the public any of the drugs specified in the Second Schedule, on condition that such drugs are sold in their original containers or in containers in which they have been packed or repacked and sealed by a pharmacist:

Provided that the Minister may, on the advice of the Board and subject to the procedure hereinafter described, from time to time amend, vary, revoke or replace the said Second Schedule.

(3) (a) The Minister, on the advice of the Board, shall prepare a notice for publication in the Official Gazette of the Republic showing the intended amendments, variations, revocations or replacements in the Second Schedule.

(b) Before the publication of the aforesaid notice in the Official Gazette of the Republic the Minister shall cause a signed copy thereof to be delivered to the House of Representatives.

(c) If within 15 days from the receipt by the House of Representatives of the aforesaid notice no objection is raised by it, the President of the House of Representatives shall, in writing, inform the Minister of that fact, and the Minister shall proceed to publish the notice in the Official Gazette of the Republic. The notice so published shall constitute the amended, varied, revoked or replaced Second Schedule.

(d) If the House of Representatives objects to the whole or any part of the notice prepared by the Minister and submitted to the House, the President of the House shall, within 15 days from the receipt of the notice by the House, inform the Minister of that fact and no amendment, variation, revocation or replacement of the Second Schedule shall take place until the House of Representatives decides the matter.

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(e) If, after objection has been raised by the House to the notice prepared by the Minister, the House of Representatives finally decides to amend, vary, revoke or replace the Second Schedule, the decision of the House shall, in accordance with Art. 52 of the Constitution, require promulgation”.

In my view the true construction of s. 4A (2) and (3) is that, in so far as the Second Schedule (hereafter “the Schedule”) may be amended as a result of action taken by “the Minister” (which, by a definition contained in s. 3 of the 1962 Law, means the Minister of Health), it is a matter for the Minister to decide whether he should take such action; the matter is within his discretion. Now it is clear from documents attached to the applications and therein referred to as exhibits, that upon application by each of the Applicants to the Minister for amendment of the Schedule by the inclusion therein of the product or products in which they are respectively interested, a specific decision was in fact taken by him, “on the advice of the Pharmacy and Poisons Board” (“the Board” referred to in s. 4A (2) and (3)), against the amendment sought by those Applicants; and that each of those decisions constituted an exercise by the Minister of the discretion vested in him under s. 4A (2) and (3). It follows that, in so far as the Applicants in each case rely on “an omission to proceed” with amendment of the Schedule, they must fail; for clearly “omission” in Art. 146, para. 1, of the Constitution means an omission to do something required by law, as distinct from the non-doing of a particular act or the non-taking of a particular course where such non-action is a result of an exercise of a discretion.

So much for point 2, and I now come to point 1. Article 146, para. 1, of the Constitution does not speak of an “executive” or “administrative” act, but of “a decision, act or omission of any organ, authority or person exercising executive or administrative function”. The question then is (a) whether the decisions complained of are decisions “of an organ, authority or person exercising executive or administrative function” and if so (b) whether they may be interfered with by this court although they were taken in the exercise of the Minister’s discretion. With regard to (a), I think the case of *Police v. Hondrou*, 3 R.S.C.C. 82, is relevant. There it was held that an order made by the Council of Ministers under s. 6(2) of the Betting Houses, Gaming Houses

and Gambling Prevention Law, Cap. 151, declaring, in effect, "the handling or the putting into operation of any gaming machine to be a game for the purposes of s. 6(1) of that Law in addition to the games specified therein" was an exercise of legislative power, notwithstanding the fact that the power, conferred on the Council of Ministers by Art. 54(g) of the Constitution, of "making orders or regulations for the carrying into effect of any Law as provided by such Law" is described in that article as "executive". In my Judgment a notice of the Minister of Health under s. 4A(3) of the 1962 Law would equally be an exercise of legislative power. It follows that a decision not to give such notice is not a decision "of an organ, authority or person exercising executive or administrative function" and therefore is not amenable to the jurisdiction of this court under Art. 146 of the Constitution. In view of this (b) does not arise and I will not discuss it.

For the reasons given both applications must fail.

No costs being claimed by the Respondents, they are hereby dismissed without costs.

Applications dismissed without costs.

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