[L. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ANASTASIOS KEFALAS,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTER OF FINANCE,

Respondent.

(Case No. 293/69).

Administrative acts or decisions—Which alone can be made the subject of a recourse under Article 146 of the Constitution—Paragraph 1 of that Article—Act merely confirmatory of a previous executory act or decision—Therefore such confirmatory act cannot be challenged by a recourse—And in so far as the present recourse concerns the original executory decision it is clearly out of time in that it was filed after the lapse of the 75 days period required under Article 146.3 of the Constitution —See further infra.

Omission—Continuing omission—Acts or decisions or omissions in the sense of Article 146.1 of the Constitution —Decision of the Council of Ministers communicated to applicant to the effect that no acting allowance should be paid to public officers in accordance with the General Orders—And an earlier letter to him to the same effect —Held to be express and positive decisions in the sense of Article 146.1 which the applicant could have challenged by recourse—They cannot obviously be treated as omissions and more so as continuing omissions.

Recourse under Article 146 of the Constitution—Act or decision merely confirmatory of a previous executory decision—Applicant—a public officer—already aware of this original executory decision of the Council of

Ministers to the effect that no longer acting allowance would be paid to public officers—Applicant so aware through letters addressed to him earlier—Renewing his claim therefor through his counsel—Counsel basing such claim solely on a judgment of this Court and not putting forward for consideration either any new fact or any other fact that the respondent did not have in mind when taking the original decision—No new inquiry taking place—Respondent's reply to counsel which is being challenged by this recourse, is not an act or decision in the sense of Article 146.1 of the Constitution—Nor is it an omission of a continuing nature—Moreover it is not the product of new inquiry on the basis of any new material—But merely confirmatory of the earlier executory decisions—And as such are deprived of any executory nature and, therefore, cannot be made the subject of a recourse—On the other hand, the present recourse filed long after the 75 days period from the date of the aforesaid original decisions is clearly out of time—Article 146.3 of the Constitution.

Executory act or decision as distinct from a mere confirmatory act or previous executory decisions—See supra.

Confirmatory act or decision—See supra.

The Court dismissed this recourse on the main ground that it was not maintainable in that the administrative act challenged thereby is not an executory act but merely an act confirmatory of previous executory acts or decisions; and that in so far as the recourse concerns those previous executory acts or decisions (done or taken in 1963 and 1964) it is clearly out of time. It was further held that there could be no question of a continuous omission because there had been in this case positive and express decisions not to do the thing claimed *viz.* not to pay to the applicant acting allowance.

The facts are very briefly as follows:

By letter dated July 5, 1969, the applicant public officer was duly informed that in view of the decision of the Council of Ministers to the effect that no acting allowance should be paid his request for such allowance could not be

approved. On February 27, 1964, the Council of Ministers by its decision No. 3697 decided that no acting allowance should be paid in accordance with the General Orders. This decision was by circular letter dated March 17, 1964, communicated amongst others to the applicant himself. The next move in the matter was not made until June 18, 1969, when counsel for the applicant wrote the letter (Exhibit 1) to the respondent raising the question of the acting allowance once more and drawing attention to the decision of this Court in the case *Frangides* v. *The Republic* (1966) 3 C.L.R. 181, which was decided more than three years earlier, on February 24, 1966. In reply to this letter the Director-General, Ministry of Finance, wrote to the applicant's counsel the letter dated July 12, 1969 which is quoted *post* in the Judgment. Eventually on September 10, 1969, the present recourse was filed. It was contended on the part of the applicant that the aforesaid letter of July 12, 1969, is an executory administrative act; alternatively, that the failure on the part of the respondent to pay to the applicant the acting allowance claimed constitutes a continuous omission and that therefore it cannot be said that the present recourse has been filed out of time.

The Court did not accept counsel's submission and dismissed the recourse holding that the aforesaid letter of July 12, 1969, contains an act merely confirmatory of the previous executory decisions communicated to the applicant as aforesaid some time in the years 1963 and 1964; and that those original decisions obviously being positive and executory decisions not to pay the acting allowance in question, there can be no question of any 'omission' so to do, let alone a continuous one.

The facts sufficiently appear in the judgment of the learned Judge, dismissing this recourse on the ground that it is not maintainable and as having been filed out of time.

Cases referred to :

Boyiatzis v. *The Republic*, 1964 C.L.R. 367;

Frangides v. *The Republic* (1966) 3 C.L.R. 181;

Hassan Mustafa and *The Republic*, 1 R.S.C.C. 44;

Philippou and *Others* v. *The Republic* (1970) 3 C.L.R. 123;

Kolokassides v. *The Republic* (1965) 3 C.L.R. 542;

Kelpis v. *The Republic* (1970) 3 C.L.R. 196;

Decisions of the Greek Council of State: Nos. 5/1937, 229/1938 and 439/1938.

Recourse.

Recourse against the decision and/or omission of the respondent to pay to applicant acting allowance when acting as Director-General to the Ministry of Justice.

D. Papachrysostomou, for the applicant.

K. Talarides, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

The following judgment was delivered by :-

L. LOIZOU, J. : By this recourse the applicant challenges the validity of the decision and/or the omission of the respondent to pay to him acting allowance as from the 21st December, 1963.

The facts of the case so far as relevant for the purpose of these proceedings are as follows :

At all material times the applicant held the substantive post of Administrative Assistant, 1st Grade. At various periods between the 30th June, 1961 and the 14th November, 1963, the applicant was appointed to act as Director-General to the Ministry of Justice. On the 14th November, 1963, his acting appointment came to an end but he was reappointed to act as Director-General again as from the 21st December, 1963. For the periods of his acting appointment up to the end of 1962 he was paid acting allowance as provided by the General Orders. As from 1st January, 1963, no provision was made in the budget for the payment of acting allowance generally and

no acting allowance was paid to the applicant. As a result of representations made by the then Minister of Justice (letter dated 11th June, 1963, *exhibit* 4) the respondent agreed to pay to the applicant responsibility allowance at the rate of £25 per month as from the 1st January, 1963. This decision was communicated to the applicant by letter dated 19th June, 1963, *exhibit* 5. By his letter dated 21st June, 1963, *exhibit* 6, applicant insisted that he was entitled to acting allowance and requested reconsideration of his case. In reply he was informed by letter dated 5th July, 1963, *exhibit* 7, that in view of the Council of Ministers' decision to the effect that no acting allowance should be paid and of the absence of any provision for acting allowance in the 1963 budget his request could not be approved. Eventually the applicant by his letter dated 8th July, 1963, *exhibit* 8, accepted the payment to him of a responsibility allowance in lieu of acting allowance under protest and without *prejudice* to his rights. Responsibility allowance was paid to the applicant up to the 14th November, 1963, when his acting appointment came to an end. As from the 21st December, 1963, when he was reappointed neither acting nor responsibility allowance was paid to him.

On the 27th February, 1964, the Council of Ministers by its decision No. 3697, *exhibit* 9, decided, *inter alia*, that no acting allowance should be paid in accordance with the General Orders. This decision was by circular letter dated 17th March, 1964, *exhibit* 10, communicated amongst others to all Directors-General to the Ministries including the applicant.

The next move in this matter was not made until the 18th June, 1969, when counsel for the applicant wrote the letter, *exhibit* 1, to the respondent raising the question of the acting allowance once more and drawing attention to the decision of this Court in the case of *Frangides* and *The Republic* (1966) 3 C.L.R. 181, which was decided more than three years earlier, on February 24th, 1966. In reply to this letter the Director-General, Ministry of Finance, wrote to the applicant's counsel the letter dated 12th July, 1969, *exhibit* 2, which reads as follows:

«Ἐνετάλην ὅπως ἀναφερθῶ εἰς τὴν ἐπιστολήν σας

ὑπὸ ἡμερομηνίαν 18 Ἰουνίου, 1969, ἐπὶ τοῦ θέματος τῆς πληρωμῆς ἐπιδόματος ἀναπληρωματικοῦ διορισμοῦ εἰς τὸν κ. Ἀν. Κεφάλαν, Διοικητικὸν Λειτουργόν, 1ης τάξεως καὶ σᾶς πληροφορῶ ὅτι τὸ θέμα τῆς πληρωμῆς ἐπιδομάτων ἀναπληρωματικοῦ διορισμοῦ εὑρίσκεται ἐνώπιον τῆς Μικτῆς Ἐπιτροπῆς Προσωπικοῦ πρὸς ἐξέτασιν. Ὅταν ἐγκριθοῦν τὰ κριτήρια, βάσει τῶν ὁποίων θὰ πληρώνωνται τοιαῦτα ἐπιδόματα, θὰ ἐξετασθῇ καὶ τὸ αἴτημα διὰ τὴν πληρωμὴν τοιούτου ἐπιδόματος εἰς τὸν κ. Κεφάλαν.»

("I have been directed to refer to your letter dated 18th June, 1969, on the subject of payment of acting allowance to Mr. An. Kefalas, Administrative Officer, 1st Grade and to inform you that the question of payment of acting allowances is being considered by the Joint Staff Committee. When the criteria, upon which such allowances will be paid, are approved, the claim for payment of such allowance to Mr. Kefalas will be considered also").

A few days later, on the 28th July, 1969, counsel for the applicant wrote yet another letter to the Director-General, Ministry of Finance. In this letter, *exhibit* 3, he again cited the case of *Frangides* v. *The Republic* and gave notice that unless he had a reply by the 30th August, 1969, he would file a recourse. There was no reply to this letter by the 10th September, 1969, and as a result the present recourse was filed.

By the Opposition it is alleged, *inter alia,* that the recourse is out of time and on the joint application of the parties the question of time-limit was argued as a preliminary issue.

It was contended on the part of the applicant that the letter, *exhibit* 2, is an administrative act within the scope of Article 146 of the Constitution; and also that in administrative law it amounts to a refusal. In support of this latter contention learned counsel cited the case of *Charalambos Boyiatzis* v. *The Republic,* 1964 C.L.R., p. 367. It was further argued that any decision by which the respondent has refused to pay acting allowance to the applicant in the past has no bearing on the present case

because such decision has not been challenged and that the only way in which any previous decision could affect the time issue is by rendering the letter *exhibit* 2 merely confirmatory of such decision. Finally learned counsel submitted that the failure on the part of the respondent to pay applicant acting allowance and the fact that he was made aware of this since 1964 does not affect the issue of time-limit because such omission was a continuous one. In support of this he cited *Hassan Mustafa* and *The Republic*, 1 R.S.C.C. p. 44.

On the other hand it was submitted by learned counsel for the respondent that the applicant had all along in mind the decision of the Council of Ministers contained in *exhibit* 9 and also the omission on the part of the respondent to pay to him acting allowance as from the 21st December, 1963, and he, nevertheless, failed to challenge such decisions and omission within the time limited by Article 146.3 and, therefore, the present recourse is out of time.

Dealing with the last point made by counsel for the applicant first I have no difficulty in holding that no question of a continuing omission arises in the present case which, in my view, is clearly distinguishable from the case of *Hassan Mustafa* and *The Republic, (supra)*. That was a case in which unkown persons set fire to applicant's sheepfold in November, 1956, destroying his sheep and other property. In January, 1957, the District Officer of Nicosia confirmed the list prepared by the mukhtar in accordance with the Recovery of Compensation for Injury to Property Law, Cap. 84 (now repealed by Law 57/62) but up to the date of the hearing of the case no warrant was issued under section 4 of the Tax Collection Law, Cap. 329 (now repealed). The applicant filed a recourse in November, 1960, praying for a declaration that the omission of the Chief Revenue Officer to collect the sums due should never have happened and that such omission was void. The respondent raised the preliminary objection that the Court had no jurisdiction to adjudicate in cases where the decision, act or omission complained of took place before the coming into force of the Constitution and also that the application was made out of time, because it was

filed more than 75 days after the omission became final.

In dealing with these issues the Supreme Constitutional Court held that the omission complained of was of a continuing nature and, therefore, it continued after the coming into operation of the Constitution and that, it could be made the subject of a recourse; and that, for the same reason, the application could not be regarded as being out of time.

Unlike the case cited, in the present case *exhibit* 10 (as well as *exhibit* 7 which relates to the period prior to the 21st December, 1963) are express and positive decisions in the sense of Article 146 of the Constitution which the applicant could have challenged by recourse and they cannot be treated as omissions and more so as continuing omissions.

Coming now to the letter of the 12th July, 1969, (*exhibit* 2 *supra*) against which this recourse is really directed, it is pertinent to consider, in the first instance, whether it amounts to an act or decision of an executory nature; whether, in other words, it is an act or decision by means of which the "will" of the administrative organ concerned has been made known and which, in itself, produces any legal result or situation consisting in the creation, modification or abolition of any legal right or obligation concerning the citizen affected; because it is only against acts or decisions of this nature that a recourse for annulment may lie (see, *inter alia,* Conclusions from the Jurisprudence of the Greek Council of State 1929—1959, pp. 236-237; Kyriakopoulos on Greek Administrative Law, 4th ed. vol. Γ, p. 92; *Philippou* and *Others* v. *The Republic* (1970) 3 C.L.R. 123 and *Kolokasides* v. *The Republic* (1965) 3 C.L.R. p. 542.

Having given the matter due consideration I am of the view that it is quite clear from the wording thereof that the said letter, obviously an interim reply, is merely of an informative nature and is devoid of an executory character.

But even if I were to assume that the letter in question amounts to a decision at all the question would then arise

whether such decision is a new one, taken upon a new inquiry and in the light of either new material or old but unknown to the respondent at the time of the original decision material, in which case such new decision would be executory and a recourse would lie or, whether, it is merely confirmatory of the original decision in which case no recourse would lie.

The letter *exhibit* 2 which is the subject of this recourse was a reply to the letter of applicant's counsel dated 18th June, 1969 (*exhibit* 1). I consider it useful to set out this last-mentioned letter in full; it reads as follows:

«Κατ' ἐντολήν τοῦ ἐκ Λευκωσίας πελάτου μου κ. Ἀναστασίου Κεφάλα, ἀναφέρομαι εἰς τάς ἐπανειλημμένας αἰτήσεις του διά τήν πληρωμήν εἰς αὐτόν τοῦ ἐπιδόματος καθήκοντος (acting allowance) ἀπό 21.12.63 μέχρι σήμερον διά τήν διαφοράν μισθοῦ τῆς θέσεως τοῦ Διοικητικοῦ Λειτουργοῦ Ἀης Τάξεως καί τῆς θέσεως τοῦ Γενικοῦ Διευθυντοῦ τοῦ Ὑπουργείου Δικαιοσύνης καί νά παρατηρήσω ὅτι μέχρι σήμερον οὐδεμιᾶς ἀπαντήσεως ἔτυχεν.

Τό ὅλον θέμα καταβολῆς ἐπιδόματος καθήκοντος ἔχει ἤδη ἀποφασισθῆ στήν ὑπόθεσιν τοῦ Ι. Φραγγίδη ν. Δημοκρατίας 108/1965, οὕτως ὥστε οὐδεμία δικαιολογία καθυστερήσεως πληρωμῆς τοῦ ἐπιδόματος νά ὑφίσταται.

Λίαν θά ὑποχρεωθῶ ὅπως τύχω συντόμου ἀπαντήσεως σας.»

("I am instructed by my client Mr. Anastassios Kefalas of Nicosia, to refer to his repeated applications for the payment of acting allowance to him, from 21.12.63 until to-day, in order to cover the difference between the salary of the post of Administrative Officer 1st Grade and the post of Director-General Ministry of Justice and to observe that he has not been furnished with a reply till now.

The whole question of payment of acting allowance has already been decided in the case of I.

Frangides v. Republic (108/1965) so that no justification at all for the delay in paying the allowance exists.

I shall be much obliged to be furnished with an early reply").

It may be added that the above letter was the only communication between the applicant and the respondent since the original decisions rejecting applicant's request for acting allowance were communicated to him by *exhibits 7 and 10.*

It clearly appears from the above-quoted lettter that learned counsel acting on behalf of the applicant was basing his claim solely on the judgment of this Court therein cited and did not put forward for consideration either any new fact or any other fact that the respondent did not have in mind when taking the original decision. What is more, there is nothing to show that a new inquiry took place; on the contrary from *exhibit* 2 one may reasonably assume that no such inquiry took place.

But, be that as it may, there is authority for the proposition that in administrative law re-examination from the legal aspect only of a matter in respect of which an executory decision has already been taken does not amount to a new inquiry resulting in a new executory decision but only to a confirmatory act. (See Conclusions from the Jurisprudence of the Greek Council of State 1929-1959, p. 241; Decisions of the Greek Council of State 439(38), 229(38) and 5(37). On the point also is the case of *Kelpis* v. *The Republic* (1970) 3 C.L.R. 196).

In the light of the foregoing I am of the view that the letter of the 12th July, 1969, challenged by this recourse, is not an act or decision in the sense of Article 146 of the Constitution nor is it an omission of a continuing nature; that in any case it cannot be considered to be the product of a new inquiry on the basis of any new material but only confirmatory of the earlier executory decisions communicated to the applicant by *exhibits 7 and 10;* and that as such it is deprived of an executory nature and cannot be the subject of a recourse.

In the result I find that this recourse is out of time and must, therefore, fail.

In the circumstances I consider it just that there should be no order as to costs.

Recourse dismissed.
No order as to costs.