1972
June 26

NEOPHYTOS G. FELLAS

v.

REPUBLIC (MINISTER OF FINANCE)

[HADJIANASTASSIOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

NEOPHYTOS G. FELLAS.

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTER OF FINANCE.

Respondent.

(Case No. 401/71).

Administrative acts or decisions—Which alone can be made the subject of a recourse under Article 146 of the Constitution—Administrative act or decision in the sense of paragraph 1 of that Article 146—Executory acts or decisions only can be challenged by such recourse—In the instant case it was held that the sub judice *act or decision was rather of an advisory nature and not an executory act or decision intended to produce legal situations and having direct legal effects—Consequently, a recourse against the* sub judice *act or decision held not to be maintainable.*

Executory act or decision—Meaning and effect—Acts or decisions of an advisory nature and producing no legal situations are not executory acts or decisions amenable to the jurisdiction of this Court on a recourse under Article 146 of the Constitution.

Advisory acts—See supra.

Recourse under Article 146 of the Constitution—When maintainable—See supra.

Pensions—Pensionable period of service.

On March 18, 1971, the applicant (a public officer attached to the Office of the President of the Republic) addressed an application to the Council of Ministers requesting the recognition of his previous service with the Colonial Government from June 6, 1941 to February 28, 1946. On September 25, 1971, the Director-General of the Ministry of Finance by letter replied that the application has not been placed before the Council of Ministers for a decision, because subjects of recognition of a previous service for purposes of pension come within the competence of the Minister of Finance; and that questions such as those raised in the application must be decided in accordance with the Pensions Law when the public servant concerned is about to retire.

The applicant feeling aggrieved by this answer contained in the said letter of the Director-General of September 25, 1971 (*supra*) filed the present recourse challenging the decisions contained in that letter. The Court dismissed the recourse holding that the decisions complained of are not executory acts but rather of an advisory nature; and that, consequently, a recourse under Article 146 of the Constitution is not maintainable.

Held, (1) I have reached the conclusion that the *sub judice* decision or act of the Director-General is not of an executory nature, since it was not intending to produce a legal situation concerning the rights of the applicant.

(2) In my view the said act or decision was of an advisory nature only, and was intended to remind the applicant what was the position under the law, and is, therefore, not amenable within the competence of this Court on a recourse under Article 146 of the Constitution.

Recourse dismissed.
No order as to costs.

The facts sufficiently appear in the judgment of the learned Judge holding that the recourse is not maintainable.

Cases referred to :

Vrahimi and Another and *The Republic*, 4 R.S.C.C. 121.

at p. 123;

Laoudhia v. *The Republic*, 2 R.S.C.C. 119, at p. 121;

Police Association and Others v. *The Republic* (reported in this part at p. 1 *ante*, at p. 27);

Kolokassides v. *The Republic* (1965) 3 C.L.R. 549, at p. 551 (*Affirmed on Appeal:* see *ubi supra* at p. 542);

Cyprus Flour Mills Co. Ltd. v. *The Republic* (1968) 3 C.L.R. 12, at pp. 24—25;

Papanicolaou (No. 1) v. *The Republic* (1968) 3 C.L.R. 225, at pp. 230—31;

Kelpis v. *The Republic* (1970) 3 C.L.R. 196, at p. 202.

Recourse.

Recourse against the decision of the respondent Council of Ministers by virtue of which applicant's application for the recognition of his previous service for purposes of pension was transmitted to the Ministry of Finance for consideration.

A. Emilianides, for the applicant.

L. Loucaides, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

The following judgment was delivered by:

HADJIANASTASSIOU, J.: In accordance with the provisions of Article 146 of the Constitution, the Supreme Court is vested with exclusive jurisdiction to declare null and void and of no effect whatsoever any act or decision by any organ, body or person of the Republic exercising administrative or executive powers if such act or decision is found by the Court to be contrary to the Constitution or the law or if it amounts to an abuse or excess of powers.

The substantial and, indeed, the only point raised in opposition as a preliminary point of law, is whether the administrative act or decision is of an executory nature in order to be amenable within the competence of this Court.

The applicant has joined the public service of the then Colony of Cyprus on a temporary basis on June 6, 1941. After serving for a period of nearly 5 years, he was forced to resign by the Commissioner of Nicosia, from the post he was holding at that time. The applicant was re-appointed on November 2, 1946, and was attached to the office of the Colonial Secretary. On January 12, 1971, the applicant, who was 49 years of age and is now serving as a secretary and is attached to the Office of the President of the Republic, addressed a letter to the Director of the Personnel Department requesting him to place before the Council of Ministers his application for the recognition of his previous service with the Colonial Government, that is to say, from June 6, 1941 to February 28, 1946. On January 22, Mr. Tingirides on behalf of the Director of the Personnel Department, in reply said that he was directed to inform the applicant that questions such as those raised in his letter must be decided in accordance with the Pensions Law when the interested public servant is about to retire. He then goes on to point out that in accordance with s. 3 of the Pensions Law, "any pension or gratuity granted under that law shall be computed in accordance with the provisions in force at the actual date of an officer's retirement".

On March 18, 1971, the applicant, apparently feeling dissatisfied with the reply, addressed a new application to the Council of Ministers over the same topic, requesting that his application should be considered under Reg. 16(1) of the Pensions Regulations. In paragraph 1 of his letter he says :-

> "The allegation of the Director of the Personnel Department that such matters must be decided in accordance with the Pensions Law when the retirement of the interested public officer is about to take place, is contrary to the policy which is

followed by you. I have in mind instances of public servants whose previous service has been recognized for the purpose of pension by you, and the interested public servants continue to remain in the public service and will continue regularly to serve for a series of years, taking into consideration that none of them has expressed a desire to retire from service."

I think it is constructive to refer to Regulation 16(1) which is in these terms :-

"Except as otherwise provided in these Regulations, only continuous service shall be taken into account as qualifying service or as pensionable service :

Provided that any break in service caused by temporary suspension of employment not arising from misconduct or voluntary resignation shall be disregarded for the purposes of this paragraph."

The definition of "pensionable service" in accordance with Regulation 2 means service which may be taken into account in computing pension under these regulations, and "qualifying service" means service which may be taken into account in determining whether an officer is eligible by length of service for pension, gratuity or other allowance.

On August 2, 1971, in reply to the letter of the applicant, the same stand as before was adopted by the Director-General of the Ministry of Finance. On September 4, 1971, the present counsel of the applicant addressed a new letter to the Director-General of the Ministry of Finance, and in paragraph 3 they had this to say :-

"Because it does not appear from your reply that your decision regarding the application of our clients has been considered by the Council of Ministers in accordance with the law, we request you to inform us up to the 20th September, 1971, whether or not such examination has taken place."

On September 25, 1971, the Director-General, in

reply to counsel said that the application has not been placed before the Council of Ministers for a decision, because subjects regarding the recognition of a previous service for purposes of pension come within the competence of the Minister of Finance in accordance with the decision of the Council of Ministers that such matters which do not raise new policy should be examined by the Ministry of Finance without having to refer those matters to the Council of Ministers.

In paragraph 2 the previous stand of his Office has been adopted, *i.e.* that in accordance with the existing practice such subjects are not examined, but only when the retirement of the interested public servant is about to take place. See *exhibit* 5.

On October 5, 1971, the applicant, feeling aggrieved because his application was not considered, and because he wanted to know whether he ought to continue serving in the Government after his 55th year of age, filed the present recourse. The opposition was filed on November 12, 1971, and was based on the following two grounds of law :- (1) That the recourse is legally unfounded because it is made against an act which is not of an executory nature, and (2) that the decision complained of was taken in accordance with the law.

Having heard both counsel, I think it is constructive to reiterate that the trend of our case law shows that an act or decision of an authority, body or person exercising executive or administrative authority in the sense of paragraph 1 of Article 146 of the Constitution, means such an act or a decision directly affecting a right or interest, protected by law, of a particular person ascertainable at the time of doing such an act or of taking such a decision. See *Eleni Vrahimi and Another* v. *The Republic*, 4 R.S.C.C. 121, at p. 123; *Laoudhia* v *The Republic*, 2 R.S.C.C. 119, at p. 121; and also *Police Association and Others* v. *Republic* (reported in this Part at p. 1 *ante*, at p. 27).

A more comprehensive definition, of course, of an administrative act, appears also in the textbook of Professor Forsthoff's The Administrative Act at p. 11 :-

"An administrative act includes all unilateral, authoritative acts of an authority of public administration which have direct legal effect, with the exception of legislative and judicial acts."

The question which is posed is: Whether the decision of the Director of the Ministry of Finance is of an executory nature or not. I think it is a common ground that from the wording of the said Article 146, nothing is said about an administrative act or decision being executory. But in view of the fact that an administrative act must be such an act which has direct legal effect, in order to be amenable to administrative review, it must be shown (a) that the administrative act which is challenged, directly and adversely affects the existing legitimate interest of the applicant; (see paragraph 2 of Article 146 of the Constitution); and (b) that such act or decision should be executory.

I shall now proceed to examine more closely the second requirement, and in order to do so, I must, from the very beginning, stress that I have to rely on judicial precedent only, the reason being, I repeat, that no such requirement is expressly laid down in our Article 146 of the Constitution, or indeed in any other legislative enactment. That this requirement has been judicially recognized as being incorporated into Article 146, appears for the first time in *Kolokassides* and *The* Republic (1965) 3 C.L.R. 549, at p. 551, where the Court said :-

"An administrative act (and decision also) is only amenable within a competence, such as of this Court under Article 146, if it is executory (ἐκτελεστή); in other words it must be an act by means of which the 'will' of the administrative organ concerned has been made known in a given matter, an act which is aimed at producing a legal situation concerning the citizen affected and which entails its execution by administrative means (see Conclusions from the Jurisprudence of the Council of State in Greece 1929—1959, pp. 236—237).

I am quite aware that in Greece this attribute

of an act, which may be the subject of a recourse for annulment, is specifically stated in the relevant legislation (section 46 of Law 3713 as codified in 1961) but in my opinion such express provision was only intended to reaffirm a basic requirement of administrative law in relation to the notion of proceedings for annulment and, therefore, such requirement has to be treated as included by implication, because of the very nature of things, in our own Article 146, though it is not expressly mentioned."

This case was affirmed on appeal. See (1965) 3 C.L.R. 542 at p. 547. See also *Cyprus Flour Mills Co. Ltd.* and *The Republic (Council of Ministers and Another)* (1968) 3 C.L.R. 12, at pp. 24—25; *Papanicolaou (No. 1)* v. *The Republic (Ministry of Health and Others)* (1968) 3 C.L.R. 225, at pp. 230—231; *Photis Kelpis* v. *The Republic* (1970) 3 C.L.R. 196, at p. 202; and *Police Association and Others* v. *The Republic* (*supra*).

Although I fully sympathise with the applicant, and his concern in this matter is understandable, nevertheless, having heard both counsel, and directing myself with those judicial pronouncements I have quoted earlier, I have reached the view that the decision or act of the Director-General was not of an executory nature, since it was not intending to produce a legal situation concerning the rights of the applicant. In my view, such administrative act was of an advisory nature only, and was intended to remind the applicant what was the position under the law, and is, therefore, not amenable within the competence of this Court.

For these reasons, I think that I have no alternative but to accept the submission of counsel for the respondent, and I would, therefore, dismiss this recourse. Regarding the question of costs, I think this is a proper case to exercise my discretionary powers and not to award costs against the applicant.

Order of the Court is therefore: Case dismissed with no costs.

Application dismissed.
No order as to costs.