

[MALACHTOS, J.]

IN THE MATTER OF ARTICLE 146 OF THE
CONSTITUTION

MICHALIS EROTOKRITOU,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH
THE MINISTER OF INTERIOR,

Respondent.

(Case No. 378/71).

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v.

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(MINISTER
OF INTERIOR)

Administrative acts or decisions—Which alone can be made the subject of a recourse under Article 146 of the Constitution—Article 146.1 thereof—Executory act—Advisory act—In the instant case the so called decision sought to be challenged by this recourse merely expresses an opinion as to what would be the legal position concerning the applicant public officer when he would attain the age of retirement from the service—Letter by the Director of Personnel to applicant's Head of Department on the question of applicant's service that can count for pension purposes—It is not an executory act—It does not amount to more than a legal opinion on the matter and is, therefore, not amenable within the jurisdiction of this Court on a recourse under Article 146 of the Constitution.

Executory act or decision—A merely advisory act amounting to no more than a legal opinion—Recourse, therefore, not maintainable—See further supra.

The facts sufficiently appear in the judgment of the learned Judge, dismissing this recourse on the ground that it is not maintainable in that the act sought to be challenged thereby is not an executory act but merely expresses a legal opinion as to what the position concerning the applicant public officer would be when he would attain the age of retirement.

Cases referred to :

Eleni Vrahimi and Another and The Republic, 4 R.S.C.C.
121, at p. 123;

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

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Recourse.

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Recourse for a declaration that the decision of the respondent rejecting applicant's application for calculation of his military service from 26.11.1940 up to 8.10.1946 and his prior service as a sanitary labourer from March, 1933 to 26.11.1940 as a period for which the applicant is entitled to pension is null and void.

K. Michaelides, for the applicant.

N. Charalambous, Counsel of the Republic,
for the respondent.

Cur. adv. vult.

The following judgment was delivered by :

MALACHTOS, J. : The applicant in this recourse is a public servant holding the permanent pensionable post of messenger 1st grade in the Department of Mines. According to the allegations set out in the statement of facts on which this application is based, he served as a sanitary labourer in the Medical Department from 1/3/1933 to 20/11/1940. During this period he was in the regular employment of the Government as a wages employee. On 26/11/1940 he joined His Majesty's Forces after resigning his post for that purpose and served in the Cyprus Regiment up to 12/3/1946 when he was demobilised. Soon after his demobilisation he applied for re-employment and, finally, he was on 8/10/1946 appointed as a messenger.

On 1/7/1971 the applicant applied to the Director of Personnel, through the Senior Mines Officer, for recognition of his service as a sanitary labourer and as a member of His Majesty's Forces for purposes of his pension. The applicant being born on 21/6/1912 was due to retire on 30/6/1972. He based his application on a circular No. 765 (M.P. 1323/40) and the conditions attached thereto under which members of the unestablished staff and wages employees in regular employment who joined His Majesty's Forces between the 3rd September, 1939 and the 15th of August, 1945, and who were re-employed within one month after the expi-

ration of their demobilisation leave were eligible to the benefits under the Pensions Law, Cap. 311, as the time spent on War Service, would not be regarded as a break in the Government Service. On 20/7/1971 the Senior Mines Officer addressed to the applicant the following letter :

“With reference to your affidavit and the discharge certificate by the Service Authorities, which you recently submitted to me, I am to inform you that they have been submitted to the Director of Personnel and copy of his reply is attached herewith for your information (No. 6168/51/N dated 14/7/71) which speaks for itself.”

The letter of the 14th June, 1971, by the Director of Personnel to the Senior Mines Officer, reads as follows :

“I am directed to refer to your letter M. 1117(P) of 1st July, 1971 relating to the previous service of Mr. Michael Erotokritou, Messenger, 1st Grade, and to inform you that his continuous service which may count as pensionable service started from the 8th October, 1946. Mr. Erotokritou’s military service cannot count for pension purposes under the provisions of section 17 of the Pensions Law, nor can be considered pensionable his previous service as Sanitary Labourer in the Department of Health, due to breaks in this service.

2. The official date of birth of Mr. Erotokritou is obviously 21st June, 1912 according to a Birth Certificate filed in his personal paper P. 4266 kept at the office of the Public Service Commission.”

On the 21st September, 1971, the applicant filed the present recourse claiming the following relief :

A declaration of the Honourable Court that the decision of the respondent (*exhibit A*), communicated to the applicant by letter dated 20/7/71 (*exhibit A1*), by which the respondent rejected the application of the applicant for calculation of his military service from 26/11/1940 up to 8/10/1946, as well as his prior service as a sanitary labourer from March 1933 to his mobilisation on 26/11/1940, as a period for which the applicant is entitled to pension and/or the omission of the res-

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pondent to recognise the period from March 1933 up to his retirement as pensionable and/or the decision of the respondent to recognise as pensionable the period from 8/10/1946 onwards, is null and void and illegal and of no effect whatsoever.

The opposition was filed on 9/11/1971 and is based on the following two grounds of law :

1. The recourse is legally unacceptable as directed against an act which is not executory; and
2. In any case the decision complained of is in all respects legal.

When the case came on for hearing before the Court, on the submission of counsel for the respondent and with the consent of counsel for the applicant, the first ground of law set out in the opposition, *i.e.* that the recourse is legally unacceptable as directed against an act which is not executory in the sense of Article 146 of the Constitution, was taken as a preliminary legal issue. Able and extensive arguments were advanced on this point by counsel on both sides.

Article 146 of our Constitution reads as follows :

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

2. Such a recourse may be made by a person whose any existing legitimate interest, which he has either as a person or by virtue of being a member of a Community, is adversely and directly affected by such decision or act or omission.”

So, the only point which falls for consideration at this stage of the proceedings is whether the decision of the respondent complained of is an administrative one of an executory nature.

It has been decided in *Eleni Vrahimi and Another and The Republic*, 4 R.S.C.C. 121 at page 123, that "a decision or act, in the sense of paragraph 1 of Article 146, must be such as would directly affect a right or interest protected by law, of a particular person ascertainable at the time of taking such decision or doing such an act".

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It is well established that a decision, an act or omission of any organ, authority or person exercising any executive or administrative authority, must be of an executory nature in order to be amenable within the competence of this Court under Article 146 of the Constitution. This principle has been accepted by the Full Bench of this Court in its appellate jurisdiction in the case of *Nicos Colocassides v. The Republic* (1965) 3 C.L.R. 542.

In the judgment of the trial judge in the above case, which was upheld, and which appears at page 549 of the report, it is stated at page 551 :

"An administrative act (and decision also) is only amenable within a competence, such as of this Court under Article 146, if it is executory (ektelesti); 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."

In Case No. 1690/60 of the Greek Council of State

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it has been decided that an act which merely expresses the opinion of the administrative Council of the Pensions Fund on a subject placed before them by the applicant himself in various applications, without the prerequisite of the application of the law being really in existence, and since no change was effected in the legal situation concerning the applicant, is not an executory act.

In the present case the letter of the Director of Personnel dated 14th June, 1971, to the Senior Mines Officer, in my view expresses an opinion as to what the legal position concerning the applicant would be when he would attain the age of retirement, and it does not amount to more than a legal opinion on the matter. Therefore, the direct executory character of the act complained of, is missing.

For the reasons stated above, I accept the submission of counsel for the respondent that the act complained of is not of an executory nature and, therefore, this recourse fails.

In the circumstances, I make no order as to costs.

*Application dismissed.
No order as to costs.*