

IN THE MATTER OF ARTICLE 146 OF THE
CONSTITUTION
YIALOUSA SAVINGS BANK LIMITED,

—
YIALOUSA
SAVINGS
BANK
LIMITED
v.
REPUBLIC
(MINISTER OF
FINANCE AS
CONTROLLER
OF BANKS)
AND ANOTHER

Applicants,

and

1. THE REPUBLIC OF CYPRUS, THROUGH
THE MINISTER OF FINANCE, AS
CONTROLLER OF BANKS,
2. THE CENTRAL BANK OF CYPRUS,

Respondents.

(Case No. 351/74).

5 *Time—Within which a recourse may be filed—Article 146.3 of the
Constitution—Force majeure—It is an issue of fact to be de-
termined in the light of the particular circumstances of each
individual case, whether or not the time-limit for filing a re-
course is to be treated as not having expired due to force ma-
jeure—Circumstances amounting, in effect, to force majeure
prevented applicants from filing the present recourse.*

10 *Constitutional Law—Written requests or complaints under Article
29 of the Constitution—Recourse for failure to reply or to
give reasons for such failure—Subject matter of request or
complaint has to be within the competence of the Supreme
Court under Article 146—Otherwise the Court has no compe-
tence to entertain the recourse—Failure to reply to request for
furnishing copy of banking licence—Subject matter of request
15 not within competence—No recourse lies.*

20 *Administrative Law—Executory Act—Furnishing or non-furnishing
of copy of an official document (banking licence)—Not an ad-
ministrative action creating a legal situation—Not of an execu-
tory nature—And no recourse in respect of it is possible under
Article 146 of the Constitution.*

The applicants in this recourse complained (a) against the decisions of the respondents, set out in their letters dated June 1, 1974, by means of which they were not licensed to do bank-

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ing business on the strength of a banking business licence and that they were designated only as an “authorised financial institution” and (b) against the failure of the respondent Ministry to reply to a letter of Counsel for the applicants, dated June 18, 1974, by means of which he had requested to be furnished with a copy of a banking licence, which had been issued to the applicants on September 7, 1939, and had asked, also, to be informed of the reasons for any refusal, or inability, to furnish him with such a copy.

Counsel for the respondents raised the preliminary issue that the recourse is out of time in so far as it has been made against the decisions communicated by the said letters dated June 1, 1974; and that (with regard to complaint (b) above) no recourse can be made against the failure to reply to the said letter of counsel for the applicants, or against any implied refusal of the request contained in such letter, because the administrative action which was requested by means of this letter is a matter outside the competence of this Court under Article 146 of the Constitution, inasmuch as the furnishing of a copy of an official document is not an executory administrative act.

The recourse was filed on August 23, 1974, in other words seventy-nine days after the said letters were, admittedly, received by the applicants on June 4, 1974. It could be judicially noticed that after the abortive *coup d'etat* of July 15, 1974, there followed, on July 20, 1974, the Turkish invasion of Cyprus, the second phase of which commenced on August 14, 1974; and that the hostilities lasted up to, at least, August 16, 1974. It could, also, be judicially noticed that as from August 19, 1974, the Registry of the Supreme Court was functioning and it was, therefore, possible to effect the filing of a recourse on that date; actually no recourse was filed between August 12, 1974 and August 23, 1974, and no other proceeding whatsoever was filed between August 19, 1974 and August 23, 1974 except an application under the Charities Law.

Counsel for the applicants submitted that even though the Registry of the Supreme Court was functioning on August 19, 1974, it had become impossible, after August 14, 1974, to communicate with the applicants in Yialousa—(which since the second phase of the Turkish invasion has come, and continues, to be under Turkish military occupation)—and that even after the cessation of the hostilities, there were occasional

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5 shooting incidents and, so, it was really dangerous to come to the Supreme Court building which was very near the line of military confrontation. Moreover due to the absence of his staff because of the anomalous situation, he was not in a position to file the recourse before August 23, 1974.

10 *Held*, (1) that the period of time prescribed by Article 146.3 of the Constitution may cease to run against a prospective applicant if he has been prevented from making a recourse due to force majeure; that it is an issue of fact, to be determined in the light of the particular circumstances of each individual case, whether or not the time-limit for the filing of an administrative recourse is to be treated as not having expired due to force majeure; that on the basis of the material before this Court there is no difficulty in holding that this is a case in which circumstances amounting, in effect, to force majeure prevented the applicants from filing the present recourse prior to August 23, 1974; that, therefore, the recourse cannot be treated as being out of time; and that, accordingly, the relevant preliminary objection of the respondents cannot be sustained.

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40 (2) That the furnishing or non-furnishing of a copy of an official document, in circumstances such as these of the present case, is not administrative action creating a legal situation; that, therefore, it is not of an executory nature; and that, consequently, no administrative recourse in respect of it is possible under Article 146 of the Constitution; that, moreover, once this is so, this Court is further of opinion that it was not possible to make a recourse, under Article 146 read in conjunction with Article 29 of the Constitution, against the failure, or implied refusal, of respondent 1 to either furnish a copy of the document concerned, or to give reasons for such course (see *Xenophontos and The Republic*, 2 R.S.C.C. 89, where it was held that unless the subject matter of a request or a complaint, in the sense of Article 29, in respect of which no duly reasoned reply has been given, is a matter within the competence of this Court, under Article 146 of the Constitution, this Court has no competence to entertain a recourse, under Article 146, complaining of non-compliance with Article 29).

Order accordingly.

Cases referred to:

Moran and The Republic, 1 R.S.C.C. 10 at p. 13;

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Mahdesian v. Republic (1966) 3 C.L.R. 630;
HadjiGregoriou v. Republic (1976) 3 C.L.R. 163;
Xenophontos and The Republic, 2 R.S.C.C. 89 at pp. 92-93;
Case Nos. 114/1931, 402/1937, 642/1963, 2399/1970,
1866/1967, 10/1968, 19/1970 of the Greek Council of
State.

Recourse.

Recourse against the decision of the respondents whereby applicants were not licensed to do banking business on the strength of a banking business licence and they were designated only as an "authorised financial institution" and against the failure of the respondent Ministry to reply to a letter of Counsel for the applicants by means of which he had requested to be furnished with a copy of a banking licence, which had been issued to the applicants on September 7, 1939.

L. Demetriades, for the applicants.

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

Cur. adv. vult. 20

The following decision was delivered by:-

TRIANTAFYLLIDES, P.: In this case the applicants are seeking (by means of paragraphs (A) and (C) of the motion for relief in the Application) to annul decisions, set out in letters dated June 1, 1974, which were addressed to them, respectively, by the respondent Minister of Finance (see *exhibit* 1) and the respondent Governor of the Central Bank (see *exhibit* 2).

By the said letters the applicants were informed that they were not licensed to do banking business on the strength of a banking business licence, and that they were designated only as an "authorized financial institution".

Furthermore, by the present recourse, the applicants are complaining (by means of paragraph (B) of the motion for relief) against the failure of the respondent Ministry to reply to a letter of counsel for the applicants, dated June 18, 1974 (see *exhibit* 3), by means of which he had

5 requested to be furnished with a copy of a banking licence, which had been issued to the applicants on September 7, 1939, and had asked, also, to be informed of the reasons for any refusal, or inability, to furnish him with such a copy.

10 At the commencement of the hearing of this recourse counsel for the respondents raised the preliminary issue that the recourse is out of time in so far as it has been made against the decisions communicated to the applicants by the two aforementioned letters dated June 1, 1974.

15 Actually, the recourse was filed on August 23, 1974, in other words seventy-nine days after the said letters were, admittedly, received by the applicants on June 4, 1974.

The period prescribed for the filing of a recourse under Article 146.3 of the Constitution is seventy-five days and this time-limit has to be observed in the public interest (see *Moran v. The Republic*, 1 R.S.C.C. 10, 13).

20 It is well settled that the period of time prescribed by Article 146.3, above, may cease to run against a prospective applicant if he has been prevented from making a recourse due to force majeure (see, *Mahdesian v. The Republic*, (1966) 3 C.L.R. 630, and *HadjiGregoriou v. The Republic*, (1976) 3 C.L.R. 163, as well as "Πορίσματα Νομολογίας του Συμβουλίου της Έπικρατείας", 1929-1959, p. 256); but, force majeure does not operate so as to extend the said period if it has only prevented a prospective applicant from making a recourse during part of such period, but did not continue to be operative, too, at its expiration; force majeure can only be relied on by a prospective applicant if it, actually, has prevented him from filing a recourse within the prescribed period and continued doing so after the expiration of such period up to the time of the filing of the recourse (see, *inter alia*, the *HadjiGregoriou* case, *supra*, as well as, Τσάτσου "Αίτησις 'Ακυρώσεως ενώπιον του Συμβουλίου της Έπικρατείας", 3rd ed., p. 97).

40 A dispute has arisen, in the present case, as to whether, in actual fact, the filing of the recourse within a period

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of seventy-five days as from June 4, 1974, namely up to August 19, 1974 (August 18, 1974, being a Sunday) was rendered impossible due to force majeure, which continued to prevent the filing of a recourse prior to August 23, 1974, when it was eventually filed.

It can be judicially noticed that after the abortive *coup d'etat* of July 15, 1974, there followed, on July 20, 1974, the Turkish invasion of Cyprus, the second phase of which commenced on August 14, 1974; and that the hostilities lasted up to, at least, August 16, 1974.

It should, also, be judicially noticed, that, as from, at any rate, August 19, 1974, the Registry of the Supreme Court was functioning and it was, therefore, possible to effect the filing of a recourse on that date; actually, however, as it appears from the Court's records, no recourse was filed between August 12, 1974, and August 23, 1974, and no other proceeding whatsoever was filed between August 19, 1974, and August 23, 1974, except an application under the Charities Law, which was sent by post and was received on August 20, 1974.

Counsel for the applicants submitted that even though the Registry of the Supreme Court was functioning on August 19, 1974, it had become impossible, after August 14, 1974, to communicate with the applicants in Yialoussa—which since the second phase of the Turkish invasion has come, and continues, to be under Turkish military occupation—and that, even after the cessation of the hostilities, there were occasional shooting incidents and, so, it was really dangerous to come to the Supreme Court building which was very near the line of military confrontation. Moreover, he told the Court that due to the absence of the staff of his office, because of the anomalous situation, he was not in a position to file the recourse before August 23, 1974.

As it is to be derived from relevant case-law of the Greek Council of State (see, *inter alia*, its decisions in cases 114/1931, 402/1937, 642/1963, and 2399/1970) it is an issue of fact, to be determined in the light of the particular circumstances of each individual case, whether or not the time-limit for the filing of an administrative recourse is to be treated as not having expired due to force majeure.

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5 On the basis of the material before me I have no difficulty in holding that this is, indeed, a case in which circumstances amounting, in effect, to force majeure prevented the applicants from filing the present recourse prior to August 23, 1974; therefore, the recourse cannot be treated as being out of time, and, so, the relevant preliminary objection of the respondents cannot be sustained.

10 In relation to paragraph (B) of the motion for relief it has been admitted by counsel for the respondents that no reply was given to the letter of counsel for the applicants dated June 18, 1974 (and, in this respect, it was conceded that what is stated to the contrary in ground of law (B) (a) in the Opposition is not correct); but, it has been submitted, by way of a preliminary objection, that no re-
15 course can be made against the failure to reply to the said letter, or against any implied refusal of the request contained in such letter, because the administrative action which was requested by means of this letter is a matter outside the competence of this Court under Article 146
20 of the Constitution, inasmuch as the furnishing of a copy of an official document is not an executory administrative act.

25 I agree with counsel for the respondents that the furnishing or non-furnishing of a copy of an official document, in circumstances such as these of the present case, is not administrative action creating a legal situation and, therefore, it is not of an executory nature; consequently, no administrative recourse in respect of it is possible under Article 146 (see, in this respect, the decisions of the
30 Greek Council of State in cases 1866/1967, 10/1968, 19/1970). Once this is so I am, further, of the opinion that it was not possible to make a recourse, under Article 146 read in conjunction with Article 29 of the Constitution, against the failure, or implied refusal, of respondent
35 1 to either furnish a copy of the document concerned, or to give reasons for such course of action. Article 29 reads as follows:-

“ARTICLE 29

40 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

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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 a person may have recourse to a competent court in the matter of such request or complaint”.

In *Xenophontos and The Republic*, 2 R.S.C.C. 89, it was held that unless the subject matter of a request or complaint, in the sense of Article 29, in respect of which no duly reasoned reply has been given, is a matter within the competence of this Court, under Article 146 of the Constitution, this Court has no competence to entertain a recourse, under Article 146, complaining of non-compliance with Article 29; the following passage appears in the judgment of the Court (at pp. 92-93):-

With regard to the failure of the Respondent to give a reasoned reply to *Exhibit 1* under Article 29 of the Constitution, it should first be observed that *Exhibit 1* was addressed not to the Minister of the Interior but to the Attorney-General of the Republic with only a copy to the Ministry of the Interior. Having regard to the subject-matter of the complaint contained in the said *Exhibit 1*, namely, the failure to institute criminal proceedings against the police constables concerned, the Court considers that *Exhibit 1* was properly addressed to the Attorney-General of the Republic who, by virtue of paragraph 2 of Article 113 of the Constitution, has control over the institution and conduct of criminal proceedings.

The question for consideration in this Case is whether, having regard to the subject-matter of the complaint made by *Exhibit 1*, this Court has jurisdiction to entertain the prayer contained in paragraph 3 of the Applicant's motion for relief, *i.e.* that there has been an omission to reply to *Exhibit 1* in accordance with Article 29 of the Constitution.

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5 Inasmuch as paragraph 1 of Article 29 of the
Constitution requires that the notice of decision
which has been taken in the matter shall be 'duly
reasoned', it follows that in order for this Court to
have competence to entertain a recourse in respect
of a failure to comply with Article 29, the subject-
matter of the written request or complaint in ques-
tion made under Article 29 must be within the juris-
10 diction of this Court under Article 146. Otherwise
this Court could not properly examine the matter
and decide whether the reply in question was 'duly
reasoned' or not as required by Article 29.

15 In this Case the subject-matter of the complaint
made by *Exhibit 1* under Article 29 is, in effect, the
failure of the Attorney-General of the Republic to
institute criminal proceedings in respect of the acts
in question against the police constables concerned.
In the opinion of the Court the exercise of such an
20 authority by the Attorney-General of the Republic,
which in this respect is so closely related to judicial
proceedings in criminal cases, is not within the ambit
of paragraph 1 of Article 146, and, therefore, this
Court has no jurisdiction to entertain the prayer con-
tained in paragraph 3 of the Applicant's motion for
25 relief".

In the light of the above I am bound to hold that the
preliminary objection of counsel for the respondents in
relation to paragraph (B) of the motion for relief has to
30 succeed and, to that extent, the present recourse is, con-
sequently, dismissed; but, of course, there is nothing to
prevent counsel for the applicants from seeking to secure
production of a copy of the document in question in re-
lation to the hearing of this case regarding the remaining
two paragraphs, (A) and (C), of the motion for relief.

35 Before concluding this decision I should refer to two
other preliminary issues which have been raised by coun-
sel for the respondents:

40 By means of ground of law (C) in the Opposition it is
being contended that the applicants cannot succeed on the
strength of paragraph (C) of the motion for relief, because
they have accepted, and consented to, the administrative

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action challenged by means of the said paragraph (C). As this is a matter which is inextricably connected with the merits of the whole case, about which I have not yet heard full argument, and there may be adduced further documentary or other evidence in relation thereto, I will not decide on this issue now, but at the end of the proceedings in the present case.

Lastly, it should be noted, in relation to paragraph (A) of the motion for relief, that counsel for the respondents has stated that he no longer insists on the objection raised by ground of law (A) in the Opposition to the effect that the administrative action challenged by this part of the recourse is not of an executory nature.

In the result, this recourse fails in so far as paragraph (B) of the motion for relief is concerned, but it will proceed to a hearing on the merits in respect of paragraphs (A) and (C) of the motion for relief.

Order accordingly.