1979 April 2

[TRIANTAFYLLIDES, P., STAVRINIDES L. LOIZOU, MALACHTOS, JJ.]

LEFKI PAPASAVVA,

Appellant,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE CHIEF OF POLICE,

Respondent.

(*Revisional Jurisdiction Appeal No.* 124).

Administrative Law—Omission—Continuing omission—When a decision not to do something is taken it cannot be said that it amounts, also, to an omission, to do the same thing.

Time—Within which to file a recourse—Article 146.3 *of the Constitution—Decision not to reappoint appellant as an acting police sergeant—Constitutes a refusal to reappoint her as such—Not a continuing omission—Time provided under above Article began to run as from date of communication to her of said decision—* Mustafa *v.* Republic, 1 *R.S.C.C.* 44 *distinguished.*

Administrative Law—Decision of the Supreme Court in a recourse under Article 146 *of the Constitution—Compliance of administration with—Paragraph* 5 *of the said Article—Annulment of decision concerning termination of acting appointment to rank of acting police sergeant—No direction that appellant had to be reappointed but that the matter had to be reconsidered—Subsequent decision not to appoint appellant to said rank amounts to such reconsideration and constitutes a sufficient compliance in the sense of Article* 146.5.

Following the decision of the respondent to terminate the appointment of the appellant as acting sergeant in the Police, with effect as from the 1st January, 1969, she challenged this decision by means of recourse No. 21/69; and on November 28, 1969 the Court annulled such decision on the ground that it was taken in ignorance of the existence of a policy decision.

On May 1, 1970, the respondent decided not to reappoint the appellant as an acting police sergeant on the ground that such a course was not required by the needs of the Police Force. On July 24, 1970, appellant's Counsel wrote to the respondent and requested that the appellant should be paid the acting allowance of which she had been deprived due to the termination of her appointment and, also, that there should be returned to her the insignia of the rank of acting police sergeant. In his reply, dated August 3, 1970, received on August 6, 1970, the respondent informed him that since as from January 1, 1969, she was not acting in such a capacity there could not be paid to her an acting allowance, and, also, that as she had ceased, as from the same date, to be an acting sergeant it was not possible to return to her the insignia of that rank.

On November 16, 1972, the appellant filed a recourse complaining against the continuing omission of the respondent to comply with the decision of the Supreme Court in recourse No. 21/69. The trial Judge held that if there existed a continuing omission such omission came to an end when the decision not to reappoint the appellant was reached on May 1, 1970; that such decision was communicated to her counsel by letter dated August 3, 1970, which was received on August 6, 1972; and that as the recourse was filed much more than seventy-five days after August 6, 1970, the said recourse was out of time, in view of the provisions of Article 146.3 of the Constitution, and dismissed the recourse. Hence this appeal.

Held, that when a decision refusing to do something is taken it cannot be said that it amounts, also, to an omission to do the same thing (see, *inter alia*, *Vafeadis* v. *The Republic*, 1964 C.L.R. 454); that the decision of the Chief of Police of May 1, 1970, constituted a refusal to reappoint the appellant as an acting police sergeant and that it could not be, therefore, treated as an omission of a continuing nature to do so; that consequently, it was rightly held that the time of seventy-five days provided for under Article 146.3 of the Constitution began to run as from August 6, 1970; and that, thus, the appellant's recourse was out of time (*Mustafa* v. *The Republic*, 1 R.S.C.C. 44 *distinguishable*).

Held, further, that the contention of counsel for the appellant that this is a case of a continuing omission to comply with the judgment given in the appellant's earlier recourse No. 21/69

cannot be accepted, because by the judgment in that recourse it was not laid down that the appellant had to be reappointed as an acting police sergeant, but, in effect, only, that the matter of the termination of her acting appointment to such rank, which was annulled by this Court in such recourse, had to be reconsidered in the light of the then in force policy of the police; and that the decision of the Chief of Police, which was reached as aforesaid on May 1, 1970, is regarded as amounting to such a reconsideration and as constituting a sufficient compliance, in the sense of paragraph 5 of Article 146 of the Constitution, with the judgment given in the said recourse.

Appeal dismissed.

Cases referred to:

Nicolaou v. *The Republic* (1969) 3 C.L.R. 520;

Vafeadis v. *The Republic*, 1964 C.L.R. 454;

Mustafa v. *The Republic*, 1 R.S.C.C. 44 at p. 47.

Appeal.

Appeal against the judgment of a Judge of the Supreme Court of Cyprus (A. Loizou, J.) given on the 10th September, 1973 (Revisional Jurisdiction Case No. 431/72) whereby appellant's recourse against an alleged continuing omission of the respondent Chief of Police to comply with the judgment of the Supreme Court in recourse No. 21/69 was dismissed.

A. Pandelides, for the appellant.

L. Loucaides, Deputy Attorney-General of the Republic, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment of the Court. The appellant has appealed against a first instance decision* of a Judge of this Court by means of which there was dismissed her recourse against an alleged continuing omission of the respondent Chief of Police to comply with the judgment of the Supreme Court in recourse No. 21/69, which was delivered on November 28, 1969 (see *Nicolaou* v. *The Republic*, (1969) 3 C.L.R. 520; "Nicolaou" being, at that time, the maiden name of the appellant).

That recourse was made against a decision to terminate the appointment of the appellant as an acting police sergeant and such decision was annulled on the ground that it was taken in

* Reported in (1973) 3 C.L.R. 467.

ignorance of the existence of a policy decision according to which a female acting sergeant should be in charge of the female police constables in each Police Division.

On July 24, 1970, the appellant addressed through counsel acting for her at the time—who is not the same as counsel who appeared for her in this appeal—a letter to the Chief of Police referring to the judgment in the aforesaid recourse No. 21/69 and requesting that the appellant should be paid the acting allowance of which she had been deprived due to the termination of her appointment and, also, that there should be returned to her the insignia of the rank of acting police sergeant.

In the meantime, however, the Chief of Police had decided, on May 1, 1970, not to reappoint the appellant as an acting police sergeant, as there was serving at the Nicosia Police Division, where the appellant was also serving, another female acting police sergeant, Vrisiis Georghiadou. Actually, Georghiadou had been serving previously as an acting police sergeant at Limassol, and when she was transferred to Nicosia, where the appellant was holding, at the time, the rank of acting police sergeant, it was decided to terminate the acting appointments to the rank of police sergeant of both of them; and it was as a result of the termination then of her acting appointment that appellant made recourse No. 21/69.

In the judgment given in the said recourse No. 21/69 the following are stated in relation to the termination of the acting appointment of the appellant:-

> " It is quite clear, from the foregoing, that such termination was made in ignorance of the existence of the relevant policy regarding female acting sergeants and that, therefore, the *sub judice* decision was reached under a misconception as to a material consideration, thus being rendered the product of a defective exercise of the relevant powers. Had the matter been decided on the proper basis and in its correct context then no doubt there would have been examined who of the two—the Applicant or Georghiadou—was the most suitable and consequently there would not have been terminated the acting appointments of both, as being unnecessary (see *exhibit* 3).
>
> In the circumstances, there is no other alternative open

to me than to declare the *sub judice* decision as being *null and void and of no effect whatsoever.* It is up to the appropriate authority in the Police to decide as to whether the acting appointment of the Applicant should be terminated, or, whether or not, in the light of existing requirements, the implementations of the spirit of the relevant policy renders it proper in the interests of the service—which are a primary consideration—to keep two female acting sergeants in the Nicosia Police Division, one of them being the Applicant."

After the appellant had made recourse No. 21/69, and prior to its determination on November 28, 1969, the said Georghiadou was reappointed as an acting police sergeant on January 21, 1969, but the appellant did not choose to challenge her reappointment.

Thus, on May 1, 1970, Georghiadou was still serving at the Nicosia Police Division as a female acting police sergeant and, as already stated, the Chief of Police decided not to appoint the appellant, also, in the same capacity, on the ground that such a course was not required by the needs of the Police Force.

The Chief of Police replied on August 3, 1970, to the aforementioned letter of appellant's counsel, dated July 24, 1970, and informed him that since as from January 1, 1969, when her acting appointment to the rank of police sergeant had been terminated, she was not acting in such a capacity there could not be paid to her an acting allowance, and, also, that as she had ceased, as from the same date, to be an acting police sergeant it was not possible to return to her the insignia of that rank.

On October 17, 1970, the appellant filed in the Nicosia District Court civil action No. 5645/70, obviously under paragraph 6 of Article 146 of the Constitution, claiming damages for the termination of her acting appointment, which had been annulled by recourse No. 21/69. The said paragraph 6 reads as follows:-

"6. Any person aggrieved by any decision or act declared to be void under paragraph 4 of this Article or by any omission declared thereunder that it ought not to have been made shall be entitled, if his claim is not met to his satisfaction by the organ, authority or person concerned, to institute legal proceedings in a Court for the recovery of

damages or for being granted other remedy and to recover just and equitable damages to be assessed by the Court or to be granted such other just and equitable remedy as such Court is empowered to grant."

Then, on November 16, 1972, the appellant filed recourse No. 431/72, which was dismissed by a Judge of this Court, and against the dismissal of which the present appeal has been made.

The learned trial Judge has held that if there existed a continuing omission to comply with the judgment in recourse No. 21/69, such omission came to an end when the decision was reached by the Chief of Police on May 1, 1970, not to reappoint the appellant to the post of acting police sergeant; such decision was communicated to her counsel by means of the letter dated August 3, 1970, and it is common ground that this letter was received on August 6, 1970. As the appellant's recourse No. 431/72 was filed on November 16, 1972, that is much more than seventy-five days after August 6, 1970, the trial Judge found that appellant's said recourse was out of time, in view of the provisions of Article 146.3 of the Constitution, and dismissed it accordingly.

It has often been pointed out by this Court that when a decision refusing to do something is taken it cannot be said that it amounts, also, to an omission to do the same thing (see, *inter alia*, *Vafeadis* v. *The Republic*, 1964 C.L.R. 454).

We are of the view, on the basis of the facts of the present case, that the decision of the Chief of Police of May 1, 1970, constituted a refusal to reappoint the appellant as an acting police sergeant and that it could not be, therefore, treated as an omission of a continuing nature to do so; and, consequently, that it was rightly held that the time of seventy-five days provided for under Article 146.3 of the Constitution began to run as from August 6, 1970; thus, the appellant's recourse No. 431/72 was out of time.

Nor can we accept the contention of counsel for the appellant that this is a case of a continuing omission to comply with the judgment given in the appellant's earlier recourse No. 21/69, because by the judgment in that recourse it was not laid down that the appellant had to be reappointed as an acting police sergeant, but, in effect, only, that the matter of the termination

of her acting appointment to such rank, which was annulled by this Court in such recourse, had to be reconsidered in the light of the then in force policy of the Police; and we regard the decision of the Chief of Police, which was reached as aforesaid on May 1, 1970, as amounting to such a reconsideration and as constituting a sufficient compliance, in the sense of paragraph 5 of Article 146 of the Constitution, with the judgment given in the said recourse.

The said paragraph 5 reads as follows:-

"5. Any decision given under paragraph 4 of this Article shall be binding on all Courts and all organs or authorities in the Republic and shall be given effect to and acted upon by the organ or authority or person concerned."

In trying to persuade us that this is a case where there exists a continuing omission counsel for the appellant has referred, *inter alia*, to the case of *Mustafa* v. *The Republic*, 1 R.S.C.C. 44, where the following were stated (at p. 47):-

" Leaving aside 'decisions' or 'acts', with which the Court is not concerned in this case, and dealing only with 'omissions', a distinction must be made between a non-continuing omission (e.g. the failure of a competent authority to issue a permit in respect of something to be done on a particular date) and an omission which is of a continuing nature."

We are of the view that the *Mustafa* case is clearly distinguishable on the basis of its particular facts from the present case and that the abovequoted dictum of the Court in that case has to be read and understood by reference to the said facts, which are stated as follows in the judgment in such case (at p. 45):-

" On the 26th November, 1956, unknown persons set fire to a sheepfold in the Ayios Mamas quarter of Morphou, in which the Applicant kept some sheep and as the result of the fire he lost his sheep and other contents of the sheepfold.

Action was taken under the provisions of the Recovery of Compensation for Injury to Property Law (now CAP. 84) and the Mukhtar of the quarter accordingly prepared a list of the tax-paying inhabitants liable to pay the compensation under the Law in respect of the damage which was estimated

to be £24.—, showing the amount payable by each of the said inhabitants. On the 29th January, 1957, the District Officer of Nicosia (then the Commissioner of Nicosia) duly confirmed the list under the provisions of the aforesaid Law.

Up to the date of the hearing of this case no warrant had been issued under section 4 of the Tax Collection Law (CAP. 329)."

On the basis of all that we have stated in this judgment it is clear that the aforementioned dictum in the *Mustafa* case, *supra*, could not be relied upon in the present case in order to lead us to a finding that there exists a continuing omission to comply with the judgment delivered in appellant's recourse No. 21/69.

For all the above reasons this appeal fails and it is dismissed accordingly; but in view of all relevant considerations we shall follow the same course as the trial Judge and make no order as to costs against the appellant.

Appeal dismissed. No order as to costs.