

1983 July 27

[TRIANTAFYLIDES, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

PANAYIOTIS ORPHANOS,

*Applicant.*

THE ACTING COMMISSIONER AND REGISTRAR  
OF GREEK CO-OPERATIVE SOCIETIES.

*Respondent.*

(Case No. 505/81).

*Act or decision in the sense of Article 146.1 of the Constitution—  
Which can be made the subject of a recourse—Decision of Com-  
missioner and Registrar of Greek Co-operative Societies to term-  
5 inate services of an employee of the Audit and Supervision Fund  
of Co-operative Societies established under rule 92 of the Co-  
Operative Societies Rules—Falls within the domain of Public  
Law and can be challenged by a recourse under the above Article.*

The applicant was appointed by the Registrar of Greek Co-  
operative Societies, on a temporary monthly basis as an  
10 employee of the Audit and Supervision Fund\*, as from the 28th  
October, 1966.

On the 8th April 1981 the applicant was found guilty by the  
District Court of Nicosia of the commission of the offences  
of aiding and abetting the stealing of money by an agent, abuse  
15 of office by a public servant and breach of trust and was  
sentenced to twelve months' imprisonment; which, on appeal,  
was reduced to seven months' imprisonment. Following the  
above conviction and sentence the respondent came to the con-  
clusion that he was no longer suitable to be an employee of the

\* The said Fund was established under rule 92 of the Co-operative Societies Rules which were made under section 54(1)(m) of the Co-operative Societies Law, Cap. 114, the provisions of which are quoted at p. 1371 post.

Audit and Supervision Fund and decided to terminate his services forthwith. Hence this recourse.

*On the preliminary objection of Counsel for the respondents that the sub judice decision was not an administrative act coming within the ambit of Article 146 of the Constitution and, therefore, it could not be challenged by means of a recourse made under that Article.* 5

Counsel submitted, in this respect, that the employment of the applicant was a matter falling within the domain of private law, and not of public law. This submission was mainly based on the terms of the contract of employment of the applicant. 10

*Held*, that taking into account the nature and character of the particular decision such decision falls within the domain of public law and it can be challenged by the present recourse under Article 146 of the Constitution (p. 1375 post). 15

*Order accordingly.*

Cases referred to

*Azmas and Another v. Police* (1981) 2 C.L.R. 9,

*Greek Registrar of Co-Operative Societies v. Nicolaides* (1965) 3 C.L.R. 164 at pp. 170-172. 20

*Paschalidou v. Republic* (1969) 3 C.L.R. 297,

*Papakypriacoi v. The Health Services of Cyprus* (1970) 3 C.L.R. 351,

*Ioannou v. Republic* (1983) 3 C.L.R. 150.

**Recourse.** 25

Recourse against the decision of the respondent to terminate applicant's services as an employee of the Audit and Supervision Fund of Co-operative Societies.

*M. Papamichael*, for the applicant.

*M. Photiou*, for the respondent. 30

*Cur. adv. vult*

FRANTAFYLLIDES P. read the following judgment. By means of the present recourse the applicant challenges the decision of the respondent Acting Commissioner and Registrar of Greek Co-operative Societies, dated 16th October 1981, to terminate his services as an employee of the Audit and Supervision Fund of Co-operative Societies. 35

The facts of the case are briefly as follows:

The applicant was appointed by the Registrar of Greek Co-operative Societies, on a temporary monthly basis, as an employee of the Audit and Supervision Fund, as from 28th  
5 October 1966.

The said Fund was established under rule 92 of the Co-operative Societies Rules (see Subsidiary Legislation of Cyprus, vol. 1, p. 426), which were made under section 54(1)(m) of the Co-operative Societies Law, Cap. 114.

10 The said section 54(1)(m), as modified by Article 188.3 of the Constitution, reads as follows:

“54(1) The Council of Ministers may make Rules to be published in the Gazette for the purpose of carrying out or giving effect to the principles and provisions of this Law.

(2)

15 (m) provide for the audit of the accounts of registered societies and for the charges, if any, to be made for such audit and provide for the levy of contributions from all or any registered societies to a fund to be used for the audit and supervision of existing societies  
20 and co-operative propaganda and prescribe for the administration of such a fund;”

Rule 92, above, reads as follows:

“92.--(1) There shall be constituted a fund to be known as the Audit and Supervision Fund and every registered society  
25 shall, when called upon to do so by the Registrar, make annually a contribution to such Fund.

(2) Until such time as a society has been established and registered for the purposes of supervision and audit, such contributions shall be held by the Registrar and administered by him on behalf of the contributing registered  
30 societies.

(3) So long as the Registrar administers the Fund on behalf of the contributing registered societies, he shall

report in every year to the Government in respect of the income derived from contributions, the expenditure he has sanctioned from the Fund and the balance in his hands.

(4) As soon as a society for supervision and audit has been established and registered, the Fund shall be credited to such society and shall be utilized by such society in accordance with its objects and bye-laws. 5

(5) Until a society for supervision and audit has been established and registered, the Registrar shall fix the amount of the annual contribution to the Fund of every registered society called upon to contribute to the Fund. The amount of every such annual contribution shall be subject to a maximum of either fifteen per centum on the net annual profits of the registered society or of one per centum of the working capital of the registered society, and shall not in any case be less than five shillings". 10 15

On the 8th April 1981 the applicant was found guilty by the District Court of Nicosia of the commission of the offences of aiding and abetting the stealing of money by an agent, abuse of office by a public servant and breach of trust and was sentenced to twelve months' imprisonment. Against such conviction and sentence the applicant filed an appeal which was partly allowed on the 16th October 1981 with the result that the sentence that was imposed on him was reduced to seven months' imprisonment (see *Azinas and another v. The Police*, (1981) 2 C.L.R. 9). 20 25

As a result of the conviction and sentence imposed on the applicant the respondent came to the conclusion that he was no longer suitable to be an employee of the Audit and Supervision Fund and decided to terminate his services forthwith; and the applicant was informed accordingly by means of a letter dated 16th October 1981. The applicant then filed the present recourse against the termination of his services. 30

Counsel for the respondent has raised in the Opposition the preliminary objection that the sub judice decision is not an administrative act coming within the ambit of Article 146 of the Constitution and, therefore, it cannot be challenged by means of a recourse made under that Article. He has sub- 35

mitted, in this respect, that the employment of the applicant is a matter falling within the domain of private law, and not of public law, and has based, mainly, this submission on the terms of the contract of employment of the applicant.

5 Counsel for the applicant has referred me to the case of *The Greek Registrar of Co-operative Societies v. Nicolaidis*, (1965) 3 C.L.R. 164, where the following are stated (at pp. 170-172):

10 "In the opinion of the Court it is primarily the nature and character of a particular act or decision which determines whether or not such act or decision comes within the scope of paragraph 1 of Article 146 of the Constitution. Such an issue is one which must be decided on the merits and in the circumstances of each particular case and having due regard to such relevant factors as the office and status of the organ, authority, person or body performing such act or taking such decision, as well as to the circumstances and context in which such act was performed or decision taken. As pointed out by the learned Judge in his Ruling (at p. 16 of the appeal record) the 'same organ may be acting either in the domain of private law or in the domain of public law, depending on the nature of its action'. Ultimately, what is the important and decisive factor in this respect is the nature and character of the particular function which is the subject-matter of a recourse.

25 The particular decision, which is the subject-matter of these proceedings, was one taken, under paragraph(1) of rule 89 of the Co-operative Societies Rules, which provides, inter alia, that--

30 the Registrar may by order under his hand remove any member of the committee or council or any officer of the registered society who in his opinion is unfit to discharge the duties of his office'.

35 Having given careful consideration to all that has been said on behalf of the Appellant by his learned counsel as well as to the authorities cited by him, this Court sees no reason for differing from the opinion expressed by the learned Judge in his Ruling (at p. 16 of the appeal record) that the function of Respondent (Appellant) under rule

89 is one which 'has as its primary object the promotion of a public purpose viz. the proper functioning of co-operative societies. Such an object has been treated as a characteristic of an act or decision in the domain of public law in *Valana and the Republic*' (cited supra). 5

As has been pointed out by the Supreme Constitutional Court in its Decision in the Case of *John Stamatiou and The Electricity Authority of Cyprus* (3 R.S.C.C. p. 44, at pp. 45-46).

'Whatever the general and predominant character of the Respondent might precisely be it is only relevant for the purposes of this case to consider whether, in relation to the particular function which is the subject-matter of this recourse, the Respondent was acting in the capacity of an 'organ, authority or person, exercising any executive or administrative authority' in the sense of paragraph 1 of Article 146'. 10 15

Likewise, in this case, whatever the general or predominant character of the Greek Registrar of Co-operative Societies might be—and as pointed out by the learned Judge in his Ruling (p. 17 of the appeal record) the Respondent in exercising the power in question vested in him by rule 89 was, in this instance, doing so 'as an organ of government', with which view we agree—and whatever the general or predominant character of co-operative societies themselves generally might be, all these factors are only relevant for the purposes of deciding whether, in relation to the particular function which is the subject-matter of these proceedings (namely, the exercise of the power of dismissal under rule 89), the Registrar was acting, in that instance, in the capacity of an 'organ authority or person, exercising executive or administrative authority' in the sense of paragraph 1 of Article 146. 20 25 30

We agree with the conclusion reached by the learned Judge, and with his reasoning for doing so, 'that an act or decision of the Respondent under rule 89, having as its primary object the promotion of a public purpose, being unilateral authoritative pronouncement and being, 35

also, an instance of governmental control of co-operative societies, is an act or decision in the domain of public law and subject to the competence under Article 146' ''.

5 Useful reference may be made, in this respect, too, to case-law of this Court on matters of similar nature such as *Paschalidou v. The Republic*, (1969) 3 C.L.R. 297, *Papakyriakou v. The Health Services of Cyprus*, (1970) 3 C.L.R. 351, and *Ioannou v. The Republic*, (1983) 3 C.L.R. 150.

10 In the light of the above case-law and having taken into account the nature and character of the particular decision in the present case I have come to the conclusion that such decision falls within the domain of public law and that it can be challenged by the present recourse under Article 146 of the Constitution.

15 In reaching my above conclusion I have relied particularly on the following factors:

20 It is correct that when the applicant was appointed it was expressly stated in the instrument of his appointment that he would not be a Government employee; that he would be responsible for co-operative enlightenment and propaganda; and that his salary would be payable from the Audit and Supervision Fund established under rule 92, above.

25 On the other hand, the applicant was appointed as an employee of the Co-operative Societies Department, which comes under the Ministry of Commerce and Industry; and the Audit and Supervision Fund was established under the aforementioned relevant statutory provision and Rules and the applicant was responsible for the administration of such Fund and had to report accordingly to Government. Moreover,  
30 the Fund was established for primarily a purpose of public benefit, namely the proper functioning of Co-operative Societies, and, consequently, the appointment of the applicant in this respect was made for the promotion of such purposes. Also, it is relevant to have in mind the nature of all the duties of the  
35 applicant which benefited the Co-operative movement generally. Lastly, the aforesaid letter, informing the applicant about the termination of his services, is headed "Ministry of Commerce and Industry—Co-operative Societies Department" and bears

the stamp of the Republic of Cyprus; and, indeed, about the termination of his services were notified the Director-General of the Ministry of Finance, the Director-General of the Ministry of Commerce and Industry, the Central Co-operative Bank and the Audit and Supervision Fund. 5

In the light of the foregoing I find that this recourse has to be heard further as a recourse which could be made under Article 146 of the Constitution.

*Order accordingly.*