1984 June 22

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

DR. ANDREAS VORKAS AND OTHERS,

Applicants.

v.

THE REPUBLIC OF CYPRUS, THROUGH
1. THE MINISTER OF HEALTH, AND
2. THE DIRECTOR OF MEDICAL SERVICES AND THE SERVICES OF PUBLIC HEALTH,

Respondents.

(*Case No.* 204/83).

Administrative Law—Administrative acts or decisions—Executory act—Meaning—What are executory acts in relation to the Public Service—Circular-letter by Director of Medical Services to Government Medical Officers defining by reference to section 64 of the Public Service Law, 1967, (Law 33/67), the position of the administration in relation to the rights of government doctors to operate a private practice—It lacked executory character and was inamenable to judicial review under Article 146.1 of the Constitution.

Constitutional Law—Right to practise any profession or to carry on any occupation, trade or business—Article 25 of the Constitution—Intended to safeguard a citizen's freedom to work—Section 64 of the Public Service Law, 1967 (Law 33/67) prohibiting public officers from practising any profession or trade not contrary to the above Article.

Public Service Law, 1967 (Law 33/67)—Section 64 of the Law prohibiting public officers from practising any profession or trade not contrary to Article 25 of the Constitution.

Government Medical Officers—Prohibition from engaging in private practice—Imposed by section 64 of the Public Service Law, 1967 (Law 33/67)—Not contrary to Article 25 of the Constitution—Moreover their obligation to comply with the terms and conditions of

their service proclaimed to be their duty under regulation 33 *of the Medical Profession Rules of Etiquette of* 1972—*Government Medical Institutions* (*Charges and Fees*) *Regulations,* 1962–1975 *do not permit engagement in private practice—And even if they did permit they must be declared illegal for conflict with the above section* 64 *of Law* 33/67—*Even if private practice has evolved into a rule of administrative practice such practice cannot overrule the law.*

Administrative practice—No practice can overrule the law and none should be suffered that conflicts with its provisions.

On the 20th March, 1983, the Director of Medical Services and Public Health addressed a circular to all Government Medical Officers wherein he sought to define the position of the Administration in relation to the rights of government doctors to operate a private practice and intimated the measures the authorities contemplated to take in the event of doctors acting in breach of their duties under the Public Service Law. A principal object of the letter was to signify the Administration's interpretation of the pertinent provisions of the Public Service Law, 1967 (Law 33/67) backed by an opinion of the Attorney-General; it was the opinion of the Director that section 64 of Law 33/67 prohibited medical officers from practising medicine outside government service under any guise whatsoever; and therefore, government doctors were not allowed to keep private surgeries at their home or anywhere else. They were warned that the law would be rigorously applied by the institution of disciplinary proceedings against every government doctor who engaged in private practice.

Following the receipt of this circular its validity was challenged by 31 Government Medical Officers on the ground that it was issued in breach of Article 25.1 of the Constitution, the needs and mission of the medical profession and established government practice.

On the submission of Counsel for the respondents that the action complained of, that is, the circular letter, lacked executory character and as such was inamenable to judicial review under Article 146.1 *of the Constitution; and on the merits of the recourse:*

Held, (1) that only administrative acts of an executory character

are justiciable under Article 146.1 of the Constitution; that executory acts are those that are in themselves productive of legal consequences; that in relation to public servants, executory are those acts that define their position, status, remuneration and generally their terms of service; that the circular under consideration had no effect whatever on the rights of the applicants and it merely proclaimed the Administration's understanding of the law, an understanding that had no conceivable repercussions in itself upon the rights of the parties; and that, therefore, it lacked executory character and as such was inamenable to judicial review under Article 146.1 of the Constitution (pp. 763-764 post).

Held, on the merits of the recourse:

(1) That Article 25 is intended to safeguard a citizen's freedom to work; that there is no suggestion that applicants joined the public service except on their own freewill; that in such circumstances the freedom guaranteed by Article 25 is neither taken away nor compromised; and that if conditions at work as such are for any reason impermissible, they can be challenged as unconstitutional on other grounds; accordingly section 64 of the Public Service Law, 1967 neither violates nor is it inconsistent or in any way incompatible with the provisions of Article 25 of the Constitution.

Held, further, that the obligation of government medical officers to comply with the terms and conditions of their service is proclaimed to be their duty under regulation 33 of the Medical Profession Rules of Etiquette of 1972.

(2) That the Government Medical Institutions (Charges and Fees) Regulations, 1962-1975 do not permit engagement in private practice and even if they did permit they must be declared illegal for conflict with the provisions of section 64 of the Public Service Law, 1967 (Law 33/67).

(3) *On the submission of applicants that the authorities conceded over the years a right to medical officers to carry on a private practice parallel to their duties as public officers and that this practice became so widespread that it has hardened into a rule of administrative practice from which the authorities could not withdraw:*

That no practice can overrule the law and none should be suffered that conflicts with its provisions; and that the supremacy

of the law would be destroyed and with it the rule of law, if the administration could be suffered to evolve practices in breach of the provisions of the law.

Per Pikis J.: If public servants were allowed to engage in work or business outside the sphere of their duties, their performance would inevitably deteriotate but more important still their devotion to duty would be diminished. Inevitably, such a course would put public servants before dilemmas that should never confront members of the public service. Invariably they would be faced with a conflict between public duty and private interest, a situation that should not be lightly countenanced, if the aim is to ensure efficient administration and sustain the confidence of the public in the mission of the civil service. This appreciation is, to my comprehension, valid in relation to every section of the public service.

Application dismissed.

Cases referred to:

Nemitsas v. *Republic* (1967) 3 C.L.R. 134;

Papakokkinou v. *Republic* (1974) 3 C.L.R. 492;

Karapataki v. *Republic* (1982) 3 C.L.R. 88;

Anastassiou v. *Demetriou and Others* (1981) 1 C.L.R. 589;

Grigoropoulos v. *Republic* (1984) 3 C.L.R. 449;

Decisions of the Greek Council of State Nos. 674/66, 781/66, 1652/66, 401/64;

Sarri v. *Republic* (1973) 3 C.L.R. 92;

Board for Registration of Architects and Civil Engineers v. *Kyriakides* (1966) 3 C.L.R. 649;

Frangos v. "*Prassino Livadhi*" (1978) 1 J.S.C. 48 at p. 52;

Police v. *Georghiades* (1983) 2 C.L.R. 33;

Kontos v. *Republic* (1974) 3 C.L.R. 112;

Marabou Floating Restaurant Ltd. v. *Republic* (1973) 3 C.L.R. 397.

Recourse.

Recourse against the validity of a letter addressed by the Director of Medical Services and Public Health to the First Medical Officer and circulated to all Government Medical Offi-

cers affecting their right to engage in private practice outside office hours.

K. Talarides, for the applicants.

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

T. Papadopoullos, for interested party "Association of Private Doctors".

Cur. adv. vult.

PIKIS J. read the following judgment. The recourse centres on the effect and implications, from the view point of justiciability as well as the validity, of a letter addressed by the Director of Medical Services and Public Health to the First Medical Officer circulated at the request of the former to all government medical officers. Thirty-one of them joined as parties in these proceedings and mounted a challenge to the validity of the circularized letter allegedly issued in breach of Article 25.1 of the Constitution, the needs and mission of the medical profession and established government practice. The law on which the letter is premised, notably section 64 of the Public Service Law, 33/67, is contested as unconstitutional for inconsistency and incompatibility with the provisions of Article 25.1, safeguarding the right to work.

The respondents questioned, in the first place, the justiciability of the cause propounded, a non-executory act in their contention. On the merits they supported the decision as well founded in law, the Public Service Law, an enactment perfectly compatible with Article 25.1, in their view. No practice, they asserted, can, under any circumstances, supersede the law or be countenanced as valid if evolved or suffered in breach of its provisions.

Lengthy arguments were raised in support of the rival positions. Hopefully, I shall not do injustice to the labour of counsel by omitting to recount them; much of what has been said relates to events that leave the substance of the case unaffected. What I propose to do is identify the issues calling for resolution as they emerge from the pleadings and arguments advanced in support of the case of each party and then attempt to resolve them as best as I can. In order to define the issues we must first refer to the letter of the Director of Medical Services that

stirred the applicants to resort to the Court for the protection of their rights allegedly infringed or threatened with infringement by the circular letter.

For some time it appears the right, if any, of government medical officers to engage in private practice outside working hours has been the subject of controversy between government medical officers and doctors in private practice. The rights of government doctors in this connection were also the subject of discussion between the Union of Public Employees - PASYDY - and medical authorities, culminating in a decision to refer the matter to the Mixed Personnel Committee - MEP - for further consideration. MEP took cognizance of the matter and arrived at certain conclusions reflected in part in the letter of the Director of Medical Services under review.

On 20th March, 1983, the Director sought to define the position of the Administration in relation to the rights of government doctors to operate a private practice and intimated the measures the authorities contemplated to take in the event of doctors acting in breach of their duties under the Public Service Law. A principal object of the letter was to signify the Administration's interpretation of the pertinent provisions of the law backed by an opinion of the Attorney-General. In the opinion of the Director, section 64 of Law 33/67 prohibits medical officers from practising medicine outside government service under any guise whatsoever. Therefore, government doctors are not allowed to keep private surgeries at their home or anywhere else. They were warned the law would be rigorously applied by the institution of disciplinary proceedings against every government doctor who engaged in private practice.

A separate part of the letter purports to depict the implications stemming from the admission of patients by government doctors at their home and the issue of prescriptions outside government service. Such acts, it is stated, will be treated as prima facie evidence of engagement in private practice.

In sum, the letter aimed to achieve three objectives: (a) Furnish the government's understanding of the law on the rights and duties of government medical officers. (b) Warn of the consequences that may befall doctors acting in breach or defiance of the provisions of the law, and (c) Express an opinion

on the implications likely to arise from certain acts or conduct of government doctors. At the maximum it signified the course of action contemplated by the Administration in the event of government doctors engaging in certain acts regarded by the authorities as violative of their duties as members of the public service. Their interpretation of the laws on the other hand was not binding either on the Courts or on any other body, the Public Service Commission in particular, before which disciplinary proceedings might be instituted fashioned on this understanding of the law.

Irrespective of the intentions of the Director in circularizing this letter, its contents, judged from whatever view point or angle, had no bearing on the rights of the applicants under the law. If the applicants had a right to engage in a private practice in any area, this right was left intact.

Counsel for the Attorney-General submitted the action complained of, that is, the circular letter, lacked executory character and as such was inamenable to judicial review under Article 146.1 of the Constitution. In my judgment the submission is plainly right.

Only administrative acts of an executory character are justiciable under Article 146.1 of the Constitution. As often repeated, executory acts are those that are in themselves productive of legal consequences. Legally productive are those acts that affect the rights of the persons to whom they are addressed. Particularizing the subject in relation to public service, executory are those acts that define their position, status, remuneration and generally their terms of service. Only acts of this category can be made the subject of review under Article 146.1 in the interest of legality and sound administration.*

The letter under consideration had no effect whatever on the rights of the applicants; it merely proclaimed the Administration's understanding of the law, an understanding that had no conceivable repercussions in itself upon the rights of the parties. If this understanding of the law was erroneous, it could be checked whenever they sought to enforce the law

* *Nemitsas* v. *Republic* (1967) 3 C.L.R., 134, *Papakokkinou* v. *Republic* (1974) 3 C.L.R., 492, *Karapataki* v. *Republic* (1982) 3 C.L.R., 88.

by the institution of disciplinary or other proceedings. Certainly it did not and could not amend, alter or in any way modify the law applicable to public service. The circular was not an act issued in exercise of statutory or other power conferred on the Director to define the rights of the applicants under the law. The interpretation of the law attempted in the interest of clarity, could under no circumstances affect the rights of anyone. Whatever rights the applicants had, they continued to possess them. If the interpretation supplied by the Director, on the other hand, was correct then their complaint is with the law and not the Director recapitulating its effect.

The remaining provisions of the circular letter are referable to the realm of intent, outlining future course of action. If the understanding of the law propounded in the said circular was ill-founded, it could be ignored with immunity by those to whom it was addressed. Moreover, if the Director's view of the law was wrong, subordinates required to take action upon such interpretation could likewise ignore it and refrain from acting upon it in the name of legality[1].

Greek caselaw and authors alike take the view that circulars of whatever kind are, as a rule, beyond the scope of judicial review. Normally they aim to supply either an interpretation of the law for the guidance of subordinates or provide guidelines for the application of the law in a manner best suited to its objects[2]. Thus a circular of the Minister of Social Care, giving directions to medical institutions for the enforcement of the law in a given area was held to be non-justiciable for lack of executory character[3]. Generally a circular limited in content to the issuing of instructions cannot be made the subject of judicial review[4].

In France, by way of exception to the rule, circulars purporting to regulate matters affecting public officers are justiciable[5]. It may be noted that in France, the law allows greater freedom

1. *Anastassiou* v. *Demetriou & Others* (1981) 1 C.L.R., 589; *Grigoropoulos* v. *Republic*, (1984) 3 C.L.R. 449.
2. See Stassinopoulos, Law of Administrative Disputes, 4th Ed., pp. 171-172; and Stassinopoulos, on the Law of Administrative Acts 1975, pp. 121-122.
3. See Decisions of the Greek Council of State in 674/66, 781/66 and 1652/66.
4. See Decision of the Greek Council of State in 401/64
5. See Stassinopoulos, supra.

to resort to Court for the purpose of challenging action of the Administration. There is no such flexibility in Cyprus. It has been authoritatively settled that only executory acts are usticiable under Article 146.1.

In my judgment the recourse must necessarily be dismissed for it is directed against a non-executory act[1]. Nevertheless, I shall probe the remaining issues canvassed in view of their importance and the need to offer guidance on a matter affecting an important branch of the public service. Addressing myself to the remaining issues is, in my view, also warranted by the fact that the case may go higher and, in a matter of this nature it may be deemed appropriate that the trial Judge should express his views on all disputed issues. To do so I must go back to the contentious issues. In order of importance the most prominent of the remaining issues is that of constitutionality of section 64 of the Public Service Law. The submission is that it is unconstitutional because of inconsistency or incompatibility with the provisions of Article 25 of the Constitution.

The Right to Work

The right to work acknowledged by Article 23 of the Universal Declaration of Human Rights of 1948 as a fundamental human right, is given effect to and safeguarded in Cyprus by the provisions of Article 25 of the Constitution. Article 25.1 expressly entrenches the right to work by proclaiming everyone's freedom to carry out or engage in any profession, occupation or any other businesslike activity he chooses. It casts a corresponding obligation on the State to ensure a meaningful exercise of this freedom. By the ensuing paragraphs of Article 25 the right may be subjected to reasonable limitations in the interest of specified objects. Like every limitation of a basic right, it must be strictly construed and be directly referable to the purposes in the name of which limitations are imposed[2]. The subject of limitations to the right of work is discussed in the leading authority of *The Board for Registration of Architects and Civil Engineers* v. *Christodoulos Kyriakides* (1966) 2 C.L.R. 640. Of course, the question of reasonableness of a limitation can only arise if freedom of choice of profession or occupation is

1. In *Sarri* v. *Republic* (1973) 3 C.L.R. 92, Malachtos J. ruled without hesitation that a circular does not constitute an executory act.
2. *Police* v. *Andreas Georghiades* (1983) 2 C.L.R. p. 33.

legislatively or otherwise limited; while in this case I fail to see how section 64 of the Public Service Law infringes the right safeguarded by Article 25.

Section 64 is solely concerned with the regulation of conditions of employment in the public service. It prohibits public servants from engaging in any other work, business or business-like activity, except with the leave of the Minister of Finance. That these conditions are statutorily regulated does not change their character. In much the same way as a private employer may require employees to comply with terms and conditions mutually agreed, so can the State require public employees to comply with terms approved by the legislature as a necessary incident of their employment. As I had occasion to indicate, as far back as 1975, in *Frangos* v. "*Prassino Livadhi*" (1978) 1 J.S.C., pp. 48, 52, the terms envisaged by section 64 are not only reasonable but essential for the efficient administration of the public service as well as ultimate success of its mission. If public servants were allowed to engage in work or business outside the sphere of their duties, their performance would inevitably deteriorate but more important still their devotion to duty would be diminished. Inevitably, such a course would put public servants before dilemmas that should never confront members of the public service. Invariably they would be faced with a conflict between public duty and private interest, a situation that should not be lightly countenanced, if the aim is to ensure efficient administration and sustain the confidence of the public in the mission of the civil service. This appreciation is, to my comprehension, valid in relation to every section of the public service.

Article 25 is intended to safeguard a citizen's freedom to work. There is no suggestion that applicants joined the public service except on their own freewill. In such circumstances the freedom guaranteed by Article 25 is neither taken away nor compromised. If conditions at work as such are for any reason impermissible, they can be challenged as unconstitutional on other grounds.

The decision in *Dinos Kontos* v. *The Republic* (1974) 3 C.L.R. 112, is indicative of the compass of Article 25. As Hadjianastassiou, J., pointed out in that case, Article 25 is relevant to the entrenchment of the right to work and not the circum-

stances relevant to the execution of one's duties at work. Thus, it was held that restrictions in the use of airport space as a parking station in no way interfered with the freedom to pursue the occupation or business of public carrier. The case of *Marabou Floating Restaurant Ltd.* v. *The Republic* (1973) 3 C.L.R. 397, suggests that only where the freedom under Article 25 is necessarily curtailed by a given Act or decision is there justification for interfering. Malachtos J. held that an order of the Council of Ministers closing the Kyrenia Harbour to restaurant boats in the interest of the Republic in no way violated Article 25 or the pursuit of a restaurant business.

It is my considered view that section 64 of the Public Service Law neither violates nor is it inconsistent or in any way incompatible with the provisions of Article 25 of the Constitution[1].

Administrative Practice

Applicants contended that the Government Medical Institutions (Charges and Fees) Regulations[2] postulating for engagement by medical officers in a consultative and specialist practice acknowledged impliedly a right to them to pursue a private practice. If this is the effect of the relevant provisions of the Regulations, they must be declared illegal for conflict with the provisions of section 64 of the Public Service Law. Moreover, the construction placed upon the aforementioned Regulations by the applicants is, in my view, erroneous. To my comprehension a consultative or specialist practice can only be undertaken within the compass of their duties as medical officers and not outside it. Certainly they do not permit engagement in private practice.

The principal submission of applicants in this area is that the authorities conceded over the years a right to medical officers to carry on a private practice parallel to their duties as public officers. This practice became so widespread that it could be said to have hardened into a rule of administrative practice from which the authorities could not withdraw. The answer is

1. Also it can be added that the obligation of government medical officers to comply with the terms and conditions of their service is proclaimed to be their duty under regulation 33 of the Medical Profession Rules of Etiquette of 1972.

2. See 1962–1975 Regulations.

that no practice can overrule the law and none should be suffered that conflicts with its provisions. The supremacy of the law would be destroyed and with it the rule of law, if the administration could be suffered to evolve practices in breach of the provisions of the law.

As Greek Jurisprudence establishes, an administrative practice is only relevant in testing the consistency of the Administration but not the legality of action found thereon. As stated in the Conclusions of the Jurisprudence of the Greek Council of State 1929–1959, no rule of administrative practice can bind the administration to the sustainance of an illegal state of affairs or prevent it from acting according to law (see page 158. See also Stassinopoulos on the Law of Administrative Acts 1951, at p. 19). Consequently, the recourse is doomed to failure on the merits as well.

For the reasons indicated in this judgment, the recourse fails. It is dismissed. Let there be no order as to costs.

Recourse dismissed. No order as to costs.