

1987 January 27
[SAVVIDES J]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

DEMETRIS DEMETRIOU,

Applicant

v

THE REPUBLIC OF CYPRUS, THROUGH
THE MINISTER OF FINANCE,

Respondent

(Case No 654/84)

Executory act—Definition of—Application for authorisation to exercise profession of approved auditor—Condition that applicant should pass examinations—Decision imposing such condition is of an executory nature

5 *Income Tax—Authorisation or withdrawal of an authorisation from a person to prepare accounts and assessments for income tax purposes—The Income Tax Law 58/61, as amended by the Income Tax Laws 4/63-24/81— Sections 46 and 52(3)—Powers of Minister of Finance under section 46—The two sections should be read together—In exercising his powers under section 46 the*
10 *Minister has no power to impose conditions outside the scope of Regulations made by the Council of Ministers under section 52(3)*

The applicant, who is a holder of a certificate of the London Chamber of Commerce in Higher Accounting and had worked with Russel and Co , a firm of accountants and auditors from 1972 till 1983, applied to the respondent Minister for an authorization to exercise the profession of an approved auditor By letter dated 24 9 84* the Acting Director - General of the Ministry of Finance informed the applicant that the possibility of granting to him a limited and conditional authorization would be considered, provided beforehand, he passes certain examinations described in the said letter As a result the applicant filed the present recourse

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20 Counsel for the respondent raised the preliminary objection that the sub judice act is not executory, but admitted that if such objection is not sustained, the act should be annulled as having been taken in abuse or excess of power

Held, annulling the sub judice decision (1) Executory administrative acts are, as defined in the Conclusions from the Case Law of the Greek Council of State (1939-1959) page 237 those «by means of which the will of the administration is expressed, aiming at the production of legal consequences

*Quoted at page p 114 post

regarding those governed and entailing its immediate administrative enforcement The main element of the notion of executory act is the immediate production of legal consequences» This definition has been adopted in a number of cases by this Court In this case the sub judge act expresses the definite will of the respondent not to grant to the applicant the authorisation in question unless he participates in the examinations referred in the aforesaid letter (*Ioannidou v The Republic* (1965) 3 C L R 664 and on appeal (1966) 3 C L R 480, *Pavides v The Republic* (1977) 3 C L R 421, *Tanis v The Republic* (1978) 3 C L R 314, and *Kitromilides v The Republic* (1984) 3 C L R 1279, distinguished) It follows that the preliminary objection fails

(2) The relevant law empowering the Minister of Finance to issue authorisation to a person to prepare accounts and assessments for income tax purposes is Law 58/61, as amended by the Income Tax Laws 4/63-24/81 and in particular section 46* The power of the Minister thereunder is to impose conditions for «ensuring preparation and submission of accounts» and to withdraw a permit if «the ability or conduct of an accountant in the preparation of accounts justifies such an action » This section should be read in conjunction with section 52(3), empowering the Council of Ministers to make regulations governing the grant or withdrawal of authorisation from independent professional accountants under section 46 The Minister has no power to impose any conditions for the issue of authorisation which are outside the scope of the regulations made by the Council of Ministers As this is what happened in this case, the sub judge decision has to be annulled as having been taken in abuse or excess of power

Sub judge decision annulled
£50 costs in favour of applicant

Cases referred to

- Ioannidou v Republic* (1965) 3 C L R 664 and on appeal (1966) 3 C L R 480
- Pavides v Republic* (1977) 3 C L R 421,
- Tanis v Republic* (1978) 3 C L R 314,
- Kitromilides v Republic* (1984) 3 C L R 1279,
- Republic v Demetrou and Others* (1972) 3 C L R 219,
- HjiPanayn v Municipal Committee of Nicosia* (1974) 3 C L R 366,
- Kynakides v Municipality of Nicosia* (1976) 3 C L R 183,
- Vassiliadou and Another v Republic* (1985) 3 C L R 1296,

Previously section 53 re numbered to 46 by Law 60/69

Decision 1194/1957 of the Greek Council of State

Recourse.

Recourse against the refusal of the respondent to authorise the applicant to prepare accounts and assessments of income for the purposes of the Income Tax Laws

Th Ioannides, for the applicant

St Theodoulou, for the respondent

Cur adv vult

SAVVIDES J read the following judgment The applicant by this recourse prays for the following relief

A declaration of the Court that the act and/or decision of the respondent communicated to the applicant by letter dated the 24th September, 1984, whereby his application for the issue to him of authorisation to prepare accounts and assessments of income for the purposes of the Income Tax Laws was dismissed by the Minister of Finance, is null and void and of no legal effect

The grounds of law on which the recourse is based are the following

(1) The respondent acted in violation and/or misinterpretation of the Income Tax Laws 58/61-24/81

(2) The respondent based his decision on Regulations which were invalid and/or not duly published or approved

(3) The respondent acted unlawfully and/or in abuse or excess of power

(4) He exercised his powers under the Income Tax Laws wrongly.

(5) The applicant was treated in a discriminatory manner in violation of the Constitution

(6) The sub judice decision is not duly reasoned and

(7) The respondent acted under a misconception of fact

Counsel for the respondent by his opposition raised the preliminary objection that the sub judice decision is not an executory administrative act in the sense of Article 146 of the Constitution

Subject to such objection, he submitted that the sub judge decision was properly taken according to the law and the Regulations and in the proper exercise of the powers vested in the respondent and it is duly reasoned.

The facts of the case are briefly as follows:

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The applicant is the holder of a certificate of the London Chamber of Commerce in Higher Accounting, (L.C.C. Accounting Higher), since 1970. From 1972 till 1983 he worked with Russel & Co. a firm of accountants and auditors. During such period, according to a certificate issued by such firm he had been engaged in accounting duties and was preparing accounts and computations of income for the purposes of the Income Tax Laws.

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On the 22nd March, 1984 the applicant applied to the Minister of Finance for an authorisation to exercise the profession of an approved auditor, placing before him all necessary information concerning his qualifications and experience.

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The Acting Director-General of the Ministry of Finance, by letter dated the 24th September, 1984, replied to the applicant as follows:

«I am directed to refer to correspondence ending with my letter under reference M.F. 601/72/8 dated 5.4.84 in connection with your request for authorization to prepare accounts and computations for income tax purposes.

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I would like to inform you that we would be prepared to consider the possibility of granting to you a limited and conditional authorization, for the aforesaid purposes provided, beforehand, you pass such examinations as may be prescribed by the Commissioner of Income Tax.

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Presently the required written examinations consist of two papers on the following topics:

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(i) A Special paper on tax legislation.

(ii) A Special paper in auditing.

Please note that the said examinations are held twice a year, on the 1st June and 1st December and at least one month's notice must be given by the interested applicants.»

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As a result, applicant filed the present recourse.

Counsel for applicant by his written address in dealing with the preliminary objection of counsel for the respondent contended that the sub judge decision is an executory administrative act productive of legal effects tending to prejudice the position of the applicant in the exercise of his profession. He went on to expound on the grounds of law advanced by him. He submitted that the only competent organ, which can make regulations imposing conditions subject to which authorisation may be granted to accountants and auditors, is the Council of Ministers under the provisions of section 52(3) of the Law. No such regulations had ever been made by the Council of Ministers or published in the official Gazette of the Republic in this respect. Therefore, the decision of the Minister to invite the applicant to participate in examinations before authorisation was granted to him, was in the circumstances null and void. Counsel for applicant further argued that the respondent in reaching the sub judge decision acted in violation of Articles 25 and 28 of the Constitution in that similar authorisations were granted to other persons holding the same qualifications as the applicant without requesting them to undergo any examinations.

Counsel for the respondent by his written address frankly conceded that if the court rejected his preliminary objection that the sub judge decision is not of an executory nature, then, the sub judge decision has to be annulled as he agrees that it was taken in abuse and/or in excess of power. A similar statement was made by counsel in the course of the hearing.

In expounding on his preliminary objection, counsel for the respondent submitted that the act in question is merely a preparatory act for enabling the Minister to reach his final decision on the matter and as such cannot be challenged by a recourse. He relied, in this respect, on the dicta of this Court in the cases of *Ioannidou v. Republic* (1965) 3 C.L.R. 664 and on appeal (1966) 3 C.L.R. 480, *Pavvides v. Republic* (1977) 3 C.L.R. 421, *Tanis v. Republic* (1978) 3 C.L.R. 314, and *Kitromilides v. The Republic* (1984) 3 C.L.R. 1279.

In *Ioannidou v. The Republic* (1965) 3 C.L.R. 664, it was held by Triantafyllides, J. as he then was, that the decision of the Public Service Commission to hold a written examination for candidates in the process of selection of the most suitable candidates for appointment was a preparatory step to the process of selection and not a final executory act which could be challenged by a recourse.

The decision was affirmed on appeal (1966) 3 C.L.R. 480).

The cases of *Pavlidis* (supra) and *Tanis* (supra) were in respect of grading and general assessments of the applicants' work in respect of particular years and in both of them the court held that the general assessment of the work of the educationalists in question contained in a confidential report and the outcome of inspection or special inspection made by virtue of the regulations and the law, are preparatory acts to the compilation of the lists of those suitable for promotion and to the actual acts or decisions of promotions and as such they did not produce any direct legal consequence and could not be made the subject of a recourse under Article 146 of the Constitution. 5 10

In *Kitromilides* case (supra) the Full Bench held that the consideration as such of candidates for promotion was only a preparatory step and did not amount to an executory act which could be challenged by means of a recourse under Article 146 of the Constitution. 15

I find myself unable to agree with counsel for the respondent that anyone of the above cases can be of any assistance in the present case. In all the above cases the question in issue was the selection of the best candidate for appointment or promotion out of a number of candidates and the acts complained of were rightly found to be preparatory acts. The present case is clearly distinguishable from the above cases as it does not concern any process for the selection of one candidate out of a number of candidates but concerns the admission of the applicant into a certain calling, the requirements for which are contemplated by law. 20 25

Executory administrative acts are, as defined in the Conclusions from the Case Law of the Greek Council of State (1929-1959) at p. 237: 30 35

«...εκείναι δι' ὧν δηλοῦται βούλησις διοικητικοῦ ὀργάνου, ἀποσκοπούσα εἰς τὴν παραγωγὴν ἐνόμου ἀποτελέσματος ἐναντὶ τῶν διοικουμένων καὶ συνεπαγομένη τὴν ἀμεσὸν ἐκτέλεσιν αὐτῆς διὰ τῆς διοικητικῆς οδοῦ. Τὸ κύριον στοιχεῖον τῆς ἐννοίας τῆς ἐκτελεστικῆς πράξεως εἶναι ἡ ἀμεσὸς παραγωγή ἐνόμου ἀποτελέσματος, ...» 35

(«...acts by means of which the will of the administration is ex-

pressed, aiming at the production of legal consequences regarding those governed and entailing its immediate administrative enforcement. The main element of the notion of executory act is the immediate production of legal consequences »).

This definition has been adopted by our courts in a number of cases (see *The Republic v Demetriou & Others* (1972) 3 C L R 219, 223, *Hadjipanayi v Municipal Committee of Nicosia* (1974) 3 C L R 366, 375, *Kynakides v Municipality of Nicosia* (1976) 3 C L R 183, 189)

In the *Kynakides* case (supra) it was held that a letter informing the applicant that the building permit for which she applied would only be possible if new plans were submitted complying with certain remarks concerning the new street alignment was considered as expressing the will of the administration not to grant the permit at that stage and was thus executory

Similarly in the case of *Vassiliadou and Another v Republic* (1985) 3 C L R 1296, a letter informing the applicants that their application for a building permit could not be proceeded with because it contravened a certain regulation, amounted to an expression of the will of the administration and was, as a result, executory

Useful reference may also be made to the decision in Case No 1194/1957 of the Greek Council of State, whereby the results of an examination held for the purpose of admission into a certain calling were held to be of a final executory nature

In the light of the above cases I find that in the circumstances of the case, the sub judice decision expresses the definite will of the respondent not to grant to the applicant authorisation unless he takes part in the examinations referred to therein and is therefore executory

Irrespective of the admissions made by counsel for the respondent that the sub judice decision was taken in excess and abuse of power, I feel bound, in the light of our case law on this matter, to adjudicate on this issue and I shall therefore proceed to make my findings on the validity of the sub judice decision

The relevant law empowering the Minister of Finance to issue authorisation to a person to prepare accounts and assessments for

income tax purposes, is the Income Tax Law 58/61 as amended by the Income Tax Laws 4/63-24/81 and, in particular, section 46 (previously section 53, re-numbered to 46 by Law 60/69). Section 46 provides as follows:

«Λογαριασμοί και προσδιορισμοί του φορολογητέου 5
 εισοδήματος προσαγόμενοι τῷ Εφόρῳ ἢ συνοδεύοντες
 φορολογικὰς δηλώσεις υποβαλλομένης τῷ Εφόρῳ
 δυνατόν, ἐν τῇ ὑπὸ τοῦ Εφόρου ἐνασκήσει τῆς
 διακριτικῆς τοῦ ἐξουσίας, νὰ μὴ ληφθῶσιν ὑπ' ὄψιν ἐάν 10
 δὲν ἠτοιμάσθησαν καὶ ἐπιστοποιήθησαν ὑπὸ τινος
 ἀνεξαρτήτου λογιστοῦ ασκούντος ἐπάγγελμα ἐν τῇ
 Δημοκρατία καὶ δεόντως ἐξουσιοδοτημένου ὑπὸ τοῦ
 Υπουργοῦ τῶν Οικονομικῶν ὅπως ετοιμάζῃ
 λογαριασμοὺς καὶ προσδιορισμοὺς φορολογητέου 15
 εισοδήματος δια σκοποῦς ἐπιβολῆς φόρου
 εισοδήματος. Ὁ Υπουργὸς τῶν Οικονομικῶν δύναται,
 κατὰ τὴν ἐκδοσὶν τοιαύτης ἀδείας νὰ ἐπιβάλῃ
 τοιοῦτους ὅρους οἷους ἠθέλε κρίνει ἀναγκαίους ἢ
 σκοπίμους δια τὴν ἐξασφάλισιν τῆς ετοιμασίας καὶ 20
 υποβολῆς λογαριασμῶν δεικνυόντων τὴν ἀληθῆ καὶ
 ἀκριβῆ δηλώσιν τῶν κερδῶν ἢ ζημιῶν ἐμπορικῆς ἢ
 βιομηχανικῆς ἐπιχειρήσεως, ἐπιτηδεύματος ἢ
 βιοτεχνίας, ἐλευθερίου ἢ ἄλλου τινὸς ἐπαγγέλματος:
 Νοεῖται ὅτι ὁ Υπουργὸς τῶν Οικονομικῶν δύναται 25
 ὁποτεδήποτε νὰ ἀφαιρέσῃ τὴν τοιαύτην ἀδειαν ἐκ
 προσώπου ἐπαγγελλομένου τὸν λογιστὴν ἢ ἐκ τινος
 μέλους ἀνήκοντος εἰς οἶκον τοιοῦτων λογιστῶν, ἐὰν ἡ
 ἰκανότης ἢ συμπεριφορὰ τοῦ λογιστοῦ ἐν τῇ ετοιμασίᾳ
 λογαριασμῶν ἢ προσδιορισμῶν τοῦ φορολογητέου 30
 εισοδήματος δικαιολογῇ τοιαύτην ἐνέργειαν ἐκ μέρους
 τοῦ Υπουργοῦ Οικονομικῶν:

Νοεῖται περαιτέρω ὅτι οἰαδήποτε ἀπόφασις τοῦ Υ-
 πουργοῦ τῶν Οικονομικῶν βάσει τοῦ παρόντος ἀρ-
 θρου θὰ δύναται νὰ ἀναθεωρηθῇ ὑπὸ τοῦ Υπουργικοῦ 35
 Συμβουλίου συμφώνως τοῖς Κανονισμοῖς τοῖς γενομέ-
 νοις δυνάμει τοῦ ἀρθροῦ 52.»

And in English:-

(«46. Any accounts and any computations of chargeable in-
 come produced to the Commissioner or accompanying any

return of income submitted to the Commissioner may, at the Commissioner's discretion, not be considered if they have not been prepared and certified by an independent accountant practising in the Republic duly authorised by the Minister of Finance to prepare accounts and computations for income tax purposes. The Minister of Finance in issuing such authorisation may impose such conditions as to him may appear necessary or advisable for the purpose of ensuring preparation and submission of accounts showing a true and correct statement of the profits or losses of a trade, business, profession or vocation:

Provided that the Minister of Finance may at any time withdraw such authorisation from any practising accountant or member of a firm of such accountants, if an accountant's ability or conduct in the matter of preparation of accounts and computations of chargeable income justifies such an action on the part of the Minister of Finance;

Provided further that any decision of the Minister of Finance under this section may be subject to review by the Council of Ministers in accordance with Regulations made under section 52.)

The power of the Minister under section 46, when issuing authorisation is to impose conditions as he deems necessary for «ensuring preparation and submission of accounts.» He is also empowered to withdraw a permit if «the ability or conduct of an accountant in the preparation of accounts.... justifies such an action on the part of the Minister of Finance.»

Section 46 should be read in conjunction with section 52(3) which provides that:

«The Council of Ministers may make regulations for the application of the provisions governing the grant or withdrawal of authorisation from independent professional accountants under section 46.»

It is clear from the above provisions that the organ vested with the power to make regulations as to the grant or withdrawal of an authorisation is the Council of Ministers and the organ delegated with the power to issue or withdraw such authorisation is the Minister of Finance.

Reading the two sections together, it is apparent that the Minister has no power to impose any conditions for the issue of authorisation which are outside the scope of the regulations made by the Council of Ministers. The Minister can refuse to grant authorisation if an applicant does not satisfy the minimum qualifications required for the discharge of his duties, but he cannot impose any conditions not contemplated by the regulations 5

It is common ground that no regulations have been made by the Council of Ministers in this respect

In the present case the qualifications of the applicant for the purpose for which authorisation was applied for were not disputed as being unsatisfactory. The Minister, by imposing upon the applicant a condition of success in written examinations before granting authorisation to him, has acted in excess and/or abuse of his powers and the sub-judice decision must therefore be annulled 10 15

In the result this recourse succeeds and the sub-judice decision is hereby annulled with £50 - towards costs in favour of the applicant

*Sub-judice decision
annulled with £50 - costs 20
in favour of applicant*