

1986 August 6

[TRIANTAFYLIDES P]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

SIMONE GEORGHIADOU,

Applicant,

v

1 THE MUNICIPALITY OF NICOSIA,
2 THE MUNICIPAL ENGINEER OF THE
MUNICIPALITY OF NICOSIA,

Respondents

(Case No 556/83)

Time within which to file a recourse under Art 146 of the Constitution — Decision, which has not been published — Time begins to run when the decision comes to the knowledge of the applicant

Executory act — Preparatory act — Application for a building permit — Letter by the Municipal Engineer requesting the modification of the plans — Such decision is of an executory nature 5

On 5 4 83 the applicant applied for a building permit for erecting a fourth floor on, and effecting alterations to, a building of hers in Nicosia

By letter dated 22 7 83 the Municipal Engineer informed the applicant that the modification of her plans was necessary and requested certain additional documents 10

The said letter was received by the applicant on the 6 or 7 October, 1983 This recourse was filed on 19 12 83

Counsel for the respondents raised two preliminary objections, i.e. that the recourse is out of time and that the sub judice decision is not of an executory, but of a preparatory nature 15

Held, dismissing the preliminary objections (1) The time-limit within which a recourse can be made does not begin to run in relation to a decision which has not been published until such decision has come to the knowledge of the person making the recourse 20

(2) A preparatory act or decision cannot be challenged by means of a recourse under Article 146 of the Constitution, because it lacks executory nature.

5 (3) The modification of the plans submitted by the applicant was the main element in the letter of 22.7.83 and to that extent the said letter conveyed an executory decision, which can be challenged by means of the present recourse.

*Preliminary objections
dismissed.*

10 *Cases referred to:*

The Cyprus Tannery Ltd. v. The Republic, (1980) 3 C.L.R. 405;

Holy Monastery of Kykko v. The Republic (1982) 3 C.L.R. 1080;

Polyviou v. The Improvement Board of Ay. Napa (1985) 3 C.L.R. 1058;

Kyriakides v. The Municipality of Nicosia (1976) 3 C.L.R. 183;

15 *Orphanides v. The Improvement Board of Ayios Dhometios* (1979) 3 C.L.R. 446;

Simonis v. The Improvement Board of Latsia, (1984) 3 C.L.R. 109.

Recourse.

20 Recourse against the refusal of the respondent to grant applicant a building permit for erecting a fourth floor on, and effecting alterations to, a building of hers in Nicosia.

A. *Markides*, for the applicant.

A. *Liatsos with M. Georghiou*, for the respondents.

Cur. adv. vult.

25 TRIANTAFYLLIDES P. read the following decision. By this recourse the applicant complains against the decision of the respondents which was communicated to her by means of a letter dated 22 July 1983.

30 The applicant applied on 5 April 1983 for a building permit for the purpose of erecting a fourth floor on, and effecting alterations to, a building of hers in Nicosia.

On 22 July 1983 the Municipal Engineer of the respondent Municipality of Nicosia wrote a letter to the applicant stating that a modification of the plans submitted by her was necessary and requesting also the production of certain documents which were needed in relation to the further consideration of her application. 5

This letter was not received in the normal course of events by the applicant as she was away in Greece and, on the basis of the material before me, including evidence given on oath by the applicant, I am satisfied that it was received by her on 6 or 7 October 1983 when she returned from abroad. 10

Counsel acting for the applicant addressed to the respondents a letter dated 22 October 1983 insisting that the applied for building permit should be issued without further delay and as, apparently, such permit was not issued, the present recourse was filed on 19 December 1983. 15

I have heard arguments by counsel in relation to two preliminary objections raised by counsel for the respondents, namely (a) that the present recourse is out of time and (b) that the complained of decision is not of an executory, but only of a preparatory, nature and, therefore, this recourse, under Article 146 of the Constitution, could not be made against it. 20

As regards the first of the above objections it is important to bear in mind the text of paragraph 3 of Article 146 of the Constitution, which reads as follows:

«3. Such a recourse shall be made within seventy-five days of the date when the decision or act was published or, if not published, and in the case of an omission, when it came to the knowledge of the person making the recourse.» 25

(«3. Η προσφυγή ασκείται εντός εβδομήκοντα πέντε ημερών από της ημέρας της δημοσίευσεως της αποφάσεως ή της πράξεως ή, εν περιπτώσει μη δημοσίευσεως ή εν περιπτώσει παραλείψεως, από της ημέρας καθ' ην η πράξις ή παράλειψις περιήλθεν εις γνώσιν του προσφεύγοντος.»). 30

It is to be noted that for the purposes of a recourse for annulment before the Council of State in Greece, which is a remedy closely similar to a recourse under Article 146 of the Constitution, the time-limit within which a recourse can be made does not begin to run in relation to a decision which has not been 35

published until such decision has come to the knowledge of the person making the recourse (see, inter alia, in this respect, Δαγτόγλου, Γενικό Διοικητικό Δίκαιο - Dagtoglou, General Administrative Law - 1981, vol.γ./I, p. 239 - Σπηλιωτοπούλου, 5 Εγχειρίδιον Διοικητικού Δικαίου - Spyliotopoulou, Manual of Administrative Law - 2nd ed., 1982, p. 367).

I am, therefore, of the opinion that in the present instance the time-limit of seventy-five days, prescribed by Article 146(3) of the Constitution, did not begin to run as from 22 July 1983, but only 10 as from 6 or 7 October 1983, when the applicant came to know of the contents of the letter of the Municipal Engineer dated 22 July 1983 and, consequently, as the present recourse was filed on 19 December 1983 it cannot be found to be out of time.

As regards the second objection it is, indeed, well settled that a 15 preparatory act or decision cannot be challenged by means of a recourse under Article 146 of the Constitution because it lacks executory nature (see, inter alia, in this respect, *The Cyprus Tannery Ltd. v. The Republic*, (1980) 3 C.L.R. 405, 412, 413, *Holy Monastery of Kykko v. The Republic*, (1982) 3 C.L.R. 1080, 20 1083 and *Polyviou v. The Improvement Board of Ayia Napa*, (1985) 3 C.L.R. 1058, 1068, 1069); and, particularly, in relation to applications for building permits or other similar permits and to the nature of replies given to such applications attention may be drawn, inter alia, to *Kyriakides v. The Municipality of Nicosia*, 25 (1976) 3 C.L.R. 183, *Orphanides v. The Improvement Board of Ayios Dhometios*, (1979) 3 C.L.R. 466 and *Simonis v. The Improvement Board of Latsia*, (1984) 3 C.L.R. 109, which show that the finding as to whether or not a reply given by the appropriate authority is executory or merely preparatory, and, 30 therefore, not final, depends to a great extent on the circumstances of each particular situation.

In the present instance, having in mind that the modification of the plans submitted by the applicant, which was requested by the letter of 22 July 1983, was the main element in that letter, because 35 without such modification the production by the applicant of the documents requested by that letter would not carry the matter any further, I have reached the conclusion that to the extent to which the said letter of 22 July 1983 asked for the modification of the plans submitted by the applicant it conveyed an executory

decision which can be challenged by means of the present recourse.

Both preliminary objections raised by counsel for the respondents are, therefore, dismissed and this recourse has to be heard on its merits.

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Order accordingly.