

1988 December 31

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION  
THE INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS  
OF CYPRUS AND OTHERS,

*Applicants,*

v.

THE REPUBLIC OF CYPRUS, THROUGH  
THE CENTRAL BANK OF CYPRUS,

*Respondents.*

(Case No. 169/86).

5 *Executory act—What acts are executory—Persons acting on behalf of others in a representative capacity (in the case accountants acting for clients for the purpose of forming an offshore company) has no cause of his own—The executory character of the decision is necessarily determined by reference to the rights of the principal—If such rights are not affected, the decision is not executory and it cannot be reviewed under any guise.*

*Executory act—Legitimate interest—The issue of whether the sub judice act is executory or not should be examined before examination of the question of legitimate interest.*

10 *Constitutional Law—Constitutionality of a statute—Should not be examined unless unavoidable for the purpose of due determination of the case.*

15 Applicants 2 are accountants, who submitted on behalf of clients, application to the Central Bank in respect of formation of offshore Companies. The Central Bank refused to deal with the applications on the ground that the making of such applications in a representative capacity constitutes a species of advocacy (The Advocates Law, Cap. 2 as amended, sections 2 and 11(2)). It is not in dispute that the Central Bank correctly interpreted these provisions; nor that there has been no determination on the merits of the applications. Applicants 1 are a company limited by guarantee and regis-

tered under Cap. 113. Its main object is to protect and promote the interests of the accounting profession.

The issues raised for determination concerned: (a) The executory nature of the sub judice decision, (b) The legitimate interest of applicants 1 and (c) The constitutionality of the aforesaid provisions of the Advocates Law.

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Having determined the first of the above issues by concluding that the sub judice act is not executory, the Court dismissed the recourse without determining other issues. The legal principles, which, in doing so, the Court expounded and applied are sufficiently indicated in the hereinabove, headnote.

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*Recourse dismissed.*  
*No order as to costs.*

*Cases referred to:*

*The Board for Registration of Architects and Civil Engineers v. Kyriakides*  
(1966) 3 C.L.R. 640;

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*Josephin v. The Republic* (1986) 3 C.L.R. 111;

*Panayiotides v. The Republic* (1986) 3 C.L.R. 495;

*Photiades v. Photiades* (1988) 3 C.L.R. 2084;

*Pitsillos v. C.B.C* (1982) 3 C.L.R. 208.

**Recourse.**

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Recourse against the refusal of the respondents to deal with applications made by applicants on behalf of individual clients for the registration and transfer of shares and the subscription of the Memorandum of Association of offshore companies.

*L. Demetriades*, for the applicants.

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*A. Evangelou*, Senior Counsel of the Republic, for the respondent.

A.S. Angelides, for the Bar Council of Cyprus, as interested party.

*Cur. adv. vult.*

5       PIKIS J. read the following judgment. For reasons that will  
soon become apparent it is necessary to refer in some detail to the  
identity of the applicants and the capacity in which they sue, as  
well as analyse the decision that forms the subject matter of these  
proceedings, with a view to establishing its character and deter-  
10       mining its justiciability. The Institute of Certified Public Accountants  
the first Applicants is a company limited by guarantee, registered  
under the provisions of the Companies Law - Cap. 113. Its prin-  
cipal object is the protection and promotion of the interests of the  
accounting profession. The second Applicants, seven in number,  
15       are practising accountants, members of the Institute. Applicants 1  
joined with Applicants 2 in challenging the refusal of the Central  
Bank to deal with applications made by the latter on behalf of in-  
dividual clients for the registration and transfer of shares and the  
subscription of the Memorandum of Association of offshore com-  
20       panies. Applicants 1 contend that by the refusal of the Central  
Bank the interest of every member of the Institute in the exercise  
of his profession is prejudicially affected, so much so as to legit-  
imise the Institute to make the reversal of the decision a corporate  
cause, thereby uniting forces with Applicants 2 in the pursuit of,  
25       what they proclaim as common cause, ultimately reduced to the  
protection of the interests of the accounting profession.

30       The Central Bank refused to deal with applications of Appli-  
cants 2 made on behalf of their clients for the effectuation of the  
purposes above mentioned; for the reason that the making of  
such applications in a representative capacity, constitutes a spe-  
cies of advocacy and as such cannot be undertaken by anyone  
other than a practicing advocate (see, s. 2 and s.11(2) of the Ad-  
vocates Law - Cap. 2, as amended).

The Central Bank declined to deal with the applications after  
advice from the Office of the Attorney-General to the effect that

only practicing advocates can transact in a representative capacity any of the business sought to be transacted by Applicants 2, practicing accountants. It is not in dispute that this is the effect of the plain provisions of the Advocates Law and that the refusal of the Central Bank to deal with the applications is in conformity with the law. In its reply the Central Bank refrained from expressing any opinion on the merits of the applications and in no way prejudged their outcome if and when properly submitted. 5

The case for the applicants is that the law, in virtue to which the applications were returned, is unconstitutional for the reason that it constitutes an impermissible restriction of the exercise of the profession of an accountant in breach of the provisions of Article 25 of the Constitution. Furthermore, the relevant provisions of the Advocates Law are also impugned as unconstitutional for breach of the right of the applicants to equality before the law, safeguarded by article 28 of the Constitution. The exclusion of the accounting profession from the transaction of the business in question, is inveighed as arbitrary and unreasonable. No valid reasons exist for premising a distinction between the legal and the accounting profession in the area under consideration. If anything, it is more in the line of the accounting profession, so it has been argued, to undertake business or work associated with company matters including the registration and transfer of shares. 10  
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The subject of these recourses, it must be noticed, is the refusal of the Central Bank to deal with the applications of the pursuers (applicants 2). They do not attack a negative decision of the Administration affecting the merits of the application nor could such a gloss be put upon the communications of the Central Bank (see letters of 24/1/86, 31/1/86, 5/2/86 and 7/2/86). 25

The respondents and the Bar Council disputed the validity of the plea of unconstitutionality. In addition, the Bar Council raised questions affecting the justiciability of the recourse. The following two questions would, in any event, have to be addressed by the Court as they go to its jurisdiction. 30

(a) Whether the subject matter of the recourse is cognizable under article 146, in particular whether the decisions constitute executory acts of decisions, and

5 (b) the legitimacy of the interest of applicants 1 to challenge the decisions.

10 Direct prejudice to the interests of the pursuer is a prerequisite for the invocation of the jurisdiction under article 146 of the Constitution. In the contention of the Bar Council the prejudice of applicants 1 is at the highest indirect. The revisional jurisdiction vested in the Supreme Court under article 146 is confined to the review of acts and decisions of the Administration of an executory character. Only persons immediately (presently) and directly affected by an executory act or decision of the Administration operating in the domain of public law, can be reviewed under article 15 146. Jurisdictional questions must, as a matter of logical sequence, be resolved before the Court assumes jurisdiction to inquire into the merits of the case. The merits of the case should not as a rule be gone unless it is judged expedient for the sustenance of the efficacy of the right of appeal. In this case there is an additional reason for not inquiring into the merits of the case unless 20 necessary for the disposal of the case. The merits of the recourse revolve on the constitutionality of the pertinent provisions of the definition of "advocacy" and "practicing advocacy" in the Advocates Law and as such ought not to be addressed unless unavoidable for the purpose of due determination of the case. (See the *Board for Registration of Architects and Civil Engineers v. Kyriakides* (1966) 3 C.L.R. 640, *Josephin v. Republic* (1986) 3 C.L.R. 111, *Panayiotides v. Republic* (1986) 3 C.L.R. 495).

30 The principal jurisdictional question in any proceeding under article 146 is the amenity to review the subject matter of the proceedings, an exercise that revolves primarily on the determination of the nature of the act or decision. If the act or decision is not executory, it cannot be judicially reviewed irrespective of the magnitude of the interest of the party in the reversal of the non executory 35 act or decision of the Administration. The legitimacy of the

interest of the challenger can only be established after the identification of the character of the subject matter of the proceeding. Because it is in relation to the executory element of administrative action that *legitimacy of interest must be established*.

The attributes of an executory decision have been the subject of discussion in numerous cases. This topic that has been the subject of judicial pronouncements probably more than any other subject of administrative law. To qualify as executory the act or decision must be productive of legal consequences, that is, it must generate rights or impose obligations, or it must modify or abolish existing rights or obligations. Furthermore, it must emanate from an administrative authority competent in law to bring about changes in the existing legal regime. (See, conclusions from the Greek Council of State 1929-59, p. 237, Tsoutsos "Administration and the Law" 1979, p. 105 at seq.) Tsatsos "Application for Annulment" 1951, p. 120 at seq.) The rights or obligations enhanced or abridged by the decision must be those of the person whose rights and obligations are the subject of the decision. A representative or, more accurately, a person acting in a representative capacity, has no cause of his own. His cause is that of his principal or client. Therefore, the first question we must answer is whether the rights or obligations, of the principal or client of the representative, are prejudiced by the decision under consideration. The question is whether any corporeal or incorporeal rights of the applicant, not the representative of the applicant, within the sphere of authority of the Central Bank to acknowledge, give effect to and register, are adversely affected by the decision. The executory character of a decision is necessarily determined by reference to those rights. If the decision is determinative of those rights, it is productive of legal consequences and as such qualifies as executory.

To the question whether the sub judice decisions were productive of legal consequences vis - a - vis the rights of the clients of the applicants, the answer is plainly in the negative. In fact, no decision whatever was taken respecting their rights. Provided they apply in the manner ordained by the law, they can renew

5 their application the following day without encountering any barrier or estoppel in their way. The reply of the Central Bank vis-a-vis the clients, the beneficiaries of the rights sought to be asserted by the application of their representatives, was an advisory or in-

10 formatory act acquainting them of the requisites set by law for consideration of their application.

15 A principal characteristic of an executory administrative act is the element of unilateral expression of the will of the Administration, a species of imperium, in a matter affecting the rights of the subject. The Central Bank not only refrained from determining the substance of the applications but held back the expression of any opinion upon the rights sought to be asserted by the client. No doubt the Central Bank is bound to observe the formalities prescribed by law as a condition for the exercise of the powers vested in them.

20 A decision that is not executory vis-a-vis the party whose rights are at issue, cannot acquire an executory character through any other process. If the clients of the applicants challenged the refusal to deal with their application they would be faced with the conclusive answer that the decision is not executory and as such not a fit subject for judicial review. A non executory decision cannot be reviewed under any guise. It is worthy of notice that the applicants did not treat the refusal of the Central Bank to deal with their applications as a negative decision on the merits, nor could such a gloss be put upon it. As earlier explained, the legitimacy of the interest of the pursuer must derive from the nucleus of the executory decision, that is from the part affecting in a definitive way rights and obligations. It is in relation to the legal consequences arising therefrom that the legitimacy of the interest must be determined. As the decisions complained of are not executory, it is unnecessary to debate whether decisions of the Central Bank affecting registrations of shares in offshore companies and related matters fall in the domain of public law. (For a discussion of the subject and relevant caselaw, see the recent decision of the Full Bench in *Photiades v. Photiades and Another* (1988) 3 C.L.R. 2084.

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A third party may, under circumstances, (See, *Pitsillos v. C.B.C.* (1982) 3 C.L.R. 208, *Skouris "Orientations in Public Law - Recourse by Third Parties"* p. 54 - 55, 1981 Edition) suffer direct prejudice from an act or decision primarily affecting the rights of another person and consequently be legitimised in the pursuit of a recourse of his own. Classical examples of the application of these rules are instances of professional associations, corporate or unincorporate bodies, prejudicially affected by a decision addressed to one of its members. Provided the prejudice affects universally the interests of the members of the association, the association can mount a recourse of its own. In those circumstances prejudice to the rights of the member of the association arises coincidentally from the prejudice to the rights of the member of the association to whom the decision is addressed. In the absence of an executory decision the interest of the pursuer cannot be probed for it cannot be correlated to a proper subject for review in order to determine its legitimacy.

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The recourse must, in view of the above, necessarily be dismissed because its subject matter is not justiciable.

I am not indifferent to the grievance of the applicants or the absence of an apparent avenue for its ventilation. For that they must have recourse to their legal advisers.

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The recourse is dismissed. No order as to costs.

*Recourse dismissed.*

*No order as to costs.*

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