

1988 April 7

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ARISTOS MOSCHOVAKIS AND ANOTHER,

Applicants,

v.

THE CYPRUS BROADCASTING CORPORATION,

Respondents.

(Case No. 315/88).

Acts or decisions in the sense of Article 146.1 of the Constitution—Foremost criterion—The purpose aimed to be served—If it is a public purpose, the act naturally falls in the domain of public law—The question whether it serves a public purpose depends on the object of the decision and the interest of the public or sections of it in the achievement of such purpose.

5

Legitimate interest—It should be direct.

Revocation of an administrative act—Review of principles applicable.

Revocation of an unlawful administrative act—The time factor—It ceases to be a constraint to the revocation, whenever the subject has contributed by his action or omission to the production of the unlawful act.

10

Revocation of an unlawful administrative act—An Act, which is the product of misconception of facts, is an unlawful act.

Legitimate interest—Whenever an act affects the interest of two or more persons, anyone of them may challenge it by a recourse for annulment.

The sub judge decision in this case is a decision, whereby an earlier decision, concerning the choice of the song "ΘΥΜΑΜΑΙ" (I REMEMBER) to represent Cyprus at the Annual Eurovision Song Contest of 1988, was revoked, on the grounds that it was the product of misconception of facts in

15

that, as in finally transpired, both the composer and the lyrics-writer were disqualified under the conditions of the contest.

5 The recourse, as far as the singer of the song was concerned, was dismissed on the ground that his interest is, at most, indirect, because he had not been appointed by the respondents, who were the only persons competent to choose a singer, but by the composer and the lyric-writer.

10 Having found that the sub judge decision is an act in the domain of the public law, because it is inextricably connected with the promotion of a public purpose, namely the musical representation of Cyprus in the context of the European Song Contest, and that, before arriving at it, the respondents conducted a thorough inquiry into the facts and that it is duly reasoned, the Court dismissed the recourse.

In dismissing the recourse, the Court expounded the principles, which are sufficiently indicated in the hereinabove headnote.

15

Recourse dismissed.

No order as to costs.

Cases referred to:

Antoniou and Others v. The Republic (1984) 3 C.L.R. 623;

Mahlouzarides v. The Republic (1985) 3 C.L.R. 2342;

20 *Galanos v. C.B.C.* (1984) 3 C.L.R. 742;

Constantinides v. C.B.C. 5 R.S.C.C. 34;

Messaritou v. C.B.C. (1972) 3 C.L.R. 100;

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

Kontemeniotis v. C.B.C. (1982) 3 C.L.R. 1027;

25 *Charalambides v. The Republic*, 1964 C.L.R. 326;

Paschali v. The Republic (1966) 3 C.L.R. 39;

Yiangou and Another v. The Republic (1976) 3 C.L.R. 101;

Christofides Trading v. The Republic (1985) 3 C.L.R. 546;

Papadopoulos v. The Republic (1985) 3 C.L.R. 154;

K. and M. Transport Ltd. v. The Republic and Others (1987) 3 C.L.R. 1939.

5

Recourse.

Recourse against the decision of the respondent to revoke its earlier decision whereby the song "ΘΥΜΑΜΑΙ" (I REMEMBER) was chosen to represent Cyprus at the Annual Eurovision Song Contest due to be held in the Republic of Ireland on 30.4.88.

10

L. Clerides with N. Clerides, for the applicants.

P. Polyviou, for the respondent.

Cur. adv. vult.

PIKIS J. read the following judgment. At issue is the validity of the decision of the Cyprus Broadcasting Corporation to revoke an earlier decision of the Corporation whereby the song "ΘΥΜΑΜΑΙ" (I REMEMBER) was chosen to represent Cyprus at the Annual Eurovision Song Contest due to be held in the Republic of Ireland on April 30, 1988.

15

20

The revocatory decision, taken on March 11, 1988, was taken after an inquiry into the circumstances that preceded and attended the choice of the song on 10th February, 1988. On the basis of this inquiry the respondents concluded that their original decision was defective in that it had been taken in breach of the terms and conditions of the competition. The inquiry was prompted by two publications in the daily press that appeared on February 22, 1988 (newspapers ALITHIA and SIMERINI) suggesting that

25

contrary to the terms of the competition the verses of the song, its composer and lyrics-writer, became known through a series of publications in the press as far back as 1984. In consequence the anonymity, essential for participation in the competition, had been forfeited long ago. In the course of the inquiry another significant disqualifying factor emerged. The writer of the lyrics, namely, John Vickers, was neither a Cypriot national nor a Cypriot by descent. Consequently, he was disqualified from participating in view of an express condition embodied in the terms of the competition. And inasmuch as the decision to choose "I REMEMBER" had been taken in ignorance or unawareness of the facts disqualifying the composers of the song, the decision was revoked in order to rectify the anomaly.

Aristos Moschovakis, the composer and, Yiannis Demetriou, the singer nominated by the composer and lyrics-writer to perform the song, challenged the decision to revoke the choice of the song "I REMEMBER" to represent Cyprus. In their contention the revocatory decision is defective for lack of due reasoning and the inadequacy of the inquiry; particularly, the failure of the respondents to afford the parties an opportunity to controvert allegations relevant to the eligibility of the contestants and the song.

The respondents supported the decision as well founded in fact and duly reasoned in substance. Moreover, they questioned the legitimacy of the interest of the singer to seek the judicial review of the sub judice decision. More significantly, they doubted the justiciability of the subject matter of the recourse. As a matter of logical priorities we must dispose of the last two objections in reverse order at that as they go to the root of the proceedings and affect the jurisdiction of the Court.

To be justiciable under Article 146.1 of the Constitution, the administrative decision at issue must be in the domain of public law. As explained in *Antoniou and Others v. Republic* (1984) 3 C.L.R. 623 "the domain of public law encompasses decisions expressive of the policy of the Administration in matters of interest to the public at large or a distinct section of it."

The approach of the Court in *Antoniou*, supra, to the classification of acts and the demarcation of the public and private domains of law, was sanctioned by the Full Bench in *Mahlouzarides v. Republic* (1985) 3 C.L.R. 2342. An empirical approach is favoured to the identification of the nature of the act. The foremost criterion is the purpose that the decision aims to serve. If intended to serve a public purpose the decision naturally falls in the domain of public law. Whether it serves such a purpose depends on the object of the decision and the interest of the public or sections of it in the achievement of that purpose.

5

10

Relying on the decision of the Full Bench in *Galanos v. C.B.C.* (1984) 3 C.L.R. 742 a majority judgment, counsel for the respondents submitted that the sub judge decision is not justiciable. In that case the Full Bench decided that decisions pertaining to the commercial operations of the C.B.C., notably, its advertising policy, are not justiciable. The ratio of the decision in *Galanos*, supra, as I perceive it, is that the advertising policy of the Corporation and commercial considerations associated therewith are mainly of interest to the parties immediately involved thereto. In no way does it decide that other areas of activity of the Corporation are not cognizable under article 146.1 of the Constitution. On the contrary, numerous cases decide that many other activities of the Corporation are subject to judicial review by administrative action. (See inter alia, *Constantinides v. C.B.C.*, 5 R.S.C.C. 34; *Rita Messaritou v. C.B.C.* (1972) 3 C.L.R. 100; *Pitsillos v. C.B.C.* (1982) 3 C.L.R. 208; *Kontemeniotis v. C.B.C.* (1982) 3 C.L.R. 1027).

15

20

25

The decision here under review affects the cultural representation of Cyprus within the framework of the European Song Contest organised by the European Broadcasting Union.

30

Which song should represent Cyprus and subject to what conditions, is of vast interest to the public. Whereas the decision as such is inextricably connected with the promotion of a public purpose, namely, the musical representation of Cyprus in the context of the European Song Contest. The culture of the country and its

35

representation abroad are invariably of interest to the public.

Next, the legitimacy of the interest of Yiannis Demetriou, the singer suggested by the composer and the Lyrics - writer to sing "I REMEMBER".

5 The singer was not a participant in the competition. According to the explicit terms of the competition the participants were exclusively the composer and the Lyrics - writer. The absence of a legitimate interest in a decision does not necessarily entail absence of a legitimate interest in a subsequent revocatory decision. For, 10 revocation of a decision may adversely affect rights that came into being in the process of the implementation of the decision. In this case, however, no such rights accrued to the singer for his nomination by the composer and Lyrics - writer conferred on him at best an expectation to be chosen as the performer of the song. Under Clause 10 of the terms of the competition final choice of 15 the performer or performers of the song vested exclusively in the respondents. In the absence of a decision by the Cyprus Broadcasting Corporation choosing Yiannis Demetriou as the performer of the song, Yiannis Demetriou did not have the interest envisaged by para. 2 of article 146 of the Constitution to question the 20 legitimacy of the decision. Only a person with a direct, as opposed to indirect interest in the decision, can challenge it by means of judicial review. The interest of Yiannis Demetriou was at the highest indirect. Therefore, he lacks the necessary interest to seek review of the sub judice decision. His recourse will, 25 therefore, be dismissed. The interest of the composer, on the other hand, has not been doubted nor does it diminish in the absence of challenge by John Vickers, the fellow - participant in the competition. Whenever a decision affects in the manner envisaged by para. 2 of article 146 the interests of two or more persons, any- 30 one of them may challenge the decision, independently of the other.

The invitation to take part in the contest organised by the Cyprus Broadcasting Corporation for the choice of the song to represent Cyprus, made participation specifically dependent on the observance of a series of terms and conditions distributed at re- 35

quest to the contestants. Applicant acknowledges he was aware of those conditions and took part in the competition with knowledge of them. Clause 1(a) limited participation among Cypriot composers and Lyrics - writers. Seemingly this condition was designed to ensure that the composition and the Lyrics reflected music trends of the country. John Vickers, the writer of the Lyrics (verses of the song), was not a Cypriot national; nor was he a person of Cypriot descent. He is an English national of English origin. The fact that he is married to a Cypriot woman and resides and works in Cyprus for a number of years, does not make him a Cypriot, however broadly one may be inclined to interpret "Cypriot" in the context of this clause. The interpretation accorded by the legal advisers of the respondents to the term "Cypriot" in the context of Clause 1, that is, Cypriots nationals or persons of Cypriot descent, is as broad as it could reasonably be. On the basis of this advice rendered on 22/1/88, the respondents treated as ineligible Mr. James Williams to submit an entry for the competition. The invitation to submit entries was explicit that the competition was confined among Cypriot citizens. Consequently, John Vickers was ineligible to participate and the entry made by himself and Mr. Moschovakis was invalid ab initio. By submitting the application the entrants, including Mr. Vickers, represented that they satisfied the relevant requirements for entry. This constituted a misrepresentation affecting their eligibility. Irrespective of whether the representation was made innocently or otherwise, it led the respondents to a misconception of the facts relevant to the eligibility of the entrants.

5

10

15

20

25

The respondents had laboured under other material misconceptions, too, affecting the conditions of entry specified by Clauses 2 and 6 (a). Contrary to the prohibition of Clause 2(a), the song had been recorded for commercial purposes, a fact confirmed by Mr. Rotsides, the person who had agreed with one or both of the authors to promote the song commercially. Furthermore, the composer and the writer of the Lyrics were made known before the submission of the entry for the competition. The publications produced before the Court make it abundantly clear that in the aftermath of the rejection of the same song at the 1984 Song Con-

30

35

test, albeit presented with a different name - "ΣΑΝ ΤΟ ΠΟΚ
ΕΝΤΡΟΑ" - the composer and Lyrics - writer made statements
about the song disclosing the composer and the writer of the Lyrics
(see, in particular, "FLASH" and "CYPRUS WEEKLY" periodicals).
5 These disclosures, and the part taken by the authors in
the disclosures, ruled out the entry of the song for the 1988 competition
in view of the explicit provisions of Clause 6(a). Anonymity was,
according to Clause 6(a) and Clause 7, a vital prerequisite for
participation, necessary in order to safeguard the
10 impersonal character of the competition.

The facts founding the misconception are enumerated in the
decision, as well as the conditions for the competition that were
breached. The Board had also before it the relevant publications.
The inquiry, conducted with a view to ascertaining the true facts
15 of the case, was thorough and far reaching. The suggestion that
the applicant and his fellow - participant, John Vickers, were not
given an opportunity to be heard in the matter, is wholly incorrect.
They were invited to an interview on February 23, 1988,
with Mr. Ch. Papadopoulos, Director of the Programmes of the
20 Corporation, who specifically warned them of the possibility of
revocation of the decision of 10/2/88. A formal notice to that end
was addressed to the applicants on 27/2/88 and came to their
hands on 29/2/88. The facts disqualifying the song were objectively
verifiable whereas the facts relevant to the nationality of
25 Mr. Vickers were fully investigated with his collaboration. The
submission that the sub judge act was not duly reasoned cannot
be sustained. The same is true with regard to the submission that
the inquiry into the facts was inadequate.

Nonetheless Mr. Clerides submitted it was incompetent for the
30 respondents to revoke the act because of the situation that ensued
following the award of the competition to the applicant and Mr.
Vickers. The applicant persisted in his preparations for the Euro-
vision Song Contest notwithstanding the verbal warning of 23rd
and the formal one on 27th February, 1988. The action of the applicant
35 cannot be described but as rash and ill advised. Under the
provisions of Clause 10 of the Rules of Entry, responsibility for

preparation and projection of the song vested exclusively with the respondents. Therefore, any action of the applicant in that direction did not derive from the decision revoked nor can it be pegged to it. Counsel made lengthy reference to the principles of administrative law governing the revocation of an administrative act or decision. These principles are nowhere more lucidly analysed than in *Law of Administrative Disputes* by *Stassinopoulos*, 1951, p. 230 et seq. These principles may be summarised as follows:-

(i) The Administration has an inherent power to revoke earlier acts or decisions. 10

(ii) The amenity of the Administration to revoke earlier decisions is not unlimited. It is subject to rules designed to ensure that the Administration observes the norms of good faith and heeds rights that may have accrued in consequence of its decisions. 15

(iii) The competence of the Administration to revoke depends, in the first place, on the legality of the act intended to be revoked. If the act of the Administration was a valid one it cannot be revoked if, as a result, a new factual situation has arisen that entitles the subject to demand adherence to it. 20

(iv) The constraints on the amenity of the Administration to revoke an earlier valid act or decision have no application to unlawful acts provided the Administration acts within a reasonable time. (*Charalambides v. Republic*, 1964 C.L.R. 326; *Iro Paschali v. The Republic* (1966) 3 C.L.R. 539; *Yiangou and Another v. The Republic* (1976) 3 C.L.R. 101). An act founded, inter alia, on a misconception of the facts is void and has the attributes of unlawful administrative action. 25

(v) What constitutes a reasonable time in this context is a matter of fact and degree. 30

(vi) The time factor ceases to be a constraint for the revocation of an unlawful act whenever the subject has contributed

by his action or omission to the production of the unlawful act.

Applying these principles to the facts of our case we reach the following conclusions:-

5 (A) The decision to choose "I REMEMBER" to represent Cuprus in the Eurovision Song Contest was illegal. It was founded on a misconception of the facts relevant to the eligibility of the entrants, applicant Moschovakis and John Vickers, and the eligibility of the song.

10 (B) The entry was admitted in ingonance of the true facts and in breach of the conditions for entry. Every term of the rules regulating entry to the competition was essential (*Christophides Trading v. Republic* (1985) 3 C.L.R. 546; *Papadopoulos v. Republic* (1985) 3 C.L.R. 154; *K & M. Transport Ltd. v. Republic and Others* (1987) 3 C.L.R. 1939) and had to be heeded as a matter of legality and in the
15 interests of equality among the contestants.

(C) Being an unlawful administrative act it was open to the Administration to revoke it. In seeking to elicit the true facts the respondents acted with promptitude, fairness and after a thorough inquiry into the facts. The decision cannot be
20 faulted for lack of due expedition on their part.

This being the case it becomes unnecessary to examine the extent to which the applicant and Mr. Vickers induced the unlawful decision by their own acts or omissions .

25 Before finally disposing of the case, I must express my appreciation to counsel for their thorough research into the principles governing the revocatory powers of the Administration, and the clear presentation of the case of each of the parties; assistance that enabled me to dispose of the case within the day.

30 In the result, the recourse is dismissed. The revocatory act of 11th March, 1988, is confirmed pursuant to the provisions of Article 146.4(a) of the Constitution. There will be no order as to costs.

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