

[LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE
CONSTITUTION

ELLI MEGALEMOU,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

(Case No. 109/66)

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Recourse under Article 146 of the Constitution—Time—Article 146.3—Time within which the recourse may be filed—Court bound to consider the time factor even though not raised in the opposition—Indeed, ex proprio motu—Confirmatory act or decision as distinct from executory act or decision—A merely confirmatory act cannot be made the subject of a recourse—New decision confirming a previous decision may amount to a new executory decision, in which case a recourse would lie—Provided that there has been a new inquiry and the decision was taken on new material, or old material but unknown to the authority concerned at the time it took its original decision.

Administrative and Constitutional Law—Article 146 of the Constitution—Recourse thereunder—Time—Confirmatory act—Executory act—New inquiry—New material—See above.

Confirmatory act or decision—As distinct from an executory decision—See above.

Executory act or decision—See above.

The Transfer of the Exercise of the Competences of the Greek Communal Chamber and the Ministry of Education Law, 1965 (Law No. 12 of 1965)—Section 16(2)(3).

The Applicant, who held a post under the Greek Communal Chamber until its dissolution on March 31, 1965 by Law No. 12 of 1965 (*infra*), complains by this recourse that the Respondent Public Service Commission, acted in breach of the provisions of section 16(2) of the Transfer of the Exercise of the Competences of the Greek Communal Chamber and the Ministry of Education Law, 1965 (Law No. 12 of 1965)—emplacing her to the post of Clerical Assistant in the General

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Clerical Staff instead of to the post of Stenographer, and seeks a declaration that the said decision is *null and void*. The original decision was taken by the Respondents in January, 1966; and the Applicant was informed of it by letter dated February 3, 1966 (*Exhibit 1*). On February 14, 1966, the Applicant by a letter (*Exhibit 2*) acknowledged receipt of this letter, without any objection, and made her election under section 16(3) of the said Law No. 12 of 1965. On February 24, 1966, the Commissioner of Co-operative Development wrote to the Chairman of the Respondent Commission a letter (*Exhibit 5*) repeating a previous recommendation of his for the promotion of the Applicant and her appointment to the post of a permanent Stenographer in this Department. In answer to this letter, the Chairman, Public Service Commission, wrote to the Commissioner of Co-operative Development *Exhibit 6 viz.* the letter dated the 8th March, 1966, informing him that vacant posts of Stenographers 2nd Grade, are published in the Gazette before such posts are filled and that, therefore, the Applicant is urged to submit an application when such vacant posts are published in which case her application will be considered together with the applications of all other candidates.

On the 22nd of March, 1966, the Commissioner of Co-operative Development wrote yet another letter to the Chairman, Public Service Commission (*Exhibit 7*) in answer to the latter's aforesaid letter of the 8th March, 1966, (*Exhibit 6*). Two days later, on March, 24, 1966, the Chairman of the Commission replied by a letter (*Exhibit 8*) informing the Commissioner that he had nothing to add to the contents of his previous letter of the 8th March.

As a result the present recourse was filed on the 13th May, 1966, challenging the validity of the decision *communicated to her by the letter of the 8th March, 1966 (supra)*. In the particulars filed by the Applicant on the 18th November 1966, it is contended that the decision communicated to her on February 3, 1966 by *Exhibit 1* only finalized by the letter of the 24th March, 1966 (*Exhibit 8*) and, therefore, the period of 75 days prescribed in Article 146.3 of the Constitution should run as from the latter date. In the same particulars it is also contended, in the alternative, that by *Exhibits 2, 5 and 7 (supra)* new material was placed before the Respondent Commission and since a new reply had

been received from the said Commission there has been a re-examination of the Applicant's case on the basis of this new material and, thus, a new decision was taken both on March 8, 1966 (*Exhibit 6*) and on March 24, 1966 (*Exhibit 8*). In the course of his address before the Court, counsel for the Applicant has submitted that the aforesaid new material was contained in *Exhibits 5, 6, 7 and 8*.

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Counsel for the Respondent on his part contended that the decision was communicated to the Applicant on February 3, 1966 by the letter *Exhibit 1* and that the correspondence that followed adds nothing new and, therefore, the recourse was out of time.

Dismissing the recourse as out of time, the Court:

Held. (1). The issue of the time limit was not raised in the Opposition; in fact, it was not raised until the commencement of the hearing of this case, counsel for the Respondents then objecting that the recourse was not filed within the period of 75 days prescribed by Article 146.3 of the Constitution. But it has not been disputed and in fact it is well settled in the light of the authorities that the Court is bound to consider the time factor even though it is not raised in the Opposition or, indeed, by either party. See for instance *John Moran and The Republic*, 1 R.S.C.C. 10, at p. 13; Tsatsos, *Τὸ Ἐνδίκιον Μέσον τῆς Αἰτήσεως Ἀκυρώσεως* at p. 48, paragraph 22.

(2) The original decision is that communicated to the Applicant by the letter of February, 3, 1966 (*Exhibit 1*). On the other hand this recourse was filed on May 13, 1966. The question, therefore, that falls for consideration is whether, after the aforesaid original decision, there was a new decision taken upon a new inquiry and in the light of either new material or old but unknown to the Respondent Commission at the time of their aforesaid original decision, in which case such new decision is executory and a recourse would lie, or, whether the new act or decision invoked by counsel for the Applicant is merely confirmatory of the original decision, in which case no recourse would lie (See Stassinopoulos *Law of Administrative Disputes* 4th edition, pp. 175-176 καὶ Πορίσματα Νομολογίας Συμβουλίου Ἐπικρατείας 1929-1959 at p. 240 et seq.; and *Ktenas and Another (No. 1)* and *The Republic* (1966) 3 C.L.R. 64).

(3) I am of the opinion that none of the letters referred

to by counsel for the Applicant contains any material relevant, to the issue which was not before the Respondents when they took their decision of the 26th January, 1966, which was communicated to the Applicant on the 3rd February 1966, by the letter *Exhibit 1*.

(4) In the circumstances, even if I were to assume for a moment that the letters of the 8th March, 1966, and of the 24th March, 1966 (*Exhibits 6 and 8*, respectively, *supra*), are “decisions” at all which I, to say the least, consider very doubtful such decisions can only be confirmatory of the original decision taken on the 26th January, 1966 (and communicated to the Applicant on February 3, 1966 by the letter *Exhibit 1*) and can in no way be treated as amounting to a new decision or decisions in the matter, after a new inquiry; consequently they cannot be the subject of a recourse and, in effect this recourse is made against the decision of the 26th January, 1966, which was communicated to the Applicant on February 3, 1966 by *Exhibit 1* and is, therefore, quite clearly out of time.

Recourse dismissed.

No order as to costs.

Cases referred to:

Ktenas and Another (No. 1) and The Republic (1966) 3 C.L.R. 64;

John Moran and The Republic 1 R.S.C.C. 10, at p. 13.

Recourse.

Recourse against the decision of the Respondent Public Service Commission to emplace Applicant to the post of Clerical Assistant in the General Clerical Staff instead of to the post of a Stenographer.

L. Clerides, for the Applicant.

K. Talarides, Senior Counsel of the Republic, for the Respondent.

Cur. adv. vult.

The following Judgment was delivered by:—

LOIZOU, J.: The Applicant, who held a post under the Greek Communal Chamber until its dissolution in 1965, by this recourse complains that the Respondents, the Public

Service Commission, acted in breach of the provisions of section 16(2) of Law 12/65 in emplacing her to the post of Clerical Assistant in the General Clerical Staff instead of to the post of a Stenographer, and seeks a declaration that the said decision is *null* and *void* and of no effect.

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At the commencement of the hearing of this case learned counsel for the Respondents raised the issue of whether the Application was filed within the time limited by paragraph (3) of Article 146 of the Constitution and applied that this issue be determined in the first instance; but as this was a comparatively short case, and for the sake of convenience, the Court heard argument both on this issue and on the substance of the case on the understanding, of course, that the preliminary point should be considered and determined first, for quite obviously if it were to be decided against the Applicant, then the recourse would be bound to fail and there would be no need to go into the substance of the case. I, therefore, propose to deal with the time limit issue first.

This issue was not raised in the Opposition, but it has not been disputed and in fact it is well settled in the light of the authorities, that the Court is bound to consider the time factor even though it is not raised in the Opposition. See for instance *John Moran and The Republic*, 1 R.S.C.C., p. 10 at p. 13 and *Τὸ Ἐνδίκιον Μέσον τῆς Αἰτήσεως Ἀκυρώσεως* by Tsatsos at p. 48, paragraph 22.

The uncontested facts of this case which are relevant for the determination of this preliminary issue are as follows:—

The Applicant was first appointed in the service of the then Colonial Government in 1957. In 1960 she was appointed as a Clerical Assistant in the Greek Communal Chamber. On the 15th October, 1964, the Committee of Administration of the Greek Communal Chamber, on the recommendation of the Commissioner of Co-operative Development, decided to include in the budget of the Chamber for the year 1965, a post for a Stenographer, which would be filled in as from the 1st January, 1965, by the appointment of the Applicant who had, it would appear, been already performing the duties of a Shorthand-typist.

The Greek Communal Chamber was dissolved by Law 12/65 on the 31st March, 1965.

On the 13th January, 1966, the Commissioner of Co-

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operative Development, Mr. Azinas, addressed a letter, *exhibit 4*, to the Chairman, Public Service Commission, informing him of the decision of the Committee of Administration of the 15th October, 1964, and enclosing a copy thereof; in that same letter the Chairman of the Public Service Commission was also informed by the Commissioner of Co-operative Development that provision had been made in the budget for the post of a Stenographer both for the years 1965 and 1966; that the Applicant had already been performing the duties of a Secretary and Stenographer and he was requested that she be promoted and appointed as a Stenographer on a permanent basis in the Department of Co-operative Development.

At a meeting of the Public Service Commission held on the 26th January, 1966, the Commission, acting under section 16 of Law 12/65, dealt with the question of the emplacement of a number of officers, including the Applicant, who had been employed in the service of the Greek Communal Chamber as Typists and unanimously decided that the functions of that post were analogous to the functions of the post of Clerical Assistant, General Clerical Staff, and accordingly decided, again unanimously, that the officers concerned be emplaced in the post of Clerical Assistant, General Clerical Staff with effect from the 1st February, 1966.

The Applicant was informed by the Public Service Commission of the above decision by a letter dated 3rd February, 1966 (*exhibit 1*).

On the 14th February, 1966, the Applicant acting under section 16(3) of the same Law (12/65) wrote to the Accountant-General and referring to the letter addressed to her by the Public Service Commission, copy of which had been also forwarded to the Accountant-General, informed him that she elected to refund the money collected by her upon the termination of her service with the Greek Communal Chamber, so that her service in the Government would be considered as continuous. This letter has been produced in evidence and is *exhibit 2* in this case. Copy of this letter was sent, *inter alia*, to the Chairman, Public Service Commission. It may be stated at this stage that this is the only document emanating from the Applicant herself, which has been produced as an *exhibit* in this case.

On the 24th February, 1966, the Commissioner of Co-

operative Development wrote to the Chairman, Public Service Commission the letter *exhibit 5* and referring to the latter's letter to the Applicant (*exhibit 1*) went on: "I wish to refer to my letter under No. 26/65 dated 13th January, 1966, addressed to you and to repeat my recommendation for the promotion of Mrs. Megalemou and her appointment to the post of a permanent Stenographer in this Department. A decision to this effect has already been taken by the Committee of Administration of the Greek Communal Chamber of Cyprus copy of which has been forwarded to you together with my letter dated 13th January, 1966". Then the writer goes on to repeat the fact that the Applicant had already been performing the duties of a Secretary and Stenographer satisfactorily and repeats his request that she be promoted and be appointed to the post of Stenographer with effect from the 1st January, 1965. Copy of a decision of the Committee of Administration of the Greek Communal Chamber under No. 273, dated 4th November, 1963 (*exhibit 9*) was attached to this letter for information.

In answer to the above letter (*exhibit 5*) the Chairman, Public Service Commission, wrote to the Commissioner of Co-operative Development the letter P. 6606 dated 8th March, 1966, which is *exhibit 6*, informing him that vacant posts of Stenographers 2nd Grade, are published in the Gazette before such posts are filled and that, therefore, the Applicant is urged to submit an application when such vacant posts are published in which case her application will be considered together with the applications of all other candidates.

On the 22nd March, 1966, the Commissioner of Co-operative Development wrote yet another letter to the Chairman, Public Service Commission (*exhibit 7*) in answer to the latter's letter *exhibit 6*; in this last letter the Commissioner after referring to his previous letters of the 13th January, 1966 (*exhibit 4*) and the 24th February, 1966 (*exhibit 5*) repeats his request that the Applicant be appointed to the post of a Stenographer, 2nd grade, in his Department. "In my opinion", he goes on to say "by virtue of the decision of the Greek Communal Chamber of the 15th October, 1964, copy of which has already been forwarded to you together with my letter dated the 13th January, 1966, Government is bound by virtue of Law 12/65 to appoint Mrs. Megalemou to the above post for which provision has been made in the budget for the years 1965 and 1966;" and in the last

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paragraph of the letter the writer informs the Chairman, Public Service Commission, that under the provisions of Law 12/65 the Applicant had already refunded the sum of £23.584 mils, which was paid to her, so that her service should be considered as continuous. Two days later, on the 24th March, 1966, the Commissioner of Co-operative Development received a reply (*exhibit 8*) to his last letter which reads as follows:

«Ένετάλην ὅπως ἀναφερθῶ εἰς τὴν ὑμέτεραν ἐπιστολὴν ὑπ' ἀρ. Π.10—καὶ ἡμερομηνίαν 22αν Μαρτίου, 1966, ἐν σχέσει μὲ προηγούμενην σύστασιν σας περὶ διορισμοῦ τῆς κ. Ἑλλης Μεγαλέμου Βοηθοῦ Γραφέως, εἰς τὴν θέσιν Στενογράφου, 2ας τάξεως, καὶ νὰ πληροφορήσω ὑμᾶς ὅτι οὐδὲν δύναται νὰ προστεθῇ εἰς τὸ περιεχόμενον τῆς ἡμετέρας ἐπιστολῆς ὑπ. ἀρ. Π. 6606 καὶ ἡμερομηνίαν 3ην Μαρτίου, 1966.»

As a result the present recourse was filed on the 13th May, 1966.

There is no doubt that the decision to emplace the Applicant in the post of Clerical Assistant, General Clerical Staff (*exhibit 10*) was taken on the 26th January, 1966 and that it was communicated to her by the letter *exhibit 1* dated the 3rd February, 1966. It is equally clear that on the 14th February, 1966, the Applicant acknowledged receipt of the letter *exhibit 1*, without any objection, and made her election under section 16(3) of Law 12/65 (*exhibit 2*).

In the recourse itself the relief claimed by the Applicant is a declaration that the decision communicated to her on the 8th March, 1966 (*i.e. exhibit 6*) is *null and void* and of no effect. (This letter was in fact written to the Commissioner of Co-operative Development by the Chairman, Public Service Commission). In the particulars filed by the Applicant on the 18th November, 1966, it is contended that the decision communicated to the Applicant on the 3rd February, 1966, *exhibit 1*, only finalized on the 24th March, 1966 (presumably this is the letter *exhibit 8* quoted above) and, therefore, the period of 75 days should run as from the latter date. In the same particulars it is also contended, in the alternative, that by the letters dated 14th February, 1966 (*exhibit 2*), 24th February, 1966 (*exhibit 5*) and 22nd March, 1966 (*exhibit 7*) new material was placed before the Commission and since a new reply had been received from the

Respondents there has been a re-examination of Applicant's case on the basis of this new material and a new decision was taken both on the 8th March, 1966 (*exhibit 6*) and 22nd March, 1966 (*exhibit 7*). This last *exhibit* is a letter addressed by the Commissioner of Co-operative Development to the Chairman of the Public Service Commission and I think that there is a mistake here and that the intention was to refer to the letter dated 24th March, 1966, *exhibit 8*, instead.

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In the course of his address before this Court learned counsel for the Applicant has submitted that the new material placed before the Respondents was contained in *exhibits 5, 6, 7 and 8* and he produced the decision No. 273 referred to in the last paragraph of *exhibit 5*. This decision is *exhibit 9*. Here again there must be some mistake because *exhibits 6 and 8* are letters addressed by the Respondents to the Applicant's Head of Department and can hardly be said to contain any new material placed before the Respondents on the basis of which they took a new decision.

Learned counsel for the Respondents on his part contended that the decision was communicated to the Applicant on the 3rd February, 1966, by the letter *exhibit 1*, that the correspondence that followed adds nothing new and that the recourse is out of time.

The question, therefore, that falls for consideration in so far as this issue is concerned is whether, after the original decision, there was a new decision taken upon a new inquiry and in the light of either new material or old but unknown to the Commission at the time of the original decision in which case such new decision is executory and a recourse would lie, or, whether the new act or decision is merely confirmatory of the original decision in which case no recourse would lie. See *Δίκαιον Διοικητικῶν Διαφορῶν* by Stassinopoulos at pp. 175-176 and *Πορίσματα Νομολογίας τοῦ Συμβουλίου Ἐπικρατείας 1929-1959* at p. 240 et seq. A thorough exposition of the law on this subject is also to be found in the very lucid Judgment in *Ktenas and Another (No. 1)* and *The Republic*, reported in (1966) 3 C.L.R. at p. 64, in which this question is fully dealt with with very helpful references to the relevant authorities.

Let us now see what new material, if any, was placed before the Respondents or came to their knowledge subsequent to their decision of the 26th January, 1966 (*exhibit 10*), which

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as stated earlier on was communicated to the Applicant by the letter *exhibit 1* dated 3rd February, 1966.

The first and only communication from the Applicant herself to the Respondents is a copy of her letter to the Accountant-General dated 14th February, 1966 (*exhibit 2*) in which she acknowledges receipt of the letter *exhibit 1* communicating to her the decision of the Public Service Commission to emplace her in the post of Clerical Assistant and in which she states that she elects to refund the benefit received by her so that her service should be considered as continuous. It has not been suggested that this letter contains any new material upon which a new decision could be based.

Then follows the letter *exhibit 5* dated 24th February, 1966, addressed by the Head of Applicant's Department to the Chairman, Public Service Commission. In the first two paragraphs of this letter the writer repeats the contents and the request made in his letter to the Chairman, Public Service Commission dated 13th January, 1966, *i.e.* before the original decision was taken. In the third paragraph of the letter reference is made to a decision of the Greek Communal Chamber under No. 273 dated the 4th November, 1963 (*exhibit 9*). By this decision a Selection Committee is set up consisting of five persons for the filling of vacant posts in the Clerical Staff and directions are given with regard to the procedure to be followed. In my view this circular letter has no possible relevance to the issue under consideration.

The next letter to the Respondents is dated 22nd March, 1966 (*exhibit 7*), which, like the previous one, is written by the Head of the Applicant's Department to the Chairman, Public Service Commission and he again refers to his letter of the 13th January, 1966 (*exhibit 4*) and in addition to his second letter of the 24th February, 1966, *exhibit 5*, and repeats the contents of those letters and makes the same request. In the last paragraph of this letter he informs the Respondents that the Applicant has already refunded to Government the sum of £23.584 mils so that her service should be considered as continuous. Here again I cannot see how it can be said that this letter contains any new material upon which the Respondents could have acted or based a new decision or which could possibly affect the issue.

I am of the opinion that none of the above letters contains any material relevant to the issue which was not already before the Respondents when they took their decision on the 26th January, 1966.

In the circumstances, even if I were to assume for a moment that the letters of the 8th March, 1966, and the 24th March, 1966, which are *exhibits 6 and 8* respectively, are "decisions" at all—which I, to say the least, consider very doubtful—such decisions can only be confirmatory of the decision taken on the 26th January, 1966 and can in no way be treated as amounting to a new decision or decisions in the matter, after a new inquiry; therefore, they cannot become the subject of a recourse and, in effect, this recourse is made against the decision of the 26th January, 1966, which was communicated to the Applicant on the 3rd February, 1966, by *exhibit 1* and is, therefore, quite clearly out of time as it was filed more than 75 days after the 3rd February, 1966, contrary to Article 146.3 of the Constitution.

Having reached this conclusion I do not consider it necessary to deal with the substance of the case as the recourse has to be dismissed on this preliminary issue.

In all the circumstances I have decided to make no order as to costs.

*Recourse dismissed.
No order as to costs.*

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