

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

DEMETRIOS PHILIPPOU AND OTHERS,

Applicants,

and

THE REPUBLIC OF CYPRUS, THROUGH

1. THE COUNCIL OF MINISTERS,
2. THE MINISTRY OF FINANCE,

Respondents.

1970
May 30
—
DEMETRIOS
PHILIPPOU
AND OTHERS
v.
REPUBLIC
(COUNCIL OF
MINISTERS
AND ANOTHER)

(Cases Nos. 74/69, 75/69,
76/69, 77/69, 78/69, 84/69, 85/69).

Public Officers—Revision of salaries—Effected by the Public Officers (Revision of Salaries and Salary Scales) Law, 1968 (Law No. 106 of 1968); and the Police, Firefighting Services and Prisons (Revision of Salaries) Law, 1969 (Law No. 2 of 1969)—Recourse against alleged administrative acts connected with, and in application of, the aforesaid legislative enactments—Decision on Preliminary Legal Issues—See also infra.

Recourse for annulment under Article 146 of the Constitution—Action taken by the Council of Ministers (Respondent 1) preparatory to the legislative process aforesaid viz. such as was necessary for introducing the afore-mentioned legislation (supra)—It is an action directly related to the exercise of legislative powers—Therefore, such action is outside the ambit of the jurisdiction of the Court on a recourse under Article 146 of the Constitution—And, consequently, cannot be made the subject-matter of such recourse—See further infra.

Recourse for annulment etc. etc.—On the contrary, the acts done by the Ministry of Finance (Respondent 2) connected with, and in the course and for the purpose, of the application of the aforesaid legislative enactments (Laws 106/68 and 2/69 supra) to the case of each particular Applicant in these recourses, are executory administrative acts—Notwithstanding that they were done by the said Ministry without exercising or without having to exercise any discretionary power in respect of such application of the Laws—Therefore, such acts being within the ambit of Article

1970
May 30

—
DEMETRIOS
PHILIPPOU
AND OTHERS
v.
REPUBLIC
(COUNCIL OF
MINISTERS
AND ANOTHER)

146.1 of the Constitution can properly be attacked by the recourse for annulment under that Article.

Administrative acts—Acts by the administration connected with the exercise of legislative powers—Outside the jurisdiction on a recourse for annulment under Article 146 of the Constitution.

Executory administrative acts—An act done by application of legislative provisions, even without the exercise of any discretionary administrative power, is an executory administrative act within the ambit of Article 146.1 of the Constitution—And as such it can properly be challenged by the recourse for annulment under that Article—See also supra.

Equality—Principle of equality—It entails equal treatment not only by the administration but, also, by the legislature—Articles 6 and 28 of the Constitution.

Constitutional Law—Principle of equality—See supra.

These recourses are, in essence, aimed at testing the constitutionality of two legislative enactments (Laws 106/68 and 2/69 *infra*) through challenging alleged administrative acts based thereon.

The issue at this stage of the present proceedings was taken as a preliminary point of law and it is whether or not the matters directly challenged by these recourses are within the ambit of Article 146.1 of the Constitution; in other words whether or not they are really such executory administrative acts or decisions or such omissions as could be made the subject-matter of a recourse under that Article.

Article 146.1 of the Constitution reads as follows:

“The Supreme Constitutional Court shall have exclusive jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, an act or omission of any organ, authority or person, exercising any executive or administrative authority is contrary to any of the provisions of this Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person.”

The complaint of the Applicants in these cases is, in essence, that, during the revisions of salaries which were effected by means of the Public Officers (Revision of Salaries and Salary

Scales) Law, 1968 (Law No. 106 of 1968)—affecting the Applicants in Cases Nos. 84/69 and 85/69—and by means of the Police, Firefighting Services and Prisons (Revision of Salaries) Law, 1969 (Law No. 2 of 1969)—affecting the Applicants in Cases Nos. 74/69, 75/69, 76/69, 77/69 and 78/69—they were granted salary scales, which as compared with the salary scales granted to other officers holding comparable posts, render the Applicants victims of unequal treatment, contrary to the provisions in Articles 6 and 28 of the Constitution.

1970
May 30
—
DEMETRIOS
PHILIPPOU
AND OTHERS
v.
REPUBLIC
(COUNCIL OF
MINISTERS
AND ANOTHER)

Article 28.1 of the Constitution provides:

“ 28.1 All persons are equal before the law, the administration and justice and are entitled to equal protection thereof and treatment thereby.”

These recourses have not been made directly against the aforesaid legislative enactments as such, but they were made—(except in Case No. 85/69)—against the failure of the Council of Ministers to grant to the Applicants the salary scales to which they claim to be entitled; and all of them complain, too, against acts or omissions of the Ministry of Finance in connection with, and in the course of, the application of the aforesaid Laws, due to which action (or omissions) they were deprived, allegedly of their proper emoluments.

Held, (1). The action taken by the Council of Ministers was such as was necessary for introducing the afore-mentioned legislation; but the action taken by the Ministry of Finance amounted to the application of the appropriate legislative provision to the case of each particular Applicant. In any event no question of any omission could arise in these cases.

(2) *As regards the action of the Council of Ministers:—*

(a) It is well settled that executive action which is preparatory to the legislative process cannot become the subject-matter of a recourse under Article 146 of the Constitution (*Papaphilippou and The Republic*, 1 R.S.C.C. 62; see, too, Odent on *Contentieux Administratif*, 2nd ed. p. 124; Auby and Drago, *Traité de Contentieux Administratif*, 1962, Vol. I. p. 81).

(b) In the present case, the action of the Council of Ministers was directly related to the exercise of the legislative powers; I have no hesitation, therefore, in holding that such action

1970
May 30

—
DEMETRIOS
PHILIPPOU
AND OTHERS

v.

REPUBLIC
(COUNCIL OF
MINISTERS
AND ANOTHER)

could not be attacked by way of the recourse under Article 146 of the Constitution. It follows, that the present recourses in so far as they are aimed at anything done by the Council of Ministers have to be dismissed as not being possible under Article 146.

(3) *As regards the action taken by the Ministry of Finance:*

(a) The action of the Ministry of Finance in applying to the case of each individual Applicant the respective provisions of Laws No. 106 of 1968 and No. 2 of 1969 (*supra*) has resulted in executory acts which could be properly attacked by the present recourses (see *the decisions of the Greek Council of State in cases* Nos. 736/53, 737/53, and 1283/60 in Zacharopoulos Digest of Cases of the Council of State 1953–1960, Part II p. 329 para. 726 and p. 330, para. 738; see also case No. 2080/50.

(b) An administrative act may produce a legal situation, so as to be an executory act and as such liable to be made the subject-matter of a recourse for annulment under Article 146 of the Constitution, either because it is the product of the exercise of a relevant discretionary power or because it is done in the course of the application of a legal provision without any administrative discretion having to be exercised. (See Stasinopoulos on the Law of Administrative Acts, 1951, p. 27; Kyriacopoulos on Greek Administrative Law, 4th edition Vol. II, pp. 339–340; Conclusions from the Jurisprudence of the (Greek) Council of State 1929–1959, p. 164).

(c) And that the application of legislative provisions may lead to recourses testing the constitutionality of such provisions in connection with the principle of equality, can be readily seen from the cases referred to by Svolos and Vlachos at pp. 194–195 of Vol. A of their Treatise on the Constitution of Greece (1954).

Held, in the result, these recourses fail in so far as they complain of anything done by the Council of Ministers, and this organ has to be struck off from the title of the proceedings; but they have to proceed to a hearing regarding the action of the Ministry of Finance taken in relation to each one of the Applicants under the relevant to his case legislative provisions.

Order accordingly.

Cases referred to:

Papaphilippou and The Republic, 1 R.S.C.C. 62;

Fekkas and The Electricity Authority (1968) 1 C.L.R. 173;

Matsis and The Republic (1969) 3 C.L.R. 245;

Shener and The Republic, 3 R.S.C.C. 138;

The decisions of the Greek Council of State in cases No. 2080/50, 736/53, 737/53 and 1283/60.

1970
May 30
—
DEMETRIOS
PHILIPPOU
AND OTHERS
v.
REPUBLIC
(COUNCIL OF
MINISTERS
AND ANOTHER)

Decision.

Decision on preliminary objections taken by counsel for the Respondent to the effect that the matters complained of by the Applicants could not be brought before the Court by means of a recourse under Article 146 of the Constitution.

L. Clerides, for the Applicants, in case Nos. 74/69 – 78/69.

D. Papachrysostomou, for the Applicant in Case No. 84/69.

L. Clerides with *L. Georghiades (Mrs.)*, for the Applicant in case No. 85/69.

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

Cur. adv. vult.

The following decision on preliminary legal issues was delivered by:—

TRIANAFYLLIDES, J.: These seven cases were heard together regarding preliminary objections, taken by counsel for Respondents, to the effect that the matters complained of by the Applicants could not be brought before this Court by means of recourses made under Article 146 of the Constitution.

In all these cases except one—85/69—the Republic is proceeded against through the Council of Ministers and the Ministry of Finance; in Case 85/69 only the latter organ appears in the description of the Respondent.

The complaint of the Applicants, as it appears from the motions of relief in their recourses, is, in essence, that, during the revisions of salaries which were effected by means of the

1970
May 30
—
DEMETRIOS
PHILIPPOU
AND OTHERS
v.
REPUBLIC
(COUNCIL OF
MINISTERS
AND ANOTHER)

Public Officers (Revision of Salaries and Salary Scales) Law, 1968 (Law 106/68)—affecting the Applicants in Cases 84/69 and 85/69—and by means of the Police, Firefighting Services and Prisons (Revision of Salaries) Law, 1969 (Law 2/69)—affecting the Applicants in Cases 74/69, 75/69, 76/69, 77/69 and 78/69—they were granted salary scales, which as compared with the salary scales granted to other officers occupying comparable posts, render the Applicants victims of unequal treatment, contrary to Articles 6 and 28 of the Constitution; there is, also, the contention that rights of the Applicants, safeguarded under Article 192 of the Constitution, have been infringed, in the sense that the Applicants are all persons who were in the public service at the time of the coming into existence of the Republic, in 1960, and that the said Article protects them against such changes in their terms and conditions of service as would be found to be discriminatory.

These recourses have not been made against the aforesaid enactments as such, but they were made—except Case 85/69—against the failure of the Council of Ministers to grant to the Applicants the salary scales to which they claim to be entitled to; and all of them complain, too, against acts or omissions of the Ministry of Finance, due to which they were, allegedly, deprived of their proper emoluments.

From the material at present before the Court it appears that the action taken by the Council of Ministers was such as was necessary for introducing the afore-mentioned legislation; and that the action taken in each instance by the Ministry of Finance amounted to the application of the appropriate legislative provision to the case of each particular Applicant.

Learned counsel for the Respondents has argued that, in the circumstances, the said action of the Ministry of Finance was not of an executory nature, in that it did not create, in itself, any legal situation through the exercise of any executive or administrative authority; and, therefore, there could be made no recourse in respect thereof under Article 146; furthermore, he had submitted that the relevant action of the Council of Ministers could not be attacked by way of recourse under Article 146, because it was directly related to the exercise of legislative power.

I have no hesitation in agreeing fully with the latter submission of counsel for the Respondents, and in so far as

these recourses are aimed at anything done by the Council of Ministers they have to be dismissed as not being possible under Article 146.

It is well settled that executive action which is preparatory to the legislative process cannot become the subject-matter of a recourse under Article 146. This was clearly stated, as far back as 1961, in *Papaphilippou and The Republic*, 1 R.S.C.C. 62 (see, too, Odent on Contentieux Administratif, 2nd ed. p. 214 and *Traité de Contentieux Administratif* by Auby and Drago, 1962, Vol. I, p. 81).

What I cannot agree with is the contention of counsel for the Respondents that because the action taken by the Ministry of Finance, in the case of each one of the Applicants, was taken in application of the relevant legislation, such action does not possess executory nature, so that it can be challenged under Article 146.

An executory or administrative act may produce a legal situation, so as to be an act of an executory nature, and liable to be made the subject-matter of a recourse for annulment (as under our Article 146) either because it is the product of the exercise of a relevant discretionary power or because it is made in the course of the application of a legal provision without any administrative discretion having to be exercised; in the latter instance the making of the act, on a decision by the administration that a particular legal provision is applicable to an individual case, does create a legal situation regarding such case (see Stasinopoulos on the Law of Administrative Acts, 1951, p. 27, Kyriacopoulos on Greek Administrative Law, 4th ed., Vol. II pp. 339-340 and Conclusions from the Jurisprudence of the Greek Council of State 1929-1959 p. 164).

There are, indeed, many cases to be found in our law reports, and in the law reports of countries where there exist jurisdictions such as that under Article 146, in which acts made by application of legal provisions, and without the exercise of any administrative discretion, were properly attacked by recourse for annulment; and through such a process the constitutionality of the legislation on which they were based was tested.

In my opinion, the action of the Ministry of Finance in applying to the case of each individual Applicant the respective

1970
May 30

—
DEMETRIOS
PHILIPPOU
AND OTHERS
v.
REPUBLIC
(COUNCIL OF
MINISTERS
AND ANOTHER)

1970
May 30

—
DEMETRIOS
PHILIPPOU
AND OTHERS
v.
REPUBLIC
(COUNCIL OF
MINISTERS
AND ANOTHER)

provisions of Laws 106/68 or 26/9 has resulted in executory acts which could properly be attacked by the present recourses.

A very similar precedent is recourse 2080(50), decided by the Greek Council of State, in which there was examined, *inter alia*, in relation to Article 3 of the then in force Greek Constitution, which safeguarded the principle of equality, the constitutionality of legislation revising the salary scales of public officers, including judicial officers; that recourse having been made, as in the present cases, against computations of emoluments under the said legislation. Also, useful reference may be made to other similar cases decided by the Greek Council of State, such as cases 736(53), 737(53) and 1283(60) (in Zacharopoulos Digest of Cases of the Council of State, 1953–1960, part II, p. 329, para. 726, p. 330, para. 738).

That the application of legislative provisions may lead to recourses testing the validity of such provisions, in connection with the principle of equality, can be readily seen from the cases referred to by Svolos and Vlachos at pp. 194–195 of Vol. A of their Treatise on the Constitution of Greece (1954).

Because, as stated in the said Treatise (at p. 187) the principle of equality entails not only equality of treatment by the administration but, also, equality of treatment by the legislature; and in this respect it is useful to refer, also, to Sgouritsas on Constitutional Law (1966) Vol. B, part (b), p. 184; actually, our own Article 28.1 leaves no room for doubt that this is, indeed, so.

In the light of the foregoing, these recourses have to fail in so far as they complain of anything done by the Council of Ministers, and this organ has to be struck off from the title of the proceedings; but they have to proceed to a hearing regarding the action of the Ministry of Finance taken in relation to each one of the Applicants under the relevant to his case legislative provision.

There could, of course, be no possibility of the Applicants being entitled to complain by their recourses of any omission, either on the part of the Council of Ministers or on the part of the Ministry of Finance. The Council of Ministers has taken definite decisions with a view to introducing the relevant laws—and such decisions are in any case, as stated earlier, outside the ambit of the jurisdiction under Article 146—and

the Ministry of Finance has acted in the course of the application of such Laws; so no question of any omission could arise.

Though the Applicants have succeeded in ensuring a hearing, about their complaints, by means of the present recourses, I must make it clear that in this decision I should not be taken as indicating any view about the validity or not of the claims of the Applicants; moreover, I would like to draw the parties' attention, for the sake of guidance, to the judgments in *Fekkas* and *The Electricity Authority* ((1968) 1 C.L.R. 173) and in *Matsis* and *The Republic* ((1969) 3 C.L.R. 245) where the question of reconciling reasonable classifications with the right of equality has been gone into at length by this Court.

Lastly, regarding the possibility of Article 192 of the Constitution being taken as safeguarding for public officers prospects of advancement in the future, I think it would be useful, for guidance again, to refer the parties to the case of *Shener* and *The Republic* (3 R.S.C.C. 138).

Order accordingly.

1970
May 30

—
DEMETRIOS
PHILIPPOU
AND OTHERS
v.
REPUBLIC
(COUNCIL OF
MINISTERS
AND ANOTHER)