[TRIANTAFYLLIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

PHOTIS KELPIS,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH
THE DIRECTOR OF PERSONNEL,

Respondent.

(*Case No.* 167/68).

Recourse under Article 146 *of the Constitution—Acts or decisions which alone can be made the subject-matter of the recourse—Executory acts as distinct from merely confirmatory of previous ones—Subsequent act confirmatory of a previous executory decision—No new inquiry on the basis of new factors intervening between the two—No recourse lies against the latter act—See further* infra.

Executory decisions—Confirmatory acts—Distinction—Test—See supra—*Re-examination from the legal aspect only of a matter in relation to which an executory decision has already been reached—Does not amount to a new inquiry on the basis of new factors resulting in a new executory act or decision, but results only in a mere confirmatory act.*

Confirmatory acts—See supra.

Acts or decisions—Within the ambit of Article 146.1 *of the Constitution—Confirmatory acts of previous executory decisions—Recourse against the former not maintainable—See also* supra.

Administrative acts or decisions—Which alone can be challenged by the recourse under Article 146.1 *of the Constitution—Confirmatory acts—Executory acts or decisions—Distinction—Test—See* supra.

This case was decided on a preliminary point taken by counsel for the Respondent to the effect that the act or decision dated May 13, 1968 challenged by this recourse, is merely confirmatory of an earlier decision dated October 21, 1967,

and as such it cannot be made the subject of a recourse under Article 146 of the Constitution; and that consequently, the recourse filed on May 21, 1968 is not maintainable.

The facts are very shortly as follows: The Applicant who is a public officer was refused education grants for his children on the ground that when he was promoted some time in 1963 to the post of Foreman, 1st Grade, the offer made to him by the Public Service Commission stated expressly that in case he accepted the promotion he would not be entitled to an education grant. This refusal was communicated to the Applicant by letter dated October 21, 1967. To this letter the Applicant replied protesting by letter dated November 2, 1967 to which letter the Respondent replied by letter dated November 7, 1967; insisting on the said refusal. About six months later, on April 29, 1968 counsel for Applicant wrote to the Respondent whereby, after referring to the past correspondence he proceeded to state that his client was entitled to education grants in respect of both his sons and that the fact that the Applicant on his aforesaid promotion had signed a statement declaring that he would not be entitled to education grants, did not affect in the least his relevant right; Counsel relied in this respect on the first instance decision of this Court in *Constantinides and The Republic* (1967) 3 C.L.R. 483. By a reply dated May 13, 1968 the Respondent confirmed the contents of the previous letter of October 21, 1967 (*supra*); he furthermore, pointed out that the *Constantinides* case (*supra*) did not resolve the issue one way or the other. In fact, the point was left open in that case (ubi *supra*) at p. 495. Eight days later on May, 21, 1968 the present recourse was filed challenging the aforesaid decision contained in the aforementioned letter of the Respondent of May 13, 1968.

Dismissing the recourse as not being maintainable, the Court:-

Held, (1). In the light of all the material I have no doubt that the letter of May 13, 1968 is nothing more than a confirmatory act, deprived of executory nature; against it no recourse under Article 146 of the Constitution could be made. It is not at all the product of a new enquiry on the basis of new factors. It is a reply confirming the earlier executory decision which had been communicated to the Applicant by the letter of October 21, 1967. The position is clearly the

same as that in a great number of cases in which the Greek Council of State has found that subsequent administrative action was merely confirmatory of a previous executory decision, in that there had intervened between the two no new inquiry on the basis of new factors (see *inter alia*, case No. 21/66). The relevant principle governing the point is to be found in, *inter alia* the Conclusions from the Jurisprudence of the (Greek) Council of State 1929–1959 p. 241; and it has been, also, expounded in the *Ktena* case (*infra*).

(2) Consequently, this recourse fails as it has been made against an act which could not be the subject matter of a recourse under Article 146 of the Constitution (see Conclusions from the Jurisprudence of the (Greek) Council of State 1929–1959 at p. 237 and p. 240; *Kolokassides and The Republic* (1965) 3 C.L.R. 549; and on appeal (1965) 3 C.L.R. 542; *Ktena and The Republic* (1966) 3 C.L.R. 64 and on appeal (1966) 3 C.L.R. 820; *Cyprus Flour Mills Co. Ltd. and The Republic* (reported in this Part at p. 48 *ante*).

Recourse dismissed.
No order as to costs.

Per curiam: It is quite clearly established in administrative law that the re-examination from the legal aspect only of a matter, in relation to which an executory decision has already been reached, does not amount to a new inquiry resulting in a new executory decision but results only in a confirmatory act; and this is so even in cases in which, in relation to the legal aspect, there has been sought by the administration legal advice or the matter has been referred for the purpose to an appropriate organ, such as the State Legal Council in Greece (see the decisions of the Greek Council of State in cases Nos. 345/35, 5/37, 229/38, 439/38, 34/54, 479/66, 1013/66 and 752/30 in which even the inclusion in a subsequent decision of a further legal ground in support of a decision already reached previously in the same matter was not held sufficient to render the later decision anything more than mere confirmatory of the previous one).

Cases referred to:

Constantinides and The Republic (in the first instance) (1967) 3 C.L.R. 483 at p. 495;

Kolokassides and The Republic (1965) 3 C.L.R. 549; and on appeal (1965) 3 C.L.R. 542;

Ktena and The Republic (1966) 3 C.L.R. 64; and on appeal (1966) 3 C.L.R. 820;

Cyprus Flour Mills Co. Ltd. and The Republic (reported in this Part at p. 48 *ante*);

Decisions of the Greek Council of State in Cases Nos.: 752/30, 345/35, 5/37, 229/38, 439/38, 34/54, 21/66, 479/66, 1013/66.

Recourse.

Recourse against the refusal of the Respondent to pay to the Applicant educational grant in relation to the studies of his two sons in respect of the school-year 1966/1967.

L. Clerides, for the Applicant.

L. Loucaides, Senior Counsel of the Republic, for the Respondent.

Cur. adv. vult.

The following judgment was delivered by:

TRIANTAFYLLIDES, J.: At the commencement of the hearing of this recourse, which was filed, on the 21st May, 1968, under Article 146 of the Constitution, against the refusal to pay to the Applicant education grants in relation to the studies, in Greece, of his two sons—Theodoros and Andreas—counsel for the Respondent objected that the recourse was out of time, under Article 146.3, because it was not filed within seventy-five days after the Applicant came to know of the last executory decision in the matter, by means of letters dated the 21st October, 1967 and the 7th November, 1967 (*exhibits* 3 *and* 5), respectively); he, furthermore, objected that the recourse could not be made, under Article 146, against the refusal of the grants, as set out in a letter dated the 13th May, 1968 (*exhibit* 7), because such refusal was an act merely confirmatory of the earlier decision in the matter, which had already been communicated, as aforesaid, to the Applicant.

Counsel for the Applicant did not dispute that the recourse was out of time in so far as what had been communicated to

the Applicant by the said 1967 letters was concerned; and, actually, this recourse, as it appears from the motion for relief, was made only in respect of the letter of the 13th May, 1968, which, according to the submission of counsel for the Applicant, did not amount to a merely confirmatory act, but it communicated to the Applicant a decision of an executory nature.

The history of events in this case is as follows:-

The Applicant applied in the appropriate form, on the 6th September, 1967, for education grants in relation to the studies of his two sons; one of such applications has been produced by way of a specimen (*exhibit* 1).

On the 27th September, 1967, the Applicant was informed, by letter of the Accountant-General, that an education grant, in respect of his son Theodoros, for the academic year 1966/1967, had been approved; and he was sent a cheque of £60 for the purpose (see *exhibit* 2).

On the 21st October, 1967, he received a letter from the Accountant-General (referring to his applications, of the 6th September, 1967, for education grants in relation to both his sons) whereby he was informed that the aforementioned payment of £60 had been made to him through an oversight, without the Applicant being entitled to it, because when he was promoted from the post of Foreman, 2nd grade, to that of Foreman, 1st grade, on the 1st December, 1963, the offer made to him by the Public Service Commission stated expressly that in case he accepted the promotion he would not be entitled to an education grant; he was, therefore, requested to refund the amount of £60 by the 27th October, 1967 (see *exhibit* 3).

To this letter the Applicant replied on the 2nd November, 1967, stating that, in the meantime, he had spent the amount of £60, in connection with the studies of his son—Theodoros—and that it was, thus, impossible for him to refund it. He went on to contend that according to Article 192.1 of the Constitution he had a vested right in relation to the education grant and that the Public Service Commission was not entitled to deprive him of such right; and he concluded by stating that, in view of the letter of the Accountant-General (dated the 21st October, 1967) which informed him that he was not entitled to an education grant, he intended to take the case

to the "Constitutional Court", and that the refund of the £60 would depend on the decision of the Court (see *exhibit* 4).

Yet, though by letter dated the 7th November, 1967, the Applicant was informed by the Accountant-General—in answer to his said letter of the 2nd November, 1967—that, because of his refusal to refund the £60, there would be deducted from his salary an amount of £5 per month for twelve months (see *exhibit* 5), the Applicant did not, eventually, take any legal proceedings.

About six months later, on the 29th April, 1968, counsel for the Applicant wrote to the Accountant-General's Office (in the Ministry of Finance). After referring to the past correspondence in the matter, he proceeded to state that he had advised the Applicant that he was entitled to education grants in respect of both his sons and that the fact that the Applicant, on promotion, had signed a statement declaring that he would not be entitled to an education grant, did not affect his relevant right; counsel for the Applicant relied in this respect on the first instance decision of this Court in *Constantinides* and *The Republic* ((1967) 3 C.L.R. 483). In conclusion, counsel complained that there had been a failure to reply to the application of his client dated the "8/8/1967", and stated that proceedings would be instituted unless his client's claim was satisfied (see *exhibit* 6).

No relevant application of the Applicant dated the "8/8/1967" has been produced by Applicant's side during the proceedings before me. As a matter of fact in paragraph 2 of the recourse it is stated that the Applicant applied for the education grants, in respect of his sons, on the "3.8.1967"; but no such application has been produced, either, before this Court. Perhaps the Applicant did apply early in August, 1967, and different dates were given, as to when he applied, through a clerical error either in preparing the recourse or in writing the letter of the 29th April, 1968. It does not, however, matter which is the correct date, because there can be no doubt that any earlier informal application of the Applicant merged, eventually, together with the formal Applications for education grants which he made, as stated before in this judgment, on the 6th September, 1967 (see *exhibit* 1).

By a reply dated the 13th May, 1968, the Director of Personnel (who, like the Accountant-General, comes under the

Ministry of Finance) confirmed the contents of the letter already addressed to the Applicant by the Accountant-General's Office on the 21st October, 1967 (*exhibit* 3), to the effect that the Applicant was not entitled to an education grant; he, furthermore, pointed out that the *Constantinides* case (*supra*) did not resolve the issue of the loss or not, on promotion, of the Applicant's entitlement to an education grant; and I might, observe, while I am on this point, that the Director of Personnel was right in this respect, because in the said case such issue was left open (see at p. 495 of the report in (1967) 3 C.L.R.).

The fate of this recourse, from the point of view of whether or not it was possible under Article 146, depends on the nature of the administrative action set out in the letter of the 13th May, 1968, against which the recourse has been made; in other words, whether such action is of an executory or of a confirmatory nature.

That a recourse, under Article 146, can be made only against an act or decision which is of an executory nature, and that a confirmatory act lacks executory nature, was not in issue between learned counsel at the hearing before me; and correctly so, in view of the relevant administrative law principles (see Conclusions from Decisions of the Greek Council of State, 1929–1959 at p. 237 and p. 240; *Kolokassides* and *The Republic* (1965) 3 C.L.R. 549 and, on appeal, (1965) 3 C.L.R. 542; *Ktena* and *The Republic* (1966) 3 C.L.R. 64, and, on appeal, (1966) 3 C.L.R. 820; *Cyprus Flour Mills Co. Ltd.* and *The Republic* (reported in this Part at p. 48 *ante*).

Once the decision communicated to the Applicant by means of the letter of the 21st October, 1967—in relation to which this recourse would undoubtedly be found to be out of time—is the same as that set out in the letter of the 13th May, 1968, the latter would have to be treated as being confirmatory of the former, unless the letter of the 13th May, 1968, were written after a new inquiry into the matter in question on the basis of new factors. The relevant principle, governing this point, is to be found in, *inter alia*, the Conclusions from the Decisions of the Greek Council of State, 1929–1959, p. 241 and it has been, also, expounded in the *Ktena* case (*supra*).

There is nothing to show that, regarding the decision that the Applicant was not entitled to an education grant, there

has taken place any new inquiry on the basis of new factors between the letter dated the 21st October, 1967 and that dated the 13th May, 1968. The maximum that could be said in this respect might be that—in view of the fact that counsel for the Applicant relied expressly, in his letter of the 29th April, 1968, on the *Constantinides* case (*supra*) and the Personnel Officer dwelt upon the effect of such case in his reply of the 13th May, 1968—to a very minor and immaterial extent the matter was dealt with from the legal point of view; and I said to a very minor and immaterial extent because there was no question of the *Constantinides* case (which was decided and published *before* the letter of the 21st October, 1967, was written) having laid down a rule and a decision having to be reached whether that rule applied to the particular instance; all that took place is that counsel for the Applicant relied on that case as establishing the continued entitlement of his client to an education grant, notwithstanding his acceptance, on promotion, to relinquish his right to such a grant, and the Director of Personnel replied—and quite rightly so—that in the *Constantinides* case there had not been resolved that particular issue.

In any case, it is quite clearly established in administrative law that the re-examination from the legal aspect only of a matter, in relation to which an executory decision has already been reached, does not amount to a new inquiry resulting in a new executory decision, but results only in a confirmatory act; and this is so even in cases in which, in relation to the legal aspect, there has been sought by the administration legal advice or the matter has been referred for the purpose to an appropriate organ, such as the State Legal Council in Greece (see the decisions of the Greek Council of State in cases 345/35, 5/37, 229/38, 439/38, 34/54, 479/66, 1013/66 and 752/30, in which even the inclusion in a subsequent decision of a further legal ground in support of a decision already reached previously in the same matter was not held sufficient to render the later decision anything more than confirmatory of the earlier one).

In the light of all the material before me I have no doubt, indeed, that the letter of the 13th May, 1968, is nothing more that a confirmatory act, deprived of executory nature; and against it no recourse under Article 146 could be made. It is not at all the product of a new enquiry on the basis of new

factors. It is a reply confirming the earlier executory decision which had been communicated by the letter of the 21st October, 1967; the position is clearly the same as that in a great number of cases in which it was found by the Greek Council of State that subsequent administrative action was confirmatory of a previous executory decision, in that there had not intervened between the two a new inquiry (see, *inter alia*, case 21/66).

Also, I do not find any substance in the complaint, contained in the letter of the 29th April, 1968, to the effect that the Applicant had not received a reply to his application for education grants; by the letter written on the 21st October, 1967, such a reply *was* given, with express reference to the relevant formal applications of the Applicant dated the 6th September, 1967, and that reply was, also, duly reasoned.

On the basis of the foregoing this recourse fails, as it has been made against an act which could not be the subject-matter of a recourse under Article 146.

Of course, in this judgment I am leaving entirely open, as it is not necessary to decide it, the issue as to whether or not the Respondent refused validly to the Applicant the education grants for the reason stated in the letter of the 21st October, 1967.

I trust that if in future, in another case, it is found that this reason is an invalid one, then the appropriate authority will not fail to redress the position and proceed to deal with the case of the Applicant on the proper basis.

In the result the recourse is dismissed; but there shall be no order as to costs.

Application dismissed; no order as to costs.