IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ANASTASIS CARIOLOU,

*Applicant,*

*and*

1. THE MUNICIPALITY OF KYRENIA,
2. THE COUNCIL OF MINISTERS,
3. THE MINISTER OF INTERIOR,

*Respondents.*

(*Case No.* 15/71).

*Recourse under Article* 146 *of the Constitution—Time within which a recourse may be made—Article* 146.3*—Time begins to run from the date the applicant acquires complete knowledge of the administrative decision—Non-mention in the communication of the decision of the particular provision of the law relied upon for the decision, does not prevent the time from running—Due communication of the decision concerned—Principles governing such due communication and publication as the case may be—See further* infra.

*Time within which a recourse has to be filed—Article* 146.3 *of the Constitution—Meaning of "knowledge" in the said paragraph* 3*—Completeness of the knowledge—It does not emanate from what the decision might contain but from what in fact it does contain—See also* supra.

*Administrative acts or decisions—Due communication (and publication)—Prerequisite for the period of time prescribed under Article* 146.3 (supra) *to start running—Cf.* supra.

*Communication (and publication) of administrative acts or decisions—Bearing on the running of the time within which a recourse under Article* 146 *of the Constitution has to be filed—Article* 146.3*—See* supra.

*Words and Phrases—"Knowledge" in paragraph* 3 *of Article* 146 *of the Constitution.*

By this recourse under Article 146 of the Constitution the applicant challenged the validity of a decision of the respondent Municipality of Kyrenia, in its capacity as the "appropriate

authority" under the Streets and Buildings Regulation Law, Cap. 96,—refusing to grant him a building permit for the addition of a sixth floor on his hotel " Esperides " at Kyrenia.

The case has been decided on the preliminary objection taken by the respondent Municipality to the effect that the recourse was made out of time *viz.* after the 75 days' period provided under Article 146.3 of the Constitution had elapsed ; the Court, sustaining the objection, held that the recourse cannot be entertained for the above reasons and dismissed it accordingly.

The salient facts of the case are briefly as follows :

On March 21, 1969, the applicant applied to the respondent Municipality for a building permit for the addition of a sixth floor on his aforesaid hotel " Esperides ". This application was considered by the respondent municipal authority at their meeting of April 29, 1969 ; copy of the minutes of the said meeting has been produced (*Exhibit* 8).

They read as follows :

" Application by Hotel Hesperides Ltd. No. 31/69 for a permit to add 5th and 6th floor to their hotel. The Municipal Committee is unable to approve same because of the existing legislation that is to say the height is more than 47 feet and the floors more than four ".

This in effect is the *sub judice* decision which has been communicated to the applicant by letter dated May 8, 1969 (*Exhibit* 1) which reads as follows :

" I have been instructed to refer to your application No. 31/69 dated 21.3.1969 for a building permit for a sixth floor to your hotel and inform you that the Municipal Committee, in accordance with existing Regulations, and after Government advice, is unable to grant a permit for a building when the height is more than 47 feet or when it is more than four floors. You may, however, if you wish ask the Council of Ministers to allow the relaxation of the said law ".

In July 1969, the applicant sought the said relaxation which eventually was refused in " the public interest " by a letter dated March 12, 1970 (*Exhibit* 3). On May 26, 1970, the applicant by letter (*Exhibit* 4) addressed to the Town Clerk of the respondent Municipality requested him to clarify whether their negative reply of May 8, 1969 (*Exhibit* 1) (*supra*)

was relating to the height or to the number of storeys of the said hotel ; to which the Town Clerk replied by his letter of May 29, 1970 (*Exhibit* 5) that the refusal in question "covered both the height and the number of floors". To a further inquiry from the applicant the Municipality replied on November 16, 1970 (*Exhibit* 7) that the aforesaid refusal to grant a building permit for a sixth floor was based on Notification No. 403, published in the 3rd Supplement of the Official Gazette on May 25, 1967.

Paragraph 3 of Article 146 of the Constitution reads as follows :

"3. Such a recourse shall be made within seventy-five days of the date when the decision or act was published or, if not published and in the case of an omission, when it came to the knowledge of the person making the recourse".

It was argued by counsel for the respondent Municipality that the communication to the applicant of the refusal complained of was complete by their aforesaid letter of May 8, 1969 (*Exhibit* 1) (*supra*) ; or, at the latest, by their letter of May 29, 1970 (*Exhibit* 5) (*supra*) ; and that in either case the recourse, having been filed some time in January 1971, was obviously well outside the period of 75 days prescribed under Article 146.3 of the Constitution (*supra*).

On the other hand, counsel for the applicant submitted that *Exhibit* 1 (*supra*), the communication of the *sub judice* decision, was not complete ; there was missing therefrom the reasoning which was contained in the letter of the respondent Municipality dated November 16, 1970 (*Exhibit* 7) (*supra*), in which reference is made to the specific provision of the Law upon which the respondent relied for its decision ; and that, therefore, the time started running on November 16, 1970, and not earlier.

Dismissing the recourse as having been filed out of time, the Court :—

*Held*, (1) (*a*). It appears that there is a consensus that the communication and the publication are complete when they contain the whole of the contents of the act as they both denote in their own way full knowledge of the decision. In fact according to the decision of the Greek Council of State No. 2321/1953 (referred to in "The Conclusions from the Jurisprudence of the Greek Council of State" 1929–1959 at p. 253)

" Knowledge is considered the one referring to the contents of the act without requiring the complete knowledge of the grounds of annulment ".

(*b*) In the present case *Exhibit* 1 (*supra*), the communication of the decision to the applicant, contained everything that was in the decision, a fact obvious from a comparison between *Exhibits* 1 and 8 (*supra*).

(2) The argument that the non-mention in the communication (*Exhibit* 1) of the particular provisions of the Law relied upon for the decision, prevents the time from running, cannot be accepted as a valid one. The knowledge of the applicant was a complete one as far as the contents of the act are concerned. The completeness of the knowledge does not emanate from what the act might contain but from what in fact it does contain. (Cf. *John Morran* and *The Republic*, 1 R.S.C.C. 10, at p. 13 ; *Pissas* (*No.* 1) v. *The Electricity Authority of Cyprus* (1966) 3 C.L.R. 634, at p. 638 ; cf. also Kyriacopoulos on " Administrative Law " 3rd ed. Vol. 3, at p. 121 ; Th. Tsatsos on " The Recourse for annulment to the Council of State " 2nd ed. pp. 54, 55 para. 31).

(3) The decision as reasoned was communicated to the applicant. This is not a case of incomplete communication in the sense that the reasons appearing in the decision (*Exhibit* 8) (*supra*) were not included in the communication (*Exhibit* 1, *supra*). But if I were, however, to hold that the non-mention in *Exhibit* 1 of the particular provision of the Law relied upon by the appropriate authority, amounted to lack of reasoning, as claimed by applicant, and which reasoning was given in the said letter of November 16, 1970 (*Exhibit* 7, *supra*), I would again hold that the time started running as from the communication (*Exhibit* 1 *supra*), since lack of reasoning is in itself a ground for annulment (see Tsatsos, op. cit. at p. 57, para. 33).

(4) In the light of the foregoing, I do not consider that the letter of November 16, 1970 (*Exhibit* 7 *supra*) whereby the applicant was informed of the particular provision of the Law upon which the decision was based, has any legal effect whatsoever in favour of the applicant's claim that his application is not out of time.

*Recourse dismissed. No order as to costs.*

Cases referred to :

*John Morran* and *The Republic*, 1 R.S.C.C. 10, at. p. 13 ;

*Pissas* (*No.* 1) v. *The Electricity Authority of Cyprus* (1966) 3 C.L.R. 634, at p. 638 ;

*Decision of the Greek Council of State* No. 2321/1953, in "*The Conclusions from the Jurisprudence of the Council of State*" 1929–1959, *at p.* 253.

**Recourse.**

Recourse against the refusal of respondent No. 1 to grant a building permit to applicant for adding a further storey to his hotel and for a declaration that the regulations published under Notifications 403 and 404 of the Cyprus *Gazette* No. 576, Supplement No. 3, dated 25.5.67 are null and void and of no effect whatsoever.

*A. Triantafyllides* with *E. Liatsos*, for the applicant.

*X. Clerides* with *A. Markides*, for respondent 1.

*L. Loucaides*, Senior Counsel of the Republic, for respondents No. 2 and 3.

*Cur. adv. vult.*

The following decision was delivered by :

A. LOIZOU, J. : The applicant by his present recourse claims : "(*a*) A declaration that the decision of respondent No. 1 not to grant applicant's application for a building permit, dated 8.5.1969, under reference No. 31/69 and further correspondence bearing dates 29.5.70 and 16.11.70, for adding a further storey to his building Esperides Hotel, situated in Kyrenia, is null and void and of no effect whatsoever ; and (*b*) a declaration that the regulations published under Notification 403 and 404 of the Cyprus *Gazette* No. 576, Supplement No. 3 dated 25.5.67, are null and void and of no effect whatsoever."

When the case came up for directions on the 30th April, 1971, it was directed, by consent of the parties, that the issue that this recourse was filed out of time, raised in the opposition of respondent No. 1—the appropriate authority for the town of Kyrenia under the Streets and Buildings Regulation Law, Cap. 96—be dealt with as preliminary to the hearing of the case.

The applicant is the owner of the Hotel Esperides. On the 21st March, 1969, he applied to respondent No. 1 for a building permit for the addition of a sixth floor on his aforesaid hotel as per the plans submitted in 1961. These plans were executed by stages, for financial reasons. The said application, *exhibit* 9, was considered by respondent No.1, at their meeting of the 29th April, 1969 ; copy of the minutes of the said meeting has been produced, (*exhibit* 8). They read as follows :

> " Application by Hotel Esperides Ltd. No. 31/69, for a permit to add 5th and 6th floor to their hotel. The Municipal Committee is unable to approve same because of the existing legislation that is to say the height is more than 47 feet and the floors more than four."

This in effect is the *sub judice* decision which has been communicated to the applicant by letter dated 8th May, 1969, (*exhibit* 1). It is important that this communication should be quoted here verbatim as the preliminary issue turns to a considerable extent on its contents. It reads as follows :

> " I have been instructed to refer to your application No. 31/69 dated 21.3.69 for a building permit for a sixth floor to your hotel and inform you that the Municipal Committee, in accordance with existing legislation, and after Government advice, is unable to grant a permit for a building when the height is more than 47 feet or when it is more than four floors. You may, however, if you wish ask the Council of Ministers to allow the relaxation of the said law."

It appears that the administrative act and its communication coincide, except, as far as the present proceedings are concerned, for the addition of the words " Government advice " which were added in the communication after the words " existing legislation " and the concluding paragraph in the communication whereby it is intimated to the applicant that he may apply to the Council of Ministers for relaxation. On the 16th July, 1969, through his advocates, the applicant applied to the Council of Ministers, (*exhibit* 2), requesting that he be permitted to erect another floor on his hotel, with copy of the communication, (*exhibit* 1), attached thereto. On the 12th March, 1970, the applicant received a reply to his aforesaid application from the Director of Town Planning and Housing Department (*exhibit* 3). Reference is made in this reply to *exhibit* 2 as being an application for relaxation under Regulation 66 of the Building Regulations

and it is pointed out that it should have been submitted to him and not to the Council of Ministers ; in conclusion the applicant is informed that the relaxation applied for cannot be approved as it was not considered in the public interest to do so.

On the 26th May, 1970, obviously after *exhibit* 3 was received by applicant, his advocates wrote to the Town Clerk of Kyrenia Municipality *exhibit* 4, whereby they referred to their letter of the 8th May, 1969, (*exhibit* 1), requesting that it be clarified whether the negative reply was relating to the height or to the number of storeys of the building of their clients. On the 29th May, 1970, the Town Clerk replied, (*exhibit* 5), informing them that the refusal " in accordance with the law to issue a permit covered both the height and the number of floors." On the 9th November, 1970, the applicant, through his advocates wrote to the Town Clerk (*exhibit* 6) whereby he requests that he be informed of the relevant law on which the refusal of the 8th May, 1969, was based. In reply thereto *exhibit* 7 was sent, dated 16th November, 1970, by which the applicant's advocates are informed that the refusal to grant a building permit for a sixth floor was based on notification No. 403 published in the 3rd Supplement of the Official *Gazette* of the 25th May, 1967.

It has been argued by learned counsel for the applicant that *exhibit* 1, the communication of the *sub judice* decision, was not complete. There was missing therefrom the reasoning which was contained in *exhibit* 7, in which reference is made to the specific provision of the law upon which the respondents relied for their decision. In support of this argument counsel pointed out para. 3 of the facts in the opposition of respondents No. 1, where it is stated that the " letter of the 16.11.1970 simply informs the applicant of the reasoning of their refusal to grant a permit." This statement, however, must be read in conjunction with para. 3 of the grounds of law of the same opposition where it is claimed that this letter " simply confirms the issue of the administrative act refusing the permit for a sixth floor and/or simply repeats the reasoning of the refusal contained in the letter of the 8th May, 1969, etc. ." It cannot be said therefore that there is, or that it can amount to, an admission ; and particularly so when regarding questions of computation of time, it has been said that these are matters of public interest and therefore cannot be waived by a party.

The first question, therefore, for determination is whether, by the communication (*exhibit* 1), through which the applicant came to know of the *sub judice* decision, the applicant

acquired complete knowledge of the said decision so that the time, provided for by Article 146.3 of the Constitution, started running. I have just referred to the " complete knowledge " as being the essential element that sets in motion the running of the time. This proposition is supported by the following passage from " The Recourse for Annulment to the Council of State " by Professor Tsatsos, 2nd Ed. p. 55 para. 31, which reads :

> " It is the complete knowledge which is required to set in motion the running of the time even when it goes to acts published or communicated. But in the case of acts published or communicated there is irrebuttable presumption of the knowledge of their published or communicated content, as well as the time of such knowledge. This irrebuttable presumption is not proof of complete knowledge."

The aforesaid passage also bears out the view that legal principles relating to the contents of publication are helpful in examining when the resulting knowledge is complete or not. Regarding the completeness or not of the communication it has been said by Professor Tsatsos in his ' Recourse for Annulment etc. ' (*supra*) at p. 54 that—

> " Complete is the knowledge of the act from the time that the interested party becomes aware of those elements generally indispensable and specifically on the point, capable of being used to base thereon an application for annulment."

It may be useful to refer, whilst on this point, to the decision of the then Supreme Constitutional Court of Cyprus in the case of *John Morran* and *The Republic*, 1 R.S.C.C. p. 10 at p. 13, where it is said :—

> " Knowledge in the context of Article 146 of the Constitution means knowledge of the decision, act, or omission giving rise to the rights of a recourse and not knowledge of evidential matters necessary to substantiate before a Court an allegation of unconstitutionality, illegality, or excess or abuse of power."

Relevant, also, are the principles relating to communication, as in the present case it is common ground that the knowledge of the applicant about the *sub judice* act—complete or not—emanates from such communication. Professor Kyriacopoulos in his textbook " Administrative Law " 3rd Ed., Vol. 3, at p. 121 deals with the matter as follows :—

> " But the communication must be full, complete, because, if the interested person does not become

> *aware of the whole of the contents of the act*, he cannot judge and decide about the exercise or not of the recourse. Communication, therefore, of only the operative part without the reasoning for the act is not complete and therefore the time does not run."

It may also be relevant to consider a passage from the judgment of Triantafyllides, J., as he then was, in the case of *Charalambos Pissas* (No. 1) v. *The Electricity Authority of Cyprus* (1966) 3 C.L.R. p. 634, where at page 638 he says the following regarding the word "publication" appearing in Article 146.3 of our Constitution :—

> "Publication for the purpose of setting in motion the time within which a recourse may be filed, has to be such publication as would state in *full and clearly the contents of the act or decision concerned.* This principle has been adopted in Greece (see Conclusions from the Jurisprudence of the Greek Council of State, 1929–1959, p. 251) and is, in my opinion, equally applicable in Cyprus because the relevant Greek and Cyprus provisions are, in this respect, in *pari materia*, and such principle is a widely accepted principle of Administrative Law in relation to computing the time within which a recourse, such as the present one, may be made after publication."

In both the aforesaid passages the underlining is mine.

It appears that there is a concensus that the communication and the publication are complete when they contain the whole of the contents of the act as they both denote in their own way full knowledge of the decision. In fact, according to the decision of the Greek Council of State 2321/53 referred to in "The Conclusions from the Jurisprudence of the Greek Council of State," 1929–1959 at p. 253 "knowledge is considered the one referring to the contents of the act without requiring the complete knowledge of the grounds of annulment." In the present case *exhibit* 1, the communication of the decision to the applicant, contained everything that was in the decision, a fact obvious from a comparison between *exhibits* 1 and 8.

From the aforesaid exposition of the principles of Administrative Law, one may safely arrive at the conclusion that the argument, that the non-mention in the communication of the particular provision of the law relied upon for the decision, prevents the time from running, cannot be accepted as a valid one. The knowledge of the applicant

was a complete one as far as the contents of the act are concerned. The completeness of the knowledge does not emanate from what the act might contain but from what in fact it does contain.

The decision as reasoned was communicated to the applicant. It is not a case of incomplete communication in the sense that the reasons appearing in the decision were not included in the communication. But if I were, however, to hold that the non-mention of the particular provision of the law, relied upon by the appropriate organ, amounted to lack of reasoning, as claimed by applicant, which reasoning was given in the letter (*exhibit* 7), I would again hold that the time started running as from the communication, *exhibit* 1, since lack of reasoning is in itself a ground for annulment. As stated by Professor Tsatsos, (*supra*, p. 57, para. 33) " if from the non omitted and from the known elements of the act, the interested party may ascertain the existence of even one ground of annulment, the time for the filing of the recourse for annulment starts running .".

For the above reasons I have come to the conclusion that the applicant cannot succeed on the first argument.

The second argument was that the inclusion in *exhibit* 1 of the words " after Government advice ", coupled with the intimation in the last paragraph that he might apply, for relaxation under the law, to the Council of Ministers, misled the applicant and made him follow the wrong course, instead of going to Court. I am afraid I cannot accept the validity of this argument, inasmuch as there is, under the Streets and Buildings Regulation Law, Cap. 96, and regulations made thereunder, power to grant relaxation in cases where it is in the public interest to do so. The reference to such law amounted to nothing more than a reminder of its existence. But even if I were to accept—which I do not—that this did in fact lead the applicant astray, to use counsel's expression, the wanderings of the applicant came to an end and he should have found his course upon receiving *exhibit* 3, whereby he was informed that the relaxation applied for could not be approved as it was not considered in the public interest. But the case does not stop at that. He inquired, (*exhibit* 4), with the Town Clerk, asking whether the refusal to grant him a permit was relating to the height or to the number of storeys of the buildings and he received a reply (*exhibit* 5) informing him that the refusal referred to both height and number of floors. The decision, therefore, was clarified by the 29th

May, 1970, for all intents and purposes, if there was any doubt at all before that, which, as I said, I do not for a moment accept.

It is for all the above reasons that I do not consider that the letter of the 16th November, 1970, (*exhibit* 7), whereby the applicant was informed of the particular provision of the law upon which the decision was based, has any legal effect whatsoever in favour of the applicant's claim that his application is not out of time.

In the result the application having been filed out of time cannot proceed and is hereby dismissed, with no order as to costs.

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