IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

PANAYIOTIS THEODOROU,

Applicant,

and

THE ATTORNEY- GENERAL OF THE REPUBLIC OF CYPRUS, THROUGH THE MINISTRY OF FINANCE,

Respondent.

(*Case No.* 430/71).

Recourse under Article 146 *of the Constitution—Time—Executory decisions as distinct from merely informative or explanatory acts or statements, and from merely confirmatory decisions—Article* 146.1 *and* 3 *of the Constitution—Application of public officer for a special allowance of* £48 *per annum—Decision dated May* 22, 1971 *and communicated to applicant on June* 3, 1971, *refusing such special allowance—Applicant renewing application through his counsel on September* 4, 1971—*Counsel has not put forward any material fact that the respondent did not have in mind when taking the first decision—No new inquiry appears to have taken place—Letter of respondent to counsel dated September* 28, 1971 *refusing application not a 'decision' but merely a letter or statement of purely informative and explanatory nature devoid of any executory character—And which, even if it were to be assumed to be a decision, could only be a decision merely confirmatory of the first said decision—It cannot, therefore, on any view be made the subject of a recourse under Article* 146.1 *of the Constitution—On the other hand, the present recourse having been filed on* 10*th November,* 1971 *is obviously out of time as regards the first said decision of May–June* 1971 (supra)—*Recourse not filed within the* 75 *days period prescribed by Article* 146.3.

Executory acts or decisions—As distinct from (*a*) *decisions merely confirmatory of previous decisions, and* (*b*) *from acts or statements of merely explanatory or informative nature—See further* supra.

Confirmatory acts or decisions—See supra.

Explanatory or informative acts or statements devoid of any executory character—See supra.

1974
April 9
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PANAYIOTIS THEODOROU
v.
THE ATTORNEY-GENERAL OF THE REPUBLIC (MINISTRY OF FINANCE)

The applicant, who, is a Psychiatric Tutor, Ministry of Health, applied on April 5, 1971, for a special allowance of £48 per annum on various grounds. The respondent refused this application by a letter dated May 22, 1971, which was duly communicated to the applicant on June 3, 1971. On the 4th of September 1971, counsel for the applicant addressed a letter to the Director-General, Ministry of Health on the same subject. On September 28, 1971, the Director-General wrote the letter *exhibit* 1 explaining to the learned counsel in detail when and to whom the said allowance is payable and why it was discontinued in the case of the applicant upon his promotion to the aforesaid post of Psychiatric Tutor. As a result the applicant filed the present recourse on November 10, 1971, challenging the "decisions" in the aforesaid letters of May and September, 1971, respectively. At the hearing counsel, realising that in so far as the first "decision" is concerned the recourse was obviously out of time (period of 75 days), stated in Court that the recourse was directed against the "decision" contained in the said letter of September 28, 1971, *exhibit* 1.

The learned Judge dismissed the recourse *in limine*, holding that the so called "decision" in the second letter is not a decision at all but merely an explanatory or informative act which of course cannot be made the subject of a recourse; moreover, even if it were to be assumed that this letter contained a "decision", such decision was not an executory one but a mere confirmatory act of the previous one (that contained in the said letter of May 22, 1971, *supra*) and as such, again it cannot, be challenged by means of a recourse under Article 146 of the Constitution.

Holding, therefore, that on either view the recourse is not maintainable, the learned Judge dismissed it with no order as to costs.

Held, (1) (A) In my view the very wording of the letter (*exhibit* 1) of September 28, 1971 leads to the conclusion that it is not a decision at all but merely a letter of an informative and explanatory nature which is devoid of any executory character.

(B) But a recourse under Article 146 of the Constitution for annulment lies only against executory decisions *i.e.* decisions by means of which the "will" of the administrative organ concerned are made known and which, in themselves, produce legal

results. (See, *inter alia*, Conclusions from the Jurisprudence of the (Greek) Council of State 1929–1959 pp. 236–237; Kyriacopoulos on Greek Administrative Law, 4th ed., Vol. Γ, p. 92; and the cases *Philippou and Another* v. *The Republic* (1970) 3 C.L.R. 270 and *Kolokassides* v. *The Republic* (1965) 3 C.L.R. 542).

(2) But even if I were to assume that the said letter of September 28, 1971 (*exhibit* 1) is a decision it could only be confirmatory of the previous one contained in the said letter of May 22, 1971, because the letter of counsel dated September 4, 1971 (*supra*) in answer to which the said letter *exhibit* 1 of September 28, 1971, was written does not contain any material fact not known to the Ministry nor does it appear that there has been a new inquiry in the matter.

Recourse dismissed. No order as to costs.

Cases referred to:

Philippou and Another v. *The Republic* (1970) 3 C.L.R. 270;

Kolokassides v. *The Republic* (1965) 3 C.L.R. 542.

Recourse.

Recourse against the decision of the respondent not to grant to the applicant a special allowance of £48.– per annum.

A. Paikkos, for the applicant.

S. Georghiades, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

The following judgment was delivered by:–

L. LOIZOU, J.: By this recourse which is directed against the Attorney-General of the Republic through the Ministry of Finance the applicant seeks the following relief:

"(α) Διάταγμα τοῦ Δικαστηρίου κηρῦττον τὴν ἀπόφασιν τοῦ 'Υπουργείου 'Υγείας ληφθεῖσαν διὰ τῆς 'ἐπιστολῆς Α' ἡμερομηνίας 3/6/71 δυνάμει ἐπιστολῆς 'Υπουργοῦ Οἰκονομικῶν ἡμερομηνίας 22/5/71 'ἐπιστολὴ Β' καὶ ἐπαναλαμ-*

* An English translation of this text appears at p. 219 *post*.

βανομένην διὰ τῆς ἐπιστολῆς τοῦ Γενικοῦ Διευθυντοῦ Ὑπουργείου Ὑγείας Ἐπιστολὴ Γ' ἡμερομηνίας 28/9/71 ὡς ἄκυρον ἢ/καὶ ἐστερημένην οἱασδήποτε νομικῆς ὑποστάσεως ἢ/καὶ ληφθεῖσαν καθ' ὑπέρβασιν ἐξουσίας, ἢ/καὶ συνιστῶσα δυσμενῆ διάκρισιν εἰς βάρος τοῦ αἰτητοῦ ἢ/καὶ παραβιάζων ἓν κεκτημένον δικαίωμα τοῦ αἰτητοῦ".

It is apparent from the title of the Application and the prayer that there is some inconsistency and confusion as to the identity of the administrative act challenged by the recourse. For, whereas, the title indicates that the decision challenged is that of the Ministry of Finance, in the prayer what is expressly challenged is " the decision of the Ministry of Health taken by the letter dated 3.6.71 by virtue of a letter of the Ministry of Finance dated 22.5.71 and repeated by the letter of the Director-General, Ministry of Health, dated 28.9.1971".

What is clear enough is that the decision challenged is a decision not to grant to the applicant a special allowance of £48.- per annum.

In the course of his address learned counsel for the applicant informed the Court that what is attacked by the recourse is the decision contained in the letter of the Director-General, Ministry of Health, dated 28th September, 1971, *exhibit* 1.

In the Opposition it is alleged, *inter alia*, that the recourse is out of time and I propose to deal with this issue first.

The relevant facts are briefly as follows:

The applicant is a Psychiatric Tutor having been promoted to this post on the 1st June, 1968. Prior to his promotion he was a Mental Nurse and among his emoluments was included an allowance of £48. As from the date of his promotion the payment of this allowance was discontinued. As early as the 14th September, 1968, he wrote to the Director-General, Ministry of Health, the letter *exhibit* 7, informing him that the special allowance of £48 had not been included in the emoluments of his new post and requesting him to approach the Ministry of Finance with a view to granting to him two increments. On the 15th February, 1969, the Director-General, Ministry of Health, informed the applicant by his letter *exhibit* 8 that " the Ministry of Finance to which a suitable recommendation was made has informed this Ministry that owing to the existing ban on granting such increments, it is regretted that your request cannot be entertained".

By yet another letter, dated 13th June, 1969, *exhibit* 6, the Director-General, Ministry of Health, informed the applicant that in spite of the refusal of the Ministry of Finance to approve the grant of two increments to him the whole matter was referred by his Ministry to the Council of Ministers and that the Council decided not to approve the grant of the said increments and that, in the circumstances, there was nothing more that the Ministry of Health could do for him.

Almost two years later, on the 5th April, 1971, by a letter addressed by the applicant, through the Director-General of his Ministry, to the Minister of Finance personally he reverts to the question of the allowance of £48 and informs the Minister that the said allowance was discontinued upon his promotion and complains that inspite of his endeavours and approaches to the Ministry of Finance his request that the said allowance, which is paid to all nursing staff of the Mental Hospital, has not been granted to him again. He goes on to point out that the allowance was also discontinued in the case of the Assistant Psychiatrict Tutor (female) upon her appointment whereas in the case of the Ward Supervisors (male and female) the allowance was granted from the date of their appointment and so also in the case of the Mental Nursing Superintendents and that the duties of those members of the staff include visits to the wards whenever possible. Then he refers to the schemes of service of the posts of Psychiatric Tutor and Assistant Psychiatric Tutor and their duties and responsibilities and goes on to say that his qualifications are higher than those of the nursing staff mentioned and that in the United Kingdom as well as in other countries the emoluments both of the nursing and training staff of Psychiatric Institutions are higher than those of the staff of the General Hospitals.

By letter dated 22nd May, 1971, *exhibit* 12, the Director-General, Ministry of Finance, informed the Director-General Ministry of Health that applicant's request had not been approved. Copy of this letter was forwarded to the applicant by the Director-General, Ministry of Health, under cover of letter dated 3rd June, 1971, *exhibit* 3. On the 4th September, 1971, learned counsel appearing for the applicant addressed a letter *exhibit* 4 on applicant's behalf on the same subject to the Director-General, Ministry of Health. After referring to the Director-General's letter of the 3rd June, 1971, he goes on to state that prior to his promotion to the new post the appli-

cant was receiving an allowance of £48 per annum and that it was discontinued upon his promotion; that the special allowance was being paid to the Mental Nursing Superintendents, Ward Supervisors, Staff Nurses and Assistant Nurses, 1st Grade, and also that in England tutors employed in Psychiatric Institutions receive an additional sum by way of allowance. Learned counsel concludes his letter by saying that his instructions are to file a recourse on the ground that the refusal to grant his client an allowance amounts to discrimination against him and/or deprivation of a vested right but that before he does so he hopes that the decision will be reconsidered and the allowance granted to his client. In answer to counsel's letter the Director-General, Ministry of Health on the 28th September, 1971, wrote the letter *exhibit* 1 explaining to him in detail when and to whom the said allowance is payable and why it was discontinued in the case of the applicant upon his promotion.

As a result the applicant filed the present recourse on the 10th November, 1971.

Paragraph (a) of the prayer, as I understand it, is clearly directed against the "decision" of the Ministry of Health "taken by letter dated 3rd June, 1971". This letter is a covering letter forwarding to the applicant the decision of the Ministry of Finance contained in the letter dated 22nd May, 1971. This decision was communicated to the applicant just under six months before the filing of the recourse which would obviously render the filing of the recourse against it out of time. But learned counsel, in his short address on this issue, has submitted that the recourse is really directed against the decision of the Ministry of Health contained in the letter *exhibit* 1 dated 28.9.1971. Although this is contrary both to what is stated in the prayer, where it is stated that the letter in question repeats the previous decision and also in paragraph 4 of the facts in support of the Application from which it is clear that the applicant well appreciated that the decision not to grant to him the allowance was taken by the Minister of Finance—the Minister to whom he, himself, applied—and was communicated to him by the letter *exhibit* 2, I will assume for a moment that the recourse is really directed, as learned counsel has submitted, against the letter *exhibit* 1 and consider whether the contents of this letter amounts to a decision or a decision upon which a recourse may be based; whether in other words it is a decision by means of which the "will" of the administrative organ concerned has

been made known and which, in itself, produced any legal result concerning the applicant because it is only against decisions of this nature that a recourse for annulment may lie. See, *inter alia*, Conclusions from the Jurisprudence of the Greek Council of State 1929–1959, pp. 236–237; Kyriakopoulos on Greek Administrative Law, 4th ed., vol. Γ, p. 92; and the cases of *Philippou and Another* v. *The Republic* (1970) 3 C.L.R. 270 and *Kolokassides* v. *The Republic* (1965) 3 C.L.R. p. 542.

In my view the very wording of the letter *exhibit* 1 leads to the conclusion that it is not a decision at all but merely a letter of an informative and explanatory nature which is devoid of any executory character.

But even if I were to assume that it is a decision it could only be confirmatory of the decision contained in *exhibit* 2 because *exhibit* 4 the letter in answer to which *exhibit* 1 was written does not contain any material fact of which either Ministry was not aware when the decision in *exhibit* 2 was taken nor does it appear that there has been any new inquiry in the matter.

In the light of all the above I am of the opinion that whatever view one takes as to the identity of the decision challenged the inevitable result is that the recourse is out of time and for this reason it must fail.

In the result this recourse is dismissed but in all the circumstances I will make no order as to costs.

Recourse dismissed. No order as to costs.

TRANSLATION

This is an English translation of the Greek text appearing at pp. 215-216, *ante*.

"(a) An order of the Court declaring the decision of the Ministry of Health taken by 'letter A' dated 3.6.71 by virtue of a letter of the Minister of Finance dated 22.5.71, 'letter B' and repeated by the letter of the Director-General, Ministry of Health 'letter C' dated 28.9.71, as *null* and *void* and/or of no legal effect and/or as taken in excess of power and/or as constituting discrimination against the applicant and or as infringing applicant's vested rights."