

1980 June 6

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

MARIA TOMBOLI,

Applicant,

v.

THE CYPRUS TELECOMMUNICATIONS AUTHORITY,

Respondent.

(Case No. 24/79).

Legitimate interest—Article 146.2 of the Constitution—Acceptance of administrative act or decision, without protest, deprives the acceptor of a legitimate interest entitling him to make an administrative recourse against such act or decision—But such acceptance should be expressed clearly and distinctly and by unambiguous conduct—Unreserved acceptance by applicant of Regulations, made by respondent, governing her retirement age—Deprives her of the possibility of satisfying the Court that she possesses an existing legitimate interest in the sense of the said Article 146.2—And deprives her of the right to challenge the decision of the respondent to give effect to the provisions of such Regulations and terminate her employment in accordance thereto.

In exercise of its powers under section 42 of the Inland Telecommunications Service Law, Cap. 302 the respondent Authority made the Telecommunication Services (Pensions and Allowances to the Employees of the Authority) Regulation of 1975 and the Telecommunication Services (Provident Fund for Allowances to the Employees of the Authority) Regulation of 1975 which were published in the Official Gazette of the 31st May, 1976.

Under the provisions of the above Regulations, the retirement age of the employees of the Authority was fixed, in the case of male employees, as the 60th year and that of female employees as the 55th year of their respective age. The said Regulations,

both in respect of Pensions and also of the Provident Fund, were communicated to the employees of the Authority, soon after their publication in the Gazette, and the employees were invited to make their option and communicate same to the Personnel Manager of the Authority by written notice, specimen of which was sent with such letter.

In reply to the said communication the applicant, who was in the employment of the Authority, adopting the specimen sent to her, by letter* dated 24.6.1976 acknowledged her option to join the Pension Fund.

By letter dated the 30th October, 1978, the respondent Authority informed applicant that as she would complete her 55th year of age on the 30th November, 1978, she was to retire from the service of the Authority as from the 1st December, 1978.

In a recourse by the applicant against the validity of the above decision the only issue for consideration was whether she possessed a legitimate interest, in the sense of Article 146.2 of the Constitution, entitling her to challenge the validity of the above Regulations, on which her termination of employment was based, in view of her said acceptance of such Regulations.

Held, that if a person accepts an administrative act or decision without protest, he, no longer possesses a legitimate interest entitling him to make a recourse against it; that for the assent to an administrative act or decision to be such as to deprive the person concerned of the right to make a recourse against it, it must be expressed clearly and distinctly and by unambiguous conduct from which it is to be necessarily inferred that it was intended to assent to the administrative act or decision in question; that the acceptance by the applicant of the said Regulations took place unreservedly and freely and satisfies the principle that the assent must be expressed clearly and distinctly and by unambiguous conduct; that, therefore, written acceptance by the applicant of the Regulations from which the termination

* The said letter read as follows:

"I have the honour to inform you that I wish to join the (1)Pension Fund.

I declare that I received a copy of the Regulations made by the Authority and I realise that from the moment I become a member of the above Fund, I am bound in every respect by its Regulations.

(1) To be completed according to the option: Pension fund or provident fund".

of her employment emanates, without any reservation on her part, has deprived her of the possibility of satisfying the Court that she possesses an existing legitimate interest in the sense of Article 146.2 of the Constitution and has deprived her of the right to challenge the decision of the respondent Authority to give effect to the provisions of such Regulations and terminate her employment in accordance thereto; and that, accordingly, her recourse must be dismissed. 5

Application dismissed.

Cases referred to: 10

Garland v. British Rail Engineering Ltd. [1978] 2 All E.R. 789; [1979] 2 All E.R. 1163 (C.A.);

Piperis v. Republic (1967) 3 C.L.R. 295 at p. 298;

Ioannou and Others v. Republic (1968) 3 C.L.R. 146 at p. 153;

Ioannou v. The Grain Commission (1968) 3 C.L.R. 612 at p. 617; 15

Markou v. The Republic (1968) 3 C.L.R. 267 at p. 276;

Myrianthis v. The Republic (1977) 3 C.L.R. 165 at p. 168;

Decision of the Greek Council of State in Case No. 1341/66.

Recourse.

Recourse against the decision of the respondent whereby applicant's services were terminated as from 1st December, 1978 upon completion of her 55th year of age. 20

G. Arestis, for the applicant.

C. Hadjioannou, for the respondent.

Cur. adv. vult. 25

SAVVIDES J. read the following judgment. The applicant by the present recourse prays for:

A declaration of the Court that the act and/or decision of the respondents whereby the services of the applicant were terminated as from the 1st December, 1978, which, decision, was communicated to the applicant by letter dated the 30th October, 1978 and/or the termination of the services of the applicant as from the 1st December, 1978 upon the completion of her 55th year of age, is null and void and of no effect whatsoever, as having been made or taken contrary to the provisions of the Law and/or of the Constitution. 30 35

The undisputed facts of the case are shortly as follows:

The applicant was an employee of the Cable and Wireless

Ltd. as from 1.1.1944. By the Inland Telecommunications Law, Cap. 302, the Cyprus Inland Telecommunications Authority was established as a corporate body with perpetual succession. The object of the Law, as set out in the preamble, was to
5 provide for the establishment of a corporate body to be called the Cyprus Inland Telecommunications Authority and for the exercise and performance by such body of functions "relating to the provision and maintenance of the Inland Telecommunications Service and certain related matters; to empower such body
10 to acquire the Inland Telephone and Telegraph undertaking of Cable and Wireless Ltd.; and to provide for the regulation of the Inland Telecommunications Service and for purposes connected with the matters aforesaid."

By Law 34/62, Cap. 302, was amended and the powers of the
15 Authority were extended from Inland Telecommunications to all matters concerning telecommunications. By virtue of section 28(1) of Cap. 302, the applicant was transferred as from 1.7.1956 from Cable and Wireless Ltd. to the respondent Authority and became an officer of the Authority. Section
20 28(1) reads as follows:

"Every officer employed on the staff of the company in Cyprus on a day to be fixed by a notice of the Governor to be published in the Gazette (in this section referred to as 'the fixed day'), who shall have given notice in writing
25 within twenty-one days of the publication in the Gazette of the notice of the fixed day of his intention to be transferred to the Authority and who, in the opinion of the Governor, was mainly or wholly employed for the company's undertaking, shall be deemed to be an officer
30 of the Authority at the same rate of pay, and, as near as may be, on the same conditions, as those on which he was employed by the company, with effect from the fixed day."

Under section 42 of Cap. 302, the respondent Authority
35 was vested with power to make all Regulations providing for the establishment and constitution of a scheme for the payment of gratuities etc... The said section reads as follows:

"The Authority shall make such Regulations, as may be approved by the Governor, which shall be published in the

Gazette, providing for the establishment and constitution of a scheme for the payment of such superannuation allowances and gratuities to such of the members, officers and servants of the Authority and upon such terms and conditions as may be specified in the Regulations.” 5

In the exercise of such powers the Authority made the following Regulations which were published in Supplement No. 3 to the official Gazette of the Republic, No. 1276 of the 31st May, 1976:

- (a) Under Notification 92: The Telecommunication Services (Pensions and Allowances to the Employees of the Authority) Regulations of 1975, and 10
- (b) Under Notification 93: The Telecommunication Services (Provident Fund for Allowances to the Employees of the Authority) Regulations of 1975. 15

Under the provisions of both said Regulations, the retirement age of the employees was fixed, in the case of male employees, as the 60th year and that of female employees, as the 55th year of their respective age. (Vide regulation 2(1) in the definition of “retirement age” (“σύνηθες διά τήν άφσπηρέτησιν όριον ήλικίας”) of the Regulations under Notification 92 and regulation 15(1)(b) of the Regulations under Notification 93). 20

The said Regulations, both in respect of Pensions and also of the Provident Fund, were communicated to the employees of the Authority, soon after their publication in the Gazette, by a letter dated 5th June, 1976, copy of which is *exhibit* 1 before the Court, whereby the employees were invited to make their option and communicate same to the Personnel Manager by written notice, specimen of which was sent with such letter. This was in line with regulations 33 and 34, whereby provision is made that copy of the Regulations should be made available by the Secretary to any member of the Fund. 25 30

In reply to the said communication, adopting the specimen sent to her, the applicant by letter dated 24.6.1976, acknowledged her option to join the Pension Fund. The material part of such letter reads as follows: 35

“ Έχω τήν τιμήν νά γνωρίσω ύμιν ότι έπιθυμώ όπως ένταχθώ εις τό *Ταμείον ΣΥΝΤΑΞΕΩΣ.

Δηλώ ὅτι παρέλαβα ἀνά ἐν ἀντίγραφον τῶν ἐκδοθέντων ὑπὸ τῆς Ἀρχῆς Κανονισμῶν καὶ ἀντιλαμβάνομαι ὅτι ἀφ' ἧς στιγμῆς καθίσταμαι μέλος τοῦ ὡς ἄνω ἀναφερομένου Ταμείου, δεσμεύομαι ἀπὸ πάσης ἀπόψεως ὑπὸ τῶν Κανονισμῶν του.

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Ἵπογραφή Μαρία Τόμπολη

Μαρτυρία

*Όνομα καὶ Ἐπώνυμον Μάρτυρος

*Ανδρος Κ. Ζαντῆς

Ἵπογραφή Μάρτυρος

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* Νὰ συμπληρωθῆ ἀναλόγως τῆς προτιμῆσεως:
Ταμείον Συντάξεως ἢ Ταμείον Προνοίας."

("I have the honour to inform you that I wish to join the
*Pension Fund.

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I declare that I have received a copy of the Regulations made by the Authority and I realise that from the moment I become a member of the above Fund, I am bound in every respect by its regulations.

Signature Maria Tomboli

Witness

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Name and Surname of witness.

Andros K. Zantis

Signature of witness

* To be filled in according to the option:
Pension Fund or Provident Fund").

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By letter dated the 30th October, 1978, respondent Authority informed applicant that as she would complete her 55th year of age on the 30th November, 1978, she was to retire from the service of the Authority as from the 1st December, 1978. Copy of such letter is before the Court as *exhibit "A"*. In

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reply to such letter applicant by letter of her advocates dated 20th November, 1978, informed the respondent Authority that she questioned the validity of their decision and refused to receive any benefits as a pensioner of the respondents. Such letter, copy of which was produced and is *exhibit "B"*

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reads as follows:

“Διευθυντήν Προσωπικοῦ
Ἄρχῆ Τηλεπικοινωνιῶν Κύπρου,
Λευκωσία.

Κύριε,

Θέμα: Μαρία Τομπόλη (2513) ἀρ. ΛΠ.Α10

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Ἀφυπηρέτησις ἐκ τῆς ὑπηρεσίας τῆς Ἀρχῆς.

Κατόπιν ὀδηγιῶν τῆς πελάτιδός μας κας Μαρίας Τόμπολη, ἐκ Λάρνακος, ἐπιθυμοῦμεν ὅπως ἀναφερθοῦμεν εἰς πρὸς αὐτὴν ἐπιστολὴν σας ἡμερ. 30/10/1978 καὶ νὰ σημειώσωμεν τὰ κάτωθι:—

Ἐκ μέρους τῆς ὡς ἄνω πελάτιδός μας καὶ ἄλλων θηλέων ὑπαλλήλων τῆς Ἀρχῆς ἔχομεν καταχωρήσει ἀγωγὴν εἰς τὸ Ε.Δ. Λευκωσίας διὰ τῆς ὁποίας ἀμφισβητεῖται τὸ δικαίωμα τῆς Ἀρχῆς ὅπως ἀπολύῃ τὰς θήλεις ὑπαλλήλους της εἰς τὸ 55ον ἔτος τῆς ἡλικίας των. 10

Εἶναι ὁ ἰσχυρισμὸς τῆς πελάτιδός μας ὅτι αὕτη δικαιούται 15 ὅπως συνεχίσει ἐργοδοτούμενη ὑπὸ τῆς Ἀρχῆς μέχρι τοῦ 60ου ἔτους τῆς ἡλικίας της ὡς καὶ οἱ ἄρρενες συναδέλφοι της.

Ὡς ἐκ τούτου ἡ πελάτις μας δὲν προτίθεται ὅπως ἀποδεχθῆ τὴν διὰ τῆς ὡς ἄνω ἐπιστολῆς σας εἰδοποίησιν περὶ τερματισμοῦ τῶν ὑπηρεσιῶν της καὶ δὲν ἀποδέχεται τὴν λήψιν οἰουδήποτε 20 ποσοῦ ἐκ τοῦ Ταμείου Συντάξεως μέχρι ἐκδικάσεως τῆς ἀγωγῆς της ὑπὸ τοῦ Δικαστηρίου.

A.I. Δικηγорόπουλος

Γεώργιος Ἀρέστης”

(“Director of Personnel,
Cyprus Telecommunications Authority,
Nicosia.

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Sir,

Subject: Maria Tomboli (2513) No. LP.A. 10

Retirement from the service of the Authority.

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On the instructions of our client Mrs. Maria Tomboli of Larnaca, we wish to refer to your letter to her dated 30/10/1978 and to observe the following:—

On behalf of our above client and other female employees of the Authority we have filed an action in the District Court 35

of Nicosia whereby the right of the Authority to dismiss its female employees on their 55th year of age is disputed.

It is the contention of our client that she is entitled to be employed by the Authority until her 60th year of age like her male colleagues.

Therefore our client does not intend to accept the notice of the termination of her services sent by your above letter and does not accept the receipt of any sum from the Pension Fund until the trial of the action by the Court.

A. I. Dikigoropoulos
Georghios Arestis”).

A fact which is alleged by applicant in her statement of facts and which is denied by the respondent Authority is that during the time of her employment with Cable and Wireless Ltd. there was no discrimination as to the retirement age between male and female employees, whereas the respondent Authority alleges that there was no change concerning the retirement age.

It is the applicant's contention that her forceful retirement upon the completion of her 55th year of age is discriminatory on the ground of sex and as such, is contrary to Article 28 of the Constitution.

Counsel for the respondent Authority by his written opposition alleges that:

- (1) The said act and/or decision is lawful in all respects.
- (2) There has never been a change in the age of retirement of the employees of the respondent Authority and that the retirement age was the same before the Authority took over from Cable and Wireless Ltd. and was included in the Regulations agreed upon between the Authority and the Employees' Trade Union and was accepted by the applicant and the other employees of the Authority and it was finally embodied in the General Regulations which were published in the Cyprus Gazette No. 1276 of the 31st May, 1976.
- (3) In view of the above, the applicant cannot, at this stage, attack the validity of the said act and/or decision a fortiori in view of the fact that the applicant failed to file a

recourse within 75 days from the publication of the Regulations and continued to work under such conditions.

- (4) The applicant brought an action in the District Court of Nicosia, under No. 4079/78 and, therefore, the present proceedings amount to abuse of powers. 5

By his address counsel for applicant contested the validity of the Regulation concerning the forceful retirement upon completion of the 55th year of age by applicant, in that such Regulation is discriminatory on the ground of sex, and, therefore, contrary to Article 28 of the Constitution which provides against any direct or indirect discrimination against any person on the ground of his community, race, religion, language, sex, etc. It is his allegation that there is no express provision in the Constitution authorising the respondent Authority to discriminate against the applicant as to the age of her retirement on account of her sex. He further based his argument on the International Covenants on Human Rights adopted by the General Assembly of the United Nations as Resolution 2200 (XXI) of the 16th December, 1966 and which were enacted as Law No. 14/69 providing against any form of discrimination on account of sex. Specifically, he relied on Articles 25(c) and 26 of the International Covenant on Civil and Political Rights and Article 7 of the International Covenant on Economic, Social and Cultural Rights. He further contended that pursuant to Article 169(3) of the Constitution the said International Conventions and/or agreements which were concluded in accordance with the provisions of the Constitution and enacted as a Law by the House of Representatives, have superior force to any Municipal Law, including Cap. 302 and the Regulations made thereunder and, therefore, the act and/or decision complained of is null and void and of no effect whatsoever. 10
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He further dealt with the position of equality of treatment between male and female employees in the United Kingdom where, though such relations are regulated by the Sex Discrimination Act 1975, whereby provisions relating to retirement within section 6(4) of the Act were left outside the provisions of the Act and are not considered as discriminatory, the British Courts have stretched the interpretation of section 6(4) so as to take out of the exemption anything which appears to be discrimina- 35
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5 tory. In support of his argument in this respect, he referred to *Garland v. British Rail Engineering Ltd.* [1978] 2 All E.R. 789. (At this stage, however, I wish to observe that the said case on which counsel based his argument on this point, was reversed on appeal (vide *Garland v. British Rail Engineering Ltd.* [1979] 2 All E.R. 1163)).

10 In conclusion he submitted that discrimination of the decision complained of, is clearly and actually arbitrary and unreasonable and cannot fall into any of the reasonable differentiations or classifications to which the executive (in this case the respondent Authority) may resort to.

15 By his address counsel for the respondent Authority contended that the present recourse is out of time, in that it was filed after the expiration of 75 days since the publication of the administrative act No. 92 of 1976 and, therefore, the present recourse cannot proceed. He further alleged that the decision contained in the letter whereby the services of the applicant were terminated, is not an executory act, giving rise to a cause of complaint but is merely an act giving effect to what has been provided by the administrative act No. 92 of 1976. Therefore, such letter cannot be the subject of a recourse. Subject to the above, he submitted that the applicant had unreservedly accepted the administrative act complained of since its publication in 1976 and ever since acted upon it and, therefore, she does not possess a legitimate interest to attack it now. Finally, he submitted that in any event the administrative act attacked by the applicant, does not in any event offend Article 28 of the Constitution. He argued that since her employment by Cable and Wireless Ltd. the retirement age was the same and continued to be the same after the taking over by the respondent Authority of the powers and duties of Cable and Wireless Ltd. and has been the same till today. Since the establishment of the Republic of Cyprus, the respondent Authority started negotiations with its employees' Trade Unions and draft Regulations had been prepared under an agreement reached with the said Unions. There was full agreement as to the age limit which was accepted and acted upon till today.

40 In concluding he submitted that in any event the right of equality in the enjoyment of any fundamental right is not so absolute as to exclude reasonable differentiations and distinctions

and that the differentiation in the present case is such as not to offend the Constitution.

By his reply, counsel for applicant, disputed that the application is out of time and submitted that the publication of the Regulations in the Gazette under Notification 92 of 1976 is not by itself an executory administrative act, as far as the applicant is concerned. Such Regulations were made under the provisions of the Law and it is an act of a legislative nature and does not amount to an administrative executory act. At the material time when the Regulations were published, the applicant had no legitimate interest to attack such Regulations. The only legitimate act that she could attack was the administrative act whereby the decision of the respondent Authority about her retirement was brought to her notice. He further alleged that the preparation and publication of the Regulations was a unilateral act on the part of the respondent Authority based on section 42 of Cap. 302 and section 3 of Law 61/70 and he added that the discrimination in the present case is not a reasonable differentiation and distinction, as alleged by the other side but it is an arbitrary and unreasonable differentiation.

The questions of law posing for consideration in the present case, may be summarised and considered under the following headings:

- (1) Whether the applicant possesses a legitimate interest entitling her to challenge the validity of the Regulations on which her termination of employment was based, in view of her acceptance of such Regulations.
- (2) Whether the present recourse is barred by limitation of time, as having been made out of the 75 days' period fixed by the Constitution as from the date when the administrative act giving rise to it emanated.
- (3) Whether the decision of the respondent Authority to terminate applicant's employment upon the completion of her 55th year of age is null and void, as offending Article 28 of the Constitution, in that it makes discrimination as to the retirement age between male and female employees.
- (4) Whether such decision is null and void as offending

International Conventions on Human Rights which were concluded in accordance with the provisions of the Constitution and enacted as law by the House of Representatives, and whether such Conventions have superior
5 force to Cap. 302 and the Regulations made thereunder.

I shall deal first with the first question as to whether applicant has a legitimate interest to pursue these proceedings or whether she has lost same, as a result of her unconditional acceptance of the Regulations embodying such provision.

10 It is an undisputed fact that the letter of the respondent Authority dated 30th November, 1978 whereby applicant was notified that her services were terminated on the completion of her 55th year of age, the validity of which is attacked, and the authority by virtue of which such letter was sent, are based on
15 the Regulations published under Notification 92 referred to earlier in this judgment. Such Regulations were promulgated by the respondent Authority in compliance with statutory provisions and communicated to the applicant who, after perusing them, as it appears in her letter (*exhibit 2*) accepted them
20 without any reservation.

I come now to consider what is the effect of such acceptance. It has been repeatedly pronounced in a number of decisions of this Court that if a person accepts an administrative act or decision without protest, he, no longer possesses a legitimate
25 interest entitling him to make a recourse against it.

In *Piperis v. The Republic* (1967) 3 C.L.R. 295 at p. 298, Triantafyllides, J. (as he then was) has stated:

“In my view, once the applicant has accepted the offer of
30 appointment made to him on the 28th September, 1965, which included the salary now complained of—(and nothing was produced to show that he has accepted subject to a reservation regarding the salary offered to him)—he does not possess a legitimate interest in the sense of Article
35 146.2 of the Constitution entitling him to challenge the said salary by means of this recourse.”

In *Ioannou and others v. The Republic* (1968) 3 C.L.R. 146 at p. 153 it is stated:

“In view of this fact, I am of the view that, in any case, they

cannot succeed in these proceedings, because the acceptance of the said benefits—without having been even alleged that it was made under protest—deprived them of a legitimate interest, in the sense of Article 146.2 of the Constitution.”

In *Costas Ioannou v. The Grain Commission* (1968) 3 C.L.R. 612 at p. 617, Triantafyllides, J. (as he then was), found as follows: 5

“Actually, the Applicant by acquiescing, at the material time, to the reduction of the rent allowance paid to him, and by accepting payment of the so reduced rent allowance, 10 deprived himself of the possibility of possessing an existing legitimate interest in the matter, directly and adversely affected, in the sense of Article 146.2 of the Constitution; and this, indeed, is a further reason for which this recourse cannot succeed.” 15

In *Markou v. The Republic* (1968) 3 C.L.R. 267 at p. 276 it was held:

“It is well established in Administrative Law that if a person accepts an administrative act or decision he no longer possesses a legitimate interest entitling him to make 20 a recourse against it.”

On the same line, one can see the authorities in the Conclusions from the Jurisprudence of the Greek Council of State (1929–1959) pp. 260 and 261.

The principle established by the above authorities was reiterated in *Myriantthis v. The Republic* (1977) 3 C.L.R. 165 and all the above cases are referred to therein, in which Triantafyllides, P. had this to say at page 168: 25

“It is well established, by now, in the administrative law of Cyprus, on the basis of relevant principles which have 30 been expounded in Greece in relation to a legislative provision there (section 48 of Law 3713/1928) which corresponds to our Article 146(2) above, that a person, who expressly or impliedly, accepts an act or decision of the administration, is deprived, because of such acceptance, of a legitimate 35 interest entitling him to make an administrative recourse for the annulment of such act or decision”.

Reverting back to the facts of the case before me, I find that the written acceptance by the applicant of the Regulations from which the termination of her employment emanates, without any reservation on her part, has deprived her of the possibility of satisfying the Court that she possesses an existing legitimate interest in the sense of Article 146.2 of the Constitution and has deprived her of the right to challenge the decision of the respondent Authority to give effect to the provisions of such Regulations and terminate her employment in accordance thereto.

In Case No. 1341/66 of the Greek Council of State, it was stressed that for the assent to an administrative act or decision to be such as to deprive the person concerned of the right to make a recourse against it, it must be expressed clearly and distinctly and by unambiguous conduct from which it is to be necessarily inferred that it was intended to assent to the administrative act or decision in question.

On the facts before me the acceptance by the applicant took place unreservedly and freely and there is no allegation to the contrary. It satisfies the principle that the assent must be expressed clearly and distinctly and by unambiguous conduct.

Having found so, I consider it unnecessary to deal with all other legal questions before me, in view of the fact that the recourse fails on the grounds of failure of the applicant to satisfy the requirement of possessing an existing legitimate interest.

The recourse is, therefore, dismissed, but in view of all the circumstances, I make no order for costs.

Application dismissed. No order as to costs.