

1981 December 29

[HADJIANASTASSIOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

KEMEK (TRANSPORT) LIMITED,

*Applicant,*

v.

THE RÉPUBLIQUE OF CYPRUS, THROUGH

1. THE MINISTER OF COMMUNICATIONS AND WORKS,
2. THE AIR TRANSPORT LICENSING AUTHORITY,

*Respondents.*

(Case No. 44/80).

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*Administrative law—Executory act—Only executory acts can be made the subject of a recourse under Article 146 of the Constitution—Preparatory acts cannot be made the subject of such a recourse—Public inquiry for the grant of licence to operate helicopter air service—Refusal to allow applicants to be present and make representations and objections against the granting of the licence—Not an executory act but a preparatory act which cannot be made the subject of a recourse under the above Article.*

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The Helico Airlink Co. Ltd. (“the interested party”) having applied to the Air Transport Licensing Authority for the grant of a licence to operate a full helicopter air service throughout Cyprus the applicant company as owner of buses carrying passengers and goods between various parts of Cyprus, opposed the application and sought a public hearing into the matter. The Air Transport licensing Authority refused to allow the applicant company to be present at the public inquiry and make representations, and objections against the granting of the licence to the interested party; and hence this recourse.

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Counsel for the respondents raised the preliminary point of law that the decision complained of is not an executory act but a preparatory act and as such it cannot be made the subject of a recourse under Article 146 of the Constitution.

*He'd*, that an administrative act is only amenable within a competence such as the competence of this Court under Article 146 of the Constitution if it is executory; that it is only against a decision or act of the administration, in relation to a particular matter, which is of a final nature that a recourse under Article 146 of the Constitution can be made; that preparatory acts cannot be made the subject of such a recourse; that the act or decision of the respondents complained of is not of an executory nature but a preparatory act and as such it cannot be made the subject of a recourse under Article 146 of the Constitution; accordingly the recourse must fail.

*Application dismissed.*

Cases referred to:

- Kolokassides v. The Republic* (1965) 3 C.L.R. 542 at p. 551;  
*Ioannides and Another v. The Republic* (1979) 3 C.L.R. 628 at p. 639;  
*Cyprus Tannery Ltd. v. The Republic* (1980) 3 C.L.R. 305 at p. 412.

**Recourse.**

Recourse against the decision of the respondents whereby applicants' complaint opposing an application by Helico Air-link Co. Ltd. for the granting of a licence to operate a full helicopter service throughout Cyprus was dismissed.

*M. Christofides*, for the applicant.

*R. Gavrielides*, Senior Counsel of the Republic, for the respondents.

*N. Ioannou* (Mrs.) for *Chr. Demetriades*, for the interested party.

*Cur. adv. vult.*

HADJIANASTASSIOU J. read the following judgment. In the present proceedings under Article 146 of the Constitution the applicant Kemek (Transport) Limited of Nicosia seeks a declaration of this Court that the decision and/or act of the Air Transport Licensing Authority, of Nicosia, dated 12th February, 1980, is null and void and of no effect whatsoever. Time and again it has been said that the Supreme Constitutional Court has exclusive jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, an act or omission of any authority, organ 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.

5 With that in mind it appears that the facts are these: Helico  
Airlink Co. Ltd. has made an application to the Air Transport  
Licensing Authority for the granting of a licence to operate  
a full helicopter airlink throughout Cyprus. Because the  
complainant Kemek (Transport) Limited is the owner of buses  
10 carrying passengers and goods between Nicosia, Limassol and  
Paphos, they lodged a complaint, and opposed the application  
of the Helico Airlink Co. Ltd. for seeking a permit and sought  
a public inquiry into the whole matter. Indeed it appears  
that the Air Transport Licensing Authority on 12th February,  
1980, dismissed *their application to be present and heard because*  
15 *they were of the view that Kemek (Transport) Limited were*  
*not entitled to be present and to be heard.*

On 12th May, 1980, counsel on behalf of the respondents,  
the Minister of Communications and Works and the Air Trans-  
port Licensing Authority, gave notice that he would be raising  
20 a preliminary point of law viz., that the decision complained  
of is not an executory act but a preparatory act, and that such act  
cannot be the subject matter of a recourse under Article 146  
of the Constitution. Finally counsel applied to this Court  
to be given a month to file the grounds of his opposition.  
25 Indeed he went even further and made it clear that this point  
should be decided first. As Mr. Christofides and Mrs. Ioannou  
raised no objection, they have agreed that it was convenient  
for anyone that this point should be decided first. Inevitably  
the case had to be adjourned and it was fixed for further  
30 directions on 30th June, 1980, but on that date in the absence  
of Mr. Charalambous counsel for the respondents Mr. Hadji-  
petrou on behalf of the Attorney-General made this statement:  
"I am not in a position to know why the opposition has not  
been filed, but I shall do my best to inform my colleague to  
35 file the opposition within a period of two months". As counsel  
for the applicant as well as for the interested party did not  
oppose the granting of such a period, Mrs. Ioannou also applied  
that the opposition should be filed within one month after  
the filing of the opposition by Mr. Charalambous. Then the  
40 case was adjourned to 13th October, 1980, but in the absence

of Mr. Charalambous it had to be adjourned once again to the 1st December, 1980. Mr. Demetriades made this statement:—

“This case arises out of the application of our clients to the Ministry of Communications for a licence to operate a full helicopter air service throughout Cyprus, which, as you appreciate, is very important for the tourist development in this Island. Big foreign companies are involved, but unfortunately, there is this old colonial regulation that when you apply for an air traffic permit there must be a public hearing before which any person may object. So we started the public hearing at the beginning of the year. Kemek, who are the applicants, were amongst those who objected. Even before entering into the hearing, the Air Transport Licensing Authority, entirely uninvited, said that in a previous case they decided to reject Kemek’s objections because they believe that they are not interested parties. Personally, I do not agree with this, because the regulations say any persons may object. When the time comes to listen to all objections, the Authority will decide, but by taking this uninvited decision, they brought the whole thing to a standstill. The Licensing Authority is not sitting any more, because we have a pending recourse. If the applicants are right, it means that if we were going on having a hearing the whole proceedings would have been useless. The proceedings stopped and we are going here and there for the purpose of Mr. Charalambous putting in an opposition. It is a situation which cannot go on. I have written in September both to the Ministry of Communications, and Mr. Charalambous and Mr. Christofides. There was no reply from anybody. I put in a concrete proposal, i.e. that the whole proceeding before the Licensing Authority may continue, and Kemek (Transport) Ltd., to be entitled to be present and make its representations without prejudice to the result of this recourse. There was no reply and we are still faced with the situation of not having even an opposition, and you appreciate that we are exposed to everybody, because such an important application is being held for one year for practically no reason at all. Of course, the only one who is in a hurry is myself, so I have to be the one to press matters”.

As I have already said, once Mr. Charalambous was not

5 available as he was attending a public inquiry, the case was adjourned once again for another counsel to prepare and file the opposition. Indeed, the opposition was filed by Mr. Gavri- elides, and it was based on a single point of law, viz., that the decision complained of is not an executory act but a preparatory one, and therefore, it cannot be the subject matter of a recourse under Article 146 of the Constitution, which lays down clearly that the act must be an executory act.

10 There is no doubt that under the Regulations, the Licensing Authority is the Air Transport Licensing Authority constituted by regulation 5 of these Regulations. Indeed, under the said Colonial Regulations, the Licensing Authority under regulation 6(1) may grant to any person applying for a licence to carry passengers, mail or cargo by air for hire or reward on such 15 schedule journeys, and subject to such conditions, as may be specified in the licence. Furthermore, the Licensing Authority may attach such conditions to any licence as they may think fit having regard to the nature and circumstances of the applica- 20 tion. In paragraph 8, the Licensing Authority shall cause to be published, in the manner prescribed in the First Schedule hereto, such particulars of any applications for licences received by them as are prescribed in the said Schedule; and under para- graph 9, any person may, in the form and manner, and within the time prescribed in the First Schedule hereto, make repre- 25 sentations or objections with regard to any application for a licence. Finally under paragraph 10, the Licensing Authority may if they think fit, for the purpose of determining applications for licences, hold inquiries in public or in private and shall hold an inquiry in public if the applicant, or any person who 30 has duly made an objection, requires the Licensing Authority, by such notice and in such form as is prescribed in the First Schedule hereto, so to do. Before holding any such inquiry, the Licensing Authority shall give to the applicant and to any person who has duly made representations or objections with regard to the application, a notice of the date and time fixed 35 for such inquiry and shall give to the applicant and to any such person an opportunity of being heard at the inquiry.

40 As I have said earlier, the complaint of the applicant company was to the effect that the Air Transport Licensing Authority refused to allow them to make representations or objections

as regards the granting of a licence to the interested party, and feeling aggrieved, they brought the present application.

On the contrary, counsel for the respondent argued that once the Air Transport Licensing Authority had interpreted the relevant Regulations of 1948, and had refused to the applicant company to put before them their stand, such refusal cannot be considered as being of an executory nature but of a preparatory one, and that it cannot be the subject matter of a recourse, under Article 146 of the Constitution. 5

Indeed, counsel for the applicant company, relying on regulation 9, pointed out that the respondents wrongly interpreted such regulation, and wrongly did not allow to the applicant company to put forward their representations or objections with regard to the granting of the licence or not. Counsel further relies on the Conclusions from the Jurisprudence of the Council of State in Greece 1929–1959, where at pp. 236, 237 the meaning of an executory act is interpreted, and which reads:— 10 15

“Εἰς προσβολὴν δι’ αἰτήσεως ἀκυρώσεως δὲν ὑπόκειται οἰαδήποτε πράξεις ἀπορρέουσα ἐκ διοικητικοῦ ὄργανου, δρῶντος ὡς τοιούτου, ἀλλὰ μόνον αἱ ἐκτελεσταὶ πράξεις, τοὔτέστιν ἐκεῖναι δι’ ὧν δηλοῦται βούλησις διοικητικοῦ ὄργανου, ἀποσκοποῦσα εἰς τὴν παραγωγὴν ἐνόμου ἀποτελέσματος ἐναντι τῶν διοικουμένων καὶ συνεπαγομένη τὴν ἄμεσον ἐκτέλεσιν αὐτῆς διὰ τῆς διοικητικῆς ὁδοῦ. Τὸ κύριον στοιχεῖον τῆς ἐννοίας τῆς ἐκτελεστῆς πράξεως εἶναι ἢ ἄμεσος παραγωγὴ ἐνόμου ἀποτελέσματος, συνισταμένου εἰς τὴν δημιουργίαν, τροποποίησιν ἢ κατάλυσιν νομικῆς καταστάσεως, ἢτοι δικαιωμάτων καὶ ὑποχρεώσεων διοικητικοῦ χαρακτῆρος παρὰ τοῖς διοικουμένοις. Ἐκτελεσταὶ διοικητικᾶς πράξεις δύνανται νὰ ἀποτελοῦν οὐ μόνον αἱ ἐγγράφως διατυπούμεναι, ἀλλὰ καὶ αἱ προφορικαὶ πράξεις τῶν διοικητικῶν ἀρχῶν, ἐφ’ ὅσον συντρέχουν οἱ ὅροι τοῦ νόμου<sup>3</sup>.” 20 25 30

(“No acts emanating from an administrative organ, acting as such, are subject to a recourse for annulment but only executory acts, namely those by which the will of the admi- 35

1. 487(36), 32(38), 651(40), 1890(53), 1120(55).

2. 17(38), 400(48), 1828, 2040(50), 950(54).

3. 33(31), 1797(49), 86(54).

5 nistrative organ is expressed intending the creation of a  
legal situation against the subjects and involving its direct  
execution by administrative means. The main element  
of the concept of executory act is the direct creation of  
a legal result, consisting of the creation, amendment or  
abolition of a legal situation, i.e. rights and obligations  
of an administrative character by the subjects. Executory  
administrative acts can constitute not only those expressed  
in writing but also the verbal acts of administrative organs,  
10 so long as the provisions of the law exist”).

15 In the light of this statement of the law, counsel further com-  
plained that once his only right was to be heard and because  
the respondents refused to hear him, it follows that there was  
a final executory act issued by the respondents which in effect  
finally amounts that he had no right to be heard, and that his  
rights were violated from the decision of the Air Transport  
Licensing Authority.

20 There is no doubt that in the present application the only  
question is whether the act or decision of the respondents  
constitutes an executory act or not. What is an executory  
act appears in a number of cases, both in Greece, and in Cyprus,  
and I propose dealing first with the case of *Nicos Kolokassides*  
*and The Republic of Cyprus, through the Minister of Finance*,  
(1965) 3 C.L.R. 542 in which Mr. Justice Triantafyllides, as  
25 he then was, in delivering a separate judgment had this to say  
at p. 551:-

30 “An administrative act (and decision also) is only amenable  
within a competence, such as of this Court under Article  
146, if it is executory (εκτελεστική), in other words it must  
be an act by means of which the ‘will’ of the administrative  
organ concerned has been made known in a given matter,  
an act which is aimed at producing a legal situation con-  
cerning the citizen affected and which entails its execution  
by administrative means (see Conclusions from the Juris-  
prudence of the Council of State in Greece 1929-1959,  
35 pp. 236-237).

I am quite aware that in Greece this attribute of an act  
which may be the subject of a recourse for annulment,  
is specifically stated in the relevant legislation (section

46 of Law 3713 as codified in 1961) but in my opinion such express provision was only intended to reaffirm a basic requirement of administrative law in relation to the notion of proceedings for annulment and, therefore, such requirement has to be treated as included by implication, because of the very nature of things, in our own Article 146, though it is not expressly mentioned. 5

An act made in the course of the collection of income tax due, being an act made in execution of the assessment for such income tax, is not itself an executory act—as the assessment is—and cannot, therefore, be the subject of a recourse; it is well settled in administrative law that acts of execution are not executory acts”. 10

In *Andreas Ioannides and Another v. The Republic of Cyprus, through the Public Service Commission*, (1979) 3 C.L.R. 628 Mr. Justice A. Loizou, dealing with the argument of counsel whether the act or decision of the Public Service Commission was a preparatory act had this to say at p. 639:— 15

“Counsel for the respondent has argued that the part of the decision challenged by the present recourse is a preparatory act and as such cannot be the subject of a recourse as same is not an executory act. No doubt the examination, as it has been called, of the merits of the applicant on the 22nd April, 1977, was a preparatory act and could not be as such the subject of a recourse after the compound administrative act, of which it is a part, has been completed”. 20 25

In the *Cyprus Tannery Ltd., and The Republic of Cyprus, through The Minister of Communications and Works*, (1980), 3 C.L.R. 405, Triantafyllides, P., in dealing whether the act in question was a preparatory act or not had this to say at p. 412:— 30

“In our opinion the filing of a recourse by the appellant was premature; and it is an inevitable corollary of this that the determination of the matter on its merits, by the learned trial Judge, is to be treated as being premature too. Our reasons for reaching this conclusion are as follows: 35



5 When the recourse was filed there had not yet been reached any decision by the respondent as regards the claim of the appellant that his property concerned should be excluded from the ambit of the relevant order of compulsory acquisition. On the contrary, it clearly emerges from the last letter of the Ministry of Communications and Works, dated October 11, 1974, that the matter was still under consideration.

10 This letter can only be regarded as a preparatory act which is devoid of any executory nature; therefore, it could not be made the subject of a recourse under Article 146 of the Constitution (see, in this respect, *inter alia*, *Pavrides v. The Republic*, (1977) 3 C.L.R. 421, 426 and *Tanis v. The Republic*, (1978) 3 C.L.R. 314, 318). It is only  
15 against a decision or act of the administration, in relation to a particular matter, which is of a final nature that such a recourse can be made (see, *inter alia*, in this respect, *Mustafa v. The Republic*, 1 R.S.C.C. 44, 47, and *Haros v. The Republic*, 4 R.S.C.C. 39, 44)".

20 In the light of the authorities quoted I have reached the conclusion that the act or decision of the respondents is not of an executory nature but a preparatory act and as such it cannot be the subject of a recourse under Article 146 of the Constitution.

25 Recourse dismissed, but in the particular circumstances of this case I am not making an order for costs.

*Application dismissed. No order as to costs.*