1981 December 30

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

VARNAVAS GEORGHIOU,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTRY OF INTERIOR,

Respondent.

(*Case No.* 103/80).

Administrative law—Executory Act—Meaning—Illegal building of premises—Refusal by administration to pay compensation for their anticipated demolition—Not an executory act amenable to the jurisdiction under Article 146 *of the Constitution.*

Practice—Recourse for annulment—Absence of Counsel for the applicant—Hearing proceeded in his absence—Observations with regard to the need of speedy determination of judicial proceedings —Article 30.2 *of the Constitution.*

In 1976, the applicant, a farmer and livestock breeder, illegally built a pen and a store for rearing his sheepfold. Subsequently he applied for ex post facto approval, in the form of a covering permit which was refused on the 24th July, 1978 mainly on the ground that the premises standing thereon were outside the pattern of development envisaged by the area zoning order. The decision of the appropriate authority remained unchallenged. On the 10th November, 1978 he applied to the Minister of the Interior for compensation for the anticipated demolition of the premises, on the grounds that his premises were erected with the tacit consent of the authorities, and that compensation was paid to other occupants of buildings illegally erected, who were required to pull down the buildings in view of the zoning restrictions applicable in the locality.

The respondents rejected his application and hence this recourse.

Counsel for the applicant failed to attend on the day fixed for the hearing of the recourse because, presumably, he took it for granted that the case would be adjourned in view of negotiations for the payment of some compensation to the applicant. The Court refused to adjourn the case, pointing out that the need for the determination of judicial proceedings within a reasonable time, constitutionally entrenched by Article 30.2, is aimed to serve not only the interests of the parties but those of the public, as well, in the proper administration of justice; and that the speedy determination of judicial causes is of especial importance in the domain of administrative law for, it makes possible, on the one hand the effective review of administrative action, and on the other, the planning of public affairs with a fair degree of certainty.

Counsel of the respondents raised the preliminary legal point that the decision complained of lacked the character of an administrative action amenable to the revisional jurisdiction of the Supreme Court under Article 146.1 of the Constitution, namely executory character.

On the preliminary legal point:

Held, that it is fundamental for the exercise of jurisdiction under Article 146.1 of the Constitution that the act or omission complained of, be of an executory character; that for an act to be executory, it must emanate from an organ of public administration and express the will of the administration on a given subject in a definitive manner productive of legal consequences for the subject; that the executory ingreedient of an act is that definite element that renders an act of the administration in the domain of public law justiciable; that it is implicit in the concept of an executory act, that the organ of the administration issuing the decision, be empowered in law to make a valid determination of the rights of the governed in the given area; that, therefore, it must be competent in law for the authority to decide on the subject under review and that functioning outside the precincts of the law cannot create rights or impose obligations; that the assumption or refusal of liability to make a gratis payment, is in itself an act outside the ambit of the law

and, therefore, the decision complained of whatever its implications, is not of an executory character; accordingly no recourse could be made against it.

Application dismissed.

Cases referred to:

Republic v. *Demetriou and Others* (1972) 3 C.L.R. 219;

Amathus Navigation Co. v. *The Republic* (1979) 3 C.L.R. 10;

Florides v. *The Republic* (1979) 3 C.L.R. 37;

Ioannides v. *Republic* (1973) 3 C.L.R. 118;

Karayiannis and Others v. *Educational Service Committee* (1979) 3 C.L.R. 371;

Theodorides v. *Republic* (1973) 3 C.L.R. 702.

Recourse.

Recourse against the refusal of the respondent to pay compensation to applicant for the anticipated demolition of his premises.

C. Loizou, for the applicant.

M. Florentzos, Counsel of the Republic, for the respondent.

Cur. adv. vult.

PIKIS J. read the following judgment. The factual background of the case, as it emerges from the facts set out in support of the application and the file of the case produced before the Court, may be summarised as follows:

In 1976, the applicant, a farmer and livestock breeder, illegally built a pen and a store for rearing his sheepfold. Subsequently, he applied for ex post facto approval, in the form of a covering permit, that was refused on 24.7.1978, mainly for the reason that the premises standing thereon were outside the pattern of development envisaged by the area zoning order. The decision of the appropriate authority remained unchallenged. On 10.11.1978, the applicant applied to the Minister of the Interior for compensation for the anticipated demolition of the premises, advancing two grounds in support of his application:-

(a) That his premises were erected with the tacit consent of the authorities, and

(b) that compensation was paid to other occupants of buildings illegally erected, who were required to pull

down the buildings in view of the zoning restrictions applicable in the locality.

In the meantime, criminal proceedings were instituted against the applicant for the illegal building of the premises, that culminated on 7.5.1979 to his conviction and the imposition of a fine of £35.– coupled with an order for the demolition of the premises. The order was enforced and the premises were demolished.

The respondents admit in their opposition that compensation was paid on two occasions to occupants of property in the area who were required to vacate the area, because of the imposition of building restrictions in the neighbourhood, but deny any similarity between the circumstances of the aforesaid persons and the applicant.

SPEEDY DETERMINATION OF JUDICIAL PROCEEDINGS:

Regrettably, counsel for the applicant failed to attend on the day fixed for the hearing of this recourse, presumably taking it for granted that the case would be adjourned in view of negotiations, apparently in progress, for the payment of some compensation to the applicant. Counsel appearing on behalf of the Attorney-General was unaware of such negotiations, and had no knowledge of them, but did add that such negotiations may be taking place, in point of fact without his knowledge.

The Court refused to adjourn the case, pointing out that the need for the determination of judicial proceedings within a reasonable time, constitutionally entrenched by Article 30.2, is aimed to serve not only the interests of the parties but those of the public, as well, in the proper administration of justice. The speedy determination of judicial causes is of especial importance in the domain of administrative law for, it makes possible, on the one hand, the effective review of administrative action, and on the other, the planning of public affairs with a fair degree of certainty. In the absence of counsel for the applicant, I had only the benefit of the arguments raised on behalf of the Attorney-General.

NATURE OF THE DECISION, SUBJECT-MATTER OF THE PROCEEDINGS:

Counsel for the respondents argued, as stated in the opposi-

tion, that the decision complained of lacks the character of an administrative action amenable to the revisional jurisdiction of the Supreme Court under Article 146.1 of the Constitution, namely executory character. Reference was made to the elements of an executory act, as depicted by Kyriacopoulos in his work on Greek Administrative Law, 4th ed., Vol. 3, at p. 92. Not only the act lacks, in his submission, the insignia of an executory one, but any attempt, he submitted, by organs of public administration, to hand out compensation for the enforcement of an order of a criminal Court, would offend the principles of separation of powers that require that the three spheres of State power be kept separate and apart, in the interests of proper government and the effective sustainance of the rule of law (Kyriacopoulos, 'Greek Administrative Law' Vol. 1, pp. 147, 160, 162 and 163). Although I agree that any attempt by one power of the State to assume jurisdiction over matters properly falling within the domain of another power would be constitutionally impermissible and tend to undermine the rule of law, the question does not arise at all in these proceedings. For, a decision to make for example, a gratis payment to a citizen in need, would not involve the assumption by the executive of any judicial functions. It is fundamental for the exercise of jurisdiction under Article 146.1 that the act or omission complained of, be of an executory character; this is a fundamental precept of administrative law, as administered and applied in countries that developed administrative law as a separate branch of the law.

What is an executory administrative act: The executory ingredient of an act is that definitive element that renders an act of the administration in the domain of public law, justiciable. To be executory an act must have a direct bearing on the rights of the person affected thereby to whatever extent it is competent for organs of public administration to define such rights. It must not be a mere complaint of maladministration that concerns the general public, and for which remedy lay elsewhere, but a matter concerning the delineation of the rights of the party affected thereby under the law.

The characteristics of an administrative act were the subject of discussion in many decisions of the Supreme Court. I need only refer to one, notably the decision of the full bench

in *The Republic of Cyprus* v. *Demetriou & Others* (1972) 3 C.L.R. 219, with particular reference to the executory element that must accompany a decision in order to render it amenable to the revisional jurisdiction of the Supreme Court. For an act to be executory, it must:-

(a) emanate from an organ of public administration;

(b) express the will of the administration on a given subject in a definitive manner productive of legal consequences for the subject. This, more than any other characteristic is the hallmark of an executory act; it entails acknowledgment, amendment or modification of the rights of the person or persons affected thereby. If the decision merely incorporates an opinion in contrast to a decision, the act is not of an executory nature for, it does not have a direct impact on the rights or obligations of the citizen, nor is it enforceable as such (see, *inter alia*, *Amathus Navigation Co.* v. *The Republic* (1979) 3 C.L.R. 10, and *Florides* v. *The Republic* (1979) 3 C.L.R. 37);

(c) the decision must entail immediate administrative enforcement.

The absence of anyone of the above attributes saps the decision of its executory character and makes it inamenable to review by this Court. It is implicit in the concept of an executory act, that the organ of the administration issuing the decision, be empowered in law to make a valid determination of the rights of the governed in the given area; therefore, it must be competent in law for the authority to decide on the subject under review. Functioning outside the precincts of the law, cannot create rights or impose obligations; and the assumption or refusal of liability to make a gratis payment is in itself an act outside the ambit of the law and, therefore, the decision whatever its implications, is not of an executory character. The same legal vacuum exists whenever public officers suffer an illegality or omit to suppress it, as officials of the district administration allegedly suffered the illegal buildings of the applicant to go up. Neither tolerance of an illegal act nor failure to suppress it create actionable rights in the sphere of public law. The equitable doctrine of estoppel, as known in the field of private law, has no application in the realm of administrative law.

The administration must operate within the boundaries of the law. that must not, under any circumstances, be transgressed.

I am not suggesting that the State does not possess a degree of residual power to make on humanitarian grounds ex gratia payments. However, any such decision is not actionable, either in private or public law. The voluntary assumption of liabilities by the administration is not productive of legal rights, in the same way that promised or anticipated benevolence confers no actionable rights.

The gravamen of the complaint of the applicant lies in the allegations of unequal treatment, that is, that persons similarly circumstanced, were paid compensation. I shall not dwell on the validity of the complaints for, even if well founded, and this is doubtful, they confer no valid ground for a revisional recourse. There is authority that the right to equal treatment, as constitutionally safeguarded by Article 28.1, is limited in its application to treatment under the law. The voluntary assumption of liabilities outside the law creates no actionable rights in third parties. In *Andreas Ioannides* v. *The Republic* (1973) 3 C.L.R. 118, L. Loizou, J. points out that the principle of equality of treatment is limited in its application to cases of treatment under the law; therefore, he held that refusal to repeal an unlawful act could not, under any circumstances, amount to discrimination. Likewise, A. Loizou, J., decided in *Karayiannis* and *Others* v. *Educational Service Committee* (1979) 3 C.L.R. 371, that the right to equal treatment cannot be invoked with regard to illegal actions undertaken outside the law.

I am aware of the decision of Triantafyllides, P. in *Nicos Theodorides* v. *The Republic* (1973) 3 C.L.R. 702, but it leaves, in my judgment, the fate of this recourse unaffected for it is distinguishable from the case in hand. It was there decided that the decisions of a committee, set up to administer and distribute a fund among the victims of a cyclone that struck the town of Limassol, were of an executory character and amenable to review by the Supreme Court. In the first place, it is generally accepted that the State has an inherent duty to come to the aid of victims of natural disasters, and to that extent, the setting up of a relief committee for the aforementioned purposes is an act within the umbit of the law. Secondly,

the administration of a fund and the equitable relief of victims of such a disaster for the proper discharge of the obligations of the State in the area under consideration, is a matter of vital concern to the public and, therefore, the decisions of the committee were, with respect, rightly found to be subject to review by this Court.

Lastly, a word about the implications of illegal actions. No one can, with any degree of justification, seek State assistance for damage arising from his illegal acts. Any decision to pay compensation in such circumstances would indirectly constitute an encouragement for illegal acts. Illegality can only entail punishment; certainly not a reward.

The recourse is dismissed. No order as to costs.

Application dismissed. No order as to costs.