1982 April 30

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ANDREAS CHRYSSAFINIS,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTER OF HEALTH AND ANOTHER,

Respondents.

(*Cases Nos.* 66/82 *and* 175/82).

Act or decision in the sense of Article 146.1 *of the Constitution—Which can be made the subject of a recourse thereunder—Only executory acts can be made the subject of such a recourse—Executory acts being those acts productive of legal consequences—Investigation into the commission of a disciplinary offence under the Public Service Law,* 1967 (*Law* 33/67)*—And preferment of charges following decision of Investigating Officer that, prima facie, disciplinary offences were disclosed—Decision of Investigating Officer and his omission to afford applicant a hearing not productive of legal consequences—Not executory acts and cannot be made the subject of a recourse under the above Article*—Papanicolaou (No. 1) *v.* Republic (1968) 3 *C.L.R.* 225 *distinguished—But even if facts of this case fall within principle of Papanicolaou case, recourses should still be dismissed because Court disinclined to follow this case for the reasons indicated in* Frangos and Another *v.* Minister of Interior and Others (1982) 3 *C.L.R.* 53.

Administrative Law—Administrative acts or decisions—Composite administrative act—Disciplinary proceedings—Do not amount to a composite administrative act as this notion is accepted in administrative law.

Following reports against the applicant, the Chief Gynaecologist of the Nicosia General Hospital, that he may have committed a disciplinary offence, the appropriate Authority, the Minister

of Health, ordered an inquiry under the provisions of section 80(b) of the Public Service Law, 1967 (Law 33/67) and appointed an Investigating Officer to inquiry into the accusations. After the completion of the investigation the Attorney-General indicted the applicant before the Public Service Commission on two counts, of the disciplinary offences of refusal and/or neglect to comply with the regulations and/or instructions of the superior authority. The Public Service Commission summoned the applicant to appear before it on 6.2.1982. On 5.2.1982 the applicant filed recourse No. 66/82, seeking the annulment of the decision of the Investigating Officer and his consequential submission of the case, on the ground that it was vitiated by a failure on the part of the Investigating Officer to afford the applicant an opportunity to be heard, as provided in regulation 4 of the Second Schedule—Part I to the Public Service Law. On 12.4.1982 applicant filed a second recourse which was directed against the failure of the Investigating Officer to afford him an opportunity to be heard and against his continuing omission to observe the requirement of regulation 4.

The respondents raised a preliminary objection to the effect that the recourses disclosed no litigable cause because the decision and omission complained of lacked executory character.

On the preliminary objection:

Held, that only administrative acts of an executory character can be examined by way of judicial review in a recourse under Article 146 of the Constitution; that an executory act is one productive of legal consequences; that an act yields legal consequences when it is definitive of the rights of the person affected thereby, either in the service or with regard to his financial interests; that the preliminary investigation is aimed to elicit whether there is evidence to support a charge, not the evaluation of such evidence; that only from the evaluation of the evidence and an adverse verdict in the cause can legal consequences arise conferring a right to the subject to seek judicial review; that the decision complained of in recourse 66/82 is but a preparatory step in the process of exercising disciplinary jurisdiction over the applicant and it is not, therefore, of an executory character; accordingly it is not amenable to judicial review; that, further, an omission connected with a preparatory act is, like an act associated therewith, not productive of legal consequences;

accordingly the omission complained of in recourse 175/82 is not amenable to judicial review (*Papanicolaou (No. 1) v. The Republic* (1968) 3 C.L.R. 225 distinguished).

Held, further, (1) that even if it were to be held that the facts of the present case fall within the principle enunciated in *Papanicolaou (No. 1) v. The Republic* (1968) 3 C.L.R. 225 the recourses would still be dismissed for this Court is disinclined to follow the *Papanicolaou* case for the reasons it indicated in *Frangos and Another v. Minister of Interior and Others* (1982) 3 C.L.R. 53.

(2) That disciplinary proceedings, although composite in the sense that they envisage a series of steps before a final decision, none of the acts precedent to the final act is executory; that, therefore, the disciplinary process does not amount to a composite administrative act as the notion is accepted in administrative law.

Applications dismissed.

Cases referred to:

Papanicolaou (No. 1) v. The Republic (1968) 3 C.L.R. 225;

Gavriel v. The Republic (1971) 3 C.L.R. 185;

Vassiliou and Another v. Police Disciplinary Committee (1979) 1 C.L.R. 46;

Frangos and Another v. Minister of the Interior and Others (1982) 3 C.L.R. 53;

Case No. 232/72 of the Greek Council of State;

Veis v. The Republic (1979) 3 C.L.R. 390.

Recourses.

Recourses against the decision of the respondents whereby they found that, prima facie, there was substance in the disciplinary charges against the applicant and they submitted their findings to the appropriate authority for further action.

A. S. Angelides with *G. Triantafyllides*, for the applicant.

E. Papadopoulou (Mrs.), for the respondents.

Cur. adv. vult.

PIKIS J. read the following judgment. The applicant, the Chief Gynaecologist of the Nicosia General Hospital, was reported for default in the discharge of his duties and/or failure

to comply with orders or directions of his superiors, whereupon the Minister of Health ordered an inquiry under the provisions of section 80(b) of the Public Service Law 33/67, and appointed on 5.9.1981 an investigating officer to inquire into the accusations. On completion of the inquiry, the investigating officer, that is, the Director of Medical Services, found that, prima facie, there was substance in the charges and submitted his findings to the appropriate authority, the Minister, for further action. Thereafter, on 28.11.1981, the Minister of Health submitted to the Attorney-General the report of the investigating officer in accordance with the provisions of rule 6 of the second table to the Public Service Law. The Attorney-General indicted the applicant before the Public Service Commission on two counts, involving refusal and/or neglect to comply with the regulations and/or instructions of the superior authority. Soon afterwards, the Public Service Commission summoned the applicant to appear before it on 6.2.1982 for the hearing of the charges. A day prior to the appointed day, on 5.2.1982, the applicant instituted one of the two recourses under consideration, Recourse No. 66/82, seeking the annulment of the decision of the investigating officer and his consequential submission of the case, on the ground that it was vitiated by a failure on the part of the investigating officer to afford the applicant an opportunity to be heard, as provided in regulation 4 of the aforementioned table. This summarises the effect of the first proceeding. The second recourse, filed more than two months later, on 12.4.1982, is similarly directed against the failure of the investigating officer to afford him an opportunity to be heard but pressed from a different angle, notably, his continuing omission to observe the requirement of rule 4, an omission that likewise renders, in the contention of the applicant, the submission of the case by the investigating officer for further action, null and void.

The respondents opposed the applications, contending, in the first place, that they disclosed no litigable cause for the reason that the decision and omission complained of lack executory character. It was judged appropriate to set down for determination, preliminary to an inquiry into the merits, the validity of the objection to jurisdiction. We shall, therefore, proceed to decide whether the subject-matter of either recourse

is cognizable by a court exercising revisional jurisdiction under Article 146 of the Constitution.

At this stage the inquiry is limited to an examination of the justiciability of the causes, judged on their face value, as adumbrated in the application in much the same way as a civil court decides, preliminary to a hearing, whether the writ of summons or the statement of claim discloses a litigable cause of action. The object of the exercise is to determine whether the subject-matter of the two recourses amounts to administrative executory acts. For, as it is settled beyond any shadow of doubt, it is implicit in Article 146 that only administrative acts of an executory character can be examined by way of judicial review.

Briefly, it is the case for the applicant that the act or omission giving rise to the recourses, possess executory character notwithstanding their causative connection with the disciplinary process, inasmuch as each constitutes an integral (αὐτοτελὲς) part of a composite administrative act. In the submission of counsel for the applicant, who argued the case for his client ably and well, disciplinary proceedings form a composite administrative act made-up of a number of integral administrative acts, as distinct from purely preparatory acts, one such integral link in the causative chain being the decision finding a case meriting further consideration. The decision under consideration constitutes a landmark in the causative chain, possessing a separate identity in administrative law, sufficiently extricable from the rest of the process and definitive to a degree of the rights of the subject under investigation as to amount to an executory act. Equally vulnerable is the omission to safeguard the right of the suspect to be heard by the investigating officer, conferred by rule 4 of the second table. The omission continues until remedied, so, the lapse of the interval of 75 days from its first manifestation raises no obstacle to litigation. Counsel for the applicant went further and submitted, if I perceived his point correctly, that an omission to carry out a duty cast by law is invariably a cause amenable to the revisional jurisdiction of the Court, independently of repercussions, in the interests of legality. A continuing omission to carry out a duty cast by law is, in the submission of counsel, justiciable irrespective of whether the repercussions therefrom are such as to clothe the omission with executory character.

For the Republic it was briefly but vigorously submitted that the subject-matter of the two recourses, identical in substance, concerns preparatory acts in the disciplinary process; consequently, they lack executory character, that indispensable element in the assumption of revisional jurisdiction by the Supreme Court.

Mr. Angelides rested his submission, to a large extent, on the reasoning of the decision of Triantafyllides, J., as he then was, in *Panos Papanicolaou* v. *The Republic* (*No.* 1) (1968) 3 C.L.R., 225, and the principle emerging therefrom, to which we shall refer presently. In *Papanicolaou*, the Court had to decide whether the decision of the investigating officer to submit a case to the appropriate authority pursuant to the powers vested by s. 80(a) of Law 33/67, in preference to an interdepartmental inquiry, constitutes an executory act sufficiently integral to be severable from the rest of the process, separately amenable to judicial review. The decision attracts executory character, so it was held by the learned Judge, from the fact that it exposes the officer under investigation to the risk of potentially severer sanctions despite the absence of any immediate and direct repercussions on the suspect. The Court took the view that a decision, entailing a choice between two alternative courses in the context of disciplinary proceedings, acquires executory character because of likely future implications, albeit unknown and undefined, on the officer. It is the risk from the exercise of discretionary powers liable to prove potentially of detriment to this officer that confers executory character on the decision. The decision in *Papanicolaou* was followed by A. Loizou, J., in *Gavriel* v. *The Republic* (1971) 3 C.L.R. 185. Also, there are dicta of Triantafyllides, P., reaffirming the correctness of the decision in *Papanicolaou*, in *Platon Vassiliou & Another* v. *Police Disciplinary Committee* (1979) 1 C.L.R. 46.

Putting aside for a moment my reservations as to the soundness of the principle evolved in *Papanicolaou*, the facts of the present recourse, particularly the nature of the decision complained of, is different from that in Papanicolaou and, therefore, distinguishable therefrom. What is challenged here, is not the decision earmarking the future course of the disciplinary proceedings by adopting one of two alternative courses, but an error or omission on the part of the investigating officer

in the discharge of his duties. Therefore, the applicant can derive no support from the case of *Papanicolaou*. Indeed, the proceedings are doomed to failure unless we rule that the findings of the investigating officer, as distinct from a decision to deal with the officer in either of the two ways envisaged by section 80(a), is, in itself, an executory act, a proper subject for judicial administrative review.

In Greece, it is settled law that the findings of an investigating officer are a preparatory administrative act, totally lacking executory character. Any other review of the matter could only rest on a misconception of the attributes of an executory act. *Dagtoglou*, in his exposition of the general principles of administrative law, although he notes a degree of discrepancy and uncertainty in decided cases as to what acts are of a preparatory character, he postulates nonetheless that on any view of the law, for a decision to be subject to review, it must be productive of concrete legal consequences (see p. 154). *Fthenakis*, in his textbook on the law applicable to civil servants, Volume C', 1967 ed., at p. 325, expresses, on a consideration of Greek case law, unequivocally the view that the findings of the preliminary investigation, as well as the investigatory process in its entirety, are but preparatory acts and are not independently of the outcome of the disciplinary process subject to review. They have no impact on the subject and are solely designed to pave the ground for the holding of the disciplinary proceedings. The proceedings may, for example, be abandoned or dropped at a later stage, a fact illustrating that the acts are devoid of legal consequences. *The preliminary investigation is aimed to elicit whether there is evidence to support a charge, not the evaluation of such evidence. Only from the evaluation of the evidence and an adverse verdict in the cause can, legal consequences, arise, conferring a right to the subject to seek judicial review.* In my judgment, the decision complained of in Recourse No. 66/82 is but a preparatory step in the process of exercising disciplinary jurisdiction over the applicant and as such, not amenable to judicial review.

An omission connected with a preparatory act is like an act associated therewith not amenable to review for the same reasons, in that it is not productive of legal consequences. There is no distinction in administrative law between an act and an

omission not productive of legal consequences. *An act yields legal consequences when it is definitive of the rights of the person affected thereby, either in the service or with regard to his financial interests.* It is implicit in Article 146.1, as it has been held time and again, that for an act, decision or omission to be justiciable, it must be of an executory character, a view reinforced by para. 2 of Article 146 of the Constitution, postulating, as the prerequisite to litigation, interference with an existing legitimate right, directly resulting therefrom, adverse to the citizen affected thereby. It can be argued that the disciplinary process attracts a social stigma, affecting thereby the position of the public servant under investigation. The answer is that it leaves the rights of the subject unaffected. Nor can we elevate social prejudices into the realm of rights or allow them to prevail over the presumption of innocence, a fundamental legal norm under the Cyprus Constitution, notably, under Article 12.4.

In my judgment, neither the act nor the omission complained of can be the subject of a recourse under Article 146 and, therefore, they ought, for the reasons indicated above, be dismissed.

Lastly, if I were to hold that the facts of the present case fall within the principle enunciated in *Papanicolaou*, I would still dismiss the recourses for I am disinclined to follow it for the reasons I indicated in *Frangos & Another* v. *Minister of the Interior & Others* (1982) 3 C.L.R. 53. It is my view, voiced with the utmost respect for the opinion of Triantafyllides, P., that in *Papanicolaou* a choice between two alternative disciplinary courses is depicted as an executory act without regard to the consequences arising therefrom. Disciplinary proceedings, although composite in the sense that they envisage a series of steps before a final decision, none of the acts precedent to the final act is executory. Therefore, the disciplinary process does not amount to a composite administrative act as the notion is accepted in administrative law. In the *Conclusions of the Greek Council of State,* 1929–1959, a composite administrative act is defined as one made-up of two or more executory acts, albeit connected, in that one is precedent to the other, as part of a pyramidal process (see p. 166). That a procedure leading to an executory administrative act requires a series of preliminary steps as a prelude thereto, in no way reduces the rigour of the principle that, for an act to be justiciable, it must have an execu-

tory character in the sense earlier referred to. *Tsatsos—Application for Annulment*, 3rd ed., pp. 150–151—in his analysis of the law relevant to the character of an act that can be made the subject of a recourse, makes the position clearer still. It is emphasized that a composite administrative act is one made-up of a series of executory acts, each one of which forms a separate link in the chain of causation. In Greece, disciplinary proceedings against public servants are treated as giving rise to one executory act, arising from the verdict in the cause, and that all steps taken prior thereto are of a preparatory character. (See, *Spiliotopoulos' Manual of Administrative Law*, 1977 ed., *p.* 383, *footnote* 1, *and* 1981 *ed., p.* 379, *footnote* 3). The Greek Council of State decided, in Case *No.* 232/72, that the decision of the competent authority in that case, that of the Town Police Command, referring a case for trial, was a preparatory act not amenable to judicial review. By the same logic, the decision in this case of the investigating officer to submit a case for further action to the appropriate authority, must be treated as a preparatory act.

In my judgment, the disciplinary process cannot be, bearing in mind its object and purpose, dissected into separate integral component parts for no step in the process, except the final act, entails any consequence for the rights of the subject. Only one issue is at stake, that of the guilt or innocence of the public servant and its resolution depends on the final outcome of the proceedings. The parallel drawn by counsel from the decision in *Veis* v. *The republic* (1979) 3 C.L.R. 390, and the submission made that, by comparison, the act and omission in this case are likewise litigable is, with respect, found on a misconception of the nature and implications of interdiction. There is no doubt that interdiction is an executory act. It entails, as section 84(2) of Law 33/67 lays down, a suspension of the rights and privileges of the officer concerned, for as long as it lasts. The propriety of the decision to interdict is in no way dependent on the validity of the disciplinary charge. It is an act separate and independent therefrom, involving the exercise of distinct discretionary powers, as it was pointed out in *Veis*, involving an appreciation of the public interest and the desirability of allowing a public servant under charge to continue discharging his duties.

Nothing said in this judgment should be construed as approving the course followed by the investigating officer with regard to the opportunity afforded to the applicant to be heard, a subject on which I refrain, as I ought to, from expressing any opinion. It is with a degree of reluctance that I have decided not to adjudge the applicant to pay the costs of the proceedings. Let there be no order as to costs.

Application dismissed. No order as to costs.