1982 January 12

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

SUB INSPECTOR MICHAEL FRANGOS AND OTHERS,
Applicants,

v.

THE MINISTER OF INTERIOR AND OTHERS,
Respondents.

(*Case No.* 457/81).

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—Preparatory acts or acts forming part of the process designed to lead to an executory act lack executory character because they leave the rights of the subject unaffected—Disciplinary proceedings—Decision initiating investigation that led to the disciplinary proceedings—Not an act of an executory character but a preparatory act which cannot be made the subject of a recourse under the above article*—Papanicolaou (No. 1) v. Republic (1968) 3 *C.L.R.* 225 *disapproved.*

Costs—Revisional jurisdiction proceedings—Rule that costs follow the event—There is now more room for the application of this rule in these proceedings because many administrative law principles have become settled.

The applicants were police officers serving at Ayios Dhometios Police Station. Following a complaint attributing default of duty to them, the Nicosia Divisional Police Commander ordered an investigation as a result of which disciplinary charges were preferred against them. Applicants alleged that during the hearing of the disciplinary case they discovered that the investigation was erroneously initiated to an extent that vitiated the proceedings in their entirety. Hence this recourse to set the proceedings aside accompanied by an application for a

provisional order, seeking the suspension of the disciplinary proceedings now in progress, until the determination of the recourse.

Counsel for the respondents raised a preliminary objection that the act or acts complained of are not of an executory character and, therefore, they cannot be made the subject of a recourse under Article 146 of the Constitution. Counsel submitted that these acts are of a preparatory nature or inextricable ingredients of a composite administrative act and, therefore, not executory, because in themselves they leave the position of the applicants unaffected.

On the preliminary objection:

Held, (1) that only executory acts can be made the subject of a recourse under Article 146 of the Constitution; that executory is an act directly productive of legal consequences; that preparatory acts or acts forming part of the process designed to lead to an executory act and inextricably connected therewith, lack executory character because they leave the rights of the subject unaffected; that the decision to prosecute the applicants disciplinarily had no impact on their rights because a person charged before a criminal Court or a disciplinary committee is regarded in law to be innocent until the contrary is proved as a result of a valid determination by a competent Court or a disciplinary Committee; that an accusation may attract a social stigma, is immaterial for it has no legal implications, nor should such prejudices be allowed or encouraged to prevail whenever they run counter to fundamental legal presumptions as that of innocence; that, therefore, the act complained of is not of an executory character but of a preparatory character and as such is not answerable to the jurisdiction of this Court under Article 146 of the Constitution; accordingly the recourse should be dismissed (*Papanicolaou (No. 1) v. Republic* (1968) 3 C.L.R. 225 disapproved); that the application for a provisional order must fail since the possession of jurisdiction to try the recourse is a prerequisite to the examination of an application for a provisional order.

(2) That in revisional proceedings costs need not, unlike civil law litigation follow the outcome of the proceedings because the litigants are not the only parties with interest in the outcome

of the inquiry and because administrative law is a relatively new branch of the law, introduced in Cyprus after the establishment of the Republic in 1960 and its principles were relatively fluid and the litigant should not be penalised for coming to Court to have his rights defined; that as time goes by, these principles become gradually settled and consequently there is increasingly more room for the application of the rule that costs should follow the event; that this is not a proper case for applying this rule; and therefore the recourse will be dismissed with no order as to costs.

Application dismissed.

Per curiam: That the facts of the present case come nowhere near to establishing a case for a provisional order. There is no suggestion of irreparable damage and in the light of the dispute as to the facts, no illegality is presently discernible.

Cases referred to:

Papaleontiou v. *The Republic* (1973) 3 C.L.R. 54;

Sofocleous v. *The Republic* (1971) 3 C.L.R. 345;

Agni N. Sofocleous v. *The Republic* (1981) 3 C.L.R. 360;

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

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

Re Cushla Ltd. [1979] 3 All E.R. 415;

Republic v. *Demetriades* (1977) 3 C.L.R. 213.

Recourse.

Recourse for an order setting aside the proceedings instituted against the applicants before a disciplinary committee, set up under regulation 10A(c) of the Police Disciplinary Regulations and an application of a provisional order suspending the proceedings now in progress pending the final determination of the recourse against the validity of such proceedings.

E. Efstathiou with *Z. Katsouris* and *A. Magos*, for the applicants.

A. Vlademirou, for the respondents.

Cur. adv. vult.

PIKIS J. read the following judgment. The applicants are police officers serving at Ayios Dhometios police station within

the Nicosia Police Division. They have the following rank in the police force: Applicants 1 and 2 are inspectors; applicants 3 and 4 acting inspectors, and applicants 5 and 6 police sergeants. Following a complaint, presumably attributing default of duty to the applicants in relation to the failure of a certain Kanaris to comply with the conditions of his bail bond the Nicosia Divisional Police Commander ordered an investigation under Chief Insp. A. Moustakas. The report, on the completion of the investigation was submitted to the Minister of the Interior who, in exercise of the powers vested in him by reg. 10A of the Police Disciplinary Regulations, demanded that the conclusions of the investigation be referred to him for consideration and further action. Thereafter, the Minister directed the preferment of a number of charges against the applicants before a disciplinary committee, set up under reg. 10A(c).

During the hearing of the disciplinary case against them, the applicants discovered, so it is alleged in the present proceedings, that the investigation was erroneously initiated to an extent that vitiates the proceedings in their entirety (*Andreas C. Papaleontiou* v. *The Republic* (1973) 3 C.L.R. 54). Hence this recourse to set them aside, accompanied by an application for a provisional order, seeking the suspension of the disciplinary proceedings now in progress, until the determination of the proceedings.

The irregularity complained of lays, in the contention of the applicants, in the failure of the police authorities to initiate the investigation in the manner envisaged by the Rules, notably by rule 8(2), that requires that the Deputy Chief Constable should take cognizance of a complaint directed against members of the police force serving in more than one divisions, as the facts of this case required, and not the Nicosia Divisional Commander who would be the competent authority to direct an investigation, if the complaint implicated exclusively members of the Police Force serving under his command. Reg. 8(1) lays down that the Divisional Commander is the authority competent to order an investigation whenever complaints are directed against members of the police, serving within the area of his jurisdiction.

The facts relied upon by the applicants, by no means admitted

by the respondents, are that the complaint made to the authorities implicated members of the Nicosia, as well as the Paphos Police Division, and that in consequence it should be dealt with by the Deputy Chief Constable under reg. 8(2). The illegality of the course followed by the police authorities is so manifest that the Court should, notwithstanding the absence of any suggestion that the applicants are likely to suffer anything like irreparable damage in the event of the proceedings being allowed to continue, act and suspend further action in the interests of legality. This course is, in an appropriate case, open to the Court on the authority of *Sofocleous* v. *The Republic* (1971) 3 C.L.R. 345, in the face of the commission of a flagrant illegality. A. Loizou, J., gave expression to the powers of the Court under r. 13 of the Supreme Constitutional Court Rules, as presently applied, after reviewing the principles upon which a similar jurisdiction is exercised by courts of revisional jurisdiction in Greece and in the U.S.A. For the Court to act, the illegality must be palpably identifiable without having to probe into disputed facts. Recently, the learned Judge had occasion to examine the case law that developed on the subject, and draw attention to the care with which the relevant jurisdiction must be exercised lest the Court be allowed to prejudge the case before the trial runs its normal span, a necessary prelude under the law for the proper evaluation of the merits of the case (*Agni N. Sofocleous* v. *The Republic* (1981) 3 C.L.R. 360). Although what amounts to flagrant illegality is nowhere exhaustively defined, it appears to me to involve a clear violation of the procedure envisaged by the law or unquestionable disregard of the fundamental precepts of administrative law. The notion does not encompass any defective exercise of discretionary powers vested in an organ of public administration.

The respondents dispute the facts averred by the applicants and maintain that the complaint leading to disciplinary proceedings, being instituted against the applicants, was separate and independent from that lodged against members of the Paphos Police Division, though similar in nature, in that it attributed to colleagues of the applicants default of duty in securing compliance with the terms of bail by a co-accused of Kanaris who, like Kanaris apparently jumped his bail. Consequently, reg. 8(1) was, in their view, rightly relied upon for the investigation of the complaint. This conflict, as to the facts of the case,

makes it impossible for this Court, at this stage, to express a concluded view on the propriety of the procedure followed. Therefore, the illegality complained of is presently beyond sight. But the respondents raise a more fundamental objection directed against the tenability of the recourse itself:

This is, that the act or acts, subject matter of this recourse, are not of an executory character and, therefore, not justiciable. In the submission of the respondents, these acts are of a preparatory nature or inextricable ingredients of a composite administrative act and, therefore, not executory, because in themselves they leave the position of the applicants unaffected.

It is well settled that only acts of the administration with direct repercussions on the rights of a party affected thereby, are cognizable by an administrative court in the exercise of its revisional jurisdiction. Counsel for the applicants argued that despite the incohate nature of the subject acts, they have nonetheless the attributes of an executory act amenable to the jurisdiction of this Court, on the authority of *Panos Papanicolaou* v. *The Republic* (1968) 3 C.L.R. 225. If the submission of the respondents on the other hand, in this area is upheld, the proceedings in their entirety would be unsustainable and would have to be dismissed.

It is not impermissible at this stage to examine the substratum of the application in order to ascertain whether the act impugned has, on the face of things, the insignia of an executory act or generally an act litigable before this Court. (See, 'Application for Annulment before the Council of State' by Tsatsos, 3rd ed., and 'Provisional Protection in Revisional Litigation' by Skouris, 1979, p. 35). If the complexion of the case is such as to render its review beyond the ambit of this Court, then no question arises of granting a provisional order. For, the possession of jurisdiction to try the recourse itself, is a prerequisite to the examination of an application for a provisional order. (See, Skouris, supra, p. 33). Therefore, we must first examine whether the act or acts, subject matter of this recourse, are justiciable before this Court.

EXECUTORY ACT:

Executory is an act directly productive of legal consequences. Preparatory acts or acts forming part of the process designed

to lead to an executory act and inextricably connected therewith, lack executory character because they leave the rights of the subject unaffected. Here, no suggestion is made that the decision to prosecute the applicants before its disciplinary committee, set up under reg. 10A(c), had any impact on the rights of the applicants. A person charged before a criminal court or a disciplinary committee is regarded in law to be innocent until the contrary is proved as a result of a valid determination by a competent court or a disciplinary committee, as the case may be. That an accusation may attract a social stigma, is immaterial for it has no legal implications, nor should we allow or encourage such prejudices to prevail whenever they run counter to fundamental legal presumptions as that of innocence. Nevertheless, I was invited to hold that the act complained of, despite its preparatory character, is amenable to the jurisdiction of this Court, on the authority of *Panos Papanicolaou*, supra. Triantafyllides, J., as he then was, held that a divisible part of a composite act has executory attributes if the organ concerned has exercised a discretion adopting an alternative course that may ultimately expose the person affected thereby to greater sanctions. There are dicta, clearly obiter in *Platon Vassiliou & Another* v. *Police Disciplinary Committee* (1979) 1 C.L.R. 46, suggesting approval of the principle enunciated in the case of *Papanicolaou*.

I have studied the decision in *Papanicolaou* with the greatest care, more so because it aims to import an exception to the general rule that only acts directly productive of legal consequences are executory. Evidently, a decision to follow one disciplinary course instead of another leaves the rights of the accused unaffected. Either course for example, may lead to his acquittal that would be confirmative of his rights all along, that he is innocent. Only a conviction has a bearing on the rights of the suspect and is amenable to review by this Court. The learned trial Judge does not appear to rest his decision in *Papanicolaou* on any exception to the general rule acknowledged in any jurisdiction treating administrative law as a separate branch of the law, and appears to rest his decision on the inherent justice of the principle propounded therein. I am unable to subscribe to this proposition for, I regard it as wrong in principle. To sustain it would involve a clear departure from the concept of an executory act, a departure

that introduces a deviation from the basic rule, with nothing objective to distinguish it from other preparatory acts. To sustain it, would involve acknowledging executory character to every preparatory or intermediate act that marks the future courses of a disciplinary act. Clearly, we would be travelling far away from the principle that, only acts that define to whatever extent it is competent for the administration to define the rights of the citizen are amenable to the revisional jurisdiction of this Court.

I propose to depart from the aforesaid judgment, notwithstanding my adherence to the sound counsel of Vinelott, J., in *Re Cushla Ltd.* [1979] 3 All E.R. 415, that there should be a departure from a decision of a court of co-ordinate jurisdiction, only when the principle adopted is wrong or does not reflect the correct principles of the law due to oversight or an error in the reasoning; and in the case of Triantafyllides, P., one is apt to feel more disinclined to depart from his decisions, be it at first instance, given his vast experience in the field of administrative law. However, there is no room for upholding it once I formed the view that the proposition adopted therein is wrong in principle (*Republic (Minister of Finance & Another)* v. *Demetrios Demetriades* (1977) 3 C.L.R. 213). In my judgment, the recourse is doomed to failure on the face of the recourse; and inasmuch as it would be futile to allow fruitless litigation to continue, I propose to dismiss it. I shall nonetheless dwell briefly on the merits of the application for a provisional order, independently of the fate of the recourse for, on the material before me, it could not, under any circumstances, but be dismissed.

PROVISIONAL ORDER:

A provisional order is an extraordinary measure designed to forestall the enforcement of administrative action in the interests of justice and administrative legality. The voluminous case law on the subject establishes that the unimpeded running of the course of the administration is of paramount importance before which the interests of the applicant usually subside. With the exception of instances of flagrant illegality in the sense above outlined, the likelihood of irreparable damage is a prerequisite to the grant of an interlocutory order. Such damage

must be specifically and succinctly pleaded in the application. Irreparable damage encompasses damage of a kind that is irretrievable by subsequent legal or administrative action, such as the destruction of the res and irreversible physical deterioration. The merits of the case are not evaluated at this stage except to the extent they undisputably emerge on the face of the proceedings. The forum for the evaluation of the merits is the trial of the recourse.

The facts of the present case come nowhere near to establishing a case for a provisional order. There is no suggestion of irreparable damage and in the light of the dispute as to the facts, no illegality is presently discernible. Therefore, the application could not but be dismissed.

COSTS:

In revisional proceedings, costs need not, unlike civil law litigation, follow the outcome of the proceedings for, the litigants are not the only parties with an interest in the outcome of the inquiry. The public retains an unabating interest in the proper scrutiny of administrative action in the interests of legality and the sustainance of the rule of law. Another reason is that administrative law is a relatively new branch of the law introduced in Cyprus after the establishment of the Republic in 1960; hence its principles were relatively fluid and the litigant should not be penalised for coming to court to have his rights defined. As time goes by, these principles become gradually settled; consequently, there is increasingly more room for the application of the rule that costs should follow the event. This is not a proper case for applying this rule; therefore, the recourse will be dismissed with no order as to costs.

Application dismissed. No order as to costs.