1982 August 27

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

VASSOS KYPRIANIDES,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTER OF EDUCATION,

Respondent.

(*Case No.* 75/82).

Administrative Law—Administrative acts or decisions—Executory act—Confirmatory act—A letter merely of an informative nature which does not contain a decision creating a new legal situation, is not of an executory nature and cannot be made the subject of a recourse—It may be, however, of an executory nature if the decision has been taken after a new inquiry—Rejection of applicant's claim in 1976 *for change of nature of his leave which was granted to him in* 1974*—No recourse against rejection—Rejection of the claim when repeated in* 1981 *and* 1982*—All material before the administration when taking the* 1976 *decision —No difference between the reasoning of* 1976 *and that of* 1981 *and* 1982*—No new inquiry carried out—Letters of* 1981 *and* 1982 *of an informative nature and were confirmatory of the executory act of* 1976*—Recourse against* 1982 *decision out of time.*

The applicant, a retired Secondary Education School Master and who in 1974 was headmaster of a night Gymnasium in Nicosia, by means of various letters dated August and September, 1974 applied for leave of absence without pay to be spent abroad, for family reasons. The leave of absence was granted to him by the respondent from 1.9.1974-5.10.1974 and applicant was informed of this decision by letter of the respondent dated 8.10.1974. By letter dated 16.10.1974 applicant objected to the grant of leave without pay because besides the serious family grounds, which he put forward for his absence he also stated

that health reasons compelled him to be absent from his service and he would submit medical reports in due course. The respondent rejected applicant's claim and informed him of this decision by means of a letter dated 24.1.1976. No recourse was filed against this decision. By means of a letter dated 15.7.1981, and whilst he was on leave prior to retirement, the applicant applied for the payment of his salary during the above period because one of the reasons for his absence was his personal health. The respondent replied by letter dated 26.11.1981 informing applicant that his request to change his leave of absence without pay to a sick-leave, which had already been rejected in the past, could not be acceded to; and that the ground for rejecting his claim in the past continued to exist. Applicant repeated his request by letter dated 21.12.81 and which was rejected by letter of the respondent dated 22.1.1982. Hence this recourse.

Counsel for the respondent raised the preliminary objection that the recourse is out of time* because the acts complained of are confirmatory of the decision of the administration dated 24.1.1976 and, therefore, they are not of an executory nature and not amenable to a recourse under Article 146 of the Constitution. No new material was placed before the administration after 24.1.1976 and no new inquiry was carried out nor any decision taken.

On the preliminary objection:

Held, that a confirmatory act lacks executory nature and, therefore, it cannot be made the subject of a recourse under Article 146 of the Constitution; that a letter which is merely of an informative nature and does not contain a decision creating a new legal situation is not of an executory nature; that an act which contains a confirmation of an earlier one, may, however, be executory and therefore subject to a recourse for annulment if it has been made after a new inquiry; that whether a new inquiry has taken place is a question of fact; that since in this case all the material was in the hands of the admini-

* Article 146.3 of the Constitution provides:

"3. Such a recourse shall be made within seventy-five days of the date when the decision or act was published or, if not published and in the case of an omission, when it came to the knowledge of the person making the recourse".

stration before they reached the decision of 24.1.1976; that since everything was considered before that date; that since there is no difference between the reasoning given in 1976 and 1981 and 1982; and that since no new inquiry was carried out the letters of 26.11.1981 and 22.1.1982 are of an informative nature and they contain only a confirmation of the 1976 decision and no more; accordingly the recourse is out of time, because it was filed after the lapse of 75 days from the 1976 decision, and cannot be entertained by this Court.

Application dismissed.

Cases referred to:

Moran v. Republic, 1 R.S.C.C. 10, at p. 13;

Holy See of Kitium v. The Municipal Council of Limassol, 1 R.S.C.C. 15, at p. 18;

Protopapas v. Republic (1967) 3 C.L.R. 411, at pp. 415-416;

Mahdesian v. Republic (1966) 3 C.L.R. 630 at p. 633;

Economides v. Republic (1980) 3 C.L.R. 219;

Koudounaris v. Republic (1967) 3 C.L.R. 479 at p. 482;

Lardis v. Republic (1970) 3 C.L.R. 356 at p. 359;

HjiKyriacos and Sons Limited v. Republic (1971) 3 C.L.R. 286 at p. 290;

Republic v. Demetriou (1972) 3 C.L.R. 219 at p. 223;

Theodorou v. The Attorney-General of the Republic (1974) 3 C.L.R. 213;

HjiPanayi v. The Municipal Committee of Nicosia (1974) 3 C.L.R. 366 at p. 375;

Kolokassides v. The Republic (1965) 3 C.L.R. 542;

Ktena and Another (No. 1) v. The Republic (1966) 3 C.L.R. 64;

Varnava v. The Republic (1968) 3 C.L.R. 566 at p. 573.

Recourse.

Recourse against the refusal of the respondent to vary applicant's leave of absence without remuneration from 1.9.1974 -5.10.1974 to a sick-leave.

Ch. Ierides, for the applicant.

R. Vrachimi-Karyda (Mrs.), for the respondent.

Cur. adv. vult.

STYLIANIDES J. read the following judgment. The applicant by this recourse seeks annulment of the refusal and/or omission

of the respondent to vary his leave of absence without remuneration from 1.9.1974–5.10.1974 to a sick-leave.

Preliminary objection was raised in the opposition that the recourse is out of time as the act complained of is only a confirmatory one and not executory. The Court directed that the preliminary legal issue raised in the notice of opposition be heard first.

Paragraph 3 of Article 146 of the Constitution provides as follows:-

> "3. Such a recourse shall be made within seventy-five days of the date when the decision or act was published or, if not published and in the case of an omission, when it came to the knowledge of the person making the recourse".

This provision is mandatory and has to be given effect to in the public interest in all cases. Such view is in accordance with the interpretation of analogous provisions given by administrative tribunals in a number of European countries and also the view of authoritative writings on this subject.

The Court may on its own motion raise the issue as to whether or not a particular recourse is or is not out of time. (*John Moran and The Republic*, (*The Attorney-General and Another*), 1 R.S.C.C. 10, at p. 13; *The Holy See of Kitium and The Municipal Council of Limassol*, 1 R.S.C.C. 15, at p. 18; *Protopapas and The Republic*, (1967) 3 C.L.R. 411, at pp. 415–416; *Mahdesian and The Republic*, (1966) 3 C.L.R. 630, at p. 633).

The facts of this case are briefly as follows:-

The applicant is a retired teacher of religion who in 1974 was headmaster of a night Gymnasium of Nicosia. He was residing at Elenion Quarter of Nicosia. He was married with three children—two daughters and a son.

On 12.8.1974 he notified by letter (Appendix A) the Ministry of Education that on 13.8.1974 he would depart for Athens to accompany his wife for medical treatment, and applied for leave of absence from 1–5 September, 1974.

On 26th August, 1974, he sent a long letter from Athens

in which he stated that he had left Cyprus with his wife and son on the 13th August in order to accompany his wife to Greece for medical treatment. As in the meantime the invading Turkish forces advanced to all directions, during what is now commonly known as the 'second Turkish invasion', he decided to stay in Greece and take up employment with the Greek Ministry of Education in Athens. He applied for leave without remuneration for a whole year or for three months or even for 6–8 weeks until arrangements were made for his posting at a school in Athens. The reason for his such decision to stay and take up employment in Greece was that his house was at Elenion and he was afraid lest his daughters would be in danger by any further advance of the Turkish forces.

On 6.9.1974 he applied by cable for extension of his leave until 21.9.1974, pending the settlement of serious family matters.

On 19.9.1974 he applied again by cable for extension of his leave of absence until 5.10.1974 due to urgent family matters.

On 28.9.1974 he wrote from Lyon, France, informing the Ministry that one of the reasons that he had applied for extension of his leave of absence was the placing of one of his daughters at a college in England—which had been achieved the previous week—and the other ground was the betrothal of his elder daughter at Lyon which was happily officiated.

On 26.7.1974 the Director-General of the Ministry of Finance by circular (exhibit No. 1) communicated to the Government services a decision to grant leave of absence to civil servants only in exceptional cases.

Leave of absence without pay was granted to the applicant from 1.9.1974-5.10.1974. This was communicated to him by letter Π.Μ.Π. 1088/2 dated 8.10.1974, received by the applicant on 15th October, 1974.

On the following day—16th October, 1974—the applicant by letter (Appendix H) raised objection to the grant of leave without pay as besides the serious family grounds, which he put forward for his absence, health reasons compelled him to be absent from his service and he would submit medical reports in due course. He applied in affect for the revision of the

decision communicated to him and payment of his salary for the period in question.

On 4.12.1974 he submitted three medical reports: One from a paediatrician from Limassol dated 13.8.1974 countersigned on 9.11.1974 by the then District Medical Officer of Limassol, a medical certificate from a cardiologist of Athens dated 21.10.1974 and another one from a doctor in London dated 11.11.1974, and applied for review of the previous decision.

On 20.12.1975 his then advocate addressed a letter to the Director-General of the Ministry of Education whereby he referred to the medical reports submitted by his client on 4.12.1974 and he requested payment of his client's salary for the period 1.9.1974-5.10.1974, as among the grounds for his absence were personal health reasons.

On 24.1.1976 the respondent sent a letter to applicant's advocate informing him that, as it had already been explained to the applicant such claim could not be approved. The second paragraph thereof reads as follows:-

> "Βάσει τῶν εἰς τὰς σχετικὰς αἰτήσεις τοῦ κ. Κυπριανίδη στοιχείων δὲν ἐκρίθη ὅτι θὰ ἠδύνατο νὰ δικαιολογηθῇ οἱαδήποτε παρέκκλισις ἐκ τῆς γενικῆς τακτικῆς, ἡ ὁποία ἐφηρμόσθη ὑπὸ τοῦ Ὑπουργείου τούτου κατὰ τὰς ἀρχὰς τοῦ σχολικοῦ ἔτους 1974/75, ὑπὸ τὸ φῶς σχετικῆς ἀποφάσεως τῆς Κυβερνήσεως περὶ μὴ χορηγήσεως ἀδειῶν ἢ ἀνακλήσεως αὐτῶν, συμφώνως πρὸς τὴν ὁποίαν ἡ ἐκ τοῦ καθήκοντος ἀπουσία ἐκπαιδευτικῶν λειτουργῶν θὰ ἐλογίζετο ὡς ἄδεια ἀπουσίας ἄνευ ἀπολαβῶν".
>
> ("On the basis of the material appearing in the relevant applications of Mr. Kyprianides it was decided that a deviation from the general policy could not be justified, which was applied by this Ministry at the beginning of the school year 1974-75, in the light of the relevant decision of the government for not granting leave or their cancellation, whereby the absence from duty of educational officers would count as leave of absence without pay").

On 19.2.1976 the same advocate complained against the decision of 24.1.1976 and requested an amicable settlement of the dispute. No reply was given to this letter and the matter remained at that for over five years.

On 15.7.81, whilst the applicant was on leave prior to retirement, he addressed a long letter, repeating the history of his case and, relying on the medical reports submitted seven years earlier, he prayed for the payment of his salary, alleging that one of the reasons of his absence was his personal health. In this letter we read at page 3:-

"Πρὸ τῆς ἐπιμόνου ἀρνήσεως τοῦ κ. Γενικοῦ νὰ ἐγκρίνῃ τὸ αἴτημά μου ὑπὸ τὸ φῶς τῶν ὑποβληθέντων τριῶν πιστοποιητικῶν ἀσθενείας καὶ συναφῶν πρὸς αὐτὰ λεπτομερειακῶν ἐπεξηγήσεων, ἠναγκάσθην νὰ διακόψω τὴν περαιτέρω διαπραγμάτευσιν".

("In view of the persistent refusal of the Director-General to approve my claim in the light of the submitted three sick certificates and the relevant thereto detailed explanations I was forced to discontinue any further negotiations").

The reply to the applicant's letter of 15.7.1981 is contained in Appendix ΙΓ dated 26.11.1981 No. Π.Μ.Π. 1088/2 whereby the applicant is informed that his request to change his leave of absence without pay to a sick-leave, which had already been rejected in the past, could not be acceded to. In the second paragraph thereof he is reminded that the ground for rejecting his claim in the past continued to exist. It is further clarified that before his departure from the country and during his absence he did not mention in any of the documents submitted by him anything about his own health. Such ground was first raised on 16.10.1974, after his return to Cyprus. This had been examined but could not have possibly been approved.

On 21.12.1981 this prolific teacher expressed his dissatisfaction in writing—(see Appendix ΙΔ)—for the contents of Appendix ΙΓ and, inter alia, he wrote:-

"..... καθότι οὐδὲν νεώτερον αἰτιολογικὸν στοιχεῖον προσθέτει αὐτὴ εἰς ὅσα προηγουμένως ἐπὶ τοῦ θέματος αὐτοῦ μοῦ ἀνεκοινώσατε".

(" because it adds no new ground of reasoning to what you had already communicated to me on the matter").

And in conclusion he made known his intention to resort to justice for vindication of his rights.

The last letter of this correspondence, spread over the years, was sent on 22.1.1982 by the Acting Director-General of the Ministry of Education to the applicant. It is repeated therein that it is not possible to accede to his request as (a) the policy of the Government after the coup and the invasion was, not to grant leave of absence to civil servants, and in particular in relation to the educationalists who were abroad; leave of absence without remuneration was being granted to those who applied for, and such leave was granted to the applicant as he had applied for it; and (b) he did not put forward health reasons in any of his letters or telegrams during his absence. On the contrary, he was always relying on family and other grounds. He first raised personal health reasons after his return home. All the grounds put forward by him had been examined in the past and a reply was given to his advocate. Such reply is no other than the letter of 24.1.1976, to which reference has already been made.

It is the contention of learned counsel for the respondent that all such acts or decisions of the respondent are confirmatory of the decision of the administration of 24.1.1976 and, therefore, they are not of executory nature and are not amenable to a recourse under Article 146 of the Constitution. No new material was placed before the administration after 24.1.1976 and no new inquiry was carried out nor any decision taken.

Counsel for the applicant maintained that a new inquiry was carried out as reference to the medical reports appears for the first time in the letter of the respondent of 26.11.1981. The letter of 22.1.1982, which he is actually challenging, is the result of a new inquiry and the reasoning therein is different from that of 1976.

A confirmatory act or decision is an act or decision of the administration which repeats the contents of a previous executory act and signifies the adherence of the administration to a course already adopted; it is not in itself executory because it does not itself determine the legal position of an individual case, and cannot, therefore, be the subject of a recourse. (*Stassinopoulos, The Law of Administrative Disputes*, 4th edition, p. 175; *Conclusions from the Jurisprudence of the Greek Council of State*, 1929–1959, pp. 240–241).

It is well settled that a confirmatory act lacks executory nature and, therefore, it cannot be made the subject-matter of a recourse under Article 146 of the Constitution. (*Tsatsos—Application for Annulment*, 3rd edition, p. 131). For an act to be confirmatory the following elements are required:-

(a) Identity of the issuing authority;

(b) Identity of the person or persons to whom it relates;

(c) Identity of the procedure;

(d) Identity of the reasoning; and,

(e) Identity of the order.

(*Tsatsos*—op. cit., pp. 132-133).

There is no quarrel that (a), (b), (c) and (e) are identical in the decision communicated to the applicant on 24.1.1976 and the letters of 26.11.1981 and 22.1.1982.

It is well settled that a letter, which is merely of an informative nature and does not contain a decision creating a new legal situation, is not of an executory nature and, therefore, it cannot be made the subject-matter of a recourse under Art. 146. (*Economides* v. *Republic*, (1980) 3 C.L.R. 219; *Koudounaris* v. *The Republic*, (1967) 3 C.L.R. 479, 482; *Lardis* v. *The Republic*, (1970) 3 C.L.R. 356, 359; *HjiKyriacos and Sons Limited* v. *The Republic*, (1971) 3 C.L.R. 286, 290; *The Republic* v. *Demetriou*, (1972) 3 C.L.R. 219, 223; *Theodorou* v. *The Attorney-General of the Republic*, (1974) 3 C.L.R. 213; *HjiPanayi* v. *The Municipal Committee of Nicosia*, (1974) 3 C.L.R. 366, 375).

An act which contains a confirmation of an earlier one, may, however, be executory and therefore subject to a recourse for annulment if it has been made after a new inquiry into the matter. (*Kolokassides* v. *The Republic*, (1965) 3 C.L.R. 542; *Ktena and Another (No. 1)* v. *The Republic*, (1966) 3 C.L.R. 64; *Varnava* v. *The Republic*, (1968) 3 C.L.R. 566, at p. 573).

When does a new inquiry exist? The answer is given by *Stassinopoulos* in *The Law of Administrative Disputes*, 1964, 4th edition, at p. 176, a passage which was adopted and applied by this Court in a number of cases:-

"When does a new inquiry exist, is a question of fact. In general, it is considered to be a new enquiry, the taking into consideration of new substantive legal or factual elements, and the used new material is strictly considered, because he who has lost the time limit for the purpose of attacking an executory act, should not be allowed to circumvent such a time limit by the creation of a new act, which has been issued formally after a new enquiry, but in substance on the basis of the same elements. So, it is not considered as a new enquiry, when the case is referred afresh to a Council for examination exclusively on its legal aspect, or when referred to the Legal Council for its opinion or when another legal provision other than the one on which the original act was based is relied upon if there is no reference to additional new factual elements. There is a new enquiry particularly when, before the issue of the subsequent act, an investigation takes place of newly emerged elements or although preexisting were unknown at the time which are taken into consideration in addition to the others, but for the first time. Similarly, it constitutes new enquiry the carrying out of a local inspection or the collection of additional information in the matter under consideration".

In the present case all the material, including the medical reports, was in the hands of the administration before they reached the decision of 24.1.1976. Everything was considered before that date. I see no difference between the reasoning given in 1976 and 1981 and 1982. Indeed neither the applicant saw any difference at all and he grudgingly mentioned this in his letter of 21.12.1981. No new enquiry was carried out. The letters of 26.11.1981 and 22.1.1982 are of an informative nature; they contain only a confirmation of the 1976 decision and no more.

Counsel for the applicant invited the Court to follow the decision in *Economides* case (supra). The facts in *Economides* case are clearly distinguishable from the facts of the present case.

The act/s or decision/s attacked by this recourse are no more than confirmatory of the executory act of 24.1.1976.

In view of the above this recourse is out of time and cannot be entertained by this Court. For these reasons this case is dismissed but in all the circumstances of the case no order as to costs is made.

Application dismissed. No order as to costs.