1982 October 23

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CHARALAMBOS MYLONAS,

Applicant,

v.

THE EDUCATIONAL SERVICE COMMITTEE,

Respondent.

(*Case No.* 172/81).

Administrative Law—Administrative acts or decisions—Executory act—Confirmatory act—It lacks executory nature and it cannot be made the subject of a recourse under Article 146 *of the Constitution—But an act containing a confirmation of an earlier one may be executory and, therefore, subject to a recourse if made after a new inquiry—It is a question of fact when a new inquiry is carried out—The taking into consideration of new substantive legal and factual elements, not used before, amounts to a decision reached after a new inquiry.*

Constitutional Law—Equality—Article 28 *of the Constitution—Concept of equality—A relative one and applies only in cases of legality—Non-application of the Law by the administration on another occasion no ground for annulment of sub judice decision.*

Superior orders—Soldiers—Not bound to obey superior orders which are contrary to the basic principles of the Constitution—Coup d' etat of July 15, 1974*—Orders from the coupists to reservists —They were manifestly illegal—Applicant a reservist, had a duty to obey the Law of the land and protect the constitutional order—Plea of superior orders, absence of mens rea and acting under compulsion not constituting a defence.*

The applicant, a school-master of the elementary education was tried disciplinarily and was convicted by the Educational Service Committee on four disciplinary offences committed

during the days of, and in connection with, the Coup d'etat of July 15, 1974. Following a request by his counsel the Committee decided to re-examine his case and the applicant submitted to the Committee a number of written signed statements by inhabitants of Kokkinotrimithia, going to the guilt or innocence of the applicant, together with a petition signed by a number of villagers. After considering this material the Committee decided not to interfere with the conviction but it decided to reduce the sentence. As against the decision of the Committee which was taken after the above re-examination the present recourse was filed.

Counsel for the applicant mainly contended that:

(1) The decision of the Committee and the sentence imposed on him are contrary to the principle of equality enunciated in Art. 28 of the Constitution as it constitutes unequal treatment and discrimination against the applicant in view of the fact that by decision of the Government other persons, who committed more serious similar offences, were not proceeded with; and,

(2) The charges against the applicant were not brought home against him as—

(a) Mens rea has not been proved;

(b) The applicant was obeying superior orders; and,

(c) He was acting under compulsion.

Counsel for the respondent in his opposition raised the objection that the recourse was out of time as there was no new executory administrative act in the sense of Article 146.1 of the Constitution.

Held, (I) on the objection:

That a confirmatory act lacks executory nature and it cannot be made the subject of a recourse under Article 146 of the Constitution; that an act which contains a confirmation of an earlier one may be executory and, therefore, subject to a recourse for annulment if it has been made after a new inquiry into the matter; that when a new inquiry is carried out it is a question of fact; that the taking into consideration of new substantive legal and factual elements, not used before, amounts to a decision reached

after a new inquiry; that the respondent Committee examined applicant's case in the light of the new material placed before it which partly refers to the issue of his guilt or innocence; that therefore, its decision is not a confirmatory act but an executory administrative act; accordingly the preliminary objection fails both in fact and in law.

Held, (*II*) *on the merits of the recourse:*

(1) That the concept of equality is a relative one and applies only in cases of legality; that the non-application of the Law by the administration on another occasion is no ground for annulment of the sub judice decision; accordingly contention (1) should fail.

(2) That the disciplinary offences of which the applicant was found guilty were committed in the days of the abortive coup; that no doubt could be entertained by any person living in this country—and more so by a school-master, Grade "A", as the present applicant—that the coupists and the purported overthrow of the constitutional order were illegal acts; that the citizens of a country, irrespective of whether they are members of the Police, the Forces, etc., not only are not bound to obey superior orders which are contrary to the basic principles of the Constitution but, on the contrary, they are bound to take action in support of the freedom of the people and the protection of the constitutional order; that the orders and directions which the applicant raised in defence were manifestly illegal and they constitute no defence at all; that they were unlawful and the duty of this teacher reservist officer was to obey the Law of the land and to protect, as other Cypriots did at the time, the constitutional order; that the plea of mens rea and compulsion failed before the Committee; that these matters are well settled and useful reference may be made to the Criminal Code and the Case Law on the matter; accordingly contention (2) should, also, fail.

Application dismissed.

Cases referred to:

Moran v. *The 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. *The Republic* (1967) 3 C.L.R. 411 at pp. 415–416;

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

HadjiKyriacos and Sons Ltd. v. *The Republic* (1971) 3 C.L.R. 286;

Papademetriou v. *Board for Registration of Architects and Civil Engineers* (1977) 3 C.L.R. 411 at p. 420;

Varnava v. *The Republic* (1968) 3 C.L.R. 566;

Limassol Chemical Products Ltd. v. *The Republic* (1978) 3 C.L.R. 52;

Dr. G.N. Marangos Ltd. v. *The Municipality of Famagusta and Another* (1979) 3 C.L.R. 73;

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

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

Voyiazianos v. *The Republic* (1967) 3 C.L.R. 239,

Ioannides v. *The Republic* (1973) 3 C.L.R. 117;

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

Enotiadou v. *The Republic* (1971) 3 C.L.R. 409 at pp 414–415;

Haros v. *The Republic*, 4 R.S.C.C. 39 at p. 43;

Kyprianou v. *The Public Service Commission* (1973) 3 C.L.R. 206;

Lambrou v. *The Republic* (1972) 3 C.L.R. 379;

Constantinou v. *The Republic* (1969) 3 C.L.R. 190 at pp. 207–208;

Republic v. *Georghiades* (1972) 3 C.L.R. 594;

Anastassiou v. *Demetriou and Another* (1981) 1 C.L.R. 589;

Keighley v. *Bell* [1886] 4F. & F. 769 at p. 790;

Queen v. *Smith* [1900] 17 Cape S.C. Reports 561.

Recourse.

Recourse against that part of the decision of the respondent whereby the applicant was found guilty on certain disciplinary offences.

C. L. Clerides, for the applicant.

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

Cur. adv. vult.

STYLIANIDES J. read the following judgment. By this recourse the applicant seeks a declaration that the part of the decision of the Educational Service Committee issued on 28th February, 1981, whereby upon a re-examination of applicant's case, he was found guilty on certain disciplinary offences, is null and void and of no effect.

The applicant, a school-master of the elementary education, during the summer school vacations of 1974 was residing at his native village, Kokkinotrimithia. He was a reservist of the National Guard. The bloody abortive coup d'etat took place on 15th July, 1974. As a result of certain acts of this applicant and after the proper procedure was followed, he was charged with four disciplinary offences committed during the days of, and in connection with, the coup d'etat. Two of them were preferred under s.2 of The Certain Disciplinary Offences (Conduct of Investigation and Adjudication) Law, 1977 (Law No. 3 of 1977) and two under s.63 of the Public Educational Service Law, 1969, (Law No. 10 of 1969). Counts No. 1 and 3 refer to acts or omissions showing lack of loyalty and of devotion to the Republic of Cyprus and of respect to the Laws or in any way tending to promote the coup d'etat or the overthrow of the constitutional order or the State structure, and counts No. 2 and 4 refer to acts or omissions amounting to contravention of the duties or obligations of an educational officer.

The Educational Service Committee dealt with this case on 14.5.79, 28.6.79, 25.9.79 and 26.9.79. On 17.10.79 it delivered its decision finding the applicant guilty on all four counts. After hearing address in mitigation, it imposed on him on counts No. 1 and 2 the punishment of reduction of his salary to the starting point of the scale of School-master "A" as from 17.10.79, and on counts No. 3 and 4 disciplinary transfer to the Elementary School of Kyperounta as from 18.10.79.

The applicant by Recourse No. 470/79 challenged before the Supreme Court the aforesaid decision.

The applicant through his counsel on 5.12.80 applied in writing to the respondent Committee for re-examination of its decision of 17.10.79 in virtue of the respondent's powers under s.5(2) of the Public Educational Service Law, 1969 (Law No. 10

of 1969). (See Blues 67-68 of exhibit No. 1 and Appendix "A" to the opposition).

After obtaining legal advice from the Attorney-General (see Appendices "B" and "C"), the respondent on 29.12.80 decided to re-examine its said decision and informed the applicant accordingly.

The applicant and his advocate appeared before the respondent Committee. New material, consisting of a number of written signed statements by inhabitants of Kokkinotrimithia, going to the guilt or innocence of the applicant and a petition signed by a number of villagers in support of the applicant, was placed before the Committee. All these documents purport to have been signed from the 20th May - 3rd June, 1979, long before the first hearing of the case. (See Blues No. 50-66 in exhibit No. 1). In their letter of 5.2.80 it is stated that by oversight these had not been placed before the Committee earlier.

After hearing counsel for the applicant, the respondent Committee reserved its decision to study the new material submitted to it by applicant's side and consider the address of his counsel. On 28.2.81 they issued the sub judice decision. They did not interfere with the conviction but they reduced the sentence. The material part reads as follows:-

"Γι' αὐτὸ ἀνακαλεῖ τὴν ἀπόφασή της γιὰ τὴν ἐπιβολὴ τῆς ποινῆς τοῦ ὑποβιβασμοῦ στὸ ἀρχικὸ σημεῖο τῆς κλίμακας τοῦ δασκάλου Α' ἀπὸ τὶς 17.10.1979 καὶ ἀντὶ αὐτῆς ἐπιβάλλει ὡς χρηματικὴ ποινὴ τὸ ποσὸ τὸ ὁποῖο ὁ δάσκαλος ἔχασε ἀπὸ τὶς 17.10.1979 μέχρι τὴν 1.1.1981 λόγῳ τοῦ ὑποβιβασμοῦ. Ἀπὸ τὴν 1.1.1981 ὁ δάσκαλος ἀποκαθίσταται καὶ ἐπανέρχεται στὸ σημεῖο τῆς κλίμακας στὸ ὁποῖο θὰ βρισκόταν τὴν 1.1.1981 ἂν δὲν εἶχε μεσολαβήσει ὁ ὑποβιβασμός. Ἡ ἡμερομηνία προσαυξήσεως παραμένει ὅπως ἦταν.

Ὡς πρὸς τὴν πειθαρχικὴ ποινὴ τῆς πειθαρχικῆς μεταθέσεως ἡ Ἐπιτροπὴ θεωρεῖ ὅτι ὁ δάσκαλος, μὲ τὴν μετάθεσή του στὴ Κυπερούντα ὅπου ὑπηρέτησε γιὰ ἕνα χρόνο περίπου, ἔχει ἱκανοποιήσει τοὺς σκοποὺς γιὰ τοὺς ὁποίους τοῦ εἶχε ἐπιβληθεῖ".

("For this reason it revokes its decision for the imposition of the punishment of demotion to the starting point of the

scale of Teacher 'A' as from 17.10.1979 and in its place it imposes as a monetary sentence the amount which the teacher has lost from 17.10.1979 - 1.1.1981 due to the demotion. As from 1.1.1981 the teacher is reinstated and returns to the point on the scale to which he would have been on 1.1.1981 had the demotion not intervened. The incremental date remains as it was.

As regards the disciplinary punishment of disciplinary transfer the Committee considers that the teacher, with his transfer to Kyperounda where he served for about a year, has fulfilled the purposes for which it had been imposed").

The respondent in his opposition raised the objection that the recourse is out of time as there is no new executory administrative act in the sense of Art. 146.1 of the Constitution. Mr. Flourentzos, in his address contended that, as the respondents did not revoke its previous decision on the guilt of the applicant, either there is no new decision or their decision is simply a confirmatory one, and, therefore, this recourse is not entertainable by the Court.

It is well settled that the provision of Art. 146.3 - that 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 - is mandatory and has to be given effect in the public interest in all cases.

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).

Mr. Flourentzos cited in support of his objection, inter alia, *Kyriacopoulos - Greek Administrative Law* - 4th edition, volume 3, pp. 94 and 96, and the decisions of this Court in *Hadjikyriakos & Sons Ltd. v. The Republic of Cyprus, through the Minister of Agriculture and Natural Resources*, (1971) 3 C.L.R. 286; *Demetrios S. Papademetriou v. The Board for Registration of Architects*

and Civil Engineers, (1977) 3 C.L.R. 411, at p.420; *Varnava v. The Republic,* (1968) 3 C.L.R. 566; *Limassol Chemical Products Co. Ltd. v. The Republic of Cyprus, through the Minister of Commerce and Industry,* (1978) 3 C.L.R. 52; and *Dr. G. N. Marangos Ltd. v.* 1. *The Municipality of Famagusta,* 2. *The Republic of Cyprus, through the Council of Ministers,* (1979) 3 C.L.R. 73.

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).

A confirmatory act lacks executory nature and it cannot be the subject of a recourse under Art. 146 of the Constitution. (*Tsatsos - Application for Annulment* - 3rd ed., p.131; *Kyriacopoulos - Greek Administrative Law* - 4th ed., volume 3, p.96). The decisions cited by respondent's counsel are to the same effect.

An act which contains a confirmation of an earlier one may be executory and, therefore, subject to a recourse for annulment if it has been made after a new inquiry into the matter. This is borne out by the authorities above referred. (See also *Kolokassides v. The Republic,* (1965) 3 C.L.R) 542; *Ktenas and Another* (*No. 1*) v. *The Republic,* (1966) 3 C.L.R. 64).

Was a new inquiry carried out in the present case? This is a question of fact. The taking into consideration of new substantive legal and factual elements, not used before, amounts to a decision reached after a new inquiry. There is a new inquiry when, before the issue of the subsequent act, an investigation takes place of newly emerged elements or although pre-existing were unknown at the time and were taken into consideration in addition to the others, but for the first time. Similarly, the collection of additional information in the matter under consideration constitutes a new inquiry. (*Stassinopoulos - The Law of Administrative Disputes* - 4th edition, p.176).

Blues No. 50, 51, 52, 53, 54 and 55 are statements of inhabitants of Kokkinotrimithia relating to the disciplinary offences of which the applicant was found guilty. The aforesaid statements are contradicted by the written statement of the applicant repeated by him on oath before the Committee. The respondent Committee at the first inquiry had before it the evidence of another school-master and the statement of the applicant in his own handwriting - (Blues 8 and 9) - in which he admitted that he was manning, dressed in military uniform and armed with automatic weapon, a check-point from 16th - 19th July, 1974. The respondent expressly took time to study the new elements submitted by the applicant. (See Blue 73). Also in their sub judice decision they referred specifically to Blues 50-66 inclusive. I have no reason to doubt that the Committee re-examined applicant's case in the light of the new material placed before it which partly refers to the issue of his guilt or innocence. Therefore, there was new material and new elements of fact before the respondent when it re-examined applicant's case.

The silence of the respondent on the subject of the earlier conviction signifies only that they decided not to revoke their decision whereby the applicant was found guilty of the disciplinary offences. The respondent re-examined the case; it carried out a new inquiry and arrived at the decision not to change their previous decision on the guilt of the applicant. Such decision is not a confirmatory but an executory administrative act. The preliminary objection fails both in fact and in law.

A number of grounds of Law were set out in the recourse. Most of them have been abandoned at the commencement of the hearing and I need not advert to them.

It was submitted by counsel for the applicant that:-

(1) The decision of the Committee and the sentence imposed on him are contrary to the principle of equality enunciated in Art. 28 of the Constitution as it constitutes unequal treatment and discrimination against the applicant in view of the fact that by decision of the Government other persons, who committed more serious similar offences, were not proceeded with; and,

(2) The charges against the applicant were not brought home against him as -

(a) Mens rea has not been proved;

(b) The applicant was obeying superior orders; and,

(c) He was acting under compulsion.

1. The principle of equality is enshrined in Art. 28 of the Constitution which was judicially considered by the Supreme Court and its predecessor, the Supreme Constitutional Court, in a great number of cases.

The concept of equality is a relative one and applies only in cases of legality. The non-application of the Law by the administration on another occasion is no ground for annulment of the sub judice decision. (*Greek Council of State - Case No. 761/36; Conclusions from the Jurisprudence of the Greek Council of State*, 1929-1959, p.158; *Voyiazianos v. The Republic of Cyprus*, (1967) 3 C.L.R. 239; *Ioannides v. The Republic*, (1973) 3 C.L.R. 117; *Ecaterini Karayianni & Others v. The Educational Service Committee*, (1979) 3 C.L.R) 371).

2. As pointed out in *Enotiadou v. The Republic*, (1971) 3 C.L.R. 409, at pp. 414-415, disciplinary proceedings are not a trial by a Court but an inquiry by an administrative organ. (See also *Haros and The Republic*, 4 R.S.C.C. 39, at p.43).

It is well settled that an administrative Court in dealing with a recourse made against a disciplinary conviction should not, as a rule, interfere with the subjective evaluation of the relevant facts as made by the appropriate organ. (Decisions of the Greek Council of State in *Cases No.* 2654/65 *and* 1129/66; *Ioanna Enotiadou v. The Republic*, (1971) 3 C.L.R. 409; *Kypros Kyprianou v. The Public Service Commission*, (1973) 3 C.L.R. 206; *Lambrou v. The Republic*, (1972) 3 C.L.R. 379).

In *Constantinou v. The Republic*, (1969) 3 C.L.R. 190, at pp. 207-208, it was said:-

> "I would like to reiterate once again what has been said in a number of cases, that the evaluation of the evidence remains the province of the council, and that the Court, in reviewing the determination of the council, would not interfere if there was any evidence on which the council could reasonably have come to the conclusion which they did. If, on the other hand, there was no evidence upon

which they could reasonably have arrived at that conclusion or they have misconceived the effect of the facts before them, or they misdirected themselves on the question of the law, then their decision can be reviewed by this Court."

The ground for annulment directed against the administration's determination of the facts or questioning its determination on the merits, is unacceptable if it is not proved to be the product of misconception of fact or in excess of the extreme limits of the discretionary powers of the administration. (*Digest of Decisions of the Greek Council of State for the Years* 1961-1963, volume A (A - N) p.57; *Republic v. Lefkos Georghiades*, (1972) 3 C.L.R. 594).

The disciplinary offences of which the applicant was found guilty were committed in the days of the abortive coup. No doubt could be entertained by any person living in this country - and more so by a school-master, Grade "A", as the present applicant - that the coupists and the purported overthrow of the constitutional order were illegal acts.

The applicant alleged in his statement (Blues 8 and 9) that he obeyed orders given to reservists in general on the wireless and later directions by the officers who took part in the coup at YEEF.

The National Guard was established under the Law in order to avert any threatened invasion or any other activity directed against the independence or territorial integrity of the Republic or threatening the safety of life or property. (Section 3 of The National Guard Law, 1964). It was definitely out of the object or purpose or duties of the National Guard to overthrow the constitutional order and impose a despotism on the people of this country.

The Army in a democratic society is an organ of the State for the maintenance of the national liberty and is subordinate to the Constitution and the Laws of the country. A soldier may incur special obligations in his official character but is not thereby exempted from the ordinary liabilities of a citizen. The establishment and maintenance of military forces in a country have to be reconciled with the maintenance of freedom and the supremacy of the Law of the land. A member of the National

Guard is subject to the Law and to all the duties and liabilities of an ordinary citizen. He is subject to the same criminal liability as a civilian and his military character will not save him from standing in the dock on the charge of violating the Laws of the country. A soldier cannot escape even from his civil liabilities except if and where there is specific provision in the Law.

In *Anastassiou v. Demetriou & Another,* (1981) 1 C.L.R. 589, it was held that obedience to superior orders does not exonerate a person from civil liability.

When a soldier is put on trial on a charge of crime, obedience to superior orders is not of itself a defence. (*A. V. Dicey - The Law of the Constitution* - 10th edition, pp. 302-306; *Stephen - History of the Criminal Law* - [1883], vol. 1, pp. 204-206).

It is incontrovertible principle of the common law that the fact of a person being a soldier and of his acting strictly under orders does not of itself exempt him from criminal liability for acts which would be crimes if done by a civilian, but compare *Keighley v. Bell,* (1866) 4 F. & F. 763, at p.790, cited in *The Queen v. Smith,* [1900] 17 Cape S.C. Reports 561. In the opinion of Willes, J., obedience to an order of a superior officer which is not necessarily or manifestly illegal may be a good defence to a criminal charge against a person subject to military law.

The notion prevailing is that the citizens of a country, irrespective of whether they are members of the Police, the Forces, etc., not only are not bound to obey superior orders which are contrary to the basic principles of the Constitution but, on the contrary, they are bound to take action in support of the freedom of the people and the protection of the constitutional order. (See Article 120(4) of the Constitution of Greece, 1975). The orders and directions which the applicant raised in his defence were manifestly illegal; they constitute no defence at all. They were unlawful and the duty of this teacher reservist officer was to obey the Law of the land and to protect, as other Cypriots did at the time, the constitutional order.

The plea of mens rea and compulsion failed before the Committee. I need not expand on these two matters. They are

well settled and useful reference may be made to the Criminal Code and the Case Law on the matter.

Having regard to all the facts and circumstances, I find that the decision of the Committee was reasonably open to it.

For all the above reasons this recourse is dismissed. No order as to costs is made.

Recourse dismissed. No order as to costs.