

1983 January 15

[LORIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

- 1. ANDREAS PAPACHARALAMBOUS,
- 2. PAVLOS ANGELIDES,

Applicants.

v.

THE BAR COUNCIL,

Respondent.

(Case No. 136/82).

Act or decision in the sense of Article 146.1 of the Constitution—Bar Council—Not an “organ authority or person exercising any executive or administrative authority” in the sense of the above Article—Acts or decisions thereof not within the domain of public Law—They lack the character of “executory act” and they cannot be made the subject of a recourse under the above Article. 5

Advocates—Bar Council—Not an organ authority or person exercising “executive or administrative authority” in the sense of Article 146 of the Constitution.

By means of this recourse, which was brought against the Bar Council, by the applicants who are practising advocates, there was sought, inter alia, a declaratory judgment that the interested parties, who were elected members of the Bar Council—the first one as president and the others as members thereof—unlawfully and/or by abuse of power were established in the said posts. 10 15

On the question whether the act complained of could be made the subject matter of a recourse under Article 146.1 of the Constitution.

Held, that an association of advocates under the Advocates Law and in particular the respondent Bar Council is an association of professional people promoting their own profes- 20

sional interests, but they are not by their very nature organs or authorities exercising "executive or administrative authority" in the sense of Article 146 as there is neither express legislative provision rendering the functions of the association in question a matter of public law, (see *Elias Petrou and others v. The New Cooperative Credit Society of Karpashia*, 3 R.S.C.C. 58) nor does it present the requisites held by the Greek Council of State to constitute public corporate bodies (Νομικά Πρόσωπα Δημοσίου Δικαίου), such as state control over such bodies, or such an extent of impact of public law on their organisation and functions so as to justify characterisation of same as Public Service (see Conclusions of the Greek Council of State 1929-1959 at pp. 120, 121; that, therefore, the respondent Bar Council is not an "organ, authority or person exercising any executive or administrative authority" in the sense of Art. 146 of the Constitution; and that accordingly any act or decision of the respondent not being within the domain of public law lacks the character of an executory act which can be impugned under the said article.

Application dismissed.

Cases referred to:

HjiKyriacou v. HjiApostolou, 3 R.S.C.C. 89;

Republic v. M.D.M. Estate Developments Ltd. (1982) 3 C.L.R. 642;

Charalambous v. Republic (1982) 3 C.L.R. 403;

Chiratis v. Republic (1982) 3 C.L.R. 540;

Tekkis and Another v. Republic (1982) 3 C.L.R. 680;

Petrou and Others v. The New Co-Operative Credit Society of Karpashia, 3 R.S.C.C. 58.

30 Recourse.

Recourse against the election of the Chairman and Members of the Bar Council.

P. Angelides, for the applicants.

A. Markides with *M. Christofides*, for the respondents.

35 *A. Markides* with *Chr. Triantafyllides*, for the interested parties.

Cur. adv. vult.

LORIS J. read the following decision. Both applicants by virtue of the present recourse pray for:

- “(a) Declaratory judgment to the effect that Manolis Christofides, Ermioni Markides, Evangelia Ioannides, Alexandros Koumoundouros and Michael Vasiliou, who were elected members of the Bar Council - the first one as president and the others as members thereof - unlawfully and/or by abuse of power were established in the said posts. 5
- (b) Declaratory judgment that the General Meeting convened on or about the 15.2.82 at which the aforesaid were elected in the above posts is void and/or unlawful and devoid of any legal effect. 10
- (c) Declaratory judgment to the effect that the election of the above is void and/or unlawful and or devoid of any effect.
- (d) Any other remedy the Court deems fit under the circumstances.” 15

Applicants based the present recourse on the following grounds of law set out in the recourse:

- “(1) Those who voted at the meeting included a number of persons who did not qualify to elect or to be elected on the basis of the relevant legislation. 20
- (2) The notices envisaged by law before the summoning of the meeting, were not given and the voting was not secret.
- (3) The meeting was held in such a manner and at such place and time that deprived applicants and other advocates of the right to elect or to be elected. 25
- (4) The rules of sound administration and other rules of administrative law were not observed at the meeting.”

The respondents applied for further and better particulars in respect of the legal points on which the recourse is based. 30

The applicants furnished on 31.8.82 the following particulars:

- “1. Those who voted and were not entitled to vote at the General Meeting were all the voters with the exception of the candidates. 35

2. The persons referred to in para 1 above were not the holders of an 'annual licence'.
3. The section of the law which requires possession of Licence is Article 11 of the Advocates' Law as amended.
- 5 4. The provision for secret voting is a general principle of the law of Trade Unions and Organs of Public Administration.
5. The elections are being impugned by a recourse because the Bar Associations are organs of Public Law."
- 10 Before the filing of the opposition by the respondents one of the interested parties, namely, Ermioni Markidou, applied to the Court invoking the provisions of Art. 134.2 of the Constitution for the dismissal of the present recourse as being prima facie "frivolous" relying on the following grounds set out in her appli-
- 15 cation.
 - “(a) The recourse does not disclose an executive act in the sense of Art. 146 of the Constitution.
 - (b) The subject of the recourse does not fall within the domain of Public Law and therefore the Supreme Court in its revisional jurisdiction lacks competence and/or power to hear and determine the present recourse.
 - 20 (c) Even assuming that the subject of the recourse constituted an executive act within the ambit of Article 146 of the Constitution within the domain of Public Law, applicants lack present existing legitimate interest.
 - 25 (d) The Bar Council does not constitute an organ, authority or person exercising executive or administrative authority in the sense of Art. 146 of the Constitution.
 - 30 (e) In any event the Bar Council as mentioned in the recourse is not the proper party and has no locus standi.
 - 35 (f) Further the subject of the recourse is electoral act of the advocates of Cyprus which cannot constitute the subject of a recourse under Art. 146 of the Constitution.”

The aforesaid application of the interested party was opposed by the applicants in the main recourse who maintained that:

- “A. Bar Associations are Public Corporate Bodies (Νομικά Πρόσωπα Δημοσίου Δικαίου)
- B. The elections of Bar Associations are administrative acts and/or acts subject to a recourse under Art. 146 of the Constitution. 5
- C. Each advocate has an existing legitimate interest.
- D. The proper party to the present recourse is the relevant Bar Association.” 10

On the 2nd December, 1982, before the hearing of the application under Art. 134.2 of the Constitution, the applicant withdrew her said application under Art. 134.2 and invited the Court to treat the grounds raised by the withdrawn application as preliminary objections in point of law; the remaining interested parties as well as the respondents applied likewise and the applicants in the main recourse consented to such a course being followed. 15

As a result the application under Art. 134.2 was dismissed on 2.12.82. 20

I shall now proceed to pronounce on the preliminary legal points set out above as invited by all concerned to act.

Learned counsel for the interested parties elaborated on the above preliminary points and adopting the argument on behalf of the respondents advanced in Recourse No. 135/82 (in which the decision of this Court was delivered short while ago) dealt mainly with two points, notably: 25

- (a) That the respondent Bar Council is not a public corporate body (Νομικόν Πρόσωπο Δημοσίου Δικαίου).
- (b) That the present recourse does not impugn any executive or administrative act, as the subject matter of the recourse is outside the ambit of Article 146 of the Constitution. 30

He further maintained that the proper respondent in the present proceedings should be the Bar Association 35

and not the Bar Council, but he later withdrew this objection reserving the rights of the interested parties to raise it, if need be, at the hearing of the recourse on its merits, in case the Court pronounces in favour of the applicants on the preliminary points raised jointly by the interested parties and the respondents.

Learned counsel for the respondent Bar Council addressed the Court on the same lines as the interested parties.

Learned counsel for applicants in the main recourse adopted his own argument advanced in Recourse No. 135/82 maintaining that the respondent Bar Council is a public corporate body (Νομικὸν Πρόσωπο Δημοσίου Δικαίου) and as such exercises executive or administrative authority in the sense of Article 146 of the Constitution. As learned counsel for applicants based his argument mainly on Greek Administrative Law and as Greek authorities have been frequently resorted to for guidance in matters of administrative law, I feel that I should deal first as briefly as possible with the legal aspect of this point viewed from the angle of the Greek Administrative Law; but at the same time I wish to lay stress on the fact that guidance deduced from Greek authorities is one thing, (quite useful and helpful I should say) whilst employment of Greek Statute Law as if it were part and parcel of Cyprus Law is quite a different matter, absolutely impermissible as apt to lead to confusion, to say the least, in our law.

There is no precise definition in Greek Law of a public corporate body (Νομικὸ Πρόσωπο Δημοσίου Δικαίου); further there is no definition of a "public corporate body exercising executive or administrative authority"; several characteristics have been isolated and quite a number of criteria have been suggested by various eminent Greek writers from which the necessary requisites may be debicted with a view to defining a public corporate body exercising executive or administrative authority, (vide *Stassinopoulos - Lessons of Administrative Law* 1957 ed. pp. 172 - 188, *Kyriacopoulos - Greek Administrative Law*, 4th ed. Vol. B (General Part) at p. 220, *Dendia - Administrative Law* 5th ed. Vol. A pp. 191, 193, 195) although such a definition would not have been conclusive and on occasions it might be proved unsatisfactory.

In the *Conclusions of the Greek Council of State 1929 - 1959* under the heading "Public Corporate Bodies" (ΝΟΜΙΚΑ ΠΡΟΣΩΠΑ ΔΗΜΟΣΙΟΥ ΔΙΚΑΙΟΥ) at p. 118, several characteristics of public corporate bodies which have been accepted by the Greek Council of State are given (p. 119) whilst the aiming at several objects are being enumerated which have been accepted by the Council as falling within the objects of Public Corporate Bodies (pp. 119 and 120). 5

Finally, at the bottom of p. 120 and at the beginning of the ensuing page the following are stated verbatim: 10

“Νομικόν τι πρόσωπον δέν δύναται νά θεωρηθῆ ὡς δημοσίου δικαίου ἐάν ἐκ τῶν κειμένων διατάξεων δέν προκύπτῃ, ὅτι ἢ ἐπὶ τῆς ὀργανώσεως καί λειτουργίας του ἐπιρροή ἀρχῶν δημοσίου δικαίου εἶναι τόσον οὐσιώδης ὥστε νά ὑπάρχῃ τοιοῦτος βαθμός ἐξαρτήσεως ἀπό τήν Πολιτείαν, δικαιολογῶν τόν χαρακτηρισμόν τοῦ ὑπ’ αὐτοῦ ἐπιτελουμένου ἔργου ὡς δημοσίας ὑπηρεσίας: 1112(50), ἐάν δέν ὠπλίσθη τοῦτο διὰ τῶν προνομίων τοῦ δημοσίου δικαίου καί τῆς χρήσεως διοικητικῶν μεθόδων καί ἐάν δέν ὑπερβαίνη ἢ ἐπ’ αὐτοῦ ἀσκουμένη ἐποπτεία τήν συνήθη ἐποπτείαν ἐπὶ τῶν νομικῶν προσώπων τοῦ ἰδιωτικοῦ δικαίου: 1112(50). Συνεπῶς, δέν ἀρκεῖ μόνον τὸ γεγονός ὅτι ἀπλῶς χαρακτηρίζεται ὑπό τοῦ νόμου ὡς νομικόν πρόσωπον δημοσίου δικαίου: 1087 (46), οὐδ’ ὅτι ἀπλῶς καί μόνον ἐπιβάλλεται ὑπὲρ αὐτοῦ εἰσφορά: 1072(48). 15 20 25

Νομικόν πρόσωπον, το ὅποῖον δέν ἐπιτελεῖ δημοσίαν ὑπηρεσίαν, οὐδέ ἔχει ἀνατεθῆ αὐτῷ ἢ ἀσκῆσις διοικήσεως, οὔτε δέ χαρακτηρίζεται ὑπό τοῦ νόμου ἢ πράξεως τῆς ἐκτελεστικῆς ἐξουσίας ὡς νομικόν πρόσωπον δημοσίου δικαίου, δέν ἀποτελεῖ νομικόν πρόσωπον δημοσίου δικαίου: 356(43), 191 (44), ὡς δέν ἀποτελεῖ καί τὸ νομικόν πρόσωπον, οὗ τόν χαρακτηρισμόν του ὡς νομικοῦ προσώπου δημοσίου δικαίου ἀποφεύγει ὁ συνιστῶν αὐτὸ νόμος καί τοῦ ὁποῖου ὁ σκοπός δέν δύναται νά θεωρηθῆ ὡς ἀναγόμενος εἰς τήν σφαῖραν τῶν καθηκόντων τῆς δημοσίας διοικήσεως: 1345(49), 1830(50)...” 30 35

(“A Corporate body cannot be considered as public body if from the existing provisions there does not appear that the influence of rules of Public law on its organisation and functions is so essential that there is such a degree of de-

pendence on the State as to justify the classification of the service rendered by it as public service: 1112/50, if it has not been armed with privileges of public law and the use of administrative methods and if the supervision exercised on it does not exceed the usual supervision exercised on corporate bodies of private law: 1120/50. Therefore, the fact that it is simply considered by the law as public corporate body is not enough: 1087/46, not even simply because a contribution is imposed in its favour: 1072/48.

Public body which does not exercise a public service, and has neither been entrusted with the exercise of administration nor is it classified by the law or act of the executive power as a public corporate body does not constitute a public corporate body: 356/43, 191/44, as it does not constitute also the public body, whose classification as public corporate body is avoided by the introducing law and whose object cannot be considered as being within the sphere of the duties of public administration”).

From the above it is clear that in Greece a public corporate body (Νομικό Πρόσωπο Δημοσίου Δικαίου) is considered as such if it fulfils at least the following:

- (a) It is so termed by Law.
- (b) There is such a degree of control by the State over such body, due to the impact of the principles of public law on its organisation and functions, that classifies its functions as public service.

It is true that Greek authors classified Advocates' Associations in Greece as Public Corporate Bodies (Νομικά Πρόσωπα Δημοσίου Δικαίου); the aforesaid classification is undoubtedly based on the Decisions of the Greek Council of State, which has resolved the matter in the light of existing legislature in Greece which is reflected clearly in the wording of a relevant extract in one of its decisions:

“ Έπειδή, κατά τὸ ἄρθρον 180 τοῦ Κώδικος περὶ δικηγόρων, οἱ δικηγορικοὶ σύλλογοι ἀποτελοῦσι νομικὰ πρόσωπα δημοσίου δικαίου κατὰ δὲ τὸ ἄρθρον 214, τὸ Διοικητικὸν Συμβούλιον τοῦ Συλλόγου διοικεῖ καὶ διαχειρίζεται τὰς ὑποθέσεις ἐν γένει τοῦ συλλόγου καὶ ἐκτελεῖ τὰ διὰ τοῦ Κώδικος

ἀνατεθειμένα αὐτῶ ἔργα. Ὅθεν αἱ πράξεις τοῦ Διοικητικοῦ Συμβουλίου αἱ ἀφορῶσαι εἰς θέματα διοικήσεως τοῦ συλλόγου, ὑπόκεινται εἰς τὸ ἔνδικον μέσον τῆς αἰτήσεως ἀκυρώσεως καθ' ὃ πράξεις ἐκτελεσταὶ νομικοῦ προσώπου ἀσκοῦντος διοίκησιν . . .” (Vide Decisions of the Greek Council of State 1954 Vol. Γ' Σ.Ε. 1963/1954 (δλ.) pp. 2449–2451. 5

(“Because, according to section 180 of the Advocates’ Code, Bar Associations constitute public corporate bodies and according to section 214 the Managing Council of the Bar Association, manages and administers the affairs in general of Association and performs the acts imposed on it by the Code. Therefore the acts of the Managing Council referring to administrative matters of the Association are subject to the lawful measure of application for annulment since executory acts of a public corporate body exercising administrative . . .”). 10 15

In this respect it must always be borne in mind that the aforesaid legislative provision is purely a Greek Enactment, which of course is not applicable in Cyprus. 20

Let us now revert to the Cyprus Law; the first two paragraphs of Article 146 of our Constitution read as follows:

“Article 146

1. The Supreme Constitutional Court shall have exclusive jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, an act or omission of any organ, authority or person, exercising any executive or administrative authority is contrary to any of the provisions of the Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person. 25 30
2. Such a recourse may be made by a person whose any existing legitimate interest, which he has either as a person or by virtue of being a member of a Community, is adversely and directly affected by such decision or act of omission.” 35

It was held as early as 1962 (*Achilleas HjiKyriacou v. Theologia HjiApostolou*, 3 R.S.C.C.89) that an “act or decision” in the

sense of para. 1 of Article 146 is an act or decision in the domain only of public law. This principle was reiterated in a number of cases the most recent ones being *The Republic v. M.D.M. Estate Developments Ltd.*, (1982) 3 C.L.R. 642; *Charalambides v. The Republic* (1982) 3 C.L.R. 403; *Panayiotis Chiratis v. The Republic*, (1982) 3 C.L.R. 540; *Kyriacos Michael Tekkis and another v. The Republic* (1982) 3 C.L.R. 680

I shall now proceed to consider the Advocates' Law with particular reference to the Bar Council. Advocates' Law Cap. 2 (as amended by Laws 42/61, 20/63, 46/70, 40/75, 55/78 and 71/81) regulates the admission, enrolment, practice and discipline of advocates as well as the establishment of Local Bars, Committees, Bar Association and Bar Council; it further provides for pensions and other allowances to advocates.

Section 24 of the Advocates' Law as amended sets out the powers of the Bar Council as follows:

"24(1) The Bar Council shall consider all matters affecting the profession and take such action thereon as it may deem expedient and, without prejudice to the generality of the foregoing provision or to any other powers conferred upon it by this Law, shall have the following powers:

- (a) to maintain the honour and independence of the Bar and its defence in relation to the judiciary and the executive;
- (b) to regulate the practice and etiquette of the profession;
- (c) to answer questions and give rulings affecting professional etiquette and practice;
- (d) to examine and, if it thinks fit, to report upon current legislation and any other legal matters submitted to it or to make recommendations to Government as to the desirability of introducing any legislation;
- (e) to represent the body of practising advocates in any matter in which it may be necessary or expedient;
- (f) to further good relations and understanding between the Bar and the public;
- (g) to protect the public right of access to the Courts and

of representation by counsel before any Court or tribunal:

- (h) to prescribe the powers and functions of Local Bar Committees additional to those conferred by this Law;
- (i) to make Rules regulating and prescribing any of the above matters, subject to such Rules being approved by the majority of a general meeting of the advocates;
- (j) to negotiate with advocates clerks or their trade unions on behalf of all advocates, and to conclude collective agreements regulating the salaries and other conditions of employment of advocates clerks." (Inserted by s. 2 of Law 55/78).

It is significant to note that neither the Advocates' Law, as amended, nor any other Law or the Constitution expressly or otherwise term any association or organ established under the Advocates' Law, as public corporate body (Νομικόν Πρόσωπον Δημοσίου Δικαίου).

Having considered the provisions of Advocates' Law I hold the view that an association of advocates under the said Law and in particular the respondent Bar Council is an association of professional people promoting their own professional interests, but they are not by their very nature organs or authorities exercising "executive or administrative authority" in the sense of Article 146 as there is neither express legislative provision rendering the functions of the association in question a matter of public law, (*Elias Petrou and others v. The New Cooperative Credit Society of Karpashia*, 3 R.S.C.C. 58) nor does it present the requisites held by the Greek Council of State to constitute public corporate bodies (Νομικά Πρόσωπα Δημοσίου Δικαίου) such as state control over such bodies, or such an extent of impact of public law on their organisation and functions so as to justify characterisation of same as Public Service. (Vide Conclusions of the Greek Council of State 1929 - 1959 at pp. 120 - 121).

For all the above reasons the respondent Bar Council is not an "organ, authority or person exercising any executive or administrative authority" in the sense of Art. 146 of the Constitution

and therefore any act or decision of the respondent not being within the domain of public law lacks the character of an executive act which can be impugned under the said article.

5 Although I was unable to trace anywhere in the main re-
course, the particulars furnished on 31.8.82, or the withdrawn
application under article 134.2, an allegation on behalf of the
applicants to the effect that they were candidates at the aforesaid
elections on 15.2.82 or even an averment to the effect that the
1 applicants are advocates, I feel that I should refrain from pro-
nouncing on the question of existing legitimate interest on their
behalf, as learned counsel appearing for the interested parties
conceded in his address in this recourse that "as far as I remember
one of the applicants was a candidate at the elections" filling
thus the gap in the case for applicants on this point.

15 In the result for the reasons stated above present recourse
fails and it is accordingly dismissed.

In view of the fact that the original application under Art.
134.2 of the Constitution was withdrawn I shall refrain from
making any order as to costs.

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Recourse dismissed. No order as to costs.