

1984 February 29

[Pikis, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

POPI MAKARITOU.

Applicant.

v.

THE REPUBLIC OF CYPRUS, THROUGH
 1. THE COMMANDER OF POLICE OF CYPRUS,
 2. THE ATTORNEY-GENERAL OF THE REPUBLIC,
Respondents.

(Case No. 140/83).

Administrative Law—Administrative acts or decisions—Executory act—Road accident—Refusal of Chief of Police to supply to person injured in the accident, copies of statements obtained in connection with investigation of—Not an executory administrative act which can be made the subject of a recourse under Article 146.1 of the Constitution. 5

Act or decision in the sense of Article 146.1 of the Constitution—Road accident—Investigation of—Not in the sphere of administrative action—Falls on account of its association with the exercise of judicial power, outside the ambit of judicial review under Article 146.1 of the Constitution—Principle of separation of powers—Refusal to make available to applicant statements taken in the course of the investigation of the accident—Not an act in the domain of public law—And it cannot be made the subject of a recourse under the above article. 10
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The applicant, who was injured in a road accident that occurred in 1980, raised an action for damages for negligence before the District Court of Larnaca. Subsequently, she applied to the Chief of the Police to supply her with copies of statements obtained from named persons in connection with the investigation of the accident that caused her injury. Also she 20

applied for information about the outcome of the investigation and whether anyone was prosecuted in connection with the accident.

5 The Chief of the Police refused, by letter dated 20th January, 1983, to furnish the statements on advice from the Attorney-General. As to the remaining matters about which information was asked it was intimated to her that it could only be given in the context of a Police report. She was, also, informed on 9th March, 1983, that Police reports are only made available to
10 persons entitled to be supplied with a Police Road Accident Report. Hence this recourse.

On the questions whether:

- (a) The decision complained of was of an executory character;
- 15 (b) The nature of the decision complained of was in the sphere of administrative action in the sense of Article 146.1 of the Constitution;
- (c) The decision complained of was in the domain of public law and as such justiciable under Article 146.1 of the
20 Constitution.

Held, (1) that an executory act is an act or decision that has a direct impact upon the rights of a citizen; that the concept of rights in this area is wider than the corresponding one in the sphere of private law; that the refusal of the Chief of Police
25 in this case to supply the statements and the information sought, left unaffected the rights of the applicant; that, therefore, the refusal to supply the said official documents does not constitute an executory administrative act; and that, consequently, it cannot be made the subject of a recourse under Article 146.1
30 of the Constitution.

(2) That criminal investigation and action taken in connection therewith is not in the sphere of administrative action and falls on account of its association with the exercise of judicial power, outside the ambit of judicial review under Article 146.1 of the
35 Constitution.

Held, further, that by virtue of the principle of separation of powers, entrenched in the Constitution, there arises the need to preserve an autonomous sphere of action for the judiciary

ensured by removing matters preliminary or incidental to the exercise of judicial power from the area of administrative action.

(3) That the domain of public law extends to acts or decisions that reveal the policy of the administration in respect of matters of public interest; that the pursuit of private rights, as in this case, and the amenity to do so is primarily a matter that concerns the litigant affected thereby; that, therefore, refusal in this case to make available statements of witnesses and the other information sought concerns primarily the applicant in relation to the pursuit of private rights; and is not an act in the domain of public law; accordingly it cannot be made the subject of a recourse under Article 146.1 of the Constitution.

Application dismissed.

Per curiam: Declining to exercise jurisdiction under Article 146 does not mean that applicant is remediless in case her grievance is legitimate. He can pursue the matter before a civil Court, either within the context of pending civil proceedings or by a separate action for a declaration of her rights (pp. 107–108 post).

Cases referred to: 20

Xenophontos v. Republic, 2 R.S.C.C. 89;
Yialousu Savings Bank Ltd. v. Republic (1977) 3 C.L.R. 25;
Karapataki v. Republic (1982) 3 C.L.R. 88 at p. 94;
Decision of the French Council of State: Aigouy (decided on 20.6.1962); 25
In re C.D. An Advocate (1969) 1 C.L.R. 376;
Kourris v. Supreme Council of Judicature (1972) 3 C.L.R. 390;
Police v. Christofides (1984) 2 C.L.R. 33;
Valana v. Republic, 3 R.S.C.C. 91;
Charalambides v. Republic, 4 R.S.C.C. 24; 30
Pilavaki v. Republic, 1964 C.L.R. 164;
Decisions of the Greek Council of State Nos.: 1866/67, 10/68, and 19/70.

Recourse.

Recourse against the refusal of the respondent to supply applicant with copies of statements obtained from named 35

persons in connection with the investigation of an accident in which she sustained injuries.

K. Talarides, for the applicant.

A. Vladimirov, for the respondent.

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Cur. adv. vult.

PIKIS J. read the following judgment. The applicant was injured in a road accident that occurred in 1980. She raised an action for damages for negligence before the District Court of Larnaca (719/81). Subsequently, she applied to the Chief of the Police to supply her with copies of statements obtained from named persons in connection with the investigation of the accident that caused her injury. Also she applied for information about the outcome of the investigation and whether anyone was prosecuted in connection with the accident.

The Chief of the Police refused, by letter dated 20th January, 1983, to furnish the statements on advice from the Attorney-General. As to the remaining matters about which information was asked it was intimated to her that it could only be given in the context of a Police report. Supplementary to the above she was informed on 9th March, 1983, Police reports are only made available to persons entitled to be supplied with a Police Road Accident Report.

Applicant challenges the refusal of the respondents on the ground that the Chief of the Police was under a duty to supply her with the afore-mentioned statements and information about steps taken in the way of prosecuting persons responsible for the negligent driving. Article 29 of the Constitution casts, in the contention of counsel for the applicant, a duty on the Authorities to furnish at request a citizen with material and supply him with information intended to aid him in the exercise of his civil rights. Respondents deny the existence of such a duty and further question the justiciability of the present recourse. In their submission the act complained of is not executory and as such it is inamenable to judicial review. If the case is to get off the ground and become the subject of judicial review, it must appear on the face of the recourse that the Court has jurisdiction to take cognizance of the complaint. Elicitation of jurisdictional issues is a first priority for, unless established that the matter

is within the competence of a Court of Revisional Jurisdiction, jurisdiction in the matter will not be assumed. It is for this reason that it is permissible for the Court to raise at any stage of the proceedings on its own motion matters affecting the jurisdiction of the Court.

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On the face of the recourse serious questions arise as to the competence of the Court to take cognizance of the act complained of, because of its nature and character. Three distinct questions going to the jurisdiction of the Court must be resolved before embarking on examination of the merits of the application. The first question, specifically raised by the respondents, arises from the character of the act. In their contention the act is not executory and a such not liable to judicial review under Article 146.1. A second question, indirectly raised by the citation of the decision *Xenophontos v. The Republic*, 2 R.S.C.C., p.89, puts into focus the nature of the act and questions its administrative character. The ratio of the case, as I comprehend it, is that matters relevant to the exercise of the power to prosecute are outside the sphere of judicial review established by Article 146.1. This is so because of their connection and association with the exercise of judicial power.

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The case of *Xenophontos* is relevant in another respect as well. It refutes the suggestion, put forward by counsel for the applicant, that breach of the duty cast upon administrative authorities by Article 29 is actionable under Article 146.1 irrespective of the character of the decision or the nature of the request for information. It was authoritatively stated that Article 29 does not expand the jurisdiction under Article 146.1. Therefore, complaints for failure to reply under Article 29 or refusal to supply information in answer to a request are not justiciable under Article 146.1, unless the matter is of administrative character and has the remaining attributes of an act liable to review thereunder.

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A third question affecting the jurisdiction of the Court relates again to the character of the act. The issue here is whether the reply of the Chief of the Police purported to regulate or define a matter in the domain of public law, a prerequisite for the assumption of jurisdiction under Article 146.1, or an act bearing on the private rights of the applicant. A decision bearing on the amenity of a citizen to pursue his private rights is prima facie a matter falling in the domain of private law.

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Below I shall endeavour to answer the three questions touching upon the jurisdiction of the Court in the order indicated above:-

1. *Was the decision complained of, of an executory character?*

In *Yialousa Savings Bank Ltd. v. The Republic* (1977) 3 C.L.R..
 5 p.25, the Court accepted as sound the proposition that refusal to supply official documents does not constitute an executory administrative act, consequently it cannot be made the subject of a recourse under Article 146.1. This statement of the law is supported by ample authority of the Greek Council of State
 10 (see, inter alia, the decisions of the Greek Council of State in 1866/67 - 10/68 - 19/70). The decisions rest on the premise that unless an act is productive of legal consequences in the sense this concept is understood and applied in administrative law, it lacks executory character.

15 The principle that only decisions of an executory character are amenable to review under Article 146.1, is firmly established so much so that it is unnecessary to support it by reference to any particular decision. It is the underlying principle for the exercise of jurisdiction under Article 146.1. Executory is
 20 an act or decision that has a direct impact upon the rights of a citizen; but the concept of rights in this area is wider than the corresponding one in the sphere of private law. By way of example one may refer to a refusal to grant a building permit. The refusal has direct repercussions upon the owner's right to the use and enjoyment of his property. The right affected here is
 25 amenable to precise definition. On the other hand, if a candidate for appointment or promotion in the Government service is not selected and he has a grievance about it, the decision is again executory because it affects his position and his right (a
 30 general right), to equal treatment by the administration. As I had occasion to explain in *Karapataki v. The Republic* (1982) 3 C.L.R. 88, 94: "‘Legal’ in this context, has a wider connotation and encompasses the position and standing of the applicant in the service viewed from an objective angle." The examples
 35 I have given hopefully serve to demonstrate when an administrative act is productive of legal consequences.

The refusal of the Chief of the Police in this case to supply the statements and the information sought, left unaffected the rights of the applicant. Nor was the request designed to elicit

his rights or his position in law. The whole matter revolved round the amenity of the applicant to pursue his private rights. Refusal to make available the material sought was an act that wholly lacked the attributes of an executory act.

Learned counsel for the applicant laid stress in his address, on the decision of the *French Council of State* in the case of *Aigouy* decided on 20th June, 1962, where it was held that refusal of the Minister of Justice to communicate to the applicant the report of the Gendarmerie on a fatal accident in which his son was involved, was a matter detachable from the judicial process and could be made the subject of review by an administrative Court. I am unable to appreciate, without the report, the implications of the decision and cannot evaluate the impact of withholding the report on the rights of the applicant under French Law. It is significant, however, that the accident in question was not a road accident, but an accident that occurred during military exercises held to train the deceased in the use of mortar fire while he was doing his military service. In my judgment the decision in *Yialousa Savings* (supra) and the cases of the Greek Council of State above referred to, establish a correct principle of administrative law to the effect that refusal to supply official documents is not a justiciable act because it lacks executory character.

2. *The nature of the decision, whether in the sphere of administrative action, in the sense of Article 146.1.*

The case of *Xenophontos* (supra) establishes, as indicated, that criminal investigation and action taken in connection therewith falls on account of its association with the exercise of judicial power, outside the ambit of judicial review under Article 146.1 *Xenophontos* is not the only case that makes the point that action associated indirectly with the exercise of the judicial power of the State, is beyond the scope of review under Article 146.1. In *Re C.D. An Advocate* (1969) 1 C.L.R. 376, the Full Bench of the Supreme Court decided that decisions of the Advocates' Disciplinary Board are not amenable to review under Article 146.1 because of the implications stemming from the discipline of advocates upon the administration of justice. In *Kourris v. The Supreme Council of Judicature* (1972) 3 C.L.R., p. 390, it was decided (by majority) that appointments made by the Council are not subject to review under Article 146.1

because of the association of the Supreme Council of Judicature with the exercise of judicial power.

5 The underlying theme of the above decisions, as I perceive it, is that need arises by virtue of the principle of separation of powers, entrenched in the Constitution, to preserve an autonomous sphere of action for the judiciary ensured by removing matters preliminary or incidental to the exercise of judicial power from the area of administrative action.

10 Declining to exercise jurisdiction under Article 146 does not mean that applicant is remediless in case his grievance is legitimate. He can pursue the matter before a civil Court, either within the context of pending civil proceedings or by a separate action for a declaration of his rights. Although the recent decision of the Full Bench of the Supreme Court in *Police v. Christofides* and *Police v. Euripidou*, given on 14th February, 15 1984 (Questions of Law Reserved Nos. 193 and 194, not yet reported)* may cast doubts on the legitimacy of the complaint of the applicant. Of course, this is said by way of parenthesis: nothing said here is meant to prejudge in any way the pursuit of any rights applicant may have in the sphere of private law.

20 3. *Only acts in the domain of public law are justiciable under Article 146.1.*

Emanation of an act, decision or omission from an administrative organ or authority, is not conclusive of its justiciability. 25 The act, decision or omission must be in the domain of public law (see, inter alia, *Hadjikyriacou and Hadjiapostolou*, 3 R.S.C.C. 89; *Valana and The Republic*, 3 R.S.C.C. 91; *Charalambides and The Republic*, 4 R.S.C.C. 24; and *Pilavaki v. The Republic*, 1964 C.L.R. 164). The domain of public law extends to acts or decisions that reveal the policy of the administration in respect 30 of matters of public interest. Also it extends to decisions which because of their factual implications are of interest to the public or a section of it. Acts or decisions that bear on the private rights of the subject are not justiciable under Article 146.1. 35 Their importance is confined to the determination of the private rights of the citizen or citizens directly involved. The pursuit of private rights, as in this case, and the amenity to do so is

* Now reported in (1984) 2 C.L.R. 33.

primarily a matter that concerns the litigant affected thereby. So refusal in this case to make available statements of witnesses and the other information sought concerns primarily the applicant in relation to the pursuit of private rights. However, I shall not probe further this question for I am clearly of opinion that because of my views under 1 and 2 above, the recourse must be dismissed for lack of jurisdiction. 5

For the above reasons I hold the view the Court lacks jurisdiction to take cognizance of the substance of the recourse. The recourse fails, it is hereby dismissed. Let it be no order as to costs. 10

*Recourse dismissed with no order
as to costs.*