1984 November 16

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

NICOS SHIAFKALIS,

Applicant,

v.

CYPRUS THEATRICAL ORGANIZATION,

Respondent.

(*Case No.* 478/82).

Time within which to file a recourse—Article 146.3 *of the Constitution —Time provisions of, mandatory and inflexible—Time begins to run from the date party affected acquired knowledge of decision complained of.*

Cyprus Theatrical Organization—Validity of decisions of, in the field of its competence, including appointments and positioning of personnel—Not directly or indirectly dependent on approval by the Council of Ministers—Decisions of the Organization relating to the engagement and terms of service of its personnel are within the domain of public law.

The applicant has at all material times been engaged as a Director-Actor of the Cyprus Theatrical Organization ("the Organization") on a contractual basis. On the 13th August, 1982 the Management Council of the Organization decided to offer appointment to the applicant, again on a contractual basis, as Actor 'A' and informed him of such decision by means of a letter dated the 14th August, 1982. Though there was no direct evidence as to the date on which applicant received this letter his reply thereto was dated the 23rd August, 1982. As against the decision embodied in the above letter applicant filed a recourse on the 10th November, 1982, that is more than 75 days after he gained knowledge of the decision. His letter

of the 23rd August, 1982, signified beyond doubt knowledge of the pertinent decision, as well as acquisition of such knowledge at a date prior to the 23rd August, 1982, or less probably coinciding with the date of the letter.

Held, that a decision amenable to review under Article 146.1 can only be made the subject of litigation if challenged by recourse within 75 days (see Article 146.3 of the Constitution); that the activation of the 75 days time limit is pegged to the date the party affected thereby acquired knowledge of it; that the time provisions of Article 146.3 are mandatory and inflexible, tied to the need to ensure certainty in the administrative process; that, consequently, even if the decision complained of is of an executory character, the applicant forfeited to his detriment the right to question it within the time laid down in the Constitution; and that accordingly the recourse must fail.

Held, further, (1) that the validity of decisions of the respondents in the field of its competence that included appointments and positioning of personnel and adjustments in their terms of service was not directly or indirectly dependent on approval by the Council of Ministers.

(2) That the public has a direct interest in the affairs of the Organization, in so far as the management, structure and manning of the State Theatre is concerned; and that, therefore, the engagement and terms of service of the personnel of the Organization are matters of public interest; accordingly the sub judice decision is within the domain of public law.

Application dismissed.

Cases referred to:

Pankyprios Syntechnia Dimosion Ypallilon v. *Republic* (1978) 3 C.L.R. 27 at p. 31;

Moran v. *Republic*, 1 R.S.C.C. 10;

Holy See of Kitium v. *Municipal Council of Limassol*, 1 R.S.C.C. 15;

Ploussiou v. *Central Bank of Cyprus* (1982) 3 C.L.R. 230;

Paschalidou v. *Republic* (1969) 3 C.L.R. 297;

Vassiliou and Others v. *Republic* (1969) 3 C.L.R. 417;

Papakyriacou v. *Republic* (1983) 3 C.L.R. 870.

Recourse.

Recourse against the decision of the respondent to abolish the post of Director–Actor and to replace it by the post of Actor "A".

E. Efstathiou with *N. Stylianidou* (*Miss*) for the applicant.

M. Photiou, for the respondent.

Cur. adv. vult.

PIKIS J. read the following judgment. The respondents submitted the recourse is inamenable to review because it was raised out of time, directed against a non executory act and lastly, for lack of legitimate interest on the part of the applicant. Analytically the submissions have as follows:–

(a) *Timeliness of Recourse:* The recourse was filed on 10th November, 1982, while Nicos Shiafkalis, the applicant, gained knowledge of the decision on 14th August, 1982, or in any event on 23rd August, 1982, or more probably on an earlier date.

(b) *Non Executory:* The contention here is that the sub judice decision, i.e. the decision of 13th August, 1982, was but a preparatory act that never materialized into a legally binding decision before its approval by the Council of Ministers on 13th October, 1982. Also it lacked executory character for two additional reasons:–

(i) It was a decision other than an executory or administrative decision in the sense of Article 146.1 of the Constitution, being a decision of a policy or—legislative character beyond the purview of judicial review—*Pankyprios Syntechnia Dimosion Ypallilon* v. *Republic* (1978) 3 C.L.R. 27 at p. 31.

(ii) The decision did not sound in public law but in the realm of private law rights affecting the

contractual relations of the respondents and as such beyond the scope of Article 146.1.

(c) *Inadmissible* for lack of legitimate interest, a prerequisite for the exercise of revisional jurisdiction in accordance with Article 146.2 of the Constitution. The applicant lacked the necessary interest to propound a recourse as the decision had no adverse financial repercussions and generally did not prejudice his position in the establishment of the respondents.

Counsel for applicant disputed the validity of each one of the above propositions. He submitted the recourse was taken in time aimed at the review of an executory act in the domain of public law, an act vulnerable to be set aside for subordination of the discretion of the respondents to the exigencies of industrial relations.

The preliminary objections to the viability of the proceedings are inextricably bound up with the facts of the case, none too clearly defined in the statement of facts supporting the application. Far from being clear, the facts are shrouded in a cloud of ambiguity to an extent making it impossible to identify the decision attacked and more so the date on which it was taken. After some probing, we were able to gather the necessary information and earmark the decision challenged, as well as establish the time at which it was taken. Recitation of these facts is necessary in order to evaluate the soundness of the preliminary objections. To that task we shall presently focus attention.

The Cyprus Theatrical Organization, commonly referred to with the acronym Θ.Ο.Κ. hereinafter referred to as "the Organization", is a statutory corporation established under the provisions of Law 71/70, for the promotion of the theatre and the arts associated therewith. Its establishment was aimed to fill a gap in the cultural life of the country. It is an independent legal entity governed by a Management Council, subject to the supervision of the Minister of Education. Nicos Shiafkalis, a Theatre Director and Actor, was involved with the Organization from its early days. He was engaged as Actor on a contractual basis but use was made of his services

as Director recurrently for which he was paid an additional allowance. His contract was renewed annually and his services as Director were habitually employed. With his deceased colleague Kafkarides, a co-applicant in these proceedings before his death, they directed the performance of many plays put on stage by the Organization and acted different roles as well. Their status with the Organization was institutionalized in 1975 with the renaming of their position "Regular Director-Actor", a title suggestive of the constancy of the services of the applicant as Director. The duties and responsibilities of the two Directors—Actors of the Organization were formalized in a scheme of service approved in 1977, although their services continued to be retained on an annual basis by the execution of appropriate contracts.

The position of the applicant as Director-Actor secured him a seat on the Consultative Artistic Committee, established under section 2 of Law 68/79 by the amendment of section 5 of the basic law. This Committee was set up to advise the Organization on artistic matters relevant to its mission and functions. Although it had an advisory capacity, the Management Council of the Organization was enjoined by law to treat advice rendered as weighty counsel in its decision making process(1).

On 10th June, 1982, an agreement was entered into between the Organization on the one hand and Actors' Associations on the other, having all the attributes of a Collective Agreement providing for partial reorganization of the structure and hierarchy of personnel serving with the respondents. It provided for the abolition of the post Director—Actor and its replacement by the post of Actor 'A', a category into which all senior actors would be grouped. By any measure it was a disadvantageous arrangement for the applicant and his deceased colleague because notwithstanding the absence of immediate financial detriment, their status and authority would be diminished. The assignment to them of special responsibilities, in the case of the applicant for school and amateur theatre was meagre or no compensation. The new arrangement also entailed forfeiture of the seat of the applicant and his deceased colleague on the Advisory Committee. The proposed changes in the position of Director

(1) Proviso to subsection 4 of section 5 of the Law, as amended by section 2 of Law 68/79.

were, as well as the remaining part of the Collective Agreement, submitted to the Artistic Committee for its views.

The Artistic Committee advised against the abolition of the post of Director–Actor and recommended the extension of the contract of the applicant for one more year on the pre-existing terms. The Management Council of the Organization considered the matter at its meeting of 13th August, 1982. They adopted the provisions of the Collective Agreement sanctioning thereby the reorganization of personnel structure of the Organization. They departed from the advice of the Artistic Committee feeling in the first place bound to honour the Collective Agreement and in the second for reasons associated with the merits of reorganization. On the following day the 14th August, 1982, they addressed a letter to the applicant offering appointment, again on a contractual basis, as Actor 'A'. There is no direct evidence as to the date on which this letter was received, but so far as we may gather from his reply thereto (exhibit 'Z'), it must have been received prior to 23rd August, 1982. In his reply the applicant accepted the offer but reserved the right to challenge the decision entailing loss of the position of Theatre Director. Notwithstanding this reservation, he failed to mount the necessary challenge for review within the time of 75 days laid down in para. 3 of Article 146 of the Constitution. This recourse was filed on 10th November, 1982, that is, more than 75 days after he gained knowledge of the decision. His letter of 23rd August, 1982, signifies beyond doubt knowledge of the pertinent decision, as well as acquisition of such knowledge at a date prior to the 23rd August, 1982, or less probably coinciding with the date of the letter.

Aside from other objections to the justiciability of the recourse, a decision amenable to review under Article 146.1 can only be made the subject of litigation if challenged by recourse within 75 days. The time provisions of Article 146.3 are mandatory(1) and inflexible, tied to the need to ensure certainty in the administrative process. Consequently, even if the decision complained of is of an executory character, the applicant forfeited to his detriment the right to question it within the time laid down in the Constitution.

(1) See, inter alia, *John Moran* v. *The Republic*, 1 R.S.C.C. 10; and *Holy See of Kition* v. *Municipal Council Limassol*, 1 R.S.C.C. 15.

Counsel for the applicant tried to bypass the time barrier by raising two submissions that leave me wholly unpersuaded. The first is to the effect that the decision of 13th August, 1982, did not become executory or cognizable in law until the time it was placed before the Artistic Committee, of which applicant was a member, on 6th September, 1982; thus the period of 75 days should be computed the earliest from that date. Nothing in the law makes the validity or the effect of decisions of the Organization dependent on their communication to the Artistic Committee and far less its approval. Equally tenous is the second submission. In the contention of counsel for the applicant the subject decision could be litigated within 75 days from the date is was due to be implemented, that is, 1st October, 1982. The short answer to this submission comes from the very provisions of para. 3 of Article 146 of the Constitution that pegs the activation of the 75 days time limit to the date that the party affected thereby acquired knowledge of it(1).

Moreover, provided a decision is of an executory character, it does, from the moment it is validly taken, produce legal effects noticeable in law. Sad as it may be to have to dismiss a recourse for failure to raise it within the prescribed time limit, I am duty bound to do so. The recourse is for this reason doomed to failure.

In the interest of completeness of the judgment, it may be noted that I find the remaining preliminary objections less cogent. The validity of decisions of the respondents in the field of its competence that included appointments and positioning of personnel and adjustments in their terms of service was not directly or indirectly dependent on approval by the Council of Ministers. The fact that the budget of the Organization(2) was subject to approval by the Council of Ministers dio not have the effect of subordinating decisions of the Organization in any other area and making them subject to the approval of the Council of Ministers. Approval of the budget by the Council was a measure intended to ensure that the Organization operated within the financial framework and limits approved by the executive.

(1) *Ploussiou* v. *Central Bank* (1982) 3 C.L.R. 230.
(2) Section 10 of the law.

It had nothing to do with the exercise of the administrative functions of the Organization, such as, the terms of service of personnel and related matters.

Equally unfounded I find to be the submission that the decision under review falls outside the domain of public law. The theatre plays an important part in the cultural life of the country and the public has a corresponding interest in its promotion. The public has a direct interest in the affairs of Θ.Ο.Κ. in so far as the management, structure and manning of the State Theatre is concerned. The fact that the services of the applicant were retained on a contractual basis does not take the decision outside the compass of public law(1) for the interest of the public in the propriety of such decisions does not abate. The engagement and terms of service of the personnel of Θ.Ο.Κ. are matters of public interest.

Somewhat more complicated are the questions relevant to the characterization of the nature of the act. It is settled that policy decisions of the Administration as well as decisions of a legislative content, such as, approval of schemes of service are beyond the ambit of Article 146.1 and as such not amenable to review. On the other hand, the enforcement of such acts may, depending on the facts of a given case, crystallize into administrative executory acts; in that situation a decision becomes justiciable at the instance of a party prejudiced thereby. Under our law, the test of reviewability of decisions under 146.1 revolves round the nature of the act and is bound up with the implications of the decisions upon the rights of the persons affected thereby. In this case the application of the policy decision entailed variation of the terms of service of the applicant in a manner prejudicial to him. Whether vested interests of the applicant were infringed by the decision and whether the respondents paid due heed to the views of the Advisory Committee, are matters that go to the merits of the case. In view of the outcome of the case, I consider it inadvisable to express a concluded opinion on the merits, though it strikes me as odd that the Organization should enter into a collective

(1) *Antigoni Paschalidou* v. *The Republic* (1969) 3 C.L.R. 297; *Emmanuel Vassiliou And Others* v. *The Republic* (1969) 3 C.L.R. 417. Also, the decision in *Papakyriacou* v. *The Republic* (1983) 3 C.L.R. 870, is indicative of the reviewability of the claims to contractual appointments in the Educational Service.

agreement with the Actors' Associations and then seek the views of the Artistic Committee on the desirability of the changes envisaged thereby, especially in so far as they affected the institution of permanent directors. By following that course they may have put the cart before the horse.

In the result the recourse is dismissed. Let there be no order as to costs.

Recourse dismissed with no order as to costs.