1985 May 31

[L. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

MICHALAKIS POLYVIOU,

Applicant,

v.

THE IMPROVEMENT BOARD OF AYIA NAPA,

Respondents.

(Case No. 347/80).

Administrative Law—Administrative review—Principles applicable—Review procedure under section 18 of the Streets and Buildings Regulation Law, Cap. 96 (as set out in section 3 of Law 13/74) not an indispensable prerequisite but an optional remedy—And therefore applicant could file the present recourse before resorting first to such procedure.

Administrative Law—Administrative acts or decisions—Executory act—Preparatory act—Only final executory acts or decisions could be made the subject of a recourse under Article 146 of the Constitution—Application for a building permit—Respondents replied that applicant's property affected by a street-widening plan and asked him to modify his architectural and other plans—Said reply an act preparatory to the reaching of a final decision and not executory—It could not be made the subject of a recourse.

Streets and Buildings Regulation Law, Cap. 96—Review procedure under section 18 of the Law (as set out in section 3 of Law 13/74)—Not an indispensable prerequisite but an optional remedy.

On the 6th May, 1980, the applicant, who was the owner of a building site, situated at Ayia Napa village within the limits of the Improvement Board area submitted

to the respondent Improvement Board an application for a building permit for the construction of a two-storey house on the above plot enclosing the architectural plans and all other necessary documents. On the 14th August, 1980, the respondents addressed a letter to the applicant informing him that his property was affected by a plan for the widening of the street and also by a plan for the extension of the road network as shown on a survey plan attached to the said letter, and that, therefore, in order to be able to re-examine his application he should modify his architectural and other plans so that the building should be at a distance of ten feet from the street alignment and ten feet from the boundary of the proposed road. In reply Counsel for the applicant requested to be informed whether any administrative act or decision had been taken with regard to the plans for the street-widening and the extension of the road network. By a letter dated 10th October, 1980 the respondents reiterated their stand as appearing in their above letter of the 14th August, 1980 and, also, informed counsel that no final decision was taken on the matters mentioned in his letter. As a result the applicant filed the present recourse seeking a declaration of the Court that the decision of the respondents contained in the letters of the District Officer of Famagusta dated 14th August, 1980 and 10th October, 1980, respectively, whereby they refused to grant a building permit to him is void ab initio and of no legal effect whatsoever; and that the omission to grant to him the building permit applied for is void ab initio and of no legal effect whatsoever and that such building permit ought to have been granted to him.

By their Opposition the respondents raised the preliminary objection that the decision challenged is not a decision within the meaning of Article 146 of the Constitution. Counsel for the respondent contended in this respect that as there had not been a reference of the matter to the Minister of the Interior under section 18* of Cap. 96, as set out in section 3 of the Streets and Buildings Regulation (Amendment) Law, 1974 (Law 13/74), the administrative procedure which leads to the full and final formu-

* Section 18 is quoted at pp. 1063-1066 post.

lation of an administrative decision which is executory had not been exhausted and, further, that the letters relied upon by the applicant and the whole set up of the case support the view that the respondents had not reached, at that stage, a definite decision on the application concerned, in that they had not refused to grant the building permit applied for by the applicant, but they merely took steps which were preparatory to the consideration of such application.

On the preliminary objection:

Held, (1) *after stating the principles governing administrative review—vide pp. 1066-1067 post,* that the review procedure under section 18 of Cap. 96 is not an indispensable prerequisite but an optional remedy and, therefore, the present recourse could be filed by the applicant before resorting first to such procedure.

(2) That only final executory acts or decisions could be made the subject of a recourse under Article 146 of the Constitution; that taking into account the contents of the letters addressed by the respondents to the applicant this Court has come to the conclusion that no final decision had been reached by the respondents on the application concerned which could be challenged by a recourse under Article 146 of the Constitution and in the circumstances, the relevant letters were preparatory to the reaching of a final decision and, therefore, not in themselves executory; and that, accordingly they could not be made the subject of a recourse.

Application dismissed.

Cases referred to:

Pelides v. *Republic,* 3 R.S.C.C. 13 at p. 17;

Petrolina Ltd. v. *Municipal Committee of Famagusta* (1971) 3 C.L.R. 420 at pp. 424, 425;

Pankyprios Syntechnia Dimosion Ypallilon v. *The Municipality of Nicosia* (1978) 3 C.L.R. 117 at pp. 133-135;

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

Papakokkinou v. *Republic* (1974) 3 C.L.R. 492 at p. 496;

Cyprus Tannery Ltd. v. *Republic* (1980) 3 C.L.R. 405 at pp. 412, 413;

Orphanides and Another v. *Improvement Board of Ayios Dhometios* (1979) 3 C.L.R. 466;

Simonis and Another v. *Improvement Board of Latsia* (1984) 3 C.L.R. 109.

Recourse.

Recourse against the refusal of the respondent to grant applicant a building permit for the erection of a two-storey house at Ayia Napa village.

E. Odysseos, for the applicant.

D. Hadjihambis with *Y. Panayi,* for the respondent.

Cur. adv. vult.

L. Loizou J. read the following judgment. The applicant is the owner of a building site, plot No. 147, sheet/plan 42/20, situated at Ayia Napa village within the limits of the Improvement Board area.

On the 6th May, 1980, he submitted to the respondent Improvement Board an application for a building permit for the construction of a two-storey house on the above plot enclosing the architectural plans and all other necessary documents.

On the 14th August, 1980, the respondents addressed a letter to the applicant (exhibit 1) informing him that his property was affected by a plan for the widening of the street and also by a plan for the extension of the road network as shown on a survey plan attached to the said letter, and that, therefore, in order to be able to re-examine his application he should modify his architectural and other plans so that the building should be at a distance of ten feet from the street alignment and ten feet from the boundary of the proposed road.

In reply counsel for the applicant on the 4th September, 1980, addressed a letter to the District Officer of Famagu-

sta (exhibit 5) requesting to be informed whether, with regard to the plans for the street widening and the extension of the road network, any administrative act or decision had been taken and whether it had been published in the Gazette, seeking at the same time, all necessary particulars in respect thereof.

Counsel received no reply to his letter and on the 6th October, 1980, he addressed a second letter to the District Officer of Famagusta (exhibit 6) informing him that if within seven days he had no reply to his previous letter he would file a recourse in the Supreme Court.

On the 10th October, 1980, counsel for the applicant received from the District Officer of Famagusta the following reply:

«Επιθυμῶ νὰ ἀναφερθῶ εἰς τὰς ἐπιστολάς σας ἡμερ. 4.9.80 καὶ 6.10.80, ἀντιστοίχως, ἐν σχέσει μὲ τὴν αἴτησιν τοῦ πελάτου σας Μιχαλάκη Πολυβίου δι' ἄδειαν ἀνεγέρσεως οἰκοδομῆς ἐντὸς τοῦ τεμαχίου 147, Φ/Σχ. 42/20 εἰς Ἁγίαν Νάπαν καὶ νὰ σᾶς πληροφορήσω ὅτι τὸ Συμβούλιον Βελτιώσεως Ἁγίας Νάπας ἐξήτασεν τὴν ἐν λόγῳ ὑπόθεσιν κατὰ τὴν συνεδρίαν αὐτοῦ τῆς 25.9.80, καὶ ἐπανέλαβε τὴν ἀπόφασίν του, ἡ ὁποία διεβιβάσθη εἰς τὸν πελάτη σας δυνάμει ἐπιστολῆς μου ὑπὸ τὸν αὐτὸν ὡς ἄνω ἀριθμὸν καὶ ἡμερ. 14.8.80.

2. Δὲν ἐλήφθη εἰσέτι ὁριστικὴ ἀπόφασις διὰ τὰ σχέδια διευρύνσεως τοῦ δρόμου καὶ συνεχίσεως τοῦ ὁδικοῦ δικτύου εἰς τὴν περιοχήν.»

("I wish to refer to your letters dated 4.9.80 and 6.10.80 respectively, regarding the application of your client Michalakis Polyviou for a permit to construct a building on plot 147, Sh/Pl. 42/20 at Ayia Napa and to inform you that the Improvement Board of Ayia Napa has examined the said case at its meeting of 25.9.80 and reiterated its decision which was communicated to your client by my letter of even number and dated 14.8.80.

2. No definite decision has yet been reached for the street widening plans and extension of the road network in the area").

As a result the applicant filed the present recourse seeking a declaration of the Court that the decision of the respondents contained in the letters of the District Officer of Famagusta dated 14th August, 1980 and 10th October, 1980, respectively, whereby they refused to grant a building permit to him is void ab initio and of no legal effect whatsoever; and that the omission to grant to him the building permit applied for is void ab initio and of no legal effect whatsoever and that such building permit ought to have been ganted to him.

By their Opposition the respondents raised the preliminary objection that the decision challenged is not a decision within the meaning of Article 146 of the Constitution.

In his address, in the course of the hearing of the recourse, learned counsel for the respondents based this preliminary objection on two grounds: Firstly that as there had not been a reference of the matter to the Minister of the Interior under section 18 of Cap. 96, as set out in section 3 of the Streets and Buildings Regulation (Amendment) Law, 1974 (Law 13/74), the administrative procedure which leads to the full and final formulation of an administrative decision which is executory had not been exhausted and, secondly, that the letters relied upon by the applicant and the whole set up of the case support the view that the respondents had not reached, at that stage, a definite decision on the application concerned, in that they had not refused to grant the building permit applied for by the applicant, but they merely took steps which were preparatory to the consideration of such application.

Section 18, referred to above, which provides for a hierarchical recourse to the Minister of the Interior reads as follows:

«18.-(1) Πᾶς ὅστις=

(α) δὲν ἱκανοποιεῖται—

(ι) ἐξ ἀποφάσεως τῆς ἀρμοδίας ἀρχῆς ἐκδοθείσης δυνάμει τοῦ ἄρθρου 3, 6, 9 ἢ

(ιι) ἐκ διατάγματος ἐκδοθέντος ὑπὸ ταύτης δυνάμει τοῦ ἄρθρου 15 ἢ

(iii) ἐκ διατάγματος ἐκδοθέντος ὑπὸ ταύτης δυνάμει τοῦ ἄρθρου 15Α

(β) ἐνίσταται εἰς σχέδια παρασκευασθέντα ὑπὸ τῆς ἁρμοδίας ἀρχῆς δυνάμει τοῦ ἄρθρου 12,

δύναται, ἐντὸς εἴκοσι ἡμερῶν ἀπὸ τῆς εἰς αὐτὸν κοινοποιήσεως τῆς ἀποφάσεως τῆς ἀνεφερομένης εἰς τὴν ὑποπαράγραφον (i) τῆς παραγράφου (α) τοῦ παρόντος ἐδαφίου ἢ τοῦ διατάγματος τοῦ ἀναφερομένου εἰς τὴν ὑποπαράγραφον (ii) τῆς αὐτῆς παραγράφου ἢ ἐντὸς ἑπτὰ ἡμερῶν ἀπὸ τῆς εἰς αὐτὸν κοινοποιήσεως τοῦ διατάγματος τοῦ ἀναφερομένου εἰς τὴν ὑποπαράγραφον (iii) τῆς αὐτῆς παραγράφου καὶ καθ' οἱονδήποτε χρόνον καθ' ὃν τὰ σχέδια εἶναι ἐκτεθειμένα πρὸς ἐπιθεώρησιν, εἰς τὴν περίπτωσιν τῆς παραγράφου (β) τοῦ παρόντος ἐδαφίου, δι' ἐγγράφου προσφυγῆς, ἐν ᾗ ἐκτίθενται οἱ πρὸς ὑποστήριξιν ταύτης λόγοι, εἰς τὸν Ὑπουργὸν Ἐσωτερικῶν νὰ προσβάλῃ τὴν τοιαύτην ἀπόφασιν, διάταγμα ἢ σχέδια.

(2) Ὁ Ὑπουργὸς Ἐσωτερικῶν ἐξετάζει πᾶσαν εἰς αὐτὸν γενομένην προσφυγὴν ἀμελλητί, ἐὰν δέ, εἰς οἱανδήποτε συγεκριμένην περίπτωσιν, ἤθελε θεωρήσει τοῦτο ἀναγκαῖον ἢ σκόπιμον, ἀκούει ἢ ἄλλως δίδει τὴν εὐκαιρίαν εἰς τὸν προσφεύγοντα ὅπως ὑποστηρίξῃ τοὺς λόγους ἐφ' ὧν στηρίζεται ἡ προσφυγή. Ὁ Ὑπουργὸς ἀποφασίζει ἐπὶ πάσης προσφυγῆς τὸ ταχύτερον καὶ κοινοποιεῖ ἀμελλητὶ τὴν ἀπόφασιν αὐτοῦ εἰς τὸν προσφεύγοντα:

Νοεῖται ὅτι ὁ Ὑπουργὸς δύναται νὰ ἀναθέσῃ εἰς λειτουργὸν ἢ ἐπιτροπὴν λειτουργῶν τοῦ Ὑπουργείου του ὅπως ἐξετάσῃ ὡρισμένα θέματα ἀναφυόμενα ἐν τῇ προσφυγῇ καὶ ὑποβάλῃ εἰς αὐτὸν τὸ πόρισμα τῆς τοιαύτης ἐξετάσεως πρὸ τῆς ὑπὸ τοῦ Ὑπουργοῦ ἐκδόσεως ἀποφάσεως αὐτοῦ ἐπὶ τῆς προσφυγῆς.

(3) Ὁ μὴ ἱκανοποιηθεὶς ἐκ τῆς ἀποφάσεως τοῦ Ὑπουργοῦ δύναται νὰ προσφύγῃ εἰς τὸ δικαστήριον ἀλλὰ μέχρι τῆς ὑπὸ τοῦ Ὑπουργοῦ ἐκδόσεως τῆς ἀποφάσεως αὐτοῦ ἐν περιπτώσει προσφυγῆς εἰς αὐτὸν ἢ ἐν περιπτώσει μὴ προσφυγῆς εἰς αὐτὸν μέχρι τῆς παρόδου τῶν προθεσμιῶν τῶν προβλεπομένων εἰς τὸ

εδάφιον (1) διά την καταχώρισιν ιεραρχικής προσφυγής, ή απόφασις το διάταγμα ή τα σχέδια της αρμοδίας αρχής, ως θα ήτο η περίπτωσις, δεν καθίστανται εκτελεστά.».

("18.-(1) Any person who-

(a) is not satisfied-

(i) by a decision of the appropriate authority issued under section 3, 6 or 9; or

(ii) by an order issued by it under section 15; or

(iii) by an order issued by it under section 15A:

(b) objects to plans prepared by the appropriate authority under section 12, may, within twenty days from the communication to him of the decision referred to in sub-paragraph (i) of paragraph (2) of this subsection or of the order referred to in sub-paragraph (ii) of the same paragraph or within seven days from the communication to him of the order referred to in sub-paragraph (iii) of the same paragraph and, at any time during which the plans are open to inspection, in the case of paragraph (b) of this subsection by a recourse in writing to the Minister of Interior setting out the grounds in support thereof, challenge such decision, or order or plans.

(2) The Minister of Interior examines without delay every recourse made to him, and if, in any particular case, he considers it necessary or expedient, he hears or otherwise gives an opportunity to the applicant to support the grounds of the recourse. The Minister decides on every recourse the soonest possible and communicates without delay his decision to the applicant:

Provided that the Minister may assign to an officer or a committee of officers of his Ministry to examine certain matters arising in the recourse and submit to him the outcome of such examination, prior to the issue by the Minister of his decision on the recourse.

(3) Any person who is not satisfied by the decision of the Minister may make a recourse to the Court, but until the decision of the Minister has been issued, where a recourse has been made to him, or, where no recourse has been made to him, until the expiration of the time limits specified in subsection (1) for the filing of a hierarchical recourse, the decision, order or plans of the appropriate authority, as the case may be, do not become executory").

Regarding the submission of counsel for the respondents that such recourse is an essential step for the completion of the administrative process and that, therefore, the present recourse, had been filed prematurely, useful reference may be made to the following cases decided by this Court.

In *Pelides* v. *The Republic*, 3 R.S.C.C. 13, the following are stated (at p. 17):-

"The Court takes this opportunity of stressing that though Article 146 grants it exclusive jurisdiction in administrative Law matters there is nothing in such Article to prevent procedures for administrative review of executive or administrative acts or decisions from being provided for in a Law. Such review may be either-

(a) by way of confirmation or completion of the act or decision in question, in which case no recourse is possible to this Court until such confirmation or completion has taken place (e.g. under section 17 of CAP 96); or

(b) by way of a review by higher authority or by specially set-up organs or bodies of an administrative nature, in which case a provision for such a review will not be a bar to a recourse before this Court but once the procedure for such a review has been set in motion by a person concerned no recourse is possibe to this Court until the review has been completed."

In *Petrolina Ltd.* v. *The Municipal Committee of Famagusta*, (1971) 3 C.L.R. 420, Triantafyllides P. had this to say (at pp. 424, 425):

"Because of the manner in which section 10 is framed I have reached the view that the review by the Council of Ministers, as provided therein, is not a step by way of confirmation or completion of the relevant administrative action, but only a review by higher administrative authority; therefore, the possibility to apply for such a review does not prevent the making of a recourse to this Court, under Article 146 of the Constitution, in a case in which there has not first been made a relevant application to the Council of Ministers.

It is useful to refer in this connection to the decisions of the Greek Council of State (Συμβούλιον Επικρατείας) in Cases 24/1932 and 97/1937 whereby there was adopted, in closely similar situations, the same approach as the one adopted in the present instance. It is interesting to note, also, that in England —where in the absence of the judicial remedy of a recourse for annulment, such as the one under Article 146, resort is had to the remedy of an action for a declaration—it was held in the case of *Cooper* v. *Wilson* [1937] 2 K.B. 309, that an ex-sergeant of the police force, who claimed that he had not been validly dismissed from the force, was not limited to the right of appeal to the Secretary of State given by the Police Appeals Act, 1927, and that the fact that there existed the said remedy which he could take did not prohibit his access to the Court by way of an action for a declaration; and the *Cooper* case was quite recently applied in the case of the *London Borough of Ealing* v. *Race Relations Board*, [1971] 1 All E.R. 424."

The *Pelides* and *Petrolina Ltd.*, cases, (supra) were adopted in the case of *Pankyprios Syntechnia Dimosion Ypallilon* v. *The Municipality of Nicosia*, (1978) 3 C.L.R. 117, 133-135.

In the light of the foregoing it is clear that the review procedure under section 18 of this Law is not an indispensable prerequisite but an optional remedy and, therefore, the present recourse could be filed by the applicant before resorting first to such procedure. For this reason

this ground of learned counsel for the respondents cannot be sustained.

As to the second ground relied upon it is well settled that only final executory acts or decisions could be made the subject of a recourse under Article 146 of the Constitution (see, inter alia, *The Republic* v. *Demetriou* (1972) 3 C.L.R. 219, 223, *PapaKokkinou* v. *The Republic*, (1974) 3 C.L.R. 492, 496 and *The Cyprus Tannery Ltd.* v. *The Republic*, (1980) 3 C.L.R. 405, 412, 413).

A similar question as that raised in the present case was decided in the case of *Orphanides and another* v. *The Improvement Board of Ayios Dhometios*, (1979) 3 C.L.R. 466, a case referred to by counsel on both sides, where Stavrinides, J. held that the letter by means of which the respondents had sought the modification of the architectural plans concerned in that case was not in itself executory. But the applicants in that case replied to the said letter, through their counsel, and stated that they did not intend to modify their plans and, also, requested to be informed whether, in the circumstances, the Board intended to grant the permit in question. There was no reply to such letter and the silence of the Board was construed as a tacit rejection of the application, amounting thus to an executory decision.

Useful reference may also be made to the case of *Simonis and another* v. *The Improvement Board of Latsia*, (1984) 3 C.L.R. 109, where Pikis, J., held that suggestions of the respondents for the alteration of the plans submitted by the application for the division of their land into building sites did not amount to an executory decision, and only the decision which was definitive of the stand of the administration could be challenged by a recourse under Article 146 of the Constitution. The learned judge stated the following (at p. 113):

> "The respondents disputed the timeliness of the recourse on the ground that the decision complained of was nothing other than a repetition of a previous one, notably that of 30th September, 1982. Hence they argued the sub judice act is confirmatory, not of itself justiciable. I cannot go along with this submis-

sion. To my comprehension a proper interpretation of the facts before the Court suggests that decisions of the respondents prior to 25th April, 1982, were of a tentative character designed to reach an accommodation with the applicants. Only the decision communicated on 25th April, 1983 was definitive of the stand of the administration to the application of the owners with a corresponding impact upon the rights of the applicants. Therefore, the act challenged in these proceedings is executory and as such amenable to review under Article 146.1 of the Constitution."

Coming now to the facts of the present case and taking into account the contents of the letters addressed by the respondents to the applicant, I have come to the conclution, in line with the above authorities with the approach of which I am not prepared—though, I must say, somewhat reluctantly—to disagree, that no final decision had been reached by the respondents on the application concerned which could be challenged by a recourse under Article 146 of the Constitution. In the circumstances, the relevant letters were preparatory to the reaching of a final decision and, therefore, not in themselves executory.

In view of the conclusion that I have reached I consider it unnecessary to deal with any other issue raised in the present proceedings.

In the light of the above this recourse fails and it is hereby dismissed.

There will be no order as to costs.

Recourse dismissed.
No order as to costs.