1985 May 21

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

BOOKSELLERS ASSOCIATION OF CYPRUS,

Applicants,

v.

THE REPUBLIC OF CYPRUS, AND/OR
1. THE MINISTER OF EDUCATION
2. THE DIRECTOR OF SECONDARY EDUCATION,

Respondents.

(Case No. 487/84).

Administrative Law—Administrative acts or decisions—Executory act—Circular—Does not of itself ordinarily constitute an executory act, unless it specifically embodies or communicates an executory decision—Respondents' Circular notifying School Authorities that 31 publications were approved for instruction at secondary schools for the academic year 1984-1985—Has no bearing on the rights of the applicants to sell respondents' publications—Not executory and cannot be made the subject of a recourse.

Omission to reply to written request—Article 29 of the Constitution—Omission to take action only justiciable if dictated by Law.

Costs—Revisional jurisdiction proceedings—Principles applicable—Costs do not necessarily follow the event—All relevant facts within the knowledge of applicants—And absence of any legitimate cause for the proceedings—Applicants adjudged to pay the costs.

As far back as 1976 the applicants petitioned the Educational Authorities to acknowledge them exclusive right to the sale of publications of the Ministry prepared for

use as aids for the instruction of students of secondary education.

The respondents refused applicants' request by letter dated 2.12.1977 but the latter did not seek review of the refusal by the Court. The matter was raised anew by the applicants in 1982 and 1983 in a somewhat changed form and though there was no reply from the respondents their omission to reply was never challenged under Article 29 of the Constitution.

By a circular dated 6th July, 1984, the Ministry of Education notified the school authorities of the Republic that 31 publications of the Ministry of Education were approved for instruction at secondary schools for the academic year 1984-1985.

As against the effect of the above circular the applicants filed the present recourse seeking (1) a declaration of the Court that the act and/or decision of the respondents for the sale of the 31 publications of the Ministry designed for use at secondary schools for the academic year 1984-1985 is void, illegal and of no legal effect; and (2) a declaration of the Court that the omission and or refusal to allow the free sale and distribution of books is unconstitutional, illegal and void and whatever was omitted to be done ought to be done.

Held, with regard to prayer (1), that the circular has nothing to do with the policy of the respondents for the sale or distribution of their publications to students; that it did not in any way purport to regulate by a unilateral act of the Administration the rights or position of the applicants respecting the sale or distribution to the students of the publications mentioned therein; that apart from the fact that a circular does not of itself ordinarily constitute an executory act, unless it specifically embodies or communicates an executory decision, the circular in this case had no bearing whatever on the rights of the applicants in the area under consideration and could, under no circumstances, be made the subject of judicial review.

(2) That to the extent that prayer (2) is directed against a positive act (refusal), it is out of time for the only posi-

tive act occurring was that communicated to the applicants some seven years earlier in December 1977; that if directed against the circular, it is for like reasons to those referred to in connection with prayer (1), non-justiciable; that, further, the recourse is not directed against any omission to reply to the request addressed by the applicants in 1982 and 1983 and breach of the obligations of the Administration of the provisions of Article 29 of the Constitution; that the omission is unspecified and an omission to take action is only justiciable if dictated by Law; and that, therefore, prayer (2) is like prayer (1) not directed against an executory act or decision communicated within 75 days prior to the institution of the proceedings or an actionable omission.

(3) That unlike civil proceedings costs in proceedings for the review of administrative action do not necessarily follow the event because very often material facts of the case surface and become known in the course of the proceedings as a result of directions for discovery; that if the material facts of the case are known from the start, as in this case and they can under no guise ground or support the recourse, the Court is perfectly justified to adjudge the applicants to pay the costs of the proceedings; that considering all relevant facts were within the knowledge of the applicants and the absence of any legitimate cause for the proceeding the applicants are adjudged to pay the costs to be assessed by the Registrar.

Application dismissed.

Cases referred to:

Vorkas and Others v. *Republic* (1984) 3 C.L.R. 757;

Philippides v. *Republic* (1984) 3 C.L.R. 1471;

Costea v. *Republic* (1983) 3 C.L.R. 115;

Sophoclis Demetriades & Sons and Others v. *Republic* (1983) 3 C.L.R. 474;

Frangos and Others v. *Republic* (1982) 3 C.L.R. 53 at p. 61.

Recourse.

Recourse against the refusal of the respondents to alienate the right of the Ministry of Education to dispose directly to students publications of the Ministry.

A. S. Angelides, for the applicants.

R. Vrahimi (Mrs.), for the respondents.

Cur. adv. vult.

PIKIS J. read the following judgment. As far back as 1976 or earlier the Booksellers Association of Cyprus, the applicants, petitioned the Educational Authorities to acknowledge them exclusive right to the sale of publications of the Ministry prepared for use as aids for the instruction of students of secondary education. After a series of exchanges by correspondence and meetings held for the purpose of discussing the request of the applicants, the respondents denied their request refusing, in their words, to alienate the right of the Ministry of Education to dispose directly to students their books. However, they did agree to satisfy part of their claim agreeing to making available to them for sale to students a limited number of books designed for their use as their stock might allow. The decision was communicated to the applicants in a letter of Mr. Hadjistephanou, Director of Education, dated 2nd December, 1977. Whatever may have been the reservations or objections of the applicants to this decision they did not seek its review by the Court, assuming it was an executory act amenable to the revisional jurisdiction of the Supreme Court. It is probable applicants omitted to press the matter before the Courts because of the seemingly undeniable right of the Educational Authorities to dispose directly to students publications prepared by the Ministry for their use, especially in view of their policy to sell them at cost price and the obligations of the State to entrench the right to education safeguarded by Art. 20 of the Constitution. Apparently the procedure sanctioned by the decision set out in the aforementioned letter was implemented without drawing for a time any complaints from the applicants.

The matter was raised anew by the applicants in 1982

but in a somewhat changed form. They asked the Ministry of Education to make their publications available to them at a discount of 25% in order to make their disposal by booksellers competitive. In effect they asked of the authorities to sell them at a loss to booksellers in order to enable the latter to reap a profit from the sale of the publications of the Ministry of Education. The request was articulated in three memoranda addressed to the authorities on 11th June, 1982, 10th September, 1982, and 5th April, 1983, respectively. In support of their demand they cited the practice followed by the public corporation in Greece entrusted with the disposal and distribution of official publications allegedly making them available to booksellers at a discount of 30%. To this request of the applicants there was no response. Irrespective of the merits of their request and, to me they appear to be very slender, as presently advised, there was no reply from the authorities, an omission that was never challenged under Art. 29 of the Constitution. In the meantime the Director-General of the Ministry of Education informed the applicants on 9th August, 1982 that 20 copies of each publication of the Ministry would be made available to members of the applicants for sale expressing the hope that in time to come it would become possible to make available to them such books for sale in greater numbers.

By a circular dated 6th July, 1984, the Ministry of Education notified the school authorities of the Republic that 31 publications of the Ministry of Education were approved for instruction at secondary schools for the academic year 1984-1985. For the reasons explained below, it is against the effect of this circular that this recourse is directed. The act or decision complained of is not specified in any of the three prayers by reference to its date. Judging from the date of the filing of the recourse, notably 18th September, 1984, it can be presumed, in view of the provisions of Art. 146.3, that it is directed against an act or omission notified or brought to the knowledge of the applicants within the preceding 75 days. The only relevant act that came to the knowledge of the applicants within that period was the aforementioned circular. Counsel for the applicants acknowledged in his address that prayer (1) is directed against the act or decision allegedly embodied in the circu-

lar, appearing before me as exhibit 2. By prayers (1) the applicants seek a declaration of the Court that the act and/or decision of the respondents for the sale of the 31 publications of the Ministry designed for use at secondary schools for the academic year 1984-1985 is "void, illegal and of no legal effect". Mere perusal of the circular immediately reveals that the circular has nothing to do with the policy of the respondents for the sale or distribution of their publications to students. It does not in any way purport to regulate by a unilateral act of the Administration the rights or position of the applicants respecting the sale or distribution to the students of the publications mentioned therein. Apart from the fact that a circular does not of itself ordinarily constitute an executory act (1), unless it specifically embodies or communicates an executory decision (2), the circular in this case has no bearing whatever on the rights of the applicants in the area under consideration and can, under no circumstances, be made the subject of judicial review. The only decision that purported to regulate the rights or position of the applicants pertinent to the sale of the publications of the Ministry is that communicated to them on 2nd December, 1977, that went unchallenged as earlier indicated.

Prayer (2) is more nebulous still. A declaration is sought that the omission and/or refusal to allow the free sale and distribution of books is "unconstitutional, illegal and void and whatever was omitted to be done ought to be done". To the extent this prayer is directed against a positive act (refusal), it is out of time for the only positive act occurring was that communicated to the applicants some seven years earlier in December 1977. If directed against the circular, it is for like reasons to those referred to in connection with prayer (1), non-justiciable. It must be noted the recourse

(1) See Vorkas and Others v The Republic (1984) 3 C L R 757 and authorities referred to therein
(2) See Philippides v The Republic (1984) 3 C L R 1471

is not directed against any omission to reply to the memoranda, indicated above, addressed by the applicants in 1982 and 1983 and breach of the obligations of the Administration of the provisions of Art. 29. The omission is unspecified. An omission to take action is only justiciable if dictated by Law. As explained in *Costea* v. *The Republic* (1) "only if the act is ordained by Law, can the inaction of the administration rank as an executory act amenable to review" (2). I conclude that prayer (2) is like prayer (1) not directed against an executory act or decision communicated within 75 days prior to the institution of the proceedings or an actionable omission.

The third prayer, unless construed as ancillary to the first and second prayer, adds nothing to the recourse. It reads: "A declaration of the Court that the decision of the respondents be not confirmed". I shall concern myself no further with it nor do I deem it necesary, in view of the outcome of the recouse, to consider the remaining objections of the respondents to the justiciability of the recourse affecting the legitimacy of their interest in the matter under consideration and the intrinsic nature of a decision affecting the sale and distribution of books by Educational Authorities to school students.

For the reasons explained above, the recourse is manifestly unfounded. It is dismissed accordingly.

Costs: In *Frangos* and *Others* v. *The Republic* (3), I made reference to the principles governing the exercise of the Court's discretion with regard to costs in proceedings for the review of administrative action. Unlike civil proceedings costs do not necessarily follow the event. The Court has an unfettered discretion in the matter exercised in the light of the nature of the proceedings and the facts of the particular case. Proceedings for the review of administrative action are of an inquisitorial nature designed to elicit the legality of the action, a matter in respect of which interest

(1) (1983) 3 C.L.R. 115.
(2) See also «Conclusions from the Jurisprudence of the Greek Council of State 1929-1959», p. 243.
See also Sophoclis Demetriades and Son and Others v. The Republic (1968) 3 C.L.R. 727; Argyrou and Others v The Republic (1983) 3 C.L.R. 474.
(3) (1982) 3 C.L.R. 53, 61.

is not confined to the parties. Very often material facts of the case surface and become known in the course of the proceedings as a result of directions for discovery. In those circumstances it is undesirabe to burden the applicant with costs, although unjustified pursuit of the action thereafter may lead to an order for costs against the pursuer. On the other hand, if the material facts of the case are known from the start, as in this case and they can under no guise ground or support the recourse, the Court is perfectly justified to adjudge the applicant to pay the costs of the proceedings. This is the course I propose to follow in this case considering all relevant facts were within the knowledge of the applicants and the absence of any legitimate cause for the proceeding. The applicants are adjudged to pay the costs to be assessed by the Registrar.

Recourse dismissed with costs against applicants.