

1985 May 16

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

CHRISTAKIS PHOTIOU,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH

1. THE COUNCIL OF MINISTERS,
2. THE MINISTER OF INTERIOR,

Respondents.

(Case No. 18/84).

Administrative Law—Administrative acts or decisions—Executory act—Informatory act—Council of Ministers rejecting applicant's application for pension in June 1981—Applicant submitting an application for reconsideration of his case two years later without putting forward new matters requiring new inquiry—Reply of Ministry of Interior, that his application could not be reconsidered, of an
5 *informatory character—Not of an executory nature and cannot be made the subject of a recourse under Article*
10 *146 of the Constitution—Moreover recourse out of time because there is no omission of a continuing character.*

Omission—Continuing omission.

Following the imposition of the sentence of "requirement to resign" which was imposed on applicant, a police constable as a result of disciplinary proceedings he applied for
15 the grant to him of a pension on the basis of regulation 45 of the Police (Discipline) Regulations and section 7 of the Pensions Law, Cap. 311. The Council of Ministers having considered the matter on 13.6.1981 decided to
20 dismiss the application. On 20.10.1983 the applicant submitted another application to the Minister of Interior requesting a re-consideration of his case by the Council of

Ministers repeating his previous request for the grant to him of retirement benefits. In his letter he made reference to the facts which led to his disciplinary punishment and the mitigating circumstances in his case, also, that he was married and father of three under-age children without any property and he had a service of 12 years in the Police Force. 5

In reply the Director-General of the Ministry of Interior informed the applicant that the reasons which he mentioned in his letter were before the Council of Ministers when it examined and rejected his application on 18.6.1981 and therefore, his application could not be re-examined. 10

Upon a recourse by the applicant counsel for the respondents raised a preliminary objection that the act and/or decision and/or omission complained of does not amount to an executory administrative act within the meaning of Article 146 of the Constitution and, therefore, it could not be the subject of a recourse, and/or that the present application was out of time. 15
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On the preliminary objection:

Held, that the applicant has failed to satisfy this Court that by his application of the 20th October, 1983 new matters were disclosed which required a new inquiry by the Council of Ministers; that the reply from the Ministry of the Interior is clearly of an informatory character that such matters were before the Council of Ministers when it took its previous decision of 18.6.81 and that his application could not be re-examined by the Council of Ministers; and that, therefore, being of such a character is not of an executory nature and it cannot be the subject of a recourse under Article 146 of the Constitution. 25
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Held, further, that the recourse is, in any event out of time, as there is no omission of a continuing character as complained of by him but the matter had been finally and conclusively dealt with by the Council of Ministers on 18.6.1981. 35

Application dismissed.

Cases referred to:

Epaminondas and Others v. Chairman and Members of Municipal Committee of Limassol (1984) 3 C.L.R. 1534;

- 5 *Papasavva v. Republic* (1979) 3 C.L.R. 563 at p. 568;
 Savva v. Council of Ministers (1984) 3 C.L.R. 285.

Recourse.

10 Recourse against the refusal of the respondents to grant applicant pension after his resignation from the Police Force as a result of the punishment of requirement to resign imposed on him following disciplinary proceedings instituted against him.

A. Eftychiou, for the applicant.

15 *M. Florentzos*, Senior Counsel of the Republic, for the respondents.

Cur. adv. vult.

20 SAVVIDES J. read the following judgment. The applicant was a member of the Police Force. He enlisted in the Force on 15.1.1968 and served till 8.8.1979 when his appeal by way of review to the Commander of Police against the confirmation by the Divisional Police Superintendent of Larnaca of the sentence of "requirement to resign" imposed on him by a Police Disciplinary Board set up in accordance with the Police (Discipline) Regulations 1958-1982 as a result of disciplinary proceedings instituted against him, was dismissed and his punishment was confirmed by the Commander of Police.

30 After the imposition of such punishment he applied to the Council of Ministers on 10.8.1979 for the grant to him of a pension on the basis of regulation 45 of the Police (Discipline) Regulations and section 7 of the Pensions Law, Cap. 311. The Council of Ministers considered the matter on 13.6.1981, and decided (Decision No. 20490) to dismiss his application. The relevant minutes of the meeting of the Council of Ministers, read as follows:

35 "The Council considered an application on behalf

of ex police constable No. 2298 Christakis Photiou for the grant to him in accordance with Regulation 45 of the Police (Discipline) Regulations of 1976 of his retirement benefits after the imposition on him of the disciplinary punishment of requirement to resign and decided that the said application be rejected. 5

The Minister of Justice disagreed with the above decision."

After the lapse of more than two years and in fact on 20.10.1983, the applicant submitted another application to the Minister of Interior requesting a re-consideration of his case by the Council of Ministers repeating his previous request for the grant to him of retirement benefits. In his said letter he makes reference to the facts which led to his disciplinary punishment and the mitigating circumstances in his case, also that he was married and father of three under-age children without any property and he had a service of 12 years in the Police Force. 10 15

In reply to his above request, the following letter was sent to him by the Director-General of the Ministry of Interior: 20

"I have been instructed to refer to your letter dated 20.10.83 whereby you apply for re-examination by the Council of Ministers of your application for the grant of pension after your requirement to resign from the Police Force in consequence of a disciplinary punishment and to inform you that the reasons which you mention in your letter were before the Council of Ministers when it examined and rejected your application on 18.6.1981. Therefore, your application cannot be re-examined." 25 30

As a result, the applicant filed the present recourse whereby he prays for a declaration that-

The continuing omission of the respondents to grant to him and/or their decision to refuse to grant to him pension after his resignation from the Police Force as a result of the punishment of requirement to resign which was imposed on him by the Disciplinary Board of the Police Force of Larnaca which was confirmed by the Commander of 35

Police and which was communicated to the applicant by a letter dated 7.11.1983, is null and void and of no effect whatsoever.

5 The grounds of Law on which the recourse is based, are the following:

(1) The sub judge omission and/or decision was taken in violation of the Police Law, Cap. 285 and in particular of Regulation 10 of the Police (Discipline) Regulations 1958-1982, and of Regulation 45 and also of section 6(f) 10 of the Pensions Law, Cap. 311, as amended.

(2) The sub judge omission and/or decision was taken in abuse and/or in excess of powers.

(3) The sub judge omission and/or decision was taken in violation of Article 28(1)(2) of the Constitution and the 15 principle of equality.

(4) The sub judge decision was taken without due inquiry of all the material facts pertaining to the applicant.

(5) The sub judge decision was taken under a misconception of fact and/or on the basis of conflicting facts in 20 the case of the applicant.

(6) The sub judge decision is not duly reasoned.

(7) The sub judge decision was taken by an incompetent organ.

25 By his opposition counsel for the respondents raised a preliminary objection that the act and/or decision and/or omission complained of does not amount to an executory administrative act within the meaning of Article 146 of the Constitution and, therefore, it cannot be the subject of a recourse, and/or that the present application is out of time.

30 He further contended that the decision of the respondents was duly reasoned and was taken properly and in accordance with the relevant provisions of the Constitution, the Law and/or the Regulations and after the proper exercise of the discretionary power of the respondents after all material 35 facts in the case were taken into consideration.

It was the contention of counsel for applicant that it was

the duty of respondent 2, the Minister of Interior, to submit the case to the Council of Ministers for reconsideration in view of the fact that new material was set out in the said application, justifying such reconsideration of the case. He went on to expound on the duty of the Council of Ministers to grant to the applicant the benefits applied for under regulation 45 of the Police Regulations and that the omission of the respondents till today to satisfy his just claim in this respect, amounts to a continuing omission which can be challenged by a recourse under Article 146 of the Constitution.

He further submitted that there was no new inquiry in this case, which could be carried out only by the Council of Ministers and not by the Minister of Interior who refused to submit the application of the applicant for reconsideration and that by his said refusal the Minister of Interior has not given any reasons why the Council of Ministers which was the competent organ according to the Law, failed to exercise its duty of granting to the applicant the benefits to which he was entitled.

. Counsel for the respondents, on the other hand, contended that all the material which was contained in the letter of the applicant to the Minister of Interior was before the Council of Ministers when it examined his case and took its decision on 18.6.1981. He further submitted that the reply of the Ministry of Interior of 7.11.1983 does not embody an executory act but is merely informative of the decision already taken and which had been communicated to the applicant and that there was no new material justifying re-examination of his case by the Council of Ministers and also that all the material contained in his application had been placed before the Council of Ministers when it took its previous decision.

He further went at some length in his address to expound on the powers of the Council of Ministers and in particular the wide discretion which is vested in the Council of Ministers in exercising its powers on the matter.

Before going into the merits of the case, I find it necessary to deal first with the preliminary objection as to whether the sub judice act and/or decision is of an execu-

tory nature amenable by a recourse under Article 146 of the Constitution.

5 The matters which are referred to in the letter of the applicant dated 20th October, 1982, which, was addressed to the Minister of Interior and which the Minister was requested to submit before the Council of Ministers for re-consideration of his case, are matters which presumably were before the Council of Ministers when considering his case as they were either part of the record of the disciplinary proceedings or contained in his personal file.

10 In his letter he is setting out mitigating circumstances in respect of the disciplinary offences. Such matters were matters which could be raised both before the disciplinary board and on appeal before the Commander of Police.

15 The fact that he was married and father of three children was a matter which was specifically mentioned in his previous application to the Council of Ministers.

The applicant has failed to satisfy me that by his application of the 20th October, 1983, new matters were disclosed which required a new inquiry by the Council of Ministers. The reply from the Ministry of the Interior is clearly of an inforamatory character that such matters were before the Council of Ministers when it took its previous decision of 18.6.81 and that his application could not be re-examined by the Council of Ministers. Therefore, being of such a character it cannot be the subject of a recourse under Article 146 of the Constitution. The disciplinary punishment of the Disciplinary Board of the Police was imposed on the applicant on 16.6.1979 and in the exercise of his rights under the Law and the Police Regulations he applied for a review to the Divisional Police Superintendent of Larnaca who confirmed the sentence. The applicant then appealed to the Commander of Police by way of review, who after a full investigation into the matter, as it appears from the material before me, dismissed his appeal and confirmed the sentence. The applicant did not challenge the regularity of such proceedings or the validity of the punishment imposed upon him but from what can be inferred, he accepted such punishment and two days later he applied to the Council of Ministers for retirement benefits. As mentioned earlier, such application was exa-

mined by the Council of Ministers and finally dealt with on 18.6.1981. The applicant did not challenge within the prescribed period the said decision of the Council of Ministers. Therefore, his present application is in any event out of time, as there is no omission of a continuing character as complained of by him but the matter had been finally and conclusively dealt with by the Council of Ministers on 18.6.1981. 5

As to the nature of a continuing omission useful reference may be made to *Epaminondas and others v. The Chairman and Members of the Municipal Committee of Limassol* (1984) 3 C.L.R. 1534, in which our case Law on the subject is reviewed and the distinction is drawn between a non-continuing omission and a continuing one. Also, to the following dictum of the Full Bench of this Court in *Papasavva v. The Republic* (1979) 3 C.L.R. p. 563 at p. 568: 10 15

“It has often been pointed out by this Court that when a decision refusing to do something is taken it cannot be said that it amounts, also, to an omission to do the same thing (see, inter alia, *Vafiades v. The Republic*, 1964 C.L.R. 454). 20

We are of the view, on the basis of the facts of the present case, that the decision of the Chief of Police of May 1, 1970, constituted a refusal to re-appoint the appellant as an acting police sergeant and that it could not be, therefore, treated as an omission of a continuing nature to do so; and, consequently, that it was rightly held that the time of seventy-five days provided for under Article 146.3 of the Constitution began to run as from August 6, 1970; thus, the appellant’s recourse No. 431/72 was out of time.” 25 30

As to the nature of the right to pension under regulation 45 and the powers of the Council of Ministers to grant a pension under section 7 of Cap. 311 after a sentence of “requirement to resign” is imposed as a result of disciplinary proceedings, such matters have been expounded by me in the case of *Savva v. The Council of Ministers* (1984) 3 C.L.R. 285. For the purposes, however, of the present recourse, once I have reached the conclusion that the con- 35 40

tents of the letter of the Ministry of Interior of 20.10.1983 are not of an executory nature and that any complaint against the refusal of the Council of Ministers to grant to the applicant pension or retirement benefits, is out of time,
5 I find it unnecessary to examine such matter or deal with the merits of the case.

In the result this recourse fails and is hereby dismissed, but in the circumstances I make no order for costs.

Recourse dismissed.

No order as to costs.

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