

1985 October 29

[KOURRIS, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

CHARALAMBOS KYPREOPOULLOS,

Applicant,

v.

THE PERMITS AUTHORITY,

Respondent.

(Case No. 768/85).

5 *Provisional Order—Application for—To suspend effect of sub
judice decision pending the determination of the recourse
—Flagrant illegality as a ground for granting the order—
—Court should approach the issue with utmost caution as
it may tantamount to disposing the case on the merits—
Irreparable damage as a ground for granting the order—
In some cases of loss of business or danger to the ability
of applicant to provide the means of his support, pecu-
niary loss is considered as irreparable—Court cannot
10 grant a provisional order suspending a negative admini-
strative act.*

15 *Administrative act—Negative administrative act—A decision
to cancel a road service licence of the applicant's bus
following the annulment by the Court of the decision to
grant him the original licence amounts to a refusal to
grant a licence—And, therefore, it is a negative act.*

20 The applicant applied for a provisional order suspending
the decision to cancel the road service licence of motor
bus DS 408 pending the final determination of the re-
course directed against the said decision.

In his affidavit the applicant stated that he was doing
the route between Amathus and the Municipal Market

of Limassol since 1957. As a result of the enactment of Law 16/64 a road licence was issued for the applicant's bus DS 408 for the route Ayios Tychon to Limassol. This decision was challenged by a recourse to the Supreme Court. After reviewing the decision the Court ordered its annulment on 14.6.1985. 5

On 21.3.85 the Permits Authority decided to readjust the hours of running of the buses in Limassol. As a result the hours of the running of the applicant's bus were also readjusted. 10

After the decision of the Court, against which an appeal was filed and is still pending, the Permits Authority decided to cancel the applicant's licence. This is the sub judice decision.

Counsel for the applicant argued that this decision was tainted with flagrant illegality as violating Law 9/85 and as the respondents annulled the decision of the Minister in 1978 whereby the original permit was granted to the applicant merely relying on the judgment of the Court without taking into account the said readjustment of the hours of the running of his bus. He further argued that if the order is not granted the applicant will suffer irreparable damage because he is married and has to support himself and eight children and if his bus stays out of the route he would loose his clients. 15
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Held, dismissing the application (1) The sub judice decision is a negative administrative act, because the effect of the annulment of the original permit was to deprive the applicant ab initio of a road service licence. The sub judice decision is a refusal to grant the applicant a licence. A negative act cannot be suspended by a provisional order. If a negative act could be suspended, such suspension would amount to an invasion of the Judicial power to the domain of the administration by enjoining it to do what it has refused to do. 30
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(2) Flagrant illegality as a ground for granting a provisional order should be approached with the utmost caution as it may tantamount to disposing of the case on its merits, something discouraged by rule 13 of the Supreme

of the sub judice administrative act, namely, directing the suspension of the decision of the respondents to cancel the road service licence of motor bus No. DS 408 taken on 20.8.1985 and communicated to the applicant by letter dated 31.8.1985 (see appendix "B"), pending the final determination of the recourse for annulment of the said decision of the respondent Authority. 5

The respondents were served with the application for provisional order but they failed to appear and the application had to be adjourned to 18th October, 1985; the Court directed the Registrar to notify the respondents of the date on which the application was fixed and that they were free to appear, to instruct counsel and file an opposition to the application for a provisional order. But, the respondent Authority failed to appear on 5.10.1985 and the Court, on the application of counsel for the applicant, fixed the hearing of the application on the 18th October, 1985. 10 15

The power to grant a provisional order is provided in Rule 13 of the Supreme Constitutional Rules, 1962, which continue in force by virtue of s. 17 of the Courts of Justice (Miscellaneous Provisions), Law 1964. 20

Law No. 13 of 1964 involves the exercise of judicial discretion on the basis of the circumstances of the particular case and in the light of the principles which should guide an Administrative Court when dealing with such application (*Cleanthis Georghiades (No. 1) v. The Republic* (1965) 3 C.L.R. 392). 25

A provisional order is an extraordinary measure designed to forestall the enforcement of administrative act in the interests of justice and administrative legality. The likelihood of irreparable damage is a prerequisite to the grant of an interlocutory order. Such damage must be specifically and succinctly pleaded in the application. The merits of the case are not evaluated at this stage except to the extent they undisputably emerge on the face of the proceedings. The forum for the evaluation of the merits is the trial of the recourse (*Frangos and others v. The Republic* (1982) 3 C.L.R. 53 at pp. 60-61). 30 35

The applicant, in support of his application, swore an affidavit by which he adopted all the facts in the recourse, shortly to the following effect:-

5 The applicant is the owner of motor bus No. DS 408 and was doing the route between Amathus and the Municipal Market of Limassol since 1957.

10 As a result of the enactment of Motor Transport (Regulation) Law, 1964, Law No. 16/64, a road licence was issued for the said bus for the route Ayios Tychon to Limassol. Following the granting of the road service licence to the applicant, Efstathios Kyriacou and Sons Limited and Takis Michael filed a recourse in the Supreme Court against the decision of the Minister of Communication and Works dated 6.3.78 (Recourse No. 252/78), seeking the
15 annulment of the road service licence given to the applicant. After reviewing the decision the Court ordered its annulment by a judgment delivered on 14.6.1985. The effect of this annulment is to deprive of every legal effect the original decision. Thereupon the respondent Authority
20 came under duty to examine the matter afresh by reference to the facts and law as on the date of that first decision.

On 20.8.85 they decided to cancel the licence, that is to refuse a licence to the applicant. The decision was communicated on 31.8.85.

25 It must be noted that applicant appealed against the decision of case No. 252/78 and filed as well the present recourse on 5.9.1985.

30 It should be mentioned incidentally that on 21.3.85 the Permits Authority decided to readjust the hours of running of the buses in the area of Limassol town and for this purpose readjusted the hours of running of the bus of the applicant and they communicated their decision to him by letter dated 21.5.85 (see appendix "A").

35 Counsel for the applicant in his very attractive argument, based his client's case mainly on flagrant illegality and irreparable damage. He argued that there is flagrant illegality because the respondent Authority annulled the decision of the Minister in 1978 merely relying on the judgment of the Court without taking into account, that in

1985, at its meeting of 21.3.85, they examined the movement of the buses in the Limassol area for the better service of the public and decided to readjust the hours of running of the bus of the applicant. He said that they should not have relied on the decision of the Court in 1985 to cancel the road service licence of the applicant which was granted to him having in mind the passengers' traffic in 1978. Their failure, he went on to say, is a violation of the procedure envisaged by Law No. 9/85 where the Permits Authority has to take into account the passengers' traffic. He relied on the case of *Michaelides v. The Republic* (1980) 3 C.L.R. 430 and *Economides v. The Republic* (1982) 3 C.L.R. 837 at p. 841 (1. 30 - 35).

With regard to irreparable damage he said that his client is married and he has to support himself and his eight children. He went on to say also, that if his bus stays out of the route he will lose also his clients.

I propose to deal first with the issue, of flagrant illegality. The principle that the flagrant illegality of an administrative act is a ground for making a provisional order, even in the absence of irreparable damage being caused and even where serious obstacles would be caused to the Administration was expounded in the cases of *Cleanthis Georghiades (No. 1) v. The Republic* (supra) and *Sofocleous v. The Republic* (1971) 3 C.L.R. 345.

But, it was stressed in several cases that flagrant illegality is a ground to be approached with the utmost caution, as it may tantamount to disposing of the case on its merits, something discouraged by Rule 13 of the Supreme Constitutional Court Rules, though this rule cannot be held as divesting this Court from being the watch-dog of legality.

It is correct to say that the merits of a recourse for annulment of an administrative act, are factors to be taken into consideration in deciding whether or not a provisional order for a stay will be granted.

I have examined carefully the argument of learned counsel for the applicant and I hold the view on the material before me, that even though there is an arguable case, no

flagrant illegality has been established such as would justify the granting of the provisional order applied for.

5 The merits of the case, therefore, cannot have a decisive effect on the outcome of the application for a provisional order and I shall proceed to examine the second ground, namely irreparable damage.

10 It is well settled that irreparable damage may be either financial or moral (*Cleanthis Georghiadis*) (*No. 1*) (*supra*)). Such damage must be specifically and succinctly pleaded in the application for a provisional order (*Frangos v. The Republic* (1982) 3 C.L.R. 53). Vague statements will not do (*Sofocleous v. The Republic* (1971) 3 C.L.R. 345).

15 No doubt in this case the damage alleged by the applicant is pecuniary loss. Pecuniary loss is generally recoverable. In some cases, however, pecuniary loss is considered as irreparable if it is going to endanger a commercial business or the ability to providing the means of support of the applicant (See *Tsatsos* "The recourse for annulment before the Council of State" 3rd Edition, p. 428, para. 235).

20 I am of the view that the applicant can succeed on this ground provided that the decision of the Administration is not negative. I think I am entitled to examine the issue whether on the material placed before me, this is a negative administrative decision or not. Obviously, if it is a
25 negative administrative decision the applicant cannot succeed in his application.

30 The reason for the rule that the negative decisions cannot be suspended by a provisional order is based on the reasoning that if a negative decision is suspended this would in effect mean that the Administration is indirectly forced to grant the demand or request; and the judicial power, a quite distinct power of the state cannot invade the domain of the Administration by enjoining the latter to do things that the Administration has refused to do.

35 In this respect the following are stated by *Tsatsos* in his work "The Recourse for annulment before the Council of State" 3rd ed. at p. 424:-

«Δια τούτο: αίτησις αναστολής κατά ρητής έστω.

αλλά αρνητικής πράξεως της Διοικήσεως μηδέ κατά το γράμμα του νόμου συγχωρείται, μηδέ λογικώς είναι νοητή, ως επαγομένη εάν εγίνετο δεκτή, τον εξαναγκασμόν της διοικήσεως, όπως προβή εις ενέργειαν τινά, τούθ' όπερ αντιφάσκει προς την έννοιαν της αναστολής».

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(For this reason: application to suspend even an express negative act of the administration cannot be excused either in accordance with the letter of the law or is it logically comprehensible as leading, if accepted, to the compulsion of the administration to proceed to any act which is contrary to the notion of suspensions (*Papacharalambous v. The Republic* (1983) 3 C.L.R. 694 at p. 702)).

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Although I appreciate that applicant's bus business may come to a standstill because of the sub judice decision with great financial repercussions, nevertheless, there is no room to interfere by way of provisional order because, in effect, he is challenging a negative administrative act. I explain why. The effect of annulment of this first decision was to deprive him ab initio of a road service licence. The second decision merely involved refusal to grant him a licence. Even if I was to suspend this decision he would still have no right to use this bus.

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In these circumstances I am of the view that the decision is negative and therefore, the application for a provisional order cannot succeed. In all the circumstances the application for a provisional order is dismissed but without order as to costs.

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*Application dismissed.
No order as to costs.*

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