1986 May 14

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

THEODOROS PAPADOPOULOS,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTER OF COMMERCE AND INDUSTRY,

Respondents.

(Case No. 236/84).

Legitimate interest—Constitution, Article 146.2—Voluntary and unreserved acceptance of an act—Deprives acceptor of his legitimate interest to challenge such act by means of a recourse to this Court—Applicant applied for the classification of his restaurant as a "tourist centre" on the coming into operation of the Tourist Places of Entertainment Law 91/79—Such application mandatory under s. 19 of said Law—When applicant's restaurant was so classified, applicant filed a hierarchical recourse to the Minister under s. 10, objecting to such classification—Applicant not deprived of his legitimate interest.

Administrative act—Executory—Confirmatory—An act confirming an earlier one is in general of a confirmatory nature, unless taken after a new inquiry—What constitutes a new inquiry—For the subsequent act to be confirmatory it has to emanate from the same organ as the earlier one.

Administrative Law—General principles—Ministers—A Minister is not bound to carry out inquiries personally into any application submitted to him.

Administrative Law—Reasoning of an administrative act—Due inquiry.

Constitutional Law—Constitution—Article 25—Nothing in it limits the right of the State to subject the exercise of a trade or profession to any number of licences—So long as the conditions imposed are reasonable the law will be upheld—The Tourist Places of Entertainment Law 91/79. 5

Constitutional Law—Constitution, Article 28—"Equal Protection"—The problem is one of classification—Classification reasonable when it rests on differences pertinent to the subject in respect of which it is made. 10

Constitutional Law—Constitution, Articles 29 and 30.

The Tourist Places of Entertainment Law—Sections 2(d), 10 and 19.

The applicant was the owner of "CORONA" restaurant at Ayios Dhometios Municipality. The said restaurant was classified by name by the Cyprus Tourism Organisation (K.O.T.) with the approval of the respondent Minister as a "tourist centre" under s. 2(d) of Law 91/79 with effect as from 1.1.81. The applicant filed a hierarchical recourse under s. 10 of the Law. The said recourse was dismissed. The dismissal was not challenged by a recourse to this Court. 15 20

By letter dated 18.7.83 "Corona Restaurant Ltd." applied to K.O.T. for exemption of the said restaurant from the category of tourist centre and the collection of the 3% specified charge on every account of the customers. The grounds on which such application was based were that the restaurant was less than 100 metres from the Green Line, its customers were members of the United Nation's contingent and that other places of entertainment on the Green Line had been exempted. 25 30

K.O.T. turned down the said application on the ground that no differentiation regarding the mode of operation of the restaurant had been ascertained since its original classification. 35

By letter dated 4.8.83 the applicant, as the owner of

the restaurant, applied to the respondent Minister for exemption of payment of the 3% charge. The Minister rejected the said application as the matter had been considered in the past and he had nothing to add in relation thereto.

By letter dated 29.12.83 the applicant applied to the respondent Minister that the said restaurant should cease being designated as a "tourist centre" on the following grounds, namely that due to the recent unlawful declaration of the so-called "Turkish Cypriot State" the restaurant was deprived of a great number of its clients; that this reality that the employment of anybody beyond those absolutely necessary should be avoided and prices contained; that the 3% charge creates problems to the alien customers; and that restaurants with similar problems have already been exempted.

The Minister referred the matter to K.O.T. for its views. As a result the Director-General of K.O.T. addressed to the Director-General of the Ministry a memorandum stating the history of the case, why in his opinion the restaurant should not be exempted as aforesaid and *that there are 19 cases pending against the applicant in* the District Court of Nicosia mainly for non-collection and non-payment to K.O.T. of the 3% charge.

The said memorandum was placed before the Minister, who decided to reject the application dated 29.12.83.

Hence the present recourse seeking the annulment of this decision on the following grounds, namely that no due inquiry was carried out, that it was taken in abuse of power in that the said criminal cases were taken into consideration, that there was a misconception of fact, that it lacked due reasoning and lastly that it is contrary to Articles 25, 28 and 30 of the Constitution.

Counsel for the respondents raised the following two objections namely that the applicant lacks legitimate interest in that on 9.8.80 he voluntarily applied for the classification of the restaurant as a tourist centre and that the sub judice decision is not of an executory nature.

Held, dismissing respondents' said objections: (1) Voluntary and unreserved acceptance of an act deprives the acceptor of legitimate interest to challenge such act by means of a recourse to this Court. In the present case applicant's application dated 9.8.80 was made because of the mandatory provisions of s. 19 of Law 91/79. The hierarchical recourse to the Minister indicated his objection to the classification of his restaurant as a "tourist centre".

(2) In general, an act, confirming an earlier administrative act, is not executory, unless it was taken after a new inquiry into the matter. There is a new inquiry when an investigation takes place of newly emerged elements or, although pre-existing, were unknown at the time of the earlier act and were taken into consideration in addition to the others, but for the first time. The collection of additional information constitutes a new inquiry. For the subsequent act to be confirmatory it has to emanate from the same organ.

In this case the sub judice decision was not taken upon a hierarchical recourse under s. 10 of Law 91/79, but upon a request to the competent Authority under Article 29 of the Constitution, which safeguards the right of a person to address a written request to any competent public Authority. The applicant in this case is not the same as the applicant of 18.7.83 "Corona Restaurant Ltd.", a corporate body with separate legal entity. The grounds put forward in the request of 29.12.83 are not identical to those raised in the application of 4.8.83. As it emanates from the material before the Court a new inquiry was carried out. The Authority that issued the sub judice decision is different from the organ that took the earlier decision.

It follows that the sub judice decision is a new executory act.

Held further, dismissing the recourse: (1) It would have been impossible for a Minister to carry out inquiries personally into any application submitted to him. That is why there are the civil service, various officers and relevant public corporations. The Minister was entitled to inquire into the present matter through K.O.T.

(2) No irrelevant matter was taken into consideration. The allegation that the sub judice decision was a punitive measure because of the pending criminal cases is not borne out.

5 (3) The inquiry was complete. All matters raised by the applicant were examined.

(4) The reasoning both as set out in the letter communicating the sub judice decision to the applicant and as supplemented by the material in the file—the memorandum 10 of the Director-General of K.O.T. with which the Minister agreed—is sufficient.

(5) The Minister had all the relevant material before him. The decision was reasonably open to him.

(6) Article 30 of the Constitution is completely irrele-15 vant to the present case. As regards Article 25 of the Constitution it was held in *Shistris* v. *K.O.T.* (infra) that the licence required under Law 91/79 was designed to safeguard public interest in tourism and that nothing in the said Article limits the right of the State to subject the exercise of 20 a trade or profession to any number of licences and that so long as the conditions imposed are reasonable the law will be upheld

(7) Counsel for the applicant did not advance any argument with regard to the violation of Article 28 of the Con-25 stitution. The entire problem under the "equal protection" principle is one of classification. A classification is reasonable when it is not an arbitrary selection but rests on differences pertinent to the subject in respect of which classification is made. The classification made under Law 91/79 30 for "tourist centres" and the classification of the restaurant in question as such appear reasonable.

Recourse dismissed.

No order as to costs.

Cases referred to:

Avgoloupis v. *The Republic* (1985) 3 C.L.R. 1545;

Kritiotis v. *The Municipality of Paphos and Others,* (1986) 3 C.L.R. 322;

Piperis v. *The Republic* (1967) 3 C.L.R. 295; 5

Ioannou v. *The Grain Commission* (1968) 3 C.L.R. 612;

Myrianthis v. *The Republic* (1977) 3 C.L.R. 165;

Metaforiki Eteria "Ayios Antonios" Spilia-Courdali Ltd. v. *The Republic* (1981) 3 C.L.R. 221;

Tomboli v. *CY.T.A.* (1982) 3 C.L.R. 140; 10

Stylianides v. *The Republic* (1983) 3 C.L.R. 672;

Goulielmos v. *The Republic* (1983) 3 C.L.R. 883;

Kolokassides v. *The Republic* (1965) 3 C.L.R. 542;

Ktena and Another (No. 1) v. *The Republic* (1966) 3 C.L.R. 64; 15

Kyprianides v. *The Republic* (1982) 3 C.L.R. 611;

Mylonas v. *The Republic* (1982) 3 C.L.R. 880;

Shistris v. *K.O.T.* (1983) 2 C.L.R. 72.

Recourse.

Recourse against the refusal of the respondents to exempt 20 applicant's restaurant "CORONA" from the classification as a tourist centre.

A. S. Angelides, for the applicant.

St. Ioannides, for the respondents.

Cur. adv. vult. 25

STYLIANIDES J. read the following judgment. The applicant by this recourse seeks the annulment of the decision of the Minister of Commerce and Industry not to accede

to his request to exempt his restaurant "CORONA" from the classification as a tourist centre, and declaration of the Court annulling the consequent continuation of the classification of the said restaurant "CORONA" as a tourist centre.

The applicant was the owner of "CORONA" restaurant, housed at Ayios Dhometios Municipality. After the coming into force on 1st November, 1980, of the Tourist Places of Entertainment Law, 1979 (Law No. 91/79)—(See Notification No. 316 published in Supplement No. III(I) of the Official Gazette No. 1641 dated 31.10.80)—the Cyprus Tourism Organization (K.O.T.) classified by name the said restaurant as a tourist centre under s. 2(d) of the Law which provides that -

> "A tourist centre means a shop which the Organization will, with the approval of the Minister, define by name due to the nature of the services which are rendered or due, to its location, the gathering or movement of customers, travellers, tourists, or holiday makers".

The restaurant in question was so classified with the approval of the Minister of Commerce & Industry (hereinafter "the Minister"), with effect from 1st January, 1981. The said decision was communicated to the applicant.

On 20.12.80 the applicant filed a hierarchical recourse under s. 10 of the Law, seeking the exemption of his restaurant from the provisions of the Tourist Places of Entertainment Law, 1979. The hierarchical recourse was dismissed on 24.3.81 as the Minister concluded that the said restaurant was correctly classified as a tourist centre. The applicant did not resort to the Court against the decision of the Minister.

By letter dated 18.7.83 (Appendix III) another advocate, acting on behalf of "Corona Restaurant Ltd.", applied to K.O.T. for exemption of the said restaurant from the category of tourist centre and the collection of the 3% specified charge on every account of the customers.

The grounds on which the application was based were

that the restaurant was less than 100 meters from the Green Line; its customers were members of the United Nations' Contingent stationed in the area and that other places of entertainment on the Green Line had been exempted.

In reply to the above letter, K.O.T. informed the said advocate that the restaurant in question could not be exempted as it was within the ambit of the provisions of the Law and further no differentiation regarding its mode of operation had been ascertained since its original classification.

The applicant himself as the owner of "Corona" restaurant, by letter dated 4.8.83 (Appendix V), applied to the Minister for exemption from payment of the 3% charge. In his reply dated 3.10.83 (Appendix VI) the Minister informed the applicant that his application had already been considered in the past and rejected and he had nothing new to add in relation to this matter.

By letter dated 29.12.83 (Appendix VII), addressed to the Minister by applicant's present advocate, the Minister was requested to consider and approve that applicant's restaurant should cease being designated as a "tourist centre" within the meaning of Law No. 91/79, on the following grounds:-

The area abuts the Turkish occupied area of Cyprus and due to the recent unlawful declaration of the so-called "Turkish Cypriot State", the restaurant was deprived of a great number of its customers to a degree rendering the survival of the business problematic; this reality makes it imperative that the employment of anybody beyond those absolutely necessary should be avoided and prices be contained: the 3% charge creates extensive problems to the alien customers of the restaurant; restaurants with similar problems as the above, which have not suffered damages during the invasion of 1974, though the applicant suffered more than £10,000.- damages, have already been exempted from the category of tourist centre.

This written request was referred by letter dated 14.1.84 (Appendix VIII) to K.O.T. for its views.

The Director-General of K.O.T. by letter of 25.1.84 (Appendix IX) addressed to the Director-General of the Ministry, referred to the history of the case as from 7.10.80 and further stated in paragraphs 3 and 4 the following:-

5 «3. Το Τουριστικό Κέντρο 'CORONA' πράγματι ευρίσκεται σε περιοχή που γειτνιάζει με τη Τουρκοκρατούμενη περιοχή της Λευκωσίας. Τούτο όμως δεν μπορεί να αποτελέσει λόγο για εξαίρεση καθότι στο κέντρο, παρατηρείται ικανοποιητική κίνηση πελατών, πλη-
10 ροί όλες τις βασικές προϋποθέσεις για κατάταξη σαν Τουριστικό και επιπρόσθετα δεν έχει διαπιστωθεί καμμιά αλλαγή σε ότι αφορά τον τρόπο λειτουργίας του κέντρου από την αρχική κατάταξή του. Τυχόν εξαίρεση τούτου, δυνατό να προκαλέσει προβλήματα στον
15 Οργανισμό αφού αρκετά άλλα κέντρα γειτονεύουν σε Τουρκοκρατούμενες περιοχές.

4. Συμπληρωματικά επιθυμώ να αναφέρω ότι ο υπό αναφορά επιχειρηματίας δεν έχει μέχρι σήμερα συμμορφωθεί με τις πρόνοιες της σχετικής Νομοθεσίας,
20 εκκρεμούν δε εναντίον του στο Επαρχιακό Δικαστήριο Λευκωσίας 19 υποθέσεις, που αφορούν κυρίως μη είσπραξη και μη καταβολή στον Οργανισμό του ποσοστού 3%».

(English Translation).

25 ("3. The Tourist Centre 'CORONA' is in fact situate in an area neighbouring the Turkish occupied area of Nicosia. This fact, however, cannot be a ground of exemption because a satisfactory movement of clients is observed, it satisfies all the necessary pre-
30 requirements for its classification as a Tourist establishment and, in addition, there has not been ascertained any change regarding its mode of operation since its original classification. Any exemption of this centre may create problems to the Organisation be-
35 cause there are many other centres which are neighbouring the Turkish Occupied areas.

4. In addition I would like to refer to the fact that

the person concerned has not yet complied with the provisions of the relevant legislation and that 19 cases, mainly concerning the non-collection and non-payment to the Organisation of the 3% are pending against him in the District Court of Nicosia"). 5

On 6.2.84 a memorandum was placed before the Minister, prepared by Chr. Loizides, one of the officers of the Ministry, on the basis of the contents of the aforesaid report of the Director-General of K.O.T.—(See Appendix XII). 10

On 24.3.84 the Minister, after considering the matter and the aforesaid memorandum, decided to reject the applicant's request. Actually, on the top of the memorandum, Appendix XII, it is written in his handwriting: "Συμφωνώ να απορριφθεί η αίτηση". This decision was communicated 15 to applicant's advocate by letter dated 28.3.84 (Appendix XI). It is a short letter. It states that applicant's request could not be acceded to as no differentiation in the mode of the operation of the restaurant had been ascertained since its classification. Hence this recourse, seeking the 20 annulment of the aforesaid decision.

The grounds of Law on which this recourse is based are: No due inquiry was carried out; the decision is faulty because of abuse of power in that a number of criminal cases for violation of the Law pending against the applicant were 25 taken into consideration; there was a misconception of fact; it lacked due reasoning, and, lastly it is contrary to the provisions of Articles 25, 28 and 30 of the Constitution. Learned counsel for the respondents in the oposition raised the following objections on points of Law:- 30

(a) That the applicant lacks an existing legitimate interest; and,

(b) That no executory administrative act is being challenged.

It was alleged that the applicant himself voluntarily ap- 35 plied for the classification of his restaurant as a tourist

centre on 9.8.80, on the coming into operation of the Law.

She submitted that the applicant has no legitimate interest as he expressly accepted the decision of the classification of the restaurant as a tourist centre.

Paragraph 2 of Article 146 provides that -

> "A recourse may be made by a person whose any existing legitimate interest.... is adversely and directly affected....".

A recourse for annulment requires in respect of the applicant a legitimatio ad causum. The existence of legitimate interest creates jurisdiction for the Court. Lack of legitimate interest deprives the Court of the power to deal with a recourse. The legitimate interest must exist at the time of the filing of the recourse until its determination—(*Avgoloupis* v. *The Republic*, (1985) 3 C.L.R. 1545; *Kritiotis* v. *The Municipality of Paphos and Others*, Recourse No. 137/83, unreported*).

It is well settled that a person who voluntarily and unreservedly accepts an administrative act, no longer possesses a legitimate interest entitling him to make a recourse against it in the sense of Article 146.2 of the Constitution—(*Piperis* v. *The Republic*, (1967) 3 C.L.R. 295; *Ioannou* v. *The Grain Commission*, (1968) 3 C.L.R. 612; *Spyros A. Myrianthis* v. *The Republic*, (1977) 3 C.L.R. 165; *Metaphoriki Eteria "Ayios Antonios" Spilia-Courdali Ltd.* v. *The Republic*, (1981) 3 C.L.R. 221; *Tomboli* v. *CY.T.A.*, (1982) 3 C.L.R. 140, 154, a Full Bench case; *Stelios Stylianides* v. *The Republic*, (1983) 3 C.L.R. 672; *Goulielmos* v. *The Republic*, (1983) 3 C.L.R. 883).

In the present case the applicant did not voluntarily and unreservedly accept the designation of his restaurant as a tourist centre. He applied for this in 1980, on the coming into operation of the Law, because of the mandatory provisions of s. 19. He further indicated his objection by the hierarchical recourse to the Minister against such

* Now reoorted in (1986) 3 C.L.R. 322

designation. Therefore, preliminary objection (a) has no merit.

In support of the second objection it was submitted that the act complained of is simply a confirmatory one and repeats previous decisions of the respondent. 5

The act which contains a confirmation of an earlier one, in general is not executory and, therefore, cannot be the subject of a recourse for annulment. Only when it was taken after a new inquiry into the matter, it is an executory act— *(Kolokassides* v. *The Republic*, (1965) 3 10 C.L.R. 542; *Ktena and Another (No. 1)* v. *The Republic*, (1966) 3 C.L.R. 64; *Kyprianides* v. *The Republic*, (1982) 3 C.L.R. 611).

A confirmatory act or decision is an act or decision of the Administration which repeats the contents of a 15 previous executory act and signifies the adherence of the Administration to a course already adopted; it is not in itself executory because it does not itself determine the legal position of an individual case, and cannot, therefore, be the subject of a recourse under Article 146. 20

There is a new inquiry when, before the issue of the subsequent act, an investigation takes place of newly emerged elements or, although pre-existing, were unknown at the time and were taken into consideration in addition to the others, but for the first time. Similarly, 25 the collection of additional information in the matter under consideration constitutes a new inquiry—*(Stassinopoulos—The Law of Administrative Disputes*, 4th Edition, p. 176; *Kyprianides* v. *The Republic*, (supra), at pp. 619-620; *Mylonas* v. *The Republic*, (1982) 3 C.L.R. 30 880, at p. 887; *Kritiotis* v. *The Municipality of Paphos and Another*, (supra)).

For the subsequent act to be confirmatory it has to emanate from the same competent authority.

The request embodied in the letter of Mr. A. S. Ange- 35 lides, advocate, of 29.12.83 is not a hierarchical recourse under s. 10 of the Law; it is a request to the

competent Authority under Article 29 of the Constitution.

Article 29 is found in Part II of the Constitution, guaranteeing fundamental rights and liberties. It safeguards the right of the person to address a written request to any competent public Authority. Such Authority has the duty to attend to and decide expeditiously the matter of the request and the decision, duly reasoned, has to be given to the person making the request within a period not exceeding thirty days. This is a very important right, more so in view of the expansion of the activities of the State and the inherent risk to individual rights.

The sub-judice decision is the reply of the competent Authority to a request of the present applicant. The applicant in this case is not the same as the applicant of 18.7.83. "Corona Restaurant Ltd." is a corporate body with separate legal entity from the present applicant.

The grounds put forward in the request of 29.12.83 are not identical to those raised in the application of 4.8.83. A new inquiry was carried out and this is obvious from the documentary material before this Court to which reference was made earlier. The Authority that issued this decision is different from the organ that took the earlier decision. The Minister dealt with such a request of the present applicant for the first time.

For all these reasons the sub-judice decision is not a confirmatory but a new executory act. Therefore, the second objection in the opposition also fails.

It was canvassed by counsel for the applicant that no proper inquiry was made; the inquiry was not carried out by the Minister himself but he relied on the views of K.O.T.

The Minister is not carrying out inquiries in person. It would have been impossible for a Minister to carry out inquiries personally into any application submitted to him. That is why there are the civil service, various officers and relevant public corporations. He was entitled

to inquire into the matter through other organs—in this case K.O.T.

The allegation that the sub judice decision was a punitive measure because of the pending criminal cases for violation of the relevant Law by the applicant is not borne out. 5
On the contrary, it emerges that the applicant made these periodic endeavours for the declassification of his restaurant in order to avoid, if possible, the criminal charges pending against him. Nothing about these prosecutions is found in the memorandum placed before the Minister after 10
the inquiry of K.O.T. No irrelevant matter was taken into consideration.

The inquiry was complete. All matters raised were examined. The unlawful declaration of a State by the Turkish Cypriot leadership did not add anything to the pre-existing 15
condition in the area. The restaurant has always been situated very close to the Turkish occupied part of the country. The restaurant satisfies all the requirements for its classification into a tourist centre and no change whatsoever in the mode of its operation from its original classifi- 20
cation was observed. The inquiry was not in any way faulty.

The reasoning both as set out in the letter of 28.3.84 and as supplemented by the material in the file—the memorandum with which the Minister agreed—is sufficient 25
reasoning for the sub judice decision. The Minister had before him all relevant material that was essential for the exercise by him of his discretion. There was no defective exercise of his power. The sub judice decision is in no way faulty. It was reasonably open to the Minister. 30

The last ground is that the sub judice decision is contrary to the provisions of Articles 25, 28 and 30 of the Constitution.

Article 30 of the Constitution guarantees the right of access to the Court, and the determination of the civil 35
rights and obligations or of any criminal charge against a person by an impartial and competent Court established by

law at a fair and public hearing. This is completely irrelevant to the case under consideration.

Article 25 of the Constitution protects the right of every person to practice any profession or carry on any occupation, trade or business. In *Shristris* v. *K.O.T.*, (supra) a criminal appeal where the appellant was convicted, inter alia, for omitting to collect the specified 3% percentage on every account calculated by reference to the quantum of the bill of the customers, contrary to ss. 12 and 16(4) of the Law, at p. 83, it was said with regard to Law No. 91/79:-

> "Nothing in Article 25 limits the right of the State to subject the exercise of a trade or profession to any number of licences. So long as the conditions imposed are reasonable the law will be upheld. And so in this case, where the licence required was designed to safeguard public interest in tourism. Its proper promotion and protection is, in our judgment, to everybody's benefit, not least persons in the position of the accused".

Counsel for the applicant obviously purposely did not advance any argument with regard to the violation of Article 28 of the Constitution. Article 28.1 reads:-

> "All persons are equal before the law, the administration and justice and are entitled to equal protection thereof and treatment thereby".

"Equal protection" means the right to equal treatment in similar circumstances, both in the privileges conferred and in the liabilities imposed by the laws. The entire problem under the equal protection principle is one of classification. A classification is reasonable when it is not an arbitrary selection but rests on differences pertinent to the subject in respect of which classification is made. Thus, a particular business may be subjected to a special burden if there is a reasonable relation between the burden imposed and the peculiar character of the business.

The classification made under Law No. 91/79 for "tourist centres" and the classification of applicant's restaurant as a tourist centre in all the circumstances appear reason-

able, were made for a purpose that is intended to regulate and promote tourist industry and have a rational relation to this object.

In view of the aforesaid, this recourse fails; it is hereby dismissed but in all the circumstances of the case no order as to costs is made. 5

Recourse dismissed.
No order as to costs.