1986 September 19

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

ZENONAS K. IOANNOU,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
1. THE MINISTER OF INTERIOR,
2. THE COMMANDER OF POLICE,

Respondents.

(Case No. 3/86).

Executory act—Confirmatory act—Informative act—Distinction between an executory act and a confirmatory or informative act—Judicial pronouncement in another case that the Police (Discipline) Regulations are void—Application by applicant, who had been convicted of disciplinary charges and sentence to compulsory retirement from the Force and who had not challenged his conviction and sentence, for his restoration to the Force—Nature of the reply given by the Chief of Police to the said application—Whether said judicial pronouncement created an obligation for a new inquiry.

Legitimate interest—Acceptance of an administrative act—Member of Police Force convicted of disciplinary charges and sentenced to compulsory retirement—Acceptance of retirement benefit without reservation or protest—Acceptor deprived of his legitimate interest to challenge the disciplinary decision.

On the 25.2.80 the applicant, who was at that time a member of the Police Force, was found guilty of disciplinary charges and was sentenced to compulsory retirement. The applicant did not challenge in any way his said con-

viction or punishment and, moreover, he accepted the retirement benefits granted to him in accordance with a decision dated 4.9.80 of the Council of Ministers.

By letter dated 30.11.85 applicant's advocates applied for applicant's restitution in the Force on the ground that the Police (Discipline) Regulations were pronounced by the Supreme Court as void in case 385/85 *Patsalides* v. *The Republic* (1985) 3 C.L.R. 2611). In his reply to the said letter the Chief of Police wrote that "... I wish to inform you that he was convicted for disciplinary offences... and his conviction was not challenged before the Supreme Court and therefore it remains in force even after the recent decision in 385/85... Therefore, the satisfaction of your claim is impossible."

As a result applicant filed the present recourse.

Held, dismissing the recourse: (1) The essence of the nature of an executory administrative act is that it must be an act directly productive of legal consequences. The distinction between an executory act and a confirmatory or informative act has been lucidly drawn in *Economides* v. *The Republic* (1980) 3 C.L.R. 219 at pp. 223 and 224. Useful reference may also be made to the conclusions from the Case-Law of the Council of State in Greece 1929-1959, pp. 237 and 240, adopted by the Full Bench of this Court in *The Republic* v. *Demetriou and Others* (1972) 3 C.L.R. 219.

(2) It is a well established principle that the contents of a letter which is merely of an informative nature and does not contain a decision creating a new legal situation are not of an executory nature amenable to a recourse under Article 146 of the Constitution.

(3) It is clear that the aforesaid letter of the Chief of Police informs applicant's advocate that in view of the fact that his client's conviction has not been challenged, the relevant decision remained final irrespective of the decision of the Supreme Court in case 385/85. The letter is of an informative nature, but, bearing in mind that the Chief of Police was the appropriate organ, it may,

also, be treated as confirmatory of the previous decision. As the disciplinary decision was not challenged within the time limit of 75 days prescribed by the Constitution, this recourse is out of time.

A judicial pronouncement on the constitutionality or construction of a particular law does not constitute new material with regard to which there is an obligation to carry out a new inquiry; or if such new inquiry is carried out such pronouncement does not render the decision reached thereunder a new executory act (Dictum of A. Loizou, J. in *Zambakides* v. *The Republic* (1982) 3 C.L.R. 1017 at p. 1024 adopted).

(4) Moreover, the acceptance by the applicant of the retirement benefits without any protest or reservation of rights amounted to acceptance of the decision of his compursory retirement, and, therefore, the applicant was deprived of any legitimate interest entitling him to challenge the validity of such decision.

Recourse dismissed.
£60.- costs against applicant.

Cases referred to:

Economides v. *The Republic* (1980) 3 C.L.R. 219;

The Republic v. *Demetriou and Others* (1972) 3 C.L.R. 219;

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

Ioannou v. *The Republic* (1982) 3 C.L.R. 1002;

Fournia Ltd. v. *The Republic* (1983) 3 C.L.R. 262;

Argyrou and Others v. *The Republic* (1983) 3 C.L.R. 474;

Zambakides v. *The Republic* (1982) 3 C.L.R. 1017;

Tomboli v. *CY.T.A.* (1980) 3 C.L.R. 266 and on appeal (1982) 3 C.L.R. 149.

Recourse.

Recourse for a declaration that the decision and/or

act and/or omission of the respondents to restore the applicant in the Police Force and/or their refusal or omission to cancel their decision of the 29th February, 1980 for the compulsory retirement of the applicant is null and void.

A. Papacharalambous, for the applicant.

A. Vladimirou, for the respondents.

Cur. adv. vult.

SAVVIDES J. read the following judgment. Applicant joined the Police Force on 1st August, 1972, as a special constable, till the 6th May, 1973, and since then and till the 29th February, 1980, as an ordinary police constable. On 25th February, 1980, as a result of disciplinary proceedings instituted against him for (a) disobedience to orders and (b) neglect of duty he was found guilty on both charges and was punished with compulsory retirement from the Police Force. Applicant's conviction was published in the Police Weekly Orders, of 10th March, 1980. The applicant did not appeal against such conviction or punishment to the Chief of Police nor did he file a recourse challenging such decision. Pursuant to such decision the Council of Ministers by its decision No. 19497 of 4th September, 1980, approved in the special circumstances of the case, the payment to the applicant of retirement benefits for the period of his services, which were paid to and accepted by him.

The Supreme Court on 25th November, 1985, by its decision in recourse 385/85 *(Patsalides* v. *The Republic* (1985) 3 C.L.R. 2611) pronounced the amended Police (Discipline) Regulations as null and void on the ground that they had not been laid before the House of Representatives prior to their issue and publication.

As a result of the said decision, applicant, through his advocates, sent a letter dated 30th November, 1985, to the Ministry of Interior raising the matter of his compulsory retirement and claiming restitution to his post. The material part of such letter reads as follows:

"

It is our contention that our client has been dis-

missed on the basis of regulations which were void and illegal.

The annulment of the regulations was decided on 25.11.1985 by the Supreme Court in recourse 385/85 of Erodotos Patsalides.

On the basis of the above we claim that our client be readmitted to the Force in view of the fact that his retirement was based on invalid and illegal regulations.".

In reply to the above letter, the Chief of Police addressed the following letter to applicant's counsel (16.12.1985):

"With reference to your letter re: P.A./2031 dated 30.11.1985 whereby you claim the restoration of your client, ex police constable 2836 Zenon K. Ioannou, to his post, I wish to inform you that he was convicted for disciplinary offences on 29.2.1980 and his conviction was not challenged before the Supreme Court and therefore it remains in force even after the recent decision of the Supreme Court in case No. 385/85 to which you made reference. Therefore, the satisfaction of your claim is impossible."

As a result the applicant filed the present recourse whereby he prays for the following relief:

"Declaration that the decision and/or act and/or omission of the respondents to restore the applicant in the police force and/or their refusal or omission to cancel their decision dated 29.2.1980 for compulsory retirement of the applicant is null and void and of no legal offect."

The legal grounds set out in the recourse in support thereof are:

(a) The reply of the respondents is not duly reasoned.

(b) The respondents did not take into consideration the fact that the legal situation in force till 25.11.85 had changed.

(c) The sub judice decision was not taken after due enquiry.

(d) The sub judice decision violates the principle of equality.

(e) The sub judice decision is arbitrary and unreasonable.

By his opposition counsel for the respondents refuted the allegations of counsel for applicant and raised a preliminary objection that the applicant has no legitimate interest to file the present recourse and/or that the prerequisites of Article 146 are not satisfied.

At the request of counsel for the respondents and with the consent of counsel for applicant the preliminary objection of counsel for respondents was set down for hearing as a preliminary issue in view of the fact that if sustained, the whole subject-matter of this recourse would be disposed of.

By his written address, on the preliminary issue, counsel for the respondents, advanced the following arguments:

(a) The sub judice decision is not an executory administrative act as it has not produced legal effects.

(b) It is of an informative character and/or confirmatory of a previous decision.

(c) It has been filed out of time with respect to the original decision.

(d) The applicant has lost any legitimate interest by not having challenged the original decision and having accepted the gratuity paid to him.

Counsel for applicant, on the other hand, contended that the sub judice decision is not informative or confirmatory of a previous decision as there has been a change of the legal position as a result of the decision in Case 385/85 which nullified the regulations on which the applicant was originally convicted, but is clearly an executory act by itself which can be challenged by a recourse. The

refusal of the Chief of Police, counsel submitted, to re-instate the applicant, in the light of the decision in Case 385/85 amounts to a violation of a legitimate right of the applicant and operates to his detriment, which entitles the applicant to file a recourse under Article 146 of the Constitution.

The first question which poses for consideration is whether the sub judice decision amounts to an executory act or is merely of an informative character or confirmatory of a previous decision.

The essence of the executory nature of an administrative act is that it must be an act directly productive of legal consequences. The distinction between an executory act and a confirmatory or informative act has been very lucidly drawn by the President of this Court in *Economides* v. *The Republic* (1980) 3 C.L.R. 219 in which at pp. 223 and 224 he had this to say:

> "It is well settled that a letter which is merely of an informative nature, and does not contain a decision creating a new legal situation, is not of an executory nature and, therefore, it cannot be made the subject matter of a recourse under Article 146 (see, in this respect, inter alia, *Koudounaris* v. *Republic*, (1967) 3 C.L.R. 479, 482, *Lardis* v. *The Republic*, (1970) 3 C.L.R. 356, 359, *HadjiKyriacos and Sons Limited* v. *The Republic*, (1971) 3 C.L.R. 286, 290, *The Republic* v. *Demetriou*, (1972) 3 C.L.R. 219, 223, *Theodorou* v. *The Attorney-General of the Republic*, (1974) 3 C.L.R. 213, and *HadjiPanayi* v. *The Municipal Committee of Nicosia*, (1974) 3 C.L.R. 366, 375).
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> Also, it is well established that a confirmatory act lacks executory nature and, therefore, it cannot be made the subject matter of a recourse under Article 146 of the Constitution; and this is so even if it is a letter by means of which the administration signifies its refusal to revoke a previous executory act (see, in this respect, inter alia, *Zivlas* v. *The Municipality of Paphos*, (1975) 3 C.L.R. 349, 360, as well

as the Decisions of the Council of State in Greece Nos. 210/1929, 1224/1965, 2738/1968 and 1114/1969).

Furthermore, it cannot be said that an act is not confirmatory because it is the outcome of a re-examination of a certain matter from its legal aspect only, in the light of the legal situation which existed when a previous executory decision in relation of it, which is being confirmed, was taken (see, in this respect, inter alia, *Lordos Apartotels Limited* v. *The Republic*, (1974) 3 C.L.R. 471, the Conclusions from the Case-Law of the Council of State in Greece, supra, p. 241, and the Decision of the said Council in cases Nos. 5/1937, 229/1938, 439/1938, 1013/1966, 2250/1966, 2777/1968, 1916/1970, and 3137/1970)."

Useful reference as to the nature of an executory act and its distinction from a confirmatory or an informative act may also be made to the Conclusion from the Case-Law of the Council of State in Greece 1929-1959 at pp. 237 and 240 which were adopted by the Full Bench in *The Republic of Cyprus* v. *Demetriou and others* (1972) 3 C.L.R. 219. Triantafyllides, P., in delivering the judgment of the Court said the following at pp. 222, 223:

"As stated in the Conclusions from the Case-Law of the Council of State in Greece ('πορίσματα Νομολογίας τοῦ Συμβουλίου τῆς Ἐπικρατείας') 1929-1959, at p. 237, 'executory administrative acts are acts by means of which there is expressed the will of the administration in order to produce legal consequences regarding those governed, and which entail immediate administrative enforcement; the main element of the notion of an administrative act is the production of a legal result through the creation, modification or termination of a legal situation' ('.... αἱ ἐκτελεσταὶ πράξεις, τοὐτέστιν ἐκεῖναι δι' ὧν δηλοῦται βούλησις διοικητικοῦ ὀργάνου, ἀποσκοποῦσα εἰς τὴν παραγωγὴν ἐννόμου ἀποτελέσματος ἔναντι τῶν διοικουμένων καὶ συνεπαγομένη τὴν ἄμεσον ἐκτέλεσιν αὐτῆς διὰ τῆς διοικητικῆς ὁδοῦ. Τὸ κύριον στοιχεῖον τῆς ἐννοίας τῆς ἐκτελεστῆς πράξεως εἶναι ἡ ἄμεσος παραγωγὴ ἐννό-

μου ἀποτελέσματος, συνισταμένου εἰς τὴν δημιουργίαν, τροποποίησιν ἢ κατάλυσιν νομικῆς καταστάσεως'..).

See, also, in this respect, the decisions of the Council of State in Greece in cases 487/36, 950/54 and 1866/67.

A mere expression of the intention ('πρόθεσις') of the administration—as contradistinguished from an expression of its will ('βούλησις')—does not amount to an executory act (see the Conclusions from the Case-Law of the Council of State in Greece, 1929-1959, at p. 239, as well as the decision of such Council in case 296/32); also, there are not executory those acts of the administration which are only of an informative nature (see the Conclusions, supra, at p. 238, as well as the decisions of the Council of State in Greece in cases 1713/68 and 2446/68)."

As to the well established principle that the contents of a letter which is merely of an informative nature *and does not contain a decision creating a new legal situation* are not of an executory nature amenable by a recourse under Article 146, reference may, in addition to the above authorities, be made to *Kyprianides* v. *The Republic* (1982) 3 C.L.R. 611; *Ioannou* v. *The Republic* (1982) 3 C.L.R. 1002; *Fournia Ltd.* v. *The Republic* (1983) 3 C.L.R. 262; *Argyrou & Others* v. *The Republic* (1983) 3 C.L.R. 474.

In the light of the above authorities I am now coming to examine whether the letter of respondent 2 embodies a decision of an executory nature. A careful perusal of the contents of such letter makes it abundantly clear that respondent 2, by such letter, informs counsel for applicant that in view of the fact that his client had been convicted on 29th February, 1980 and his conviction had not been challenged, such decision remained final irrespective of the decision of the Supreme Court five years later in case 385/85* and as a result applicant's claim could not be satisfied.

It is clear from the contents of such letter that it is of an informative character, informing the applicant of the

* See (1985) 3 C.L.R. 2611.

situation which arose as a result of the decision of 29th February, 1980. One may further add that, bearing in mind that respondent 2 was the approriate organ, such latter may be treated as confirmatory of a previous decision.

The applicant did not challenge the validity of the decision of 29th February, 1980, within the 75 days time limit fixed by the Constitution, nor did he file an appeal against his conviction or punishment to the Chief of Police and the Minister as provided by the Police (Discipline) Regulations then in force, nor did he challenge in time the validity of the regulations under which he was convicted. His present recourse is therefore out of time and should be dismissed accordingly.

Before concluding on this issue I wish to make reference to the following dictum of A. Loizou, J. in *Zambakides* v. *The Republic* (1982) 3 C.L.R. 1017 at p. 1024, which I fully indorse:

> "In my view, the fact that a judicial pronouncement has been made on the construction of a particular law or the constitutionality of same by the delivery of a judgment by the Supreme Court, does not, upon the application of a person who has not exercised his rights under Article 146 of the Constitution when the executory act in question was taken, constitute a new material with regard to which there was an obligation to carry out a new inquiry or if an inquiry was carried out that the decision reached thereunder constitutes a new executory act and not a confirmatory act of a previous executory one. The act, therefore, is confirmatory and could not be the subject of a recourse which should fail on this ground also."

There is, however, a further ground which has to be examined, that is, whether the applicant has no legitimate interest, as by having accepted payment of retirement benefits upon his retirement from the force he may be taken to have accepted and or acquiesced to the executory administrative decision reached at the time of his retirement and communication to him of such decision.

The legal position as to the effect of acceptance of an administrative act or decision has been considered by this Court in a number of cases. The principle emanating from our case law and the jurisprudence and case law of the Council of State in Greece has been considered by me in *Tomboli* v. *CY.T.A.* (1980) 3 C.L.R. 266 and on appeal by the Full Bench (1982) 3 C.L.R. 149, in which our case-law on the matter is reviewed. It is well settled from the said authorities that in the administrative law of Cyprus, on the basis of the relevant principles which have been expounded in Greece in relation to legislative provision there (section 48 of Law 3713/1928) which corresponds to our Article 146.2, that a person, who expressly or impliedly accepts an act or decision of the administration, is deprived, because of such acceptance, of a legitimate interest, entitling him to make an administrative recourse for the annulment of such act or decision.

In the present case the applicant after his retirement from the service the validity of which he never challenged, accepted payment of the benefits payable to him upon such retirement without any protest or reservation on his part of any right. Such conduct must be taken as amounting to acceptance of the decision for his retirement, which had deprived him of any legitimate interest entitling him to file an administrative recourse for the annulment of such act or decision. The present recourse fails for this reason as well.

In the result the recourse fails and is hereby dismissed with £60.- against costs in favour of the respondents.

Recourse dismissed with £60.- in favour of respondents.