1988 July 7

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

PHOTIS PAPAPHOTIS,

Applicant,

v.

THE EDUCATIONAL SERVICE COMMISSION,

Respondents.

(Case No. 999/87).

Executory act—Confirmatory act—Attributes of a confirmatory act.

Executory act—Re-examination of—No duty cast on administration to re-examine a decision upon petition of a subject.

Acts or decisions in the sense of Art. 146.1 of the Constitution—Dismissal of an Educational Officer—Petition for re-examination of decision—Refusal on ground that no new facts were placed before the administration—Not within the ambit of Art. 146.1

The applicant was dismissed from the Public Educational Service on the ground of protracted absence from duty. His recourse was dismissed. An appeal to the Full Bench of this Court is still pending.

The applicant petitioned the respondent for his reinstatement. He did not invoke new facts, but simply referred to his record, participation and contribution to the struggle for the Independence of Cyprus.

The respondents refused to reconsider their decision. Hence this recourse.

Held, dismissing the recourse: (1) A confirmatory decision is one signifying adherence by the Administration to a course already plotted by administrative action.

(2) In fact, no new material, warranting re - examination was placed before the administration. On the other hand, no duty is cast on the Administration to re - examine an executory decision upon the mere petition of a party prejudicially affected thereby.

(3) The subject matter of this recourse is inamenable to judicial review and on that account the recourse must be dismissed.

Recourse dismissed.
No order as to costs.

Cases referred to:

Pieris v. The Republic (1983) 3 C.L.R. 1054;

Koudounaris v. The Republic (1967) 3 C.L.R. 479;

Varnava v. The Republic (1968) 3 C.L.R. 566;

Papademetriou v. The Republic (1974) 3 C.L.R. 28;

Theodorou v. Attorney - General (1974) 3 C.L.R. 213;

Lordos Aparthotels Ltd. v. The Republic (1974) 3 C.L.R. 471;

Ioannou v. Commander of Police (1974) 3 C.L.R. 504;

Decisions of the Greek Council of State Nos: 1297/57 and 895/54.

Recourse.

Recourse against the refusal of the respondents to revoke their decision to dismiss applicant from the service as a result of disciplinary proceedings against him for absence from duty without leave.

E. Efstathiou, for the applicant.

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

Cur. adv. vult.

PIKIS J. read the following judgment. The applicant, Photis Papaphotis, was a teacher of Theology in public education. In 1980 disciplinary proceedings were raised against him for absence from duty without leave. He pleaded guilty to the charge and on his own admission he was found guilty of absence from duty without the leave of the Authorities. The facts founding the charge were expressly admitted, as counsel who represented him in those proceedings affirmed. The respondents imposed a sentence of dismissal from the service, effective from 26/10/80. Applicant challenged his dismissal by a recourse to the Supreme Court. His recourse was dismissed and the sub judice decision confirmed (*Papaphotis v. Republic* (1984) 3 C.L.R. 915). An appeal was taken, notably Revisional Jurisdiction Appeal No. 411, which is still pending before the Full Bench of the Supreme Court.

On October 7, 1987, the applicant addressed, through his advocate, a letter to the respondents seeking the revocation of the decision whereby he was dismissed. In this letter no facts are cited warranting the re - examination of the decision, save that reference is made to an earlier letter of the applicant addressed, through his counsel, to the Minister of Education dated 26/8/87; wherein readiness is expressed on the part of the applicant to abandon his appeal and relinguish any claim to compensation provided the decision entailing his dismissal is revoked. In that letter, too, no reference is made to anything that would qualify as a new fact justifying re - examination of the decision to dismiss him. Attention is drawn to the moral duty of the State to re - employ the applicant on account of his great contribution to the struggle for the independence of Cyprus, coupled with an appeal to reinstate him in the educational service.

On October 14, 1987, the respondents dealt with the application of 7/10/87 and noted that nothing new was placed before them justifying the re - examination of the decision entailing the dismissal of the applicant. Furthermore, they observed that Revisional Appeal No. 411 is pending before the Supreme Court and that they would await and abide by its result. Respondents raised

objection to the justiciability of the decision complained of for lack of executory character. In their contention the decision impugned in these proceedings adds nothing new to that of 25/10/80 and the readiness of the Administration to abide by the outcome of judicial action. The amenity of the Court to review the sub judice decision was, with the agreement of counsel, set down for determination before inquiring into the merits of the case. It must be added, however, that the merits of the case, that is, the facts disclosed in the two letters of the applicant, are interwoven with the justiciability of the complaint of the applicant.

Counsel for the applicant made a moving plea focussed on the personal circumstances of the applicant and the moral duty of the State not to suffer one of the leaders of the struggle for independence, waged between 1955 and 1959, to remain unemployed at the age of 55. This duty should prevail over everything else. I reminded counsel that the exercise of the jurisdiction of the Supreme Court to review administrative action is not unfettered but subject to the limitations set out in article 146 and the constraints inherent thereto.

In the course of the oral hearing, it emerged from the testimony of Mr. M. Pilides, Assistant Registrar, that the personal file of the applicant was not before the respondents on 14.10.87 when they dealt with his petition for revocation of the earlier decision and re - examination of his dismissal. Lastly, counsel for the applicant made reference to Law 42/87 ratifying the Convention concerning vocational rehabilitation and employment of disabled persons. Salutary as they are, the provisions of the Convention leave unaffected the issues calling for resolution in this case.

Counsel for the respondents raised a threefold argument in support of the contention that the sub judice decision is inamenable to judicial review under article 146:-

Firstly - the decision is confirmatory of the decision of 25.10.80 and as such lacks the executory character necessary to justify judicial review.

Secondly - no facts were placed before the respondents warranting or justifying re - examination of the earlier decision.

Thirdly - no duty is cast on the Administration to re - examine a decision upon the petition of the subject.

She supported her submission by reference to Greek and Cyprus caselaw.

All three submissions are valid for the reasons explained below:

A confirmatory decision is one signifying adherence by the Administration to a course already plotted by administrative action. The principles relevant to the identification of confirmatory acts were the subject of discussion and decision in numerous cases. (See, inter alia, *Koudounaris v. Republic* (1967) 3 C.L.R. 479; *Varnava v. Republic* (1968) 3 C.L.R. 566; *Papademetriou v. Republic* (1974) 3 C.L.R. 28; *Theodorou v. Attorney - General* (1974) 3 C.L.R. 213; *Lordos Aparthotels Ltd. v. Republic* (1974) 3 C.L.R. 471; *Ioannou v. Commander of Police* (1974) 3 C.L.R. 504). In *Pieris v. Republic* (1983) 3 C.L.R. 1054 the Full Bench of the Supreme Court reviewed the attributes of confirmatory acts and the test applicable to determining whether any given decision qualifies as confirmatory. As noted in the above case the foremost consideration is the content of the two acts and their effect in law. If they are essentially similar, that is, if they produce identical consequences in law, the second act is properly regarded as confirmatory of the first.

Another way of testing the nature of the act is by inquiring into the legal consequences likely to arise from the annulment of the second act. A subsequent decision, though identical in effect to a pre-existing one, may qualify as an executory act in either of two situations (extract from *Pieris*, supra):-

"(a) If it springs from a new inquiry into the facts of the case, or,

(b) if it derives from subsequent legislation, different in content from the one in force at the time of the first act.

However, if subsequent legislation simply reproduces the previous law, the second act is regarded as confirmatory of the first."

In this case, we are not in essence confronted with a confirmatory decision but with the refusal of the Administration to re examine an executory administrative act in the absence of facts warranting re - examination. The pertinent question is whether the material placed before the respondents, deriving from the content of the letter of 7.10.87 and the letter earlier addressed to the Minister of Education on 26.8.87, warranted re - examination of the earlier decision. The answer is plainly in the negative. In essence, no new facts were placed before the respondents. The content of the two letters amounted in reality to a moral plea for the re - employment of the applicant in the public service.

On the other hand, no duty is cast on the Administration to re - examine an executory decision upon the mere petition of a party prejudicially affected thereby. Numerous decisions of the Greek Council of State, cited by counsel for the respondents, establish this proposition beyond doubt. (Supplement to Caselaw 1953-60, p. 127 (Summary of relevant Caselaw) -See, also Case 1297/57 and 895/54). Unless the law casts a positive duty to re - examine an executory decision of the Administration upon given circumstances, the Administration is under no duty to re - examine a decision on the petition of the subject affected thereby.

I conclude that the subject matter of this recourse is inamenable to judicial review and on that account the recourse must be dismissed. And I so order. No order as to costs.

Recourse dismissed.
No order as to costs.