

1988 November 23

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

IOANNIS KAMPOURIS,

Applicant.

v.

THE EDUCATIONAL SERVICE COMMISSION,

Respondent.

(Case No. 342187).

Executory act—Confirmatory act—The elements that must be present for an act to be considered as confirmatory of an earlier act—New inquiry—If new decision reached after a new inquiry, such new decision is executory—What constitutes a new inquiry.

5 The facts of this case appear sufficiently in the judgment of the Court.
Recourse dismissed.
No order as to costs.

Cases referred to:

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

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

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

Recourse.

Recourse against the refusal of the respondents to employ applicant on salary scale B.12.

L. Clerides, for the applicant.

N. Charalambous, Senior Counsel of the Republic, for the respondents.

Cur. adv. vult.

STYLIANIDES J. read the following judgment. The applicant is an Engineer Instructor, a post which carries salary in the new scales A8 - A10. 5

On 25th May, 1979, he applied to the respondent Commission to be emplaced in the then scale B12. His such application was rejected by the Respondents on 22nd December, 1979, having taken into consideration all the facts and documents before them. 10

He, being aggrieved, filed Recourse No. 6/80 seeking the annulment of that decision. The recourse was dismissed by a Judge of this Court (*Ioannis Kampouris v. The Educational Service Committee* (1983) 3 C.L.R. 1165). Revisional Appeal 351 was taken against this first instance Judgment. The appeal was withdrawn and dismissed by the Full Bench. The following statements were made before the Full Bench: 15

"*Mr. Clerides*: I have the following statement to make: As it appears from paragraph 4 of the Opposition of the respondent the Qualifications Assessment Committee informed the respondent that if applicant secures an opinion from the Department of Education and Science in the United Kingdom this would assist the Committee in reexamining the matter and that the applicant should be asked to secure such an opinion. The applicant on the 5th April 1984, after judgment was delivered by the trial Judge, secured such opinion which is favourable for him and he intends to apply afresh to the respondent for re-examination of his case on the basis of the said opinion. 20 25

Under these circumstances I apply for leave to abandon this appeal without prejudice to my client's rights. 30

Mr. Charalambous: I have nothing to state. This is a matter for the appropriate authority."

5 On 13th September, 1985, counsel for the applicant applied to the Ministry of Education informing them that he had secured on 5th April, 1984, a certificate from the Department of Education and Science of the United Kingdom that his H.N.D. in Mechanical and Production Engineering of the Central London Polytechnic was equivalent to pass degree of B.Sc., and requested the em-
placement of his client in scale B12.

10 The respondent Commission dealt with this application at its meeting of 2nd April, 1986, and in a reasoned decision rejected such request. One of the reasons was the abolition of such post by Law 61/81 and the non-inclusion of same in all subsequent Budgets and the approval of new scheme of service in 1982. By
15 letter dated 5th April, 1986, counsel for the applicant was informed of such decision and the reasons thereof.

20 On 6th February, 1987, counsel for the applicant reverted to the same matter. He recounted the history of the case of his client and asked "the examination of the request of his client in a spirit of justice".

In that letter he mentioned, also, that others were employed by the Commission in scale B12 before its abolition and flagrant injustice is being done to his client due to the abolition of scale B12.

25 On 16th February, 1987, the Respondents dealt with this petition and decided that there was no new element justifying the revision of their decision of 2nd April, 1986, communicated to Mr. Clerides by letter of the Commission dated 5th April, 1986:

30 On 24th March, 1987, the same counsel requested the re-examination of the matter, alleging that erroneously the Commission held that there was no new element and stated that the new element was the violation of Article 28 of the Constitution of the

Republic. He set down the names of five persons who were emplaced in scale B12 on 1st January, 1981 and a sixth one on 15th March, 1981.

This last request was considered by the Commission on 7th April, 1987, and on 8th April, 1987, they replied to Mr. Clerides as follows: 5

"I refer to your letter dated 24/3/87, with regard to your client Ioannis Kampouris and I inform you the following:

In addition to what is stated in our letter of 5/4/86, the Educationalist, whom you mentioned in your such letter, had been emplaced in vacant post of Technologist by decisions of the Commission dated 5/1/81 and 7/4/81, in accordance with the law and the scheme of service obtaining at that time." 10

Shortly later this recourse was filed, whereby he seeks the annulment of the decisions of the Commission contained in the letters of 17th February, 1987 and 8th April, 1987. 15

Counsel for the Respondents raised the preliminary objection that the sub judice decisions are confirmatory acts and, therefore, not justiciable.

It is well settled 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. A confirmatory act or decision is an act or decision of the administration which repeats the contents of a 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 this is the reason it cannot be the subject of a recourse. 20 25

An act which contains a confirmation of an earlier one, may, however, be executory and, therefore, subject to a recourse for annulment, if it has been made after a new inquiry into the matter 30

(*Nicos Kolokassides v. The Republic of Cyprus through the Minister of Finance* (1965) 3 C.L.R. 542; *Christakis L. Varnava v. Republic (District Officer, Nicosia and Another)* (1968) 3 C.L.R. 566; *Kyprianides v. Republic* (1982) 3 C.L.R. 611).

5 In *Kyprianides v. Republic* (supra), at pp.619-620, it was said that according to Tsatsos Application for Annulment, 3rd edition, pp. 132-133, for an act to be confirmatory the following elements are required:

- 10 (a) Identity of the issuing authority;
- (b) Identity of the person or persons to whom it relates;
- (c) Identity of the procedure;
- (d) Identity of the reasoning; and
- (e) Identity of the order."

Further down it was said:

15 "When does a new inquiry exist? The answer is given by Stassinopoulos in the Law of Administrative Disputes, 1964, 4th edition, at p. 176, a passage which was adopted and applied by this Court in a number of cases:

20 "When does a new inquiry exist, is a question of fact. In general, it is considered to be a new inquiry, the taking into consideration of new substantive legal or factual elements, and the used new material is strictly considered, because he who has lost the time limit for the purpose of attacking an executory act, should not be allowed to circumvent such a time limit by

25 the creation of a new act, which has been issued formally after a new inquiry, but in substance on the basis of the same elements. So, it is not considered as a new inquiry, when the case is referred afresh to a Council for examination exclusively

30 on its legal aspect, or when referred to the Legal Council for its opinion or when another legal provision other than the one on which the original act was based is relied upon if there is no reference to additional new factual elements. There is a new in-

quiry particularly when, before the issue of the subsequent act, an investigation takes place of newly emerged elements or although preexisting were unknown at the time which are taken into consideration in addition to the others, but for the first time. Similarly, it constitutes new inquiry the carrying out of a local inspection or the collection of additional information in the matter under consideration." 5

In this case all the facts were before the Administration before 2nd April, 1986. With regard to the allegation of contravention of Article 28 of the Constitution this preexisted and was known to the Respondents. The sub judice decisions have all the characteristics of a confirmatory act. 10

The sub judice decisions are confirmatory acts. They are not executory and they cannot be the subject of a recourse.

For the foregoing, this recourse is hereby dismissed with no order as to costs. 15

*Recourse dismissed.
No order as to costs.*