

[TRIANTAFYLLOIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE  
CONSTITUTION

NICOLAS MILLIOTIS,

*Applicant,*

*and*

THE REPUBLIC OF CYPRUS THROUGH  
THE MINISTER OF COMMUNICATIONS AND WORKS,  
*Respondent.*

(Case No. 189/67).

1968  
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NICOLAS  
MILLIOTIS

v.

REPUBLIC  
(MINISTER OF  
COMMUNICATIONS  
AND WORKS)

*Hawker—Government's property of a public nature—Famagusta Port Area—Hawker prohibited from working in such Area—Because of Government's obligation under a contract with the canteen-keeper in the area to exclude therefrom hawkers—Contract, properly construed, not extending to hawkers selling like the Applicant wares different from the things envisaged to be sold by the canteen-keeper—Sub judice decision, therefore, has to be annulled as being vitiated by a material misconception—See, also, herebelow.*

*Government's property of a public nature; not owned by Government in its capacity as private owner—Access thereto—Decision relating to access to such property is a matter in the realm of public law—Consequently it can be made the subject of a recourse under Article 146 of the Constitution.*

*Administrative and Constitutional Law—Recourse under Article 146 of the Constitution—Act or decision within Article 146.1—Decision relating to the access to a Government property of a public nature such as the Famagusta Port Area—Matter of public law—Jurisdiction of the Court in this respect on a recourse under Article 146—See, also, above.*

*Administrative Law—Administrative decision—Discretionary powers—Decision taken under the influence of a material misconception—Such misconception being as to the effect of a contractual obligation undertaken by the authorities towards a person other than the Applicant—Sufficient ground for annulment of the decision complained of—See, also, above.*

*Immovable Property—Government property—See above.*

*Discretionary powers—Defective exercise thereof on account of a material misconception—See above.*

*Contract—Contractual obligation—Misconception as to the effect of a clause in a contract entered into between the Government and A may, in a proper case, vitiate an administrative decision within Article 146.1 of the Constitution affecting a third person such as the Applicant in the present case—See, also, above.*

*Public law and Private law—See above.*

*Private law and Public law—See above.*

*Recourse under Article 146 of the Constitution—See above.*

*Famagusta Port Area—See above.*

By this recourse under Article 146 of the Constitution the Applicant, a hawker by profession, complains against a decision of the Respondents preventing him from entering the Famagusta Port Area, as, and carrying on therein the trade of, a hawker.

According to the opposition filed by the Respondents, the Applicant as well as all other hawkers have been prohibited from working as hawkers in the said Port Area because the canteen therein was let to a contractor, and it was part of the relevant agreement that the Government would protect the rights of the canteen-keeper by preventing hawkers from carrying on their trade in the Area; and this was the reason why the decision complained of was taken excluding the Applicant from the Famagusta Port Area.

Annuling the *sub judice* decision the Court:

*Held, (1)(a).* The Famagusta Port Area is not a property owned by the Government in its capacity as a private owner; it is a property of a public nature owned by the Government for public purposes.

*(b)* Therefore the *sub judice* decision, being a matter in the realm of public law, can be made the subject of a recourse under Article 146 of the Constitution.

*(2)(a)* It is well settled that the members of the public have, in relation to public property which is destined for public use, the right to use such property accordingly, subject, of course, to appropriate restriction and control.

*(b)* But, in the present case, we are not faced, at all, with such a situation, because the reason why the Applicant, as well as all other hawkers, have been excluded from the

Area in question is the alleged contractual obligation undertaken by the Government towards the canteen—contractor not to allow hawkers in the Area.

(3) Having perused the contract, I am of the opinion that, though such obligation is phrased in general terms, it cannot properly be construed, in the context of the said contract as extending to hawkers, such as the Applicant, who sell wares so remotely different from the things envisaged to be sold by the canteen-keeper.

(4) In the circumstances, the decision complained of was taken under a material misconception as to the extent of the Government's obligation towards the canteen-keeper and, consequently, has to be and is hereby, annulled with £10 costs in favour of Applicant.

*Sub judice decision annulled.*

*Costs as aforesaid.*

### **Recourse.**

Recourse against the validity of a decision whereby Applicant has been prevented from entering the Famagusta Port Area and carrying on therein the trade of a hawker, as from the 1st August, 1967.

Applicant in person.

*L. Loucaides*, Counsel of the Republic, for the Respondent.

*Cur. adv. vult.*

The following Judgment was delivered by:—

TRIANAFYLLIDES, J.: By this recourse the Applicant complains against a decision of the authorities responsible for the Famagusta Port Area—who come under the Respondent Minister—by means of which the Applicant has been prevented, as from the 1st August, 1967, from entering such area as, and carrying on therein the trade of, a hawker.

There is no doubt that the said Area is Government property; but, it is not what would be described as property owned by the Government in its capacity as a private owner; it is property of a public nature owned by the Government

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for public use purposes; and, for this reason, counsel for the Respondent has quite rightly, in my opinion, conceded that the *sub judice* decision is a matter in the realm of public law.

It is well settled that the members of the public have, in relation to public property which is destined for public use, the right to use such property accordingly.

Of course, the Government may, within certain proper limits, impose restrictions and controls regarding the mode of use by the public of such a property.

But, in the present case, we are not faced, at all, with such a situation.

What has happened is that the Applicant, and all other hawkers, have been prohibited from working as hawkers in the Famagusta Port Area because, according to the Opposition filed by the Respondent, the canteen in such Area was let, as from the 24th July, 1967, to a contractor, and it was part of the relevant agreement that the Government would protect the rights of the canteen-keeper by preventing hawkers from carrying on their trade in the said Area; and this is the reason (see para. 6 of the Opposition) for which the Applicant has been excluded, as a hawker, from the Famagusta Port Area.

An invitation for tenders for the letting of the canteen in question was published in the Official Gazette of the 25th May, 1967; the terms for tenders envisaged that the person to whom the canteen would be let would sell food, refreshments, confectionery etc., at approved prices, and that a relevant price-list would have to be posted outside the canteen; it was also stated that such person would have the exclusive use of the whole of the Port Area, and that the entrance therein of hawkers would be prohibited (see *exhibit 5*).

Eventually the canteen was let to a certain Panayiotis Georghiou, on the 24th July, 1967.

It is part of the provisions of the relevant contract (see *exhibit 6*) that the canteen-keeper will sell refreshments drinks, hot dishes, sandwiches etc., at prices expressly set out in a price-list incorporated in such contract.

It is quite clear from the said contract that what the canteen-

keeper is to sell in the Famagusta Port Area are foodstuffs, refreshments and the like.

It is, further, mentioned, in the said contract, (*exhibit 6*), that the canteen-keeper will have the exclusive use of the whole Port Area and that the entrance therein of hawkers will be prohibited.

Having perused the aforementioned contract, I am of the view that the fair and reasonable interpretation thereof is that it enables the canteen-keeper to sell in the whole Famagusta Port Area the things which are specifically mentioned in his contract, or things of similar nature, and that the Government's obligation to exclude therefrom hawkers covers only hawkers who sell the same things as the canteen-keeper is enabled to sell.

Thus, though such obligation is phrased in general terms I do not think that it can properly be construed, in the context of the relevant contract, as extending to hawkers who sell wares so remotely different from the things envisaged to be sold by the canteen-keeper such as combs, nail-clippers, shaving creams and the like, which the Applicant was selling in the Famagusta Port Area as a hawker.

In the circumstances I think that the total exclusion of the Applicant from the Port Area, as a hawker, was decided upon under the influence of a material misconception as to the extent of the obligation of the Government towards the canteen-keeper; all that need have been done pursuant to such obligation was to prohibit the Applicant from selling, as a hawker, things sold by the canteen-keeper under his contract (*exhibit 6*); it follows, thus, that the *sub judice* decision, being vitiated by a misconception, has to be declared to be null and void and of no effect whatsoever.

Of course, nothing in this Judgment should be taken as laying down that the appropriate authorities are precluded from excluding hawkers in general from the Famagusta Port Area, if such step can be taken with lawful authority and on proper grounds; I leave this matter entirely open.

In the result this recourse succeeds. There shall be, also, an order for costs in favour of the Applicant and against the Respondent for £10.-, to cover out-of-pocket expenses, including witnesses' costs; and this order for costs is made without prejudice to the order for costs already made on the 9th February, 1968.

*Sub judice decision annulled.  
Order for costs as aforesaid.*

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