

[TRIANAFYLLIDES, P.]
IN THE MATTER OF ARTICLE 146 OF THE
CONSTITUTION
ARCHIMIDES ZITTIS,
Applicant,
and
THE REPUBLIC OF CYPRUS, THROUGH
THE MINISTRY OF COMMERCE AND INDUSTRY,

1973
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Respondent.

(Case No. 278/69).

Recourse under Article 146 of the Constitution—Lack of legitimate interest—In any event not “adversely affected” in a material manner—Recourse not maintainable—Paragraph 2 of Article 146—See further immediately herebelow.

Legitimate interest adversely affected—Article 146.2 of the Constitution—Applications for permit to import potatoes, the one made to the Minister of Commerce under the Imports Regulation Law, 1962 (Law 49 of 1962), the other to the Minister of Agriculture under a different enactment viz. the Diseases of Plants Prevention Law, Cap. 49—Both applications refused, that to the Minister of Commerce on July 18, 1969, the other on July 21, 1969—Only the earlier of such refusals challenged by the present recourse—So long as the latter refusal was in force at the time of the making of the recourse and its validity remained unchallenged, it cannot be said that the applicant possessed a “legitimate interest” in the sense of Article 146.2 entitling him to make, and proceed with, the present recourse—Moreover no interest of his was “adversely” affected, by the sub judice refusal, because the annulment of such refusal could not by itself change the already adverse for him position created by the unchallenged refusal of the Minister of Agriculture, supra.

The applicant in this case applied to the Minister of Commerce for a permit to import a quantity of potatoes in

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relation to the needs of the British Bases in Cyprus. This application, made under an Order of the Minister published under section 3 of the Imports (Regulation) Law, 1962 (Law 49/62), was refused and the applicant was informed accordingly by letter dated July 18, 1969.

Now, on July 14, 1969, the applicant applied for a similar permit to the Minister of Agriculture and Natural Resources under an Order, dated June 14, 1957, published under the Diseases of Plants Prevention Law, now Cap. 49 and the Contagious Diseases (Animals) Law, now Cap. 45. The Minister of Agriculture refused such permit by letter dated 21st July, 1969.

The applicant filed his present recourse only against the refusal of the Minister of Commerce. This recourse was dismissed on the sole ground that it is not maintainable for lack of legitimate interest adversely affected by such refusal in the sense of Article 146.2 of the Constitution. Paragraph 2 of Article 146 of the Constitution reads as follows :

“2. Such a recourse may be made by a person whose any existing legitimate interest, which he has either as a person or by virtue of being a member of a Community, is adversely and directly affected by such decision or act or omission.”

Held, (1). The applicant's interest was not a legitimate interest because what he complained of by the recourse, namely his having not been allowed by the respondent Minister of Commerce to import potatoes, was something which was anyhow not lawful otherwise, in view of the provisions of the aforementioned Order of the 14th June, 1957, and of the aforesaid refusal of the Minister of Agriculture to allow him to import potatoes; in effect, by the annulment of the subject matter of this recourse he was seeking to achieve an object which was not lawfully possible. (See *Yiannaki v. The Republic* (1965) 3 C.L.R. 561; and Conclusions from the Case Law of the Greek Council of State 1929 - 1959, p. 258).

(2) Also, no interest of the applicant in the matter was, in fact, “adversely” affected, in the sense of Article 146.2 of the Constitution, by the *sub*

judice decision, because the annulment of that decision could not by itself change the already adverse for him position, as, even if such decision did not exist, he could still not import potatoes due to the aforesaid Order of the 14th June, 1957, and the aforesaid refusal of an import permit by the Ministry of Agriculture of July 21, 1969; in effect, an annulment of the *sub judice* decision could not affect the interests of the applicant in a material manner (see the Conclusions from the Case Law of the Greek Council of State 1929 - 1959, p. 260).

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(3) The recourse is therefore not maintainable.

Recourse dismissed.

Cases referred to :

Yiannaki v. The Republic (1965) 3 C.L.R. 561.

Recourse.

Recourse against the refusal of the respondent Ministry of Commerce and Industry to allow applicant to import potatoes.

L. Papaphilippou, for the applicant.

M. Kyprianou, Senior Counsel of the Republic,
for the respondent.

Cur. adv. vult.

The following judgment was delivered by :-

TRIANAFYLLIDES, P. : The applicant complains, in effect, that the Ministry of Commerce and Industry refused to allow him to import potatoes.

According to the applicant such refusal is contained in a letter of the Director-General of the Ministry, dated the 18th July, 1969 (see *exhibit* 3).

The history of the events prior to the said letter is briefly as follows :-

On the 2nd July, 1969, the applicant, who is an importer, exporter and distributor of foodstuffs, wrote to the Minister of Commerce and Industry (see *exhibit* 1A) informing him that he had undertaken the obligation to

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supply with potatoes the British Army in the British Bases in Cyprus, during the period from the 17th March, 1969 to the 30th November, 1969, at the rate of about 160 tons monthly, and that as the local crop of good quality potatoes had already been exported he was having difficulty in securing the quantities of potatoes—and especially of the specified quality—which he had to supply; he was, therefore, requesting the Ministry to examine the whole matter and to indicate to him what he could do in the circumstances or to allow him to import potatoes in order to be enabled to perform his contractual obligation.

On the 7th July, 1969, the Director-General of the Ministry of Commerce and Industry wrote, on the letter of the applicant, a minute addressed to the Senior Officer Imports, requesting him to ask Mr. Chartsiazis, an official of the Ministry, to see the applicant and explain to him that there “can be no question of imports”. There was made, next, on the 10th July, 1969, a note by Mr. Nicolaou, another official of the Ministry, stating that Mr. Chartsiazis had seen the applicant, on that date, and “advised him accordingly”.

The Minister of Commerce and Industry had written on the 21st June, 1969, a letter (see *exhibit 6*) to the Chairman of the Cyprus Potato Marketing Board, in relation to the prevention of a rise in the price of potatoes and, by a reply of the Board dated the 28th June, 1969 (see *exhibit 5*), he was informed, *inter alia*, that there were available 15,000 to 18,000 tons of potatoes for local consumption and that normally no shortage of potatoes would occur. Counsel for the respondent told the Court that the Director-General of the Ministry had in mind the reply of the Board when he wrote his aforesaid minute on the 7th July, 1969.

On the 17th July, 1969, the applicant wrote another letter to the Minister of Commerce and Industry (see *exhibit 2*), referring to his previous letter of the 2nd July, 1969, and complaining that he had received no reply; he requested an immediate reply in view of the seriousness of the matter.

By a letter of the Director-General of the Ministry, dated the 18th July, 1969, the applicant was informed,

on instructions of the Minister of Commerce and Industry, that it was not correct that he had received no reply to his letter of the 2nd July, 1969, because he had been called to the Ministry and he was given an oral reply by Mr. Chartsiazis; it was, further, mentioned in the letter that the Ministry had been in contact with the Potato Marketing Board, regarding the availability of potatoes for the needs of the country, and that the Board having ascertained that there existed sufficient quantities of potatoes had excluded the possibility of imports for the present («ἐνι τοῦ παρόντος»).

It is relevant to mention, at this stage, that there was published in the daily press, on the 13th July, 1969 (see *exhibit 8*), an announcement of the Potato Marketing Board stating, among other things, that the Board had suggested to Government the prohibition of imports of potatoes, as there were sufficient quantities of potatoes available in Cyprus.

There was produced before the Court, by counsel for the respondent, a letter of the Department of Agriculture (in the Ministry of Agriculture and Natural Resources) dated the 21st July, 1969 (see *exhibit 4*), from which it appears that on the 14th July, 1969, the applicant applied for a permit to import potatoes in relation to the needs of the British Bases in Cyprus and that he was informed that imports of potatoes were prohibited and there could not be granted to him such a permit. Copies of this letter of the Department of Agriculture were sent to the Director-General of the Ministry of Commerce and Industry and to the Potato Marketing Board.

Thus, three days after the date of the letter of the Ministry of Commerce and Industry containing the decision which is *sub judice* in these proceedings, a further decision was communicated to the applicant, by a different organ of the administration, refusing him a permit to import potatoes under, as appears hereinafter, different legislation.

At the material time the importation of potatoes in Cyprus was not free, but was regulated as follows :

On the 24th May, 1968, there was published an Order (No. 327 in Supplement No. 3 to the official Gazette of that date)—under section 3 of the Imports (Regulation)

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Law, 1962 (49/62), as amended by the Imports (Regulation) (Amendment) Law, 1967 (7/67)—by means of which the importation of, *inter alia*, potatoes was, in effect, rendered possible only on the strength of a permit of the Minister of Commerce and Industry; and the applicant had been refused a permit by the *sub judice* decision (*exhibit 3*).

Earlier, on the 14th June, 1957, there had been published an Order (No. 596 in Supplement No. 3 to the official Gazette of that date)—under the Diseases of Plants Prevention Law (then Cap. 80, now Cap. 49) and the Contagious Diseases (Animals) Law (then Cap. 65, now Cap. 45)—by virtue of which the importation of potatoes was prohibited except in certain circumstances and even then only under authorization by the Director of the Department of Agriculture; and the applicant, as already stated, was refused such authorization, by the letter of the Director of the Department of Agriculture dated the 21st July, 1969 (*exhibit 4*).

Thus, when the present recourse was filed, on the 30th August, 1969, the applicant was faced with two official refusals—under different enactments—to allow him to import potatoes, one by the Ministry of Commerce and Industry (*exhibit 3*) and another by the Department of Agriculture (*exhibit 4*). Yet the applicant challenged the former refusal only and he never filed a recourse against the latter refusal; therefore, in my opinion, counsel for the respondent quite rightly drew the attention of the Court to the latter refusal, because it is, indeed, a very material factor, in the sense that, so long as such refusal was in force at the time of the making of this recourse, and its validity remained unchallenged by the applicant, it cannot be said that the applicant possessed a “legitimate interest”, in the sense of Article 146.2 of the Constitution, entitling him to make, and proceed with, the present recourse. His interest was not a legitimate interest because what he complained of by the recourse, namely his having not been allowed by the respondent to import potatoes, was something which was anyhow not lawful otherwise, in view of the provisions of the afore-mentioned Order of the 14th June, 1957, and of the refusal, on the 21st July, 1969, of the Department of Agriculture to allow him to import potatoes; in effect, by the annul-

ment of the subject matter of this recourse he was seeking to achieve an object which was not lawfully possible. (See, in this respect, the Conclusions from the Case-Law of the Council of State in Greece «Πορίσματα Νομολογίας του Συμβουλίου της Ἐπικρατείας» 1929 - 1959, p. 258, and the case of *Yiannaki v. The Republic* (1965) 3 C.L.R. 561).

Also, no interest of his in the matter was, in fact, "adversely" affected, in the sense of Article 146.2, by the *sub judice* decision, because the annulment of that decision could not by itself change the already adverse for him position, as, even if such decision did not exist, he could still not import potatoes due to the aforesaid Order of the 14th June, 1957, and to the refusal of an import permit by the Department of Agriculture on the 21st July, 1969; in effect, the annulment of the *sub judice* decision could not affect the interests of the applicant in a material manner (see the Conclusions from the Case-Law of the Council of State in Greece, *supra*, p. 260).

Once, in the light of the foregoing, I have found that a constitutional prerequisite of making this recourse did not exist I have to dismiss this recourse on this ground; and I had to examine this aspect since counsel for the respondent referred me to the refusal of a permit by the Department of Agriculture (*exhibit* 4) and the legislative provisions in that respect (see, *inter alia*, the case of *Yiannaki, supra*, at p. 567).

I shall proceed, next, to deal, also, with the other main issues which were argued in this case, even though, once the recourse has failed as no legitimate interest of the applicant has been adversely affected, I am not bound to do so; I have, however, decided to deal with them *ex abundanti cautela*.

It has been objected by counsel for the respondent that the applicant has failed to apply to the respondent Ministry, for an import permit, by using the appropriate form specified by the Regulation of Imports (Licences) Regulations, 1967, (see No. 337 in Supplement No. 3 to the official Gazette published on the 4th May, 1967).

I do not think that, in the particular circumstances of this case, the failure in question of the applicant could

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be held to be of such a material nature so as to justify dismissing his recourse on this ground; and I am considerably strengthened in this view by the fact that the respondent dealt with applicant's application on its merits, thus obviously waiving the failure on his part to comply with the necessary formalities; and, it is also very significant that the respondent refused the applicant's application first orally, and then by writing to him a letter, without using the appropriate form prescribed by the said Regulations.

Counsel for the applicant has argued that the refusal by the respondent of the import permit took place contrary to Law 49/62; in particular, contrary to section 3 of Law 49/62, as amended by Law 7/67.

The material part of section 3—subsection (1)—reads as follows :-

“Whenever it becomes necessary, in the public interest, to restrict and regulate the importation of goods for the encouragement of local production and manufacture, the improvement of the balance of trade, compliance with international obligations or the development of the economy of the Republic, the Minister may, by Order published in the official Gazette of the Republic, restrict and regulate the importation of the goods specified in the Order.”

In the exercise of the above powers the respondent Minister made the already referred to Order of the 24th May, 1968, and on the basis of the provisions of such Order it was decided not to allow the applicant to import potatoes; I fail to see how it can be validly contended that the refusal of the import permit applied for by the applicant took place in a manner contrary to section 3 of Law 49/62, as amended by Law 7/67.

Another contention of counsel for the applicant has been that it was not open to the Minister to refer the matter to the Potato Marketing Board: It is clear from the totality of the material before the Court, including the relevant documents, that there was not referred specifically to the said Board the case of the applicant, but that in refusing to allow him to import potatoes the respondent had in mind views of the Board, which had been obtained earlier in the course of correspondence

regarding general policy; such views were, in my opinion, a material consideration and it was open to the respondent to take them into account.

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A related submission of applicant's counsel has been that the importation of potatoes by the applicant should not have been disallowed completely, in the course of implementing a general policy, but that there ought to have been examined, in relation to the particular case of the applicant, the possibility of allowing the importation of potatoes on certain conditions: This is a matter which was within the discretionary powers of the respondent and I am of the view that in reaching the *sub judice* decision the respondent exercised such powers within their proper limits; the letter dated the 18th July, 1969 (*exhibit 3*), by which the said decision was communicated to the applicant, shows that the individual case of the applicant was considered together with general policy considerations; and this was a course which was reasonably open to the respondent.

Counsel for the applicant has argued, also, that there is no due reasoning for the refusal of the respondent to grant to his client the requested import permit: I think that the relevant official records, and in particular the letter of the 18th July, 1969 (*exhibit 3*), contain sufficient reasons for the said refusal.

The last complaint of counsel for the applicant with which I have to deal is that the decision of the respondent to refuse the import permit was based on a factual misconception, in the sense that it was based on the wrong assumption that there were available in Cyprus sufficient quantities of potatoes.

In this connection the applicant gave evidence and called, also, two witnesses; all three did not impress me as being really reliable; they were ready to say anything, especially by way of exaggerations, in order to support the applicant's claim. Even if their evidence were to be accepted, it is to the effect—when taken as a whole—that the shortage of potatoes in Cyprus became actually bad from August 1969 onwards, and that it was not until the end of September 1969 that it became so serious as to cause the Government to introduce price control of potatoes. But it is to be noted that it does not appear

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that the shortage of potatoes in 1969 became at any time so acute as to result in imports of potatoes being effected.

The *sub judice* decision was reached, earlier, in July 1969; in fact, as already stated in this judgment, it was communicated at first orally to the applicant on the 10th July, 1969, and was later confirmed in writing on the 18th July, 1969.

The applicant was then told that there were sufficient quantities of potatoes available in Cyprus and that the possibility of importing potatoes had been excluded "for the present" («ἐν τῷ παρόντι»); and it is to be noted that the applicant never applied at any later time for permission to import potatoes; so I have to deal with the refusal of an import permit, regarding which he complains, on the basis of the situation as it was in the middle of July, 1969. In the light of all relevant circumstances, I cannot find that the said refusal was based, to any material extent, on a factual misconception, namely that it was erroneous to believe at that time that there were available locally such quantities of potatoes so as to preclude the importation of potatoes; and, as already pointed out, even the serious shortage of potatoes later on in the year did not become so acute as to cause importation of potatoes.

In the light of all the foregoing in this judgment, this recourse cannot succeed and is dismissed; but I have decided that, as this recourse was apparently made by the applicant in an effort to remedy what he genuinely, though mistakenly in my view, considered to be a wrong done to him, there should be no order against him regarding the costs of these proceedings.

Application dismissed.

No order as to costs.