1975
Dec. 31
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REPUBLIC
(THE COUNCIL
OF MINISTERS)
v.
NICOLAS
EKKESHIS

[STAVRINIDES, L. LOIZOU, A. LOIZOU, MALACHTOS, JJ.]

THE REPUBLIC OF CYPRUS, THROUGH
THE COUNCIL OF MINISTERS,

Appellant,

and

NICOLAS EKKESHIS,

Respondent.

(*Revisional Jurisdiction Appeal No.* 97).

Administrative Law—Misconception of fact—Principles applicable—Burden of proof—Presumption of regularity—How rebutted—Decision refusing access over state land—Under section 11*A*(8) *of the Immovable Property* (*Tenure, Registration and Valuation*) *Law, Cap.* 224 (*as amended*)*—Not reached on the basis of a material misconception of fact—Applicant, upon whom the burden of proof lay, failed to establish that the* sub judice *decision was reached on the basis of such a misconception—Nor is the Court satisfied, on the material before it, that a probability was established that a misconception had led to the taking of the said decision.*

Words and Phrases—"Μέσω" *or* "διὰ μέσου"*—"Through".*

Administrative Law—Presumption of regularity.

The respondent in this appeal applied for access to a public road over state land, in respect of immovable property of his at Kaimakli, under s. 11A of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224 (as amended). After the examination of his application by the Director of the Department of Lands and Surveys the matter was placed before the Council of Ministers. A submission for the purpose was made by the Ministry of Interior, which referred to the respondent's application for access "*through*" ("διὰ μέσου") state land. The submission further mentioned that the application was considered by the Department of Lands and Surveys in the usual manner; and that this Department specified the *direction or the passage* and the right, at 12 ft., as shown *by yellow colour on the plan deposited with the Secretariat of the Council of Ministers.*

The Council of Ministers refused the application for the reason "that the passage applied for lies within the Industrial Estate of Nicosia". When the respondent challenged the validity of the refusal by means of a recourse, the trial Court annulled the refusal on the ground that it was taken under a misconception of fact, because it was not "only very probable but virtually certain that the respondent Council of Ministers acted, due to the contents of the submission, on the basis of the misconception that the applicant was seeking an access "through" ("διὰ μέσου") and not only along a boundary of the Nicosia Industrial Area.....".

On appeal by the Council of Ministers it was held:

(1) There exists a presumption that an administrative decision is reached after a correct ascertainment of relevant facts, though such presumption can be rebutted if a litigant succeeds in establishing that there exists at least a probability that a misconception has led to the taking of the decision complained of (see Stassinopoulos, Law of Administrative Acts, (1951) 304 et seq.). This presumption has been accepted by this Court (see *Paraskevas Lordos and Others* v. *The Republic* (1974) 3 C.L.R. 447 where it was held that, "in the absence of any concrete evidence to that effect and because of the presumption of regularity—'Omnia preasumuntur rite esse acta', the conclusion to be drawn, in the circumstances, was that there was a proper ascertainment of facts"). (See, also, the other cases quoted at p. 557 of the judgment *post*).

(2) The burden of establishing that an administrative decision was reached on the basis of a misconception about a material fact, lies on the person challenging the validity of such decision on this ground. Furthermore, a decision may be annulled if an administrative court is satisfied that it is very probable that such decision was reached as a result of a factual misconception.

(3) Though we agree fully with the legal approach to this case we cannot subscribe to the view that from the wording of both the submission and the *sub judice* decision, the applicant (respondent in this appeal), upon whom the burden of proof lay, established that the *sub judice* decision was reached on the basis of a misconception about a material fact, nor are we satisfied, on the

material before us, that a probability was established that a misconception had led to the taking of the decision complained of.

(4) It was clear from the facts of the case and the material before the Council of Ministers that the matter had been examined by the Department of Lands and Surveys and that a map was deposited with the Secretariat, different opinions were expressed at the meeting of the Council of Ministers and we are not prepared to assume that the Council of Ministers, in the light of the aforesaid, and especially in view of the disagreement with the proposal of the Minister of Interior, responsible in fact for that branch of the administration and the application of the relevant law, did not inquire, did not ascertain as to the exact location of the access sought by the applicant-respondent.

(5) The words "διὰ μέσου" appear to be normally an expression used to mean, access through, without exclusively meaning through the middle and not through some other part. (See, also, "ΠΡΩΙΑΣ" Greek Dictionary, 3rd Ed. p. 1573).

(6) In the present case, in the absence of any proof to the contrary and in view of the meaning and effect of the words "διὰ μέσου" in the circumstances that it was used, we must presume, in accordance with the presumption of regularity that the Council of Ministers did examine the map that was placed at their disposal and referred to in the submission, even though that fact is not expressly mentioned in the relevant minutes, particularly so, in view of the disagreement that existed between the Ministers and the fact that the decision eventually taken was contrary to the proposal of the appropriate Minister.

(7) On the material placed before the learned trial Judge there was nothing to support the conclusion that the map to which the Council of Ministers was referred by the relevant submission and which showed the exact direction of the access in question, was not examined by the Council. The words used should be viewed in the whole context of the text and not having a meaning giving rise to doubts as to the regularity of the proceedings at the meeting of the Council of Ministers.

Appeal allowed.

Cases referred to:

Koukoullis and Others and *The Republic*, 3 R.S.C.C. 134;

Papallis and *The Republic* (1970) 3 C.L.R. 424 at p. 429;

Kousoulides v. *The Republic* (1967) 3 C.L.R. 438 at p. 447;

Paraskevas Lordos and Others v. *The Republic* (1974) 3 C.L.R. 447 at p. 457.

Appeal.

Appeal from the judgment* of the President of the Supreme Court of Cyprus (Triantafyllides, P.) given on the 19th February, 1972, (Case No. 627/70) whereby the decision of the appellant not to grant to applicant, in respect of immovable property of his at Kaimakli, an access to a public road over State land, was annulled.

L. Loucaides, Deputy Attorney-General of the Republic, for the appellant.

E. Efstathiou, for the respondent.

Cur. adv. vult.

STAVRINIDES, J.: The judgment of the Court will be delivered by Mr. Justice A. Loizou.

A. LOIZOU, J.: The respondent in this appeal, had, by an application under Article 146 of the Constitution, challenged the validity of the decision of the appellant not to grant him in respect of immovable property of his at Kaimakli, an access to a public road over State land, as the access in question was within the Nicosia Industrial Estate.

The respondent had applied for such access under section 11A of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, as amended by Laws 10/66 and 75/68, hereinafter referred to as "The Law". Had the access been sought over privately owned land, the respondent would be entitled to it, whereas in the case of access over State land of any nature, a specific decision of the Council of Ministers in that respect and on such terms and conditions as may be provided in the decision, is required by virtue of the provisions of sub-section (8) of section 11A of the Law.

* Reported in (1972) 3 C.L.R. 87.

It is not disputed that the property of the applicant, (plots 93 and 94), on account of its position, is in such a way enclaved as to be lacking any access to a public road. This is so, because in-between plots 93 and 94 and the public road, are plots 92, 260 and 267 and the industrial estate, plot 94 (or 301) abuts plots 93, 92 and 260.

The access claimed would be a strip of land of a width of 12 ft. along the boundary of the industrial estate to the side of the said plots. The respondent had applied for access, as stated in the facts relied upon in the application "through the said properties" (διὰ τῶν εἰρημένων κτημάτων) and after the examination of the respondent's application by the Director of the Department of Lands and Surveys the matter was placed before the Council of Ministers. A submission for the purpose was made by the Ministry of the Interior. The submission (*exhibit* 2), referred to the respondent's application for access "through" ("διὰ μέσου") State land; it is mentioned therein that the said application was considered by the Department of Lands and Surveys in the usual manner which specified the direction of the said passage and the right at 12 ft. as shown by yellow colour on the plan, deposited with the Secretariat of the Council of Ministers. The views of the Minister of Commerce and Industry, the Department of Town Planning and Housing and the District Officer, Nicosia-Kyrenia, were sought. All objected to the grant of the said access mainly on the ground that the State land through which the access is sought, was compulsorily acquired for the purpose of the industrial estate of Nicosia and consequently the Town Planning and Housing Department did not consider expedient to grant this passage through the industrial estate, from a town planning point of view, as well; it would not, however, object to the respondent acquiring access through the adjacent privately owned plot 266.

The Minister of Interior, however, proposed to the Council of Ministers to approve the access applied for and the submission concluded as follows: "The Minister of Interior who will introduce this subject, will propose that in view of the aforesaid, the Council of Ministers might approve, by virtue of sub-section 6 of section 11A, of the Immovable Property (Tenure, Registration and Valuation) Law, No. 75 of 1968, the granting of access of a width of 12 ft. through (thia mesou) State land under plot 74 (now 301) of Block E in Beyuk Kaimakli, as shown by yellow colour on the plan deposited at the Secretariat of

the Council of Ministers to N.P. Ekkeshis, of Nicosia, owner of enclaved property under plots 93 and 94 of the same plan, on payment of £330".

At the meeting of the Council of Ministers of the 1st June, 1970, the Minister of Commerce and Industry stated that the granting of the proposed access through the industrial Estate would affect adversely its use. The Minister further mentioned that there were already other applications for the granting of accesses and if such applications were granted, the usefulness and purpose of the industrial estate would be reduced considerably. Then, Decision No. 9729 is recorded in the minutes, as follows:

> " The Council of Ministers considered the application of N. P. Ekkeshis, of Nicosia, for the granting to him by virtue of sub-section (8) of section 11A of a right of access through the State land under plot 301 of Block "E" of Beyuk Kaimakli and decided to refuse the said application for the reason that the passage applied for lies within the Industrial Estate of Nicosia".

The grounds upon which the application was based, were the following:

(a) The *sub judice* decision was unlawful as it was taken in violation of section 3 of the Immovable Property (Tenure, Registration and Valuation) (Amendment) Law, 1966, taken in conjunction with section 2 of Law 75/68, on the correct interpretation of which the applicant is entitled to demand access through State land and the Council of Ministers is bound to grant same, so long as the prerequisites of the law are satisfied.

(b) The respondent acted, in any event, in abuse of power, because, when they reached their decision, they did not take into consideration the facts which surrounded the case of the applicant, as set out in the statement of facts and the reason given for the refusal of his application, does not legally justify its refusal.

(c) The respondent acted in violation of Articles 6 and 28 of the Constitution, because, by the *sub judice* decision, the principle of equality of rights and obligations before the law and justice, is violated.

The learned trial Judge annulled* the *sub judice* decision, as having been taken on misconception of fact.

This, apparently, comes from the address in reply of counsel for the applicant (respondent in this appeal), which was to the effect that "the passage sought is along the boundary of and not across the industrial area", and two plans were produced showing the passage sought. This argument has constituted the ground of misconception of fact which was considered by the learned trial Judge, as established, and on the basis of which the *sub judice* decision was annulled. In fact, in dealing with the facts of the case, he says: "Though it was mentioned in the submission No. 391/70 that the position of the access sought by the applicant was shown on a map forwarded to the Secretariat of the Council of Ministers, it was repeated about six times in the submission that the access would be "through" (thia mesou) the Industrial Area; moreover, on the 1st June, 1970, when the application for access was refused by the Council of Ministers, the Minister of Commerce and Industry objected—as already mentioned—to the grant of access 'through' the Industrial Area and in the Council's relevant decision it is stated that the applicant had applied for access 'through' State land".

After dismissing all other grounds of Law relied upon by the applicant, the learned trial Judge gave the following reasons for annulling the *sub judice* decision:

> "In the present case I have reached the conclusion that it is not only very probable but virtually certain that the respondent Council of Ministers acted, due to the contents of the submission, on the basis of the misconception that the applicant was seeking an access '*through*' (διὰ μέσου) and not only along a boundary of the Nicosia Industrial Area; and once the matter was presented—obviously due to an unintended inexact mode of expression—as a request for access 'through' the Industrial Area *and* it was, also, said by the Minister of Commerce and Industry that there were pending other applications for access, which, if granted, would adversely affect the Industrial Area, the matter to be decided by the Council became one of policy, irrespective of the actual position in the Industrial Area of the access requested by the applicant; therefore, it can hardly be

* Vide (1972) 3 C.L.R. 87.

reasonably assumed that the Council of Ministers thought fit, in such circumstances, to adopt the course of calling for, and studying, the map which, showed the exact position of the applied for access and which, as stated, had been forwarded to the Secretariat of the Council; actually, if that had been done, and the misdescription of the access had been discovered, the expression 'through' (διὰ μέσου) would not have been used either in recording the view of the Minister of Commerce and Industry in the minutes of the Council dated the 1st June, 1970, or in phrasing the otherwise very precisely worded—with all essential details—*sub judice* decision of the Council of Ministers, which was reached on the said date.

There can be no doubt that granting access *through* the Industrial Area to the applicant, as well as, quite probably, to others who had applied for such an access, was a matter entirely different from granting access *along one of the boundaries* of the Area; it is obvious that the former course could affect quite adversely the Area while the latter one, depending on the particular circumstances of an individual case, might or might not do so".

The learned trial Judge went on to say that as a result of such misconception the Council of Ministers was prevented from seeing the matter before it as it actually was. The other grounds of law relied upon by the applicant were dismissed.

No doubt, discretionary powers must be exercised without a misconception about a material fact. If that happens, the decision reached is contrary to law, in the sense that the law was applied on a wrong factual basis. On the other hand, there exists a presumption that an administrative decision is reached after a correct ascertainment of relevant facts, though such presumption can be rebutted if a litigant succeeds in establishing that there exists at least a probability that a misconception has led to the taking of the decision complained of. (See Stassinopoulos, Law of Administrative Acts, (1951) 304 et seq.). The burden of establishing that an administrative decision was reached on the basis of a misconception about a material fact, lies on the person challenging the validity of such decision on this ground. Furthermore, a decision may be annulled if an administrative court is satisfied that it is very probable that such decision was reached as a result of a factual misconception. In such a case, the annulment is not ordered because factual

misconception has been established, but in order to rid the administrative decision concerned of the suspicion that it was based on a factual misconception. (See Stassinopoulos, Law of Administrative Acts, 1951, p. 305 cited with approval by the learned trial Judge in his judgment).

We agree fully with the legal approach to this case but we cannot subscribe to the view that from the wording of both the submission and the *sub judice* decision, the applicant (respondent in this appeal), upon whom the burden of proof lay, established that the *sub judice* decision was reached on the basis of a misconception about a material fact, nor are we satisfied, on the material before us, that a probability was established that a misconception had led to the taking of the decision complained of. It was clear from the facts of the case and the material before the Council of Ministers that the matter had been examined by the Department of Lands and Surveys and that a map was deposited with the Secretariat; different opinions were expressed at the meeting of the Council of Ministers and we are not prepared to assume that the Council of Ministers, in the light of the aforesaid, and especially in view of the disagreement with the proposal of the Minister of Interior responsible in fact for that branch of the administration and the application of the relevant law, did not inquire, did not ascertain as to the exact location of the access sought by the applicant-respondent. Furthermore, the words "διὰ μέσου" appear to be normally an expression used to mean, access through, without exclusively meaning through the middle and not through some other part.

"Μέσω" or "διὰ μέσου" is defined in ΠΡΩΙΑΣ Greek Dictionary, 3rd Ed., p. 1573, as meaning, "Διὰ (through), passing through" and the example given is "διήλθομεν διὰ μέσου τοῦ δάσους" ("we passed through the forest"), "μεταβαίνει εἰς Παρισσίους μέσω Ρώμης" ("he is going to Paris through Rome"). It does not necessarily mean through the center or middle of the forest or Rome.

The indiscriminate use of the word "διὰ μέσου" in this sense, is also evident from the text of the applicant's statement of facts, written in Greek and which speaks of access through the said properties (μέσω ἢ διὰ μέσου).

The presumption that an administrative act is reached after a correct ascertainment of relevant facts, has been accepted by

this Court, and, in that respect, relevant are the decisions in the case of *Koukoullis and Others* and *The Republic*, 3 R.S.C.C. 134, *Papallis* v. *The Republic* (1970) 3 C.L.R. 424 at p. 429, *Kousoulides* v. *The Republic* (1967) 3 C.L.R. 438 at 447 and *Paraskevas Lordos and Others* v. *The Republic* (1974) 3 C.L.R. 447 at p. 457 where it was held that, "in the absence of any concrete evidence to that effect and because of the presumption of regularity—'Omnia preasumuntur rite esse acta', the conclusion to be drawn, in the circumstances, was that there was a proper ascertainment of facts".

In the present case, in the absence of any proof to the contrary and having explained the meaning and effect of the words "διὰ μέσου" in the circumstances that it was used, we must presume, in accordance with the presumption of regularity that the Council of Ministers did examine the map that was placed at their disposal and referred to in the submission, even though that fact is not expressly mentioned in the relevant minutes, particularly so, in view of the disagreement that existed between the Ministers and the fact that the decision eventually taken was contrary to the proposal of the appropriate Minister.

On the material placed before the learned trial Judge there was nothing to support the conclusion that the map to which the Council of Ministers was referred by the relevant submission and which showed the exact direction of the access in question, was not examined by the Council. The words used should be viewed in the whole context of the text and not having a meaning giving rise to doubts as to the regularity of the proceedings at the meeting of the Council of Ministers.

For all the above reasons the appeal is allowed and the *sub judice* decision confirmed, but in the circumstances, we make no order as to costs.

Appeal allowed. No order as to costs.