1980 April 28

[TRIANTAFYLLIDES, P., L. LOIZOU, HADJIANASTASSIOU, A. LOIZOU, DEMETRIADES, SAVVIDES, JJ.]

TSAMBIKOS KARAYIANNIS AND ANOTHER,
*Appellants,*

*v.*

THE CENTRAL BANK OF CYPRUS AND ANOTHER,
*Respondents.*

(*Revisional Jurisdiction Appeal No.* 195).

*Exchange Control Law, Cap.* 199—*Non-resident—Subscription to memorandum of company—Permission under section* 10 *of the Law—Within unfettered discretion of respondent Bank—Principles on which administrative Court will interfere with exercise of such discretion—Whether Bank has to examine possibility of imposing conditions before resorting to absolute prohibition.*

*Administrative Law—Discretionary powers—Judicial control—Principles applicable—Permission to non-resident to subscribe memorandum of company under section* 10 *of the Exchange Control Law, Cap.* 199—*Within unfettered discretion of respondent Bank—Administrative Court always cautious and slow to interfere with its exercise*—Sub judice *refusal neither wrong in law nor in abuse or excess of power and not reached under any misconception of fact—Respondent Bank under no duty to examine possibility of imposing conditions before resorting to absolute prohibition*—Michael *v.* Improvement Board of Dhali (1969) 3 *C.L.R.* 112 *distinguished.*

Applicant No. 1, who is a non-resident, applied to respondent No. 1 for permission, under s. 10 of the Exchange Control Law, Cap. 199, to subscribe the memorandum of a company to be formed under the name "Apollo 8 Tours Ltd.,". Respondent No. 1 was also informed that the company would undertake the agency of several travel companies and would act as travel agents. From the objects* of the proposed company it appeared that it was not just an ordinary travel agent dealing only with

* Quoted at p. 115 *post.*

issue of tickets but it could, deal, *inter alia*, with the "organization of cruises and excursions and generally the attraction and development of internal and international tourism".

Respondent No. 1, in accordance with its practice, referred the application to the Ministry of Commerce and Industry for its views. The Ministry in reply informed respondent 1 that they objected to such foreign participation, as foreign nationals would compete with Cypriots in a sector that was already saturated. Respondent 1 then wrote to the applicant in terms of the Ministry's objection refusing the permission applied for.

Applicants challenged the above refusal by means of a recourse which was dismissed and hence this appeal.

Counsel for the appellants mainly contended:

(a) That there was a misconceived reasoning inasmuch as the only element which the respondents took into consideration, in deciding whether to grant or not the permission sought, was the fact that among the objects of the proposed company was the issuing of tickets.

(b) That the respondents resorted to absolute prohibition without considering whether by granting conditionally or on terms the permission sought same would have served the public interest and policy.

*Held, per A. Loizou, J., L. Loizou, Savvides and Demetriades JJ. concurring, Triantafyllides, P. and Hadjianastassiou JJ. dissenting:*

(1) That in no document or other record to be found in the file of the respondent Bank any mention was made to the issuing of tickets in a way suggesting that this object was the only one relied upon, to the exclusion of, or in preference to the other objects of the company, when the Bank came to the *sub judice* decision; that from the totality of the circumstances and the contents of the various documents placed before the Court, there is no difficulty in saying that there has been no misconception of fact, either as to the objects of the company to be formed, or as to the competition with residents that would occur in a field that unquestionably was already saturated; and that, accordingly, contention (a) must fail.

(2) That if it were to be accepted that in the present case the *sub judice* decision should have been annulled because the respon-

dent Bank did not examine the possibility of imposing conditions before rejecting the appellants' application, that would mean that the respondent Bank should embark on an exercise of redrafting the objects in the memorandum of association of a company to be formed, for the purpose of intimating to a prospective applicant how far and in what circumstances its discretion would be exercised under section 10(2) of the Exchange Control Law, Cap. 199 which was not required of the respondent Bank in the circumstances; that the respondent Bank properly exercised its discretion; that the decision it reached was reasonably open to it on the basis of the material before it and is validly supported by the reasons given therefor; and that, accordingly contention (b) must, also, fail. (*Michael* v. *Improvement Board of Dhali* (1969) 3 C.L.R. 112 *distinguished*).

(3) That the paramount consideration under section 10(2) of the Exchange Control Law, Cap. 199, is to control the shareholding in companies by non-residents, as upon the registration of a company a subscriber automatically becomes a member and a holder of the shares for which he has signed, in this case 3,334 ordinary shares of one pound each as compared with 6,666 shares to be subscribed by residents; that this is a section that gives an unfettered discretion and as it covers a matter of fiscal policy it should be considered as a wide one; that being so, an administrative Court is always cautious and slow to interfere with its exercise by the appropriate organ; that, therefore, there is no difficulty in upholding the approach of the learned trial Judge in the circumstances on this issue as same was neither wrong in Law nor exercised in abuse or excess of power, nor reached under any misconception of fact; that after all, the extent of judicial control of the administrative discretion is confined to the examination of the lawful thinking and the observance of the lawful limits within which such discretion should be exercised; and that, accordingly, the appeal must be dismissed.

*Appeal dismissed.*

Cases referred to:

*Michael* v. *Improvement Board of Dhali* (1969) 3 C.L.R. 112;

*Laker Airways Ltd.*, v. *Department of Trade* [1977] 2 All E.R. 182 at p. 194;

*Droushiotis* v. *The Republic* (1966) 3 C.L.R. 722 at pp. 729-730;

*Republic* v. *Droushiotis* (1967) 3 C.L.R. 232;

*Vassos Eliades Ltd.* v. *Republic* (1979) 3 C.L.R. 259 at pp. 266–267;

*Cytechno Ltd.* v. *Republic* (1979) 3 C.L.R. 513 at pp. 532–533;

*Pissas (No. 2)* v. *The Electricity Authority of Cyprus* (1966) 3 C.L.R. 784;

Case No. 11/70 of the Court of Justice of the European Communities (reported in (1970) 9 C.M.L.R. 294);

Case No. 300/1936 of the Greek Council of State;

*Salomon* v. *Salomon and Co. Limited* [1897] A.C. 22.

**Appeal.**

Appeal against the judgment of a Judge of the Supreme Court of Cyprus (Malachtos, J.) given on the 14th January, 1978 (Revisional Jurisdiction Case No. 251/74) whereby appellants' recourse against the refusal of the respondents to grant permission to applicant 1 to subscribe in a company to be formed under the name "Apollo 8 Tours Ltd." was dismissed.

*L. Papaphilippou*, for the applicants.

*G. Constantinou* (*Miss*) for the respondents.

*Cur. adv. vult.*

TRIANTAFYLLIDES P.: The first judgment will be delivered by Mr. Justice A. Loizou.

A. LOIZOU J.: This is an appeal from the judgment* of a Judge of this Court by which the recourse of the appellants challenging the decision of the respondent Bank not to permit appellant No. 1 to subscribe to the Memorandum of a Company to be formed, was dismissed with no order as to costs.

By the said recourse the appellants sought a "declaration of the Court that the act and/or decision of the respondents, dated 14th March, 1974, whereby they refused to grant permission to the first applicant to subscribe in a company to be formed under the name of 'Apollo 8 Tours' is null and void and of no effect whatsoever".

The grounds of Law relied upon in this recourse were the following:

"1. The Respondents acted under misconception of facts in finding that the incorporation of Apollo 8 Tours Ltd.,

* Reported in (1978) 3 C.L.R. 1.

would compete with Cypriots in a sector that is already saturated.

2. The Respondents misconceived applicants application in that its main object is not at all saturated in Cyprus.

3. The Respondents' decision or act is contrary to the general Policy of the Government of Cyprus for promoting tourism in Cyprus.

4. Respondents resorted to absolute prohibition without considering whether conditional or in terms of otherwise grant would have served the public interest and policy and the objects of the application of the applicants."

The relevant facts which are not in dispute are these:

The appellants through their counsel applied to the respondent Bank that appellant No. 1, a travel agent of Greek nationality, residing permanently outside the Republic, namely in Rhodes island, Greece be permitted under section 10 subsection 2 of the Exchange Control Law, Cap. 199 to subscribe the Memorandum of Association of a private company to be formed under the Companies Law, under the name of "Apollo 8 Tours Ltd.".

The said application, dated the 22nd February, 1974, (*exhibit* 1) is worth quoting verbatim and it reads:

"We have been instructed to form a private Company of Limited Liability as per attached draft of Memorandum and Articles of Association.

You will observe that this Company will undertake the agency of several travel Companies and will act as travel agents.

The Travel Companies listed in clause 3(b) of the objects of the Company are exclusively represented by Mr. Tsambikos Karayiannis in Greece and we understand that he has the exclusivity as regards Cyprus also.

We are instructed to inform you that during the two years 1972-1973 he managed to attract 230,000 tourists in Greece and it is estimated that he will be in a position to switch tourists to Cyprus of even a greater number.

The Company will be subscribed by Cypriots for 6,666

shares and Mr. Tsambikos Karayiannis will subscribe for 3,334 ordinary shares of £1 each.

In view of all the above we hereby apply for permission under the Exchange Control Law, Cap. 199 that Mr. Tsambikos Karayiannis subscribes for the above shares in the captioned Company."

On receiving this application the respondent Bank wrote to the Director-General of the Ministry of Commerce and Industry (*exhibit* 5) and attached thereto a photocopy of *exhibit* 1, hereinabove set out and of the Memorandum and Articles of Association submitted therewith for their perusal and return and requested their views on the matter.

On the 7th March, 1974, the appellants through their counsel wrote, *exhibit* 2, to the Ministry of Commerce and Industry (Tourist Department), the material part of which reads as follows:

"We believe that since the policy of the Government is to promote and encourage the touristic industry in Cyprus the participation of Mr. Karayianni in the company will really promote tourism. In the years 1972-1973 he managed alone to attract to Greece 230,000 tourists and he is in a position to divert these tourists to Cyprus, provided that he will participate in the company to be formed.

If he does not participate this company will not be able to implement its objects as the companies mentioned in the Memorandum of Association have Mr. Karayiannis as their exclusive agent and under no circumstances they will assign their representation to the company in which Mr. Karayiannis will not participate.

The company to be formed will not be just ordinary travel agents but will really attract groups of tourists from abroad through the well organized tourist companies which are mentioned in the Memorandum."

On the 8th March, 1974 the Ministry of Commerce and Industry wrote to the respondent Bank, *exhibit* 6, as follows:

"*Application by Company Apollo* 8 *Tours.*

With reference to your letter dated 26th February, 1974

No. F.D./1650, on the aforesaid subject I have instructions to inform you that the Ministry objects in this case as foreign subjects will compete with Cypriots in a sector that is already saturated.

The Memorandum and Articles of Association of the company are returned."

The next piece of evidence is the following entry made by the officer of the respondent Bank handling the matter in the relevant file, *exhibit* "A" which reads as follows:

"According to the information given by the Ministry of Commerce & Industry there are in Cyprus 100 local agencies and a quite big number of sub-agencies and representatives, carrying on this line of business. In addition the air companies themselves are in this field, acting as booking and travel agents.

In 1973 we had 178,598 arrivals and 87,244 departures. If we take into consideration that these persons leave £3 each, average to the travel agencies, then we shall come to a figure of about £600,000. These funds have to be distributed between over 200 agencies, sub-agencies and representatives of companies thus leaving approximately £2,500 to to £2,700 for each. They hardly cover their expenses."

Thereafter there followed the communication of the decision of the respondent Bank dated the 14th March, 1974, *exhibit* 3, it reads as follows:

"*APOLLO* 8 *TOURS LIMITED*

With reference to your letter dated 22nd February, 1974, requesting permission on behalf of the above company to issue shares to a non-resident we regret to inform you that under the Exchange Control Law, Cap. 199 we are unable to grant the requisite authority as they would compete with Cypriots in a sector that is already saturated."

The picture and the material factors that the respondent Bank and the Ministry of Commerce and Industry had before them would not be complete if a brief reference was not made to the objects of the company for which permission to subscribe was sought, as set out in Article 3 of the Memorandum of Association.

These objects divided into 35 paragraphs include the acquisition by purchase and/or the taking over of the business and every asset including the good-will of the partnership "Apollo 8 Tours"; the taking over of the business or the cooperation with Mr. Tsambikos Karayiannis and the representation among others of a number of European companies and organizations set out therein; the agency and representation of air, shipping, and travelling companies; the organization of cruises and excursions and generally the attraction and development of internal and international tourism; the hire or chartering of ships and aircrafts for the carriage of passengers and cargoes and every description of every kind; the establishment and operation of tourist agencies and offices for information and travel, and the issue of tickets in Cyprus and abroad and the promotion, organization assistance and participation in excursions for tourists and visitors of every kind, the construction, supply, maintenance, repair, purchase, sale hire, charter and exploitation of ships, cargoes of every type and kind, the establishment of a business for hire, purchase, sale of motorcars, motorbuses, boats and other means of transport and/or their use for the service and promotion for the purposes of the company and for touristic purposes in general; the establishment and operation of customs clearing offices; the agency of insurance companies and the promotion of insurance policies of every kind, of every type of insurance cover; the purchase, sale hire, exchange of every kind of immovable property as lands, buildings, stores installations which the company would consider from time to time expedient to acquire for any of these purposes; the building maintenance, improvement and repair of buildings, stores, piers and every other kind of premises, either for the business of the company or for other business.

This enumeration of most of the objects of the company shows the extent of the business intended to be carried out by the said company which was stated in the letter of the appellants of the 7th March, 1974 (*exhibit* 2), that it will not be just ordinary travel agents but who will really attract groups of tourists from abroad, through the well organized tourist companies which are mentioned in the memorandum.

An application for particulars was filed under rule 10(2) of the Supreme Constitutional Rules as follows:

"That particulars be given substantiating the view that

attracting tourists in Cyprus is a sector that is already saturated, and that the policy of the Republic is to limit the tourists coming to Cyprus.

That the Respondent make a discovery of documents and allow inspection of the same."

When this application came for hearing, counsel for the respondent bank stated that they were ready and willing to give particulars and make documents available for inspection as far as relevant to this case and which were in their possession; she then went on to say that the second sentence of paragraph 1 of the application for particulars should be deleted since there was no allegation on the part of the respondents that the policy of the Republic was to limit "the tourists coming to Cyprus".

Upon this, counsel for the appellants asked that the second sentence of paragraph 1 of the application should be struck out. Thereupon it was ordered that the respondent bank do give particulars as per paragraph 1 of the application and make available all documents connected with the present recourse.

In arguing the case of the appellants, learned counsel stressed the importance of the fact that the respondents did not give any weight to the objects of the company and he is recorded to have said:

"The same facts were explained to the Ministry of Commerce and Industry by the letter *exhibit* 2, where it is stated that the companies listed above by no means were considering to give the representation of their companies in a company which Karayiannis was to participate. It is the third paragraph of *exhibit* 2. And the applicants by their last paragraph in *exhibit* 2 pointed out that they will never act as ordinary travel agents for the issuing of tickets and it is a fact which I would like to argue later but before coming to an absolute prohibition they had to consider whether it was advisable to restrict them only in tour operation which they failed to consider and I cite *Aphrodite Michael* v. *The Improvement Board of Dhali* (1969) 3 C.L.R. page 112".

Counsel for the respondent bank in arguing the case for them after referring to the provisions of section 10(1), (2) of the

Exchange Control Law, Cap. 199, is recorded in the transcribed minutes of the Court to have said the following:

> "In *exhibit* 4 one of the objects of the company was the sale of tickets and so there would be created competition between this company and the purely Cypriot companies. This appears on page 2 of *exhibit* 4. The fact that this profession is saturated is that in 1973 in Cyprus there were 100 tourist offices without counting their sub agents all over Cyprus. In 1973 there were 178598 arrivals of foreigners, tourists and 87294 departures of Cypriots. In these numbers there must be included a great number of tickets which were issued abroad. For this reason the Ministry came to the conclusion that this branch of activity was saturated."

With regard to the allegation of applicant No. 1 that it would cause many tourists to come to Cyprus, counsel for the respondent Bank argued that this could be achieved if he collaborated in some other way with a Cyprus company than by subscribing its memorandum.

I have quoted these two extracts of counsel's addresses from the transcribed record of the Court as it has been argued before us that there was a misconceived reasoning inasmuch as the only element which the respondent Bank and the Ministry of Commerce and Industry took into consideration in deciding whether to grant or not the permission sought, was the fact that among the objects of the proposed company was the issuing of tickets. Upon this premise it was further argued that the respondent Bank resorted to absolute prohibition without considering whether by granting conditionally or on terms, or otherwise the permission sought, same would have served the public interest and policy. In other words that the respondent Bank might point out to the applicants that they could subscribe the memorandum provided certain objects of the company to be formed were deleted from it.

It was the case for the respondent Bank, as rightly summed up by the learned trial Judge that the sub-judice decision was taken "after taking into account all relevant factors including the Memorandum of Association of the company, *exhibit* 4, and arrived at the conclusion that the proposed company would have competed with other local companies taking into consideration

its objects, one of which was the issue and sale of tickets. There was at the material time a great number of tourist agencies operating. The tourists would have been attracted through the cooperation of applicant No. 1 with any one of these agencies and not solely by the formation of a new company".

On this material the learned trial Judge concluded as follows:

"Respondent No. 1 very rightly upon receiving the application on behalf of applicant No. 1 sought the views of the Ministry of Commerce and Industry under which the Cyprus Tourism Organization comes, as it is clear from the memorandum of the company to be formed, *exhibit* 4, that its main objects had to do with tourism. After obtaining the views of the said Ministry and in exercising their discretion in the matter the respondents issued the decision complained of.

It is a well established principle of Administrative Law that on a recourse under Article 146 of the Constitution the Court is not empowered to substitute its own discretion for that of the Administration (*Charalambos Pissas No.* 2 v. *The Electricity Authority of Cyprus* (1966) 3 C.L.R. 784). An Administrative Court can only interfere if there exists an improper use of the discretionary power or a misconception concerning the factual situation or the non taking into account of material factors (*Costas Vafeades* v. *The Republic of Cyprus*, 1964 C.L.R. 454.).

I must say that I find no merit in the allegation that the respondents acted contrary to law or that they misconceived the facts of the case. On the contrary, the material before the respondents, including the Articles of Association of the Company under formation and the views of the Ministry of Commerce and Industry, fully justify the issue of the negative decision reached by them."

As already stated this appeal was argued along the same lines. It should be stated, however, from the outset that the arguments advanced are not born out from the material in the file.

In no document or other record to be found in the file of the respondent Bank any mention was made to the issuing of tickets in a way suggesting that this object was the only one relied upon, to the exclusion of, or in preference to the other objects of the

company, when the respondent Bank came to the sub-judice decision. On the contrary, the reasons given in *exhibit* "A" for refusing the permit applied for refer to the arrivals and departures of tourists and that such persons—and no differentiation is made between these two classes—leave on the average to the travel agencies as profits, three pounds each.

This document does not speak of the commission that travel agents receive from issuing tickets to passengers but to the overall income derived from tourists whether incoming or outgoing and the passage in the address of counsel for the respondent Bank was not and could not be treated as an admission of fact. It was nothing more than an argument advanced in reply to what was urged by counsel for the appellants. It has to be viewed in the whole context of the opposition and the address of counsel and no to be isolated from the rest.

The fundamental facts that led to the sub-judice decision were the number of travel agencies carrying on the line of business so extensively described in the objects of the company to be formed and the undesirability of having non-residents competing with Cypriots in a sector that is already saturated.

From the totality of the circumstances and the contents of the various documents placed before the Court, I have no difficulty in saying that there has been no misconception of fact, either as to the objects of the company to be formed, or as to the competition with residents that would occur in a field that unquestionably was already saturated.

Regarding the ground that the respondent Bank should have examined the possibility of imposing conditions before rejecting the appellant's application, I wish to point out that the case of *Aphrodite Michael* v. *The Improvement Board* of Dhali (1969) 3 C.L.R. p. 112 should be distinguished. That was a case of interference with the right of ownership safeguarded by Article 23 of the Constitution and it was decided on its facts and in relation to the question whether there existed the power to disallow completely any building operations on the property of that applicant which have been included in the Second Schedule to the Antiquities Law, Cap. 31, or whether the appropriate Authority could have imposed terms instead. On the other hand if I were to accept that in the present case the sub-judice

decision should have been annulled because the respondent Bank did not examine the possibility of imposing conditions before rejecting the appellants' application, that would mean that the respondent Bank should embark on an exercise of redrafting the objects in the memorandum of association of a company to be formed, for the purpose of intimating to a prospective applicant how far and in what circumstances its discretion would be exercised under section 10(2) of the Exchange Control Law, Cap. 199 which in my view was not required of the respondent Bank in the circumstances.

In my view the respondent Bank properly exercised its discretion. The decision it reached was reasonably open to it on the basis of the material before it and is validly supported by the reasons given therefor.

Section 10(2) of the Exchange Control Law provides in so far as relevant as follows:

> "The subscription of the memorandum of association of a company to be formed under the Companies Law, or any Law amending or substituted for the same, by a person resident outside the scheduled territories, or by a nominee for another person so resident, shall, unless he subscribes the memorandum with the permission of the Financial Secretary, be invalid in so far as it would on registration of the memorandum have the effect of making him a member of or shareholder in the company,..."

The paramount consideration therefore, under the aforesaid provision is to control the shareholding in companies by non-residents, as upon the registration of a company a subscriber automatically becomes a member and a holder of the shares for which he has signed, in this case 3,334 ordinary shares of one pound each as compared with 6,666 shares to be subscribed by residents. This is a section that gives an unfettered discretion and as it covers a matter of fiscal policy it should be considered as a wide one. Being so, an administrative Court is always cautious and slow to interfere with its exercise by the appropriate organ. I therefore have no difficulty in upholding the approach of the learned trial Judge in the circumstances on this issue as same was neither wrong in Law nor exercised in abuse or excess of power, nor reached under any misconception of fact. After all the extent of judicial control of the administrative

discretion is confined to the examination of the lawful thinking and the observance of the lawful limits within which such discretion should be exercised.

For all the above reasons I would dismiss this appeal.

A. LOIZOU J.: Mr. Justice L. Loizou who is absent abroad and who had the opportunity of reading in advance the judgment just delivered has authorized me to say that he agrees with it.

DEMETRIADES J.: I agree with the judgment just delivered by Mr. Justice A. Loizou.

SAVVIDES J.: I also agree with the judgment of Mr. Justice A. Loizou.

HADJIANASTASSIOU J.: This is an appeal by the appellants, Tsambikos Karayiannis and Apollo 8 Tours attacking the judgment of a single Judge of this Court dated 14th January, 1978, whereby he dismissed their recourse on the ground that the decision of the Central Bank not to permit appellant No. 1 to subscribe to the Memorandum of a company to be formed under the aforementioned name, was a correct decision. Section 10(2) of the Exchange Control Law, Cap. 199 says:-

> "The subscription of the memorandum of association of a company to be formed under the Companies Law, or any Law amending or substituted for the same, by a person resident outside the scheduled territories, or by a nominee for another person so resident, shall, unless he subscribes the memorandum with the permission of the Financial Secretary, be invalid in so far as it would on registration of the momerandum have the effect of making him a member of or shareholder in the company, so, however, that this provision shall not render invalid the incorporation of the company; and if by virtue of this subsection the number of the subscribers of the memorandum who on its registration become members of the company is less than the minimum number required to subscribe the memorandum, the provisions of the said Laws relating to the carrying on of business of a company the number of whose members is reduced below the legal minimum shall apply to the company as if the number of its members had been so reduced."

The relevant facts are these: The appellants, through their advocate, addressed a letter dated 22nd February, 1974, to the Central Bank of Cyprus in these terms:-

> "We have been instructed to form a private Company of limited liability as per attached draft of Memorandum and Articles of Association. You will observe that this Company will undertake the agency of several travel Companies and will act as travel agents. The travel companies listed in clause 3(b) of the objects of the company are exclusively represented by Mr. Tsambikos Karayiannis in Greece and we understand that he has the exclusivity as regards Cyprus also.
>
> We are instructed to inform you that during the two years 1972-1973, he managed to attract 230,000 tourists in Greece and it is estimated that he will be in a position to switch tourists to Cyprus of even a greater number. The Company will be subscribed by Cypriots for 6,666 shares and Mr. Tsambikos Karayiannis will subscribe for 3,334 ordinary shares of £1 each.
>
> In view of all the above, we hereby apply for permission under the Exchange Control Law, Cap. 199 that Mr. Tsambikos Karayiannis subscribes for the above shares in the captioned Company."

On 26th February, the two Officials of the Central Bank addressed a letter to the Director General of the Ministry of Commerce and Industry seeking their views on the matter and had this to say:

> "We enclose a photocopy of a letter dated 22nd February, 1974, addressed to us by L. Papaphilippou & Co., advocates requesting permission on behalf of the above company to issue shares to a non-resident and we would appreciate having your views on the matter.
>
> Please find enclosed a copy of the company's Memorandum and Articles of Association for your perusal and *return*".

It appears further that on 7th March, 1974, counsel appearing

for the appellants addressed a letter to the Ministry of Commerce and Industry in which they said the following:-

"'Εκ μέρους πελατῶν μας ὑπεβάλαμεν αἴτησιν πρὸς τὴν Κεντρικὴν Τράπεζαν Κύπρου ἡμ. 22.2.1974 διὰ τῆς ὁποίας αἰτούμεθα ἄδειαν συμμετοχῆς τοῦ κ. Τσαμβίκου Καραγιάννη ἐξ 'Ελλάδος εἰς τὴν ὑπὸ ἵδρυσιν ἑταιρείαν ὑπὸ τὴν ἐν θέματι ἐπωνυμίαν.

Πιστεύομεν ὅτι, ἐφ' ὅσον ἡ πολιτικὴ τῆς κυβερνήσεως εἶναι ἡ προαγωγὴ καὶ ἐνθάρρυνσις τῆς τουριστικῆς βιομηχανίας ἐν Κύπρῳ, ἡ συμμετοχὴ τοῦ κ. Καραγιάννη εἰς τὴν ἑταιρείαν θὰ προάγῃ πράγματι τὸν τουρισμόν. Οὗτος κατὰ τὸ 1972/73 κατώρθωσε μόνος νὰ προσελκύσῃ εἰς 'Ελλάδα 230,000 τουρίστας καὶ εἶναι εἰς θέσιν νὰ διοχετεύσῃ τοὺς τουρίστας εἰς Κύπρον, νοουμένου ὅτι θὰ συμμετάσχῃ εἰς τὴν ὑπὸ ἵδρυσιν ἑταιρείαν.

'Εὰν δὲν συμμετάσχει ἡ 'Εταιρεία αὕτη δὲν θὰ δυνηθῇ νὰ ἐφαρμώσῃ τοὺς σκοποὺς της καθ' ὅσον αἱ ἑταιρεῖαι αἱ κατωνομαζόμεναι εἰς τὸ 'Ιδρυτικὸν ἔγγραφον ἔχουν ἀποκλειστικὰ *ἀντιπρόσωπόν των τὸν* κ. Καραγιάννην καὶ ἐπ' οὐδενὶ λόγῳ θὰ παραχωρήσουν τὴν ἀντιπροσώπευσίν των εἰς τὴν ἑταιρείαν εἰς τὴν ὁποίαν δὲν συμμετέχει ὁ κ. Καραγιάννης.

'Η ὑπὸ σύστασιν ἑταιρεία δὲν θὰ εἶναι οἱ συνηθισμένοι ταξιδιωτικοὶ πράκτορες ἀλλὰ πραγματικῶς θὰ προσελκύει ὁμάδας τουριστῶν ἐκ τοῦ ἐξωτερικοῦ μέσῳ τῶν καλὰ ὀργανωμένων τουριστικῶν ἑταιρειῶν αἵτινες ἀναφέρονται εἰς τὸ 'Ιδρυτικὸν."

("On behalf of our clients we submitted an application to the Central Bank of Cyprus dated 22.2.1974 whereby we requested leave for the participation of Mr. Tsambikos Karayiannis of Greece in the company to be formed under the subject title.

We believe that since the policy of the Government is to promote and encourage the touristic industry in Cyprus the participation of Mr. Karayianni in the company will really promote tourism. In the years 1972–1973 he managed alone to attract to Greece 230,000 tourists and he is in a position to divert these tourists to Cyprus, provided that he will participate in the company to be formed.

If he does not participate this company will not be able to implement its objects as the companies mentioned in the Memorandum of Association have Mr. Karayiannis as their exclusive agent and under no circumstances they will assign their representation to the company in which Mr. Karayiannis will not participate.

The company to be formed will not be just ordinary travel agents but will really attract groups of tourists from abroad through the well organized tourist companies which are mentioned in the Memorandum.").

On 8th March, 1974, the Ministry of Commerce and Industry in reply said:-

" 'Εν ἀναφορᾷ πρὸς τὴν ἀπὸ 26ης Φεβρουαρίου, 1974, καὶ ὑπ' ἀρ. πρωτ. ΦΔ/1650 ἐπιστολὴν σας ἐπὶ τοῦ ἐν ἐπικεφαλίδι θέματος ἔχω ὁδηγίας ὅπως σᾶς πληροφορήσω ὅτι τὸ 'Υπουργεῖον ἔχει ἐν προκειμένῳ ἔνστασιν καθότι ξένοι ὑπήκοοι θὰ συναγωνίζωνται Κυπρίους εἰς ἕνα τομέα ὁ ὁποῖος εἶναι ἤδη κεκορεσμένος.

Τὸ 'Ιδρυτικὸν "Εγγραφον καὶ Καταστατικὸν τῆς 'Εταιρείας ἐπιστρέφονται."

("With reference to your letter dated 26th February, 1974 No. F.D./1650, on the aforesaid subject I have instructions to inform you that the Ministry objects in this case as foreign subjects will compete with Cypriots in a sector that is already saturated.

The Memorandum and Articles of Association of the company are returned.").

Finally, on 14th March, 1974, the Central Bank addressed a letter to counsel of the appellants, and it is in these terms:-

"With reference to your letter dated 22nd February, 1974, requesting permission on behalf of the above company to issue shares to a non-resident we regret to inform you that under the Exchange Control Law, Cap. 199 we are unable to grant the requisite authority as they would compete with Cypriots in a sector that is already saturated."

The appellants, feeling aggrieved, filed a recourse on 23rd April, 1974, alleging that the act or decision of the respondents

dated 14th March, 1974, whereby they refused to grant permission to the first applicant to subscribe in a company to be formed under the style Apollo 8 Tours Ltd. is null and void and of no effect whatsoever. In support of that application, the following grounds of law were put forward:

(1) The respondents acted under misconception of the facts in finding that the incorporation of Apollo 8 Tours Ltd., would compete with Cypriots in a sector that is already saturated; (2) the respondents misconceived applicants' application in that its main object is not at all saturated in Cyprus; (3) the respondents' decision or act is contrary to the general policy of the Government of Cyprus for promoting tourism in Cyprus; and (4) respondents resorted to absolute prohibition without considering whether conditional or in terms or otherwise grant would have served the public interest and policy and the objects of the application of the applicants.

The learned trial Judge, having considered the arguments of both counsel, dismissed the recourse, and had this to say:-

"Counsel for applicants argued that respondents misconceived the facts of the application in considering that the company to be formed was one for the sale of tickets and not for the promotion of tourism. The application of the applicants was only for permission for applicant No. 1 to subscribe for 1/3rd of the total number of shares in the company. He also argued that the respondents did not properly weigh all the factors of the case, such as the great number of tourists that applicant No. 1 was in a position to bring to Cyprus, the number of the companies in the tourist trade which he represented, and the fact that these companies would not appoint as their agent a company in which respondent No. 1 did not participate. He further submitted that the respondents ought to have considered the possibility of imposing restrictions on the permission before arriving at an absolute prohibition. Finally, he submitted that the respondents acted ultra vires the Central Bank of Cyprus Law 1963 (48/63) particularly sections 3, 4 and 6 of that Law, which deal with the establishment purposes and functions of the Central Bank.

Counsel for the respondents, on the other hand, submitted that the decision was taken after taking into account all

relevant factors including the Memorandum of Association of the company, *exhibit* 4, and arrived at the conclusion that the proposed company would have competed with other local companies taking into consideration its objects one of which was the issue and sale of tickets. There was at the material time a great number of tourist agencies operating. The tourists would have been attracted through the co-operation of applicant No. 1 with any one of these agencies and not solely by the formation of a new company.....

It is a well-established principle of Administrative Law that on a recourse under Article 146 of the Constitution the Court is not empowered to substitute its own discretion for that of the Administration (*Charalambos Pissas No.* 2 v. *The Electricity Authority of Cyprus*, (1966) 3 C.L.R. 784). An Administrative Court can only interfere if there exists an improper use of the discretionary power or a misconception concerning the factual situation or the non-taking into account of material factors (*Costas Vafeades* v. *The Republic of Cyprus*, 1964 C.L.R. 454).

I must say that I find no merit in the allegation that the respondents acted contrary to law or that they misconceived the facts of the case. On the contrary, the material before the respondents, including the Articles of Association of the Company under formation and the views of the Ministry of Commerce and Industry, fully justify the issue of the negative decision reached by them."

It should be added that counsel appearing for the respondent has produced a copy of a document showing the real reasons for refusing the application of counsel for the appellants. This document reads as follows:-

"According to the information given by the Ministry of Commerce and Industry there are in Cyprus 100 local agencies and a quite big number of sub-agencies and representatives, carrying on this line of business. In addition the air companies themselves are in this field acting as booking and travel agents.

In 1973 we had 178,598 arrivals and 87,244 departures. If we take into consideration that these persons leave £3 each, average to the travel agencies then we shall come to a

figure of about £600,000. These funds have to be distributed between over 200 agencies, sub-agencies and representatives of companies thus leaving approximately £2,500 to £2,700 for each. They hardly cover their expenses."

On appeal, counsel for the appellants argued at length (a) that the trial Judge was wrong in law that the Administrative Court can only interfere if there exists an improper use of the discretionary power or a misconception concerning the factual situation or non-taking into account of material factors, because in the present recourse factual misconception was apparent; (b) that the trial Judge was wrong not to decide that the respondent's discretion ought to have been exercised reasonably; and (c) that the trial Judge was wrong not to decide on the grounds of Law raised by the recourse and elaborated in its support.

Time and again it was said that although the administrative authorities have discretionary powers under the Law, a discretion has to be exercised properly and it is well-settled that in matters of discretionary powers this Court will not interfere so long as on a proper exercise thereof a decision has been taken which was reasonably open to the appropriate organ on the basis of the material before it. But this Court is bound to interfere if the said powers have been exercised in a defective manner, or when the decision reached cannot be validly supported by the reasons given or when material considerations have not been duly taken into account. In a recent case, in *Laker Airways Ltd.* v. *Department of Trade*, [1977] 2 All E.R. 182, Lord Denning, dealing with the powers of the Secretary of State, under the Civil Aviation Act, 1971, had this to say regarding the extent of the Minister's discretionary powers at p. 194:-

"We have considered this case at some length because of its constitutional importance. It is a serious matter for the Courts to declare that a Minister of the Crown has exceeded his powers. So serious that we think hard before doing it. But there comes a point when it has to be done. These Courts have the authority, and I would add the duty, in a proper case, when called on to inquire into the exercise of a discretionary power by a Minister of his department. If it found that the power has been exercised improperly or mistakenly so as to impinge unjustly on the legitimate

rights or interests of the subject, then these Courts must so declare. They stand, as ever, between the executive and the subject, alert, as Lord Atkin said in a famous passage, 'alert to see that any coercive action is justified in Law': see *Liversidge* v. *Anderson*, [1941] 3 All E.R. 338 at 361. To which I would add 'alert to see that a discretionary power is not exceeded or misused'. In this case the Judge has upheld this principle. He has declared that the Minister did exceed his powers. I agree with him. I would dismiss the appeal."

In *Yiangos Droushiotis and the Republic of Cyprus, through* 1. *The Minister of Commerce and Industry*, 2. *The Senior Mines Officer*, (1966) 3 C.L.R. 722, Triantafyllides, J., (as he then was), dealing with the discretionary powers of the administration under that law, said at pp. 729-730:-

"...the fact remains that once, under the relevant legislation (Cap. 270), a discretion has to be exercised, as to whether or not to grant a prospecting permit, such discretion has to be exercised properly; and it is well settled that in matters of discretionary powers this Court will not interfere so long as on a proper exercise thereof a decision has been taken which was reasonably open to the appropriate organ on the basis of the material before it; but this Court is bound to interfere if the said powers have been exercised in a defective manner, as for example, when the decision reached cannot be validly supported by the reasons given therefor, or when material considerations have not been duly taken into account.....

As the ground on which the applications of Applicant were refused did not render it reasonably open for Respondent to refuse them finally, at that stage, and as their final refusal, as then made, was clearly not otherwise based on a due consideration of all relevant factors pertaining to their individual merits, it follows that such applications were turned down finally, at the material time, in a defective exercise of the relevant discretionary powers and that the three relevant *sub-judice* decisions of Respondent in the matter are contrary to law (in the sense that they are contrary to basic principles of Administrative Law relating to the proper exercise of discretionary powers) and they

have also been taken in excess and abuse of powers, and have to be annulled;"

The judgment of this case was affirmed by the Full Bench in the *Republic of Cyprus* v. *Yiangos Droushiotis* (1967) 3 C.L.R. 232. In Greece, if I may add, the question of judicial control regarding the discretionary powers of the administration in Greece, is dealt with admirably by Professor Economou in his well-known textbook "Judicial Control of Discretionary Powers". At p. 181 he had this to say:-

"The judicial control of the administrative discretion has been by case-law extended to most cases where the administration acts in a way contrary to the sense of justice generally and in particular the by now settled principles of good or honest or proper or regular administration according to varying terminology of the case law. In these cases the administrative Judge checks the correctness of the method of the administrative action as characteristically happens in the following groups of administrative acts:.....(viz.)

3. In the case of administrative acts when there is a choice between equal lawful solutions, it was decided that there is excess of the outer limits of the discretionary power whenever the administration had chosen the more onerous solution instead of the more equitable one. In this case equity in the sense of the benevolent assessment of the conflicting interest aiming at the granting of the greater possible protection to him who is most adversely affected by the Law[1], constitutes a concept narrower than that of the proper use of the administrative discretion and for this reason falls as a class within the genous, in the category of the outer limits.....

In all the aforementioned cases the control of the correctness of the administrative organs refers to the more just and equitable way which the administration ought to have acted, according to the principles of good administration which have the force of law and particularly those relating to the outer limits."

In *Vassos Eliades Ltd.* v. *The Republic of Cyprus through the*

1. See M.D. Stassinopoulos at p. 346.

*Minister of Commerce and Industry*, (1979) 3 C.L.R. 259 the Full Bench reiterated the principle regarding the discretionary powers of the administration and had this to say at pp. 266-267:-

"We think we would reiterate, what has been said in other cases, that in a modern State it is often found desirable to subject specified activities to some form of governmental control. The purpose of such control will vary. Sometimes, a control is imposed for the purpose of collecting revenue; sometimes the type of activity may be such that it is desirable in the public interest to restrict the number of persons who exercise it. In practice one of the commonest methods whereby control can be imposed is the licence, and a company like any other importer who desires to carry on the business of importation, is required to secure a licence from the Ministry of Commerce and Industry which is the licensing authority under the provisions of section 4(1) of Law 49/62. The import licences are usually granted in persuance of protectionist policies. One, therefore, should remember that inspite of the fact that the Minister has a discretion under the law to refuse or grant a licence to a company—in the public interest, the trend of the authorities in Cyprus is that once a discretionary power is exercised, such exercise must be for the purpose for which it was given. As long as the discretion is exercised in a lawful manner the Supreme Court will not interfere with the exercise of such discretion by substituting its own discretion for that of the authority's concerned, even if in exercising its own discretion on the merits, the Court would have reached a different conclusion. (See *Iacovos L. Iacovides* v. *The Republic* (1966) 3 C.L.R. at pp. 219-220).....

With this in mind and having considered carefully the able arguments of both counsel, and looking at the general scope and objects of our Law, we have reached the conclusion that although the Minister has a discretion to grant or not to grant an import licence, nevertheless, such a discretion has to be exercised properly and not in a defective manner. Once, therefore, the Minister under the Law, and in accordance with the Principles of administrative law had a choice between more than one, but equally lawful solutions, in choosing the more onerous solution, instead of

the more equitable one, has acted, in our view, in excess of the limits of his discretionary powers.

Applying the principle enunciated by Economou, we think that the refusal of the Minister was taken in a defective manner, because as we said earlier, in the exercise of his discretionary powers he could have chosen the less onerous one, viz., to grant the permit and impose conditions, that is to say, by restricting and regulating the quantity of the imported rubber gloves or granting a licence but subject to conditions as he may deem fit, or indeed resort to the imposition of import duty on rubber gloves as has been suggested by the applicant company in this case.

For all these reasons, we find ourselves in agreement with counsel for the appellants that the decision of the Minister was made in a defective manner and was contrary to the law and in abuse of power. We would, therefore, set aside the decision of the Minister and allow the appeal".

In *Cytechno Ltd.* v. *The Republic* (1979) 3 C.L.R. 513, I had this to say on behalf of the Full Bench at pp. 532–533:–

"Having considered very carefully the long and able arguments of both counsel, and having reviewed and analysed the law in a number of cases quoted, we have reached the conclusion by looking at the general scope and objects of our law, Cap. 270, that the Council of Ministers which is entrusted with a discretion under the said law—particularly under sub-section 4 of section 13—have a discretion to renew, or not to renew the prospecting permits, but such discretion has to be exercised properly as not to frustrate the policy and objects of Law, Cap. 270, particularly with regard to the class of persons for whose benefit the power may be intended to have been conferred.

With this in mind, and having regard to the facts and circumstances of this case, we would adopt and apply in the present case the principle enunciated by the father of administrative law in England, Lord Reid, viz., that the discretion of a Minister might nevertheless be limited to the extent that it must not be so used whether by reason of misconstruction of the statute or other reason, as to frustrate the object of the statute which conferred it.....

As we have said earlier, it appears that all the experts expressed a different view and the fears for the pollution of the water are not justified provided, of course that appropriate measures would be taken by the appellant company...

Having in mind the facts and circumstances of this case, and having relied on the authorities we have quoted, we have reached the view that the renewal of the permits was refused in a defective manner by the administration."

This approach laid down in the above two recent cases of the Full Bench, is the correct approach, and I would adopt and apply them in the present case regarding the exercise of the discretionary powers of the administration.

The next question is whether the reasons given by the official of the Central Bank in refusing to permit the appellant to subscribe to the memorandum of the company in question, were the correct ones. I have considered very carefully the arguments put forward by both counsel, and in my view the reasons given by the official of the Central Bank in refusing permission to appellant No. 1 to subscribe to the company in question, has no connection with the powers of the Central Bank. Indeed I would go further and state that in the present case there was a misconception in the mind of the authority concerned, because the Central Bank in exercising the functions of the Financial Secretary, as our Law shows, wrongly exercised its discretionary powers in refusing to give permission to appellant No. 1 to subscribe to the memorandum of the company because it misconceived that a person outside Cyprus holding minority shares would compete with the Cypriots in a sector that is already saturated. In my view because of such misconception the authority in question, has not taken also into consideration that, it is a cardinal principle of Company Law that it is a separate legal entity and through its elected committee takes the final decisions in such matters. Once, therefore, an alien shareholder would remain a minority one, in my view, he is unable to compete with Cypriots, and the administration, I repeat, in refusing such an application has acted under a misconception regarding the factual issue before them.

In the light of the authorities and for the reasons I have given, I have reached the conclusion that the learned Judge has failed

to attach importance to this point—that appellant No. 1 would have always remained a minority shareholder, and I allow the appeal.

Appeal allowed.

No order as to costs.

TRIANTAFYLLIDES P.: In agreement with my learned brother Judge Mr. Justice Hadjianastassiou, and, regretfully, in disagreement with my other learned brother Judges who form the majority of the Court in the present instance, I am of the opinion that this appeal should be allowed, and not be dismissed.

It is an appeal against the first instance judgment of a Judge of this Court by means of which there was dismissed a recourse of the appellants, as applicants, against a decision of respondent 1, the Central Bank of Cyprus, whereby there was refused permission to appellant 1 to subscribe for shares in a company, "Apollo 8 Tours Limited", which was being formed.

For the sake of the completeness of this judgment I have to outline in brief the salient facts of this case, and, in this respect, I find it useful to quote, first, paragraphs 1, 3 and 4 of the Opposition which was filed by the respondents in this case:

"1. On 22nd February, 1974, Messrs. L. Papaphilippou & Co., advocates of Nicosia submitted an application to the Central Bank of Cyprus for authority for Mr. Tsambikos Karayiannis, a Greek subject, and a resident of Rhodes to subscribe for 3,334 shares in the share capital of the company APOLLO 8 TOURS LIMITED.

.....

3. The Central Bank in dealing with applications involving the participation by non-residents in the share capital of companies incorporated in Cyprus refers all applications to the appropriate Ministry of the Government of the Republic for their views. In this particular case the application was submitted to the Ministry of Commerce and Industry by letter dated 26th February, 1974.

4. The Ministry of Commerce and Industry by their letter dated 8th March, 1974, informed the Central Bank that they objected to such foreign participation as foreign

nationals will compete with Cypriots in a sector that is already saturated.....
.....".

After considering the objections of respondent 2, the Ministry of Commerce and Industry, respondent 1, the Central Bank of Cyprus, informed, on March 14, 1974, counsel acting for the appellants that under the Exchange Control Law, Cap. 199, it was not possible to grant the permission requested by the appellants, namely that appellant 1 should be allowed to subscribe for 3,334 shares of £1 in the under formation company "Apollo 8 Tours Limited", because "they would compete with Cypriots in a sector that is already saturated".

It is to be noted that 6,666 of £1 shares in the said company would be subscribed for by Cypriots, and, therefore, the company would not be controlled by an alien non-resident in Cyprus, appellant 1, but by Cypriots resident in Cyprus.

It must, also, be stressed that at the time when the permission in question was requested from respondent 1 there existed already in Cyprus appellant 2, "Apollo 8 Tours", which was a partnership, and which would be taken over by the company to be formed as aforesaid. The said partnership was functioning at all material times as a travel agency.

That what was conveyed, as aforementioned, to counsel for the appellants by means of the letter dated March 14, 1974, was the true reason for the refusal of the requested permission is fully borne out by the letter of respondent 2 to respondent 1, which is referred to in paragraph 4 of the Opposition, above, and by a document, in the relevant file of respondent 1, which reads as follows:-

"Reasons for refusing the application of Messrs. L. Papaphilippou & Co *re*: *Apollo 8 Tours Limited.*

According to the information given by the Ministry of Commerce and Industry there are in Cyprus 100 local agencies and a quite big number of sub-agencies and representatives, carrying on this line of business. In addition the air companies themselves are in this field, acting as booking and travel agents.

In 1973 we had 178,598 arrivals and 87,244 departures.

If we take into consideration that these persons leave £3 each, average to the travel agencies then we shall come to a figure of about £600,000. These funds have to be distributed between over 200 agencies, sub-agencies and representatives of companies thus leaving approximately £2,500 to £2,700 for each. They hardly cover their expenses."

It is in accordance with the relevant correspondence and the contents of the said document, that counsel for the respondents presented the case before the trial Court; and, in this respect, I must make it clear that I do not regard what she stated then as any admission, in the strict sense of the term, but as a presentation of the case of the respondents in conformity with her instructions and with the material available from the relevant administrative records; in this connection she very properly did what she was bound to do, that is to place before the Court the correct position as regards what has taken place in this case.

The permission, which had been requested by counsel for the appellants, enabling appellant 1 to subscribe, as a minority shareholder, for shares of "Apollo 8 Tours Limited", was refused under section 10(2) of the Exchange Control Law, Cap. 199, the material part of which, when modified in accordance with Article 188.4 of the Constitution, reads as follows:

"(2) The subscription of the memorandum of association of a company to be formed under the Companies Law, or any Law amending or substituted for the same, by a person resident outside the Republic, or by a nominee for another person so resident, shall, unless he subscribes the memorandum with the permission of the Central Bank, be invalid in so far as it would on registration of the memorandum have the effect of making him a member of or shareholder in the company, so, however, that this provision shall not render invalid the incorporation of the company;

....."

In approaching the validity of the exercise of the discretion resulting in the refusal of permission under section 10(2), above, it is useful to bear in mind the following principles of Administrative Law, which are set out in Dagtoglou on General Administrative Law—(Δαγτόγλου, Γενικὸ Διοικητικὸ Δίκαιο)—(1977), vol. A, p. 100:-

"Διακριτικὴ εὐχέρεια δὲν σημαίνει νομικὴ ἀποδεύσμευση τῆς

διοικήσεως. Δὲν σημαίνει δηλαδὴ τὴν τοποθέτησή της ἐκτὸς τῆς περιοχῆς τοῦ δικαίου. Ἡ διακριτικὴ εὐχέρεια δὲν σημαίνει ἰδίως ἐξουσία πρὸς αὐθαιρεσία. Δὲν σημαίνει κὰν τὴν ἐξουσία τοῦ 'ἐνεργεῖν κατ' ἀρέσκειαν', μιὰ δυνατότητα ποὺ ἔχει μόνο ὁ ἰδιώτης (ὑπὸ τὴν προϋπόθεση βέβαια ὅτι δὲν παραβαίνει τὸν νόμο).

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Τὸ κράτος λοιπὸν δὲν ἔχει ποτὲ ἀπεριόριστες ἐξουσίες. Ἡ ἀρχὴ τῆς νομιμότητος τῆς διοικήσεως ἐξειδικεύει τὴν διαπίστωση αὐτή, ὁρίζοντας ὅτι ἡ διοίκηση ὑπόκειται στοὺς ὁρισμοὺς καὶ φραγμοὺς τοῦ δικαίου. Ἡ διακριτικὴ εὐχέρεια τῆς διοικήσεως συμβιβάζεται μὲ τὸ κράτος δικαίου, ἀκριβῶς γιατὶ δὲν ἀποτελεῖ ἀποδεύσμευση ἀπὸ τὸ δίκαιο. Τὸ δίκαιο ὅμως περιορίζεται στὴν περίπτωση τῆς διακριτικῆς εὐχερείας ἀφενὸς στὴν χάραξη τοῦ πλαισίου, τῶν ἄκρων δηλαδὴ ὁρίων τῆς διοικητικῆς δραστηριότητος, καὶ ἀφετέρου στὸν καθορισμὸ ὁρισμένων γενικῶν ἀρχῶν ποὺ κατευθύνουν καὶ περιορίζουν τὴν ἄσκηση τῆς διακριτικῆς εὐχερείας."

("Discretionary power does not mean a legally unfettered administration. In other words it does not mean that it is placed outside the ambit of the law. In particular, discretionary power does not mean power to act arbitrarily. It does not even mean the power to 'act as it pleases', a possibility which only an individual has (on the assumption, of course, that he does not violate the law).

.....

The state, therefore, never has unlimited powers. The principle of legality of the administration substantiates this proposition by prescribing that the administration is subject to the tenets and fetters of the law. The discretionary power of the administration is reconciled with the rule of law just because it does not constitute a departure from the law. But the role of the law in the case of discretionary power is limited, on the one hand, to the definition of the framework, that is of the outer limits, of the administrative activity, and, on the other hand, to certain general principles which direct and restrict the exercise of the discretionary power").

As it is pointed out by Dagtoglou (*supra*, at p. 101) it is not the task of a Judge to substitute his own discretion for that of

the administration, but only to control the exercise of such discretion; and this was, also, very rightly stressed by the learned trial Judge in his judgment, where he referred, in this connection, to *Pissas (No. 2) v. The Electricity Authority of Cyprus*, (1966) 3 C.L.R. 784.

One of the principles, which according to Dagtoglou, *supra*, should govern the exercise of administrative discretion is the principle of "proportionality"; it is stated, in this respect, by him (at pp. 107–108):

"'Η ἀρχὴ τῆς ἀναλογικότητος ἐπιτάσσει ὅτι μεταξὺ τοῦ συγκεκριμένου διοικητικοῦ μέτρου καὶ τοῦ ἐπιδιωκομένου νομίμου σκοποῦ πρέπει νὰ ὑπάρχει μιὰ εὔλογη σχέση. 'Η σχέση αὐτὴ ὑπάρχει μόνον ὅταν τὸ λαμβανόμενο μέτρο εἶναι κατάλληλο γιὰ τὴν ἐπίτευξη τοῦ ἐπιδιωκομένου σκοποῦ (καταλληλότης), συνεπάγεται κατὰ ἔνταση καὶ διάρκεια τὰ λιγότερα δυνατὰ μειονεκτήματα γιὰ τὸν ἰδιώτη καὶ τὸ κοινὸ (ἀναγκαιότης) καὶ, τέλος, τὰ συνεπαγόμενα μειονεκτήματα δὲν ὑπερσκελίζουν τὰ πλεονεκτήματα (ἀναλογικότης). 'Η ἀρχὴ τῆς ἀναλογικότητος ἀνεπτύχθη στὸ γερμανικὸ διοικητικὸ δίκαιο (Grundsatz der Verhältnismässigkeit), ὅπου συνεδέθη στὴν νομολογία τοῦ γερμανικοῦ 'Ομοσπονδιακοῦ Συνταγματικοῦ Δικαστηρίου μὲ τὴν ἀρχὴ τοῦ κράτους δικαίου καὶ ἀπέκτησε μὲ αὐτὸν τὸν τρόπο συνταγματικὴ ἰσχύ. 'Επίσης ἔχει ἀναγνωρισθεῖ ἀπὸ τὸ Δικαστήριο τῶν Εὐρωπαϊκῶν Κοινοτήτων ὡς ἀρχὴ τοῦ Εὐρωπαϊκοῦ κοινοτικοῦ δικαίου."

("The principle of proportionality ordains that there should be a reasonable relationship between the particular administrative measure and the lawful object which is being pursued. Such relationship exists only when the measure taken is suitable for the achievement of the object which is being pursued (suitability), entails in intensity and duration the least possible disadvantages for the individual and the public (necessity) and, finally, the resulting disadvantages do not override the advantages (proportionality). The principle of proportionality was developed in German administrative law (Grundsatz der Verhältnismässigkeit) where it was connected by the case-law of the German Federal Constitutional Court with the principle of the rule of law and acquired, thus, constitutional force. It has,

also, been recognized by the Court of the European Communities as a principle of European Community law").

The case-law of the Court of Justice of the European Communities, which is referred to by Dagtoglou in the above quoted passage, is case No. 11/70 ((1970) 9, C.M.L.R. 294) where it was held that the principle of "Verhältnismässigkeit", that is of reasonableness or proportionality, is an essential part of the law not only of the Federal Republic of Germany but also of the European Communities.

The same principle is reflected in a series of cases (as, for example, No. 300/1936) in which the Council of State in Greece has held that in achieving its lawful aims the administration should choose always the less onerous course for a private citizen, though such principle, as pointed out by Dagtoglou (*supra*, at p. 108), has been deviated from, occassionally, by the Council of State in Greece when it did not seem to be adopted by the legislation applicable to a particular case.

In the light of the foregoing, and of case-law such as that referred to by Mr. Justice Hadjianastassiou in his judgment in this case (*Droushiotis* v. *The Republic*, (1966) 3 C.L.R. 722, and on appeal (1967) 3 C.L.R. 232, *Vassos Eliades, Ltd.* v. *The Republic*, (1979) 3 C.L.R. 259, and *Cytechno Ltd.* v. *The Republic*, (1979) 3 C.L.R. 513), I am of the opinion that in the present instance the relevant discretionary powers, under section 10(2) of Cap. 199, were exercised in a manner which was not reasonably proportionate to the facts of this case, and, therefore, in a manner not reasonably open to the respondents; and, furthermore, in a manner which is defective because it is vitiated by factual and legal misconceptions.

My reasons for reaching the above conclusion are, mainly, the following:

The formation of the company "Apollo 8 Tours Limited" and the taking over by it of the already existing travel agency "Apollo 8 Tours" would not have increased even by another one only the number of travel agencies operating in Cyprus and, consequently, the ground that there would be increased the competition in a sector already saturated is completely devoid of substance.

Furthermore, there could not arise a situation in which an alien, such as appellant 1, would compete in the travel agencies field with Cypriots, because it is well settled that a company is an entirely separate entity from its shareholders (see, *Salomon* v. *Salomon and Co. Limited*, [1897] A.C. 22, and Pennington's Company Law, 4th ed., pp. 39–55); and even if, on the ground of paramount public interest, the respondents were to be allowed to look behind the separate legal personality of "Apollo 8 Tours Limited" in order to take into account the nature of its shareholders, they would find out that it would be a Cypriot controlled company, and not a company controlled by a non-resident, such as appellant 1, who would be only a minority shareholder, and, therefore, there could not arise any valid reason for putting forward, as a ground for refusing permission under section 10(2) of Cap. 199, what is stated in the letter of March 14, 1974, namely that there would be competition by a non-resident with Cypriots in the travel agencies sector.

I have, consequently, reached the conclusion that this appeal ought to be allowed and that the *sub judice* refusal to grant permission to appellant 1 to subscribe for shares of "Apollo 8 Tours Limited" should be annulled.

TRIANTAFYLLIDES P.: In the result this appeal is dismissed by majority, without any order as regards its costs.

*Appeal dismissed. No order as to costs.*