

1983 December 14

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

EVELTHON MENIKOS AND OTHERS,

Applicants,

v.

THE REPUBLIC OF CYPRUS, AND/OR

1. THE COUNCIL OF MINISTERS,
2. THE MINISTER OF AGRICULTURE AND NATURAL RESOURCES AND/OR
3. FISHERIES OFFICERS,

Respondents.

(Case No. 223/83).

Legislation—Delegated legislation—Whether ultra vires the enabling enactment—Principles applicable—Regulation 8D of the Fisheries Regulations, 1952 (as amended)—Not ultra vires the enabling section 6 of the Fisheries Law, Cap. 135.

*Fisheries Regulations, 1952 (as amended)—Regulation 8D—Neither 5
ultra vires the enabling section 6 of the Fisheries Law, Cap. 135
nor contrary to Articles 13.1 and 19 of the Constitution.*

The Fisheries Officer, in exercise of his powers under regulation 8D* of the Fisheries Regulations 1952 (as amended by the Fisheries (Amendment) Regulations 1981), issued to the applicants 10
a permit to fish with the aid of aqua lungs and speargun under certain conditions which he imposed.

Upon a recourse by the applicants against the imposition of conditions the following issues arose for consideration:

- (a) Whether the said regulation 8D is ultra vires the 15
enabling section 6** of the Fisheries Law, Cap. 135
(as amended).

* Regulation 8D is quoted at pp. 1132–1133 post.

** Section 6 is quoted at pp. 1133–1134 post.

(b) Whether the sub judge decision is unconstitutional as offending Articles 13.1* and 19* of the Constitution.

Regarding issue (b) above it was contended by Counsel for the applicants that the conditions and restrictions put on their fishing licences offend their right to move freely throughout the territory of the Republic which includes its territorial waters, a right safeguarded by Article 13, and that once they are all trained divers and holders of Certificates to that effect, diving as a sport constitutes a form of expression and circulation of ideas and systems which are safeguarded by Article 19 of the Constitution.

Held, (1) after stating the legal principles relating to Regulations alleged to be *ultra vires*—*vide* pp. 1135–1136 *post*, that regulation 8D is fully justified in law and as such is *intra vires* in view of the provisions of paragraphs (c) and (h) of subsection 2 of section 6.

(2) That by no stretch of imagination there can be found any relevance of the freedom of movement and residence within the territory of the Republic or of the right to freedom of speech and expression which right includes freedom to hold opinions and receive and impart information and ideas as being violated by prohibiting or regulating with conditions and terms fishing, obviously done for the purpose of its protection for the general good.

Application dismissed.

Cases referred to:

Papaxenophontos and Others v. Republic (1982) 3 C.L.R. 1037 at p. 1047.

Recourse.

Recourse against the decision of respondents 2 and 3 whereby they refused to issue licences for fishing with the use of compressed air diving apparatus and harpoon guns to the applicants.

A.S. Angelides, for the applicants.

R. Gavrielides, Senior Counsel of the Republic, for the respondents.

Cur. adv. vult.

A. LOIZOU J. read the following judgment. By the present recourse the applicants seek:—

* Articles 13.1 and 19 are quoted at pp. 1137–1138 *post*.

- (a) A declaration of the Court that the act and/or decision of respondents 2 and 3 by which they issued licences for fishing with the use of compressed air diving apparatus and harpoon guns to the applicants is without legal effect, null and void and/or unconstitutional as the permits and/or restrictions placed are based on regulations made by respondents 1 which are ultra vires the law and/or the Constitution; 5
- (b) A declaration of the Court that the omission and/or refusal of respondents 2 and 3 to issue licences for fishing with the use of compressed air diving apparatus and harpoon guns to the applicants is illegal, void and without legal effect and that whatever has been omitted ought to have been done. 10

The facts of the case are not in dispute. The applicants are trained divers, holders of the relevant certificate and are engaged as amateurs and/or for the purpose of sport with the use of a diving equipment with compressed air commonly known as aqua lungs, and hereinafter so referred to, and spearguns or harpoon guns. No one of them is engaged in fishing as a profession or fishes for the purpose of profit and no one sells the fish caught. The applicants sought a licence for the use of aqua lungs and speargun as provided by the relevant regulations as otherwise they would commit breach of such regulations. The Fisheries Officer, however, refused to give a permit without any terms or restriction and issued same with certain conditions. A specimen of such licence has been appended to the application. It was issued under The Fisheries Law, Cap. 135, as amended by Laws Nos. 44/61, 109/68, 2/70, 9/72 and 19/81 (thereafter to be referred to as the Law) and the Regulations made thereunder, namely, the Fisheries Regulations 1952 published in Supplement No. 3 to the Official Gazette of 1952, Vol. 2, p. 91, as amended and in that respect we are concerned with the Fisheries (Amendment) Regulations of 1981 published in Supplement No. 3, Part I, to the Official Gazette No. 1741 of the 23.12.1981, under Notification 323, page 1085, by which Regulation 8D was added to the basic Regulations and which reads as follows:- 15
20
25
30
35

“8D.1. No person shall within the territorial waters of the Republic of Cyprus, without the prior permission of the 40

Fisheries Officer and on such terms and conditions that he may think fit:

- (a) Fish with the aid of any compressed-air diving apparatus.
- 5 (b) Carry any harpoon gun on any vessel, on which there are compressed-air, diving apparatus.

For the purpose of this paragraph, 'harpoon gun' means any apparatus, which can be used to kill fish by shooting any object, or projectile.

2.

10 The empowering section under which the said regulations were made is section 6 of the Law which as amended reads as follows:—

- 15 “(1) The Council of Ministers may by Order make Regulations to be published in the Gazette for carrying out the purposes of this Law.
- (2) In particular and without prejudice to the generality of the foregoing power, such Regulations may—
 - (a) prescribe the areas and seasons within which the taking of fish is prohibited or restricted;
 - 20 (b) restrict the size of fish which may be taken, landed or sold;
 - (c) prohibit or regulate any practices or methods or the employment of equipment, instrument or any other device or material for taking fish;
 - 25 (d) prescribe the size of nets or of the mesh of nets which may be used for taking fish in the Republic or in any specified part thereof;
 - (e) regulate the licensing of, and the conditions to be observed by, vessels licensed under the provisions of this Law;
 - 30 (f) provide for the limitation by the Fisheries Officer of the number of licences to be issued in any year to trawlers, and the selection of applicants to whom such

licences may be issued where the number of applications exceed the limited number of the licences and prescribe the conditions to be attached to such licences;

- (g) regulate any other matter relating to the conservation, protection and maintenance of a stock of fish which may be deemed requisite; 5
 - (h) provide for the imposition of fees for the granting of any licence issued under any regulations made under this section.
 - (i) Provide for the number, the conditions of establishment and operation of fisheries and the selection of the persons to which shall be granted licence for establishing fisheries. 10
- (3) Any person contravening any Regulations made under the provisions of this section shall be guilty of an offence and shall on conviction be liable on commission of the first offence to a fine not exceeding three thousand pounds and on commission of any subsequent offence to imprisonment not exceeding six months or to a fine not exceeding three thousand pounds or to both. 15 20
- Provided that no criminal prosecution shall be made for the commission of any offence for the contravention of any Regulation concerning the use of any trawler without the written approval of the Attorney-General of the Republic. 25
- (4) Regulations made under this section shall be laid before the House of Representatives. If within twenty one days of such laying, the House of Representatives does not by resolution, amend or annul, in whole or in part, the Regulations so laid, they shall then, soon after the expiry of the period hereinbefore mentioned, be published in the official Gazette of the Republic and they shall come into force as from such publication. In the event of their amendment, in whole or in part, by the House of Representatives, they shall be published in the official Gazette of the Republic as so amended and they shall come into force as from such publication". 30 35

It is the case for the applicants that the Fisheries Officer has no power under the Law to issue permits with conditions by which he may prohibit or restrict fishing with the use of compressed air diving apparatus and a harpoon gun and in
5 addition or in the alternative that if the relevant Regulations give such authority to him same are ultra vires the Law.

No doubt regulation 8D hereinabove set out, covers, on the face of it, the present case. It provides that no person shall within the territorial waters of the Republic fish with the aid
10 of any compressed air diving apparatus and carry any harpoon gun without the prior permission of the Fisheries Officer and on such terms and conditions as he may think fit.

It has, therefore, to be examined whether this Regulation is ultra vires the Law.

15 Counsel for the applicants has argued that the Law does not empower the said officer to prohibit and/or restrict fishing by persons who do not use boats and also by persons who do not fish for profit. Reference has been made to section 3 of the Law which provides that no vessel is to be used for fishing with-
20 out a licence, and to the definition of the word "vessel" in section 2 thereof, which provides that "...it shall not include a vessel used for catching fish otherwise than for profit". Consequently, it was argued, the Law exempted from its provisions vessels which are fishing not for profit and that being so, it
25 is not possible by regulations which are made for the purpose of carrying out the purposes of the Law to prohibit and/or restrict fishing for persons who without a vessel do so and not even for profit.

The legal principles governing questions relating to regulations
30 alleged to be ultra vires have been summed up by Stylianides, J., in the case of *Papaxenophontos & Others v. The Republic* (1982) 3 C.L.R. 1037, at p. 1047, as follows:

35 "A sub judice decision has to be annulled and be declared to be null and void and of no effect whatsoever if it was based on an invalid enactment (*Christodoulou v. The Republic*, 1 R.S.C.C. 1; *Spyrou & Others v. The Republic* (1973) 3 C.L.R. 627).

The legislature can, without impairing its sovereignty, authorise other bodies to legislate. Delegated legislation must be intra vires the enabling statute. When subsidiary legislation is examined with a view to determining whether it is intra or ultra vires, the answer to the question depends, in every case, on the true construction of the relevant enabling enactment. If delegated legislation interferes with a fundamental right, such as the right to property, any doubt arising as to the ambit and effect of the relevant enactment must be resolved in favour of the liberties of the citizen. (*Fina (Cyprus) Ltd. v. The Republic*, 4 R.S.C.C. 26; *Chester v. Bateson* [1920] 1 K.B. 829, at p. 838; *Newcastle Breweries Ltd. v. The King* [1920] 1 K.B. 854).

In examining whether or not delegated legislation is ultra vires the enabling enactment, the state of the law at the time when such enactment was passed and the changes which it was passed to effect as well as the structure of such enactment as a whole, have particularly to be borne in mind. (*Utah Construction and Engineering Property Ltd. and Another v. Pataky*, [1965] 3 All E.R. 650). Delegated legislation may be challenged for substantive ultra vires, that is, on the ground that it goes beyond the powers granted by the legislature. (*Commissioners of Customs and Excise v. Cure and Deeley Ltd.* [1962] 1 Q.B.D. 340)".

Guided by the aforesaid exposition of the law and turning now to the empowering section 6 of the Law, I cannot help noticing that subsection 2 thereof prescribes that "in particular and without prejudice to the generality of the foregoing power such regulations may " and there follows an enumeration in separate paragraphs of what the regulations may prescribe, restrict or prohibit.

In my view each paragraph that follows constitutes a separate entity and regulation 8D is fully justified in law and as such is intra vires in view of the provisions of paragraphs (c) and (h) of subsection 2. The first one, i.e. para. (c), empowers the Council of Ministers to make Regulations prohibiting or regulating any practices or methods or the employment of equipment, instrument or any other device or material for the taking of fish and within this wide provision the use of compressed

air diving apparatus and the carrying of harpoon falls. The prohibition of fishing with such means without the prior permission of the Fisheries Officer and on such terms and conditions that he may think fit, as regulation 8D provides, is nothing
 5 more than a prohibition or regulation of this matter, which also empowers the making of Regulations authorizing the said Officer to impose conditions. The second one, i.e. para. (h), authorizes the making of a Regulation providing for the imposition of fees for the granting of any licence.

10 The argument that the compressed air diving apparatus was not known when the Law was enacted and therefore the matter cannot now be controlled by regulations made thereafter does not really stand as para. (c) of subsection 2 is wide enough to
 15 include not only the methods, equipment and instruments known at the time of its enactment but also any developments that may come into existence subsequent to that time.

The Regulation, therefore, in question is *intra vires* the law and therefore this ground of the recourse fails.

20 The next ground is that the sub judice decisions are unconstitutional as offending Articles 13.1 and 19 of the Constitution. It has been claimed on behalf of the applicants that the conditions and restrictions put on their fishing licences offend their right to move freely throughout the territory of the Republic which includes its territorial waters, a right safeguarded by
 25 Article 13, which provides:-

30 "Every person has the right to move freely throughout the territory of the Republic and to reside in any part thereof subject to any restrictions imposed by law and which are necessary only for the purposes of defence or public health or provided as punishment to be passed by a competent Court".

35 And that once they are all trained divers and holders of Certificates to that effect, diving as a sport constitutes a form of expression and circulation of ideas and systems which are safeguarded by Article 19 of the Constitution which provides in paragraphs 1 and 2 thereof as follows:-

"1. Every person has the right to freedom of speech and expression in any form.

2. This right includes freedom to hold opinions and receive and impart information and ideas without interference by any public authority and regardless of frontiers”.

By no stretch of imagination I can find any relevance of the freedom of movement and residence within the territory of the Republic or of the right to freedom of speech and expression which right includes freedom to hold opinions and receive and impart information and ideas as being violated by prohibiting or regulating with conditions and terms fishing, obviously done for the purpose of its protection for the general good.

This ground should also fail. I cannot, however, but point out that issues of unconstitutionality should be thought of more carefully before they are raised.

For all the above reasons this recourse is dismissed but in the circumstances I make no order as to costs.

Recourse dismissed. No order as to costs.