

1983 April 11

[LORIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

THEKLA KITTOU AND OTHERS.

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH
1. THE DIRECTOR OF THE DEPARTMENT
OF CUSTOMS AND EXCISE,
2. THE CUSTOMS OFFICE LIMASSOL,

Respondents.

(Case No.94/83).

5 *Recourse for annulment—Recall of sub judice decisions by respondents at commencement of hearing of recourse—Probability that applicant suffered damage as a result of the sub judice decision—She is entitled in law and in fact to obtain judgment annulling sub judice decisions.*

10 *Legitimate interest—Article 146.2 of the Constitution—Prohibition of importation of books—Agreement by importer with applicants 2-4 to import some of the books on their account or to sell them to them after such importation—The agreement is a question of private law regulating contractual relations between importer and these applicants—Only the importer (applicant No.1) has a legitimate interest in the sense of Article 146.2 of the Constitution—Applicants 2-4 not vested with such interest as persons or as a class of persons or as members of the community.*

15 *Costs—Recourse for annulment—Recall of sub judice decision by respondents—Order for costs against them.*

20 *The four applicants in this recourse challenged the validity of the decision of the respondents to prohibit the importation of certain books and their decision to seize them. Applicant No.1 was the owner and/or the person in charge of the book shop for whose*

account the books referred to in the sub judge decisions were imported: and she had entered into an agreement with applicants 2, 3 and 4 to import on their account some of the books mentioned in the sub judge decisions.

At the commencement of the hearing of the recourse counsel for the respondents stated that the respondents recalled both sub judge decisions and that notice of such recall in writing will be given to applicant No.1 within the day adding at the same time that the respondents were ready to submit to an order of the Court as applied declaring null and devoid of any legal effect the decisions in question. 5 10

On the questions:

- (a) Whether the Court should proceed in pronouncing the annulment of the sub judge decisions in view of the fact that both decisions were recalled: 15
- (b) Whether applicants 2, 3 and 4 have "existing legitimate interest" as envisaged by Article 146.2 of the Constitution:
- (c) Whether applicants should be awarded costs.

Held, that an administrative act of "limited duration", which before ceasing to be effective has produced results, can be annulled even though the legal situation created by it has subsequently ceased to exist; that damages under Article 146.6 of the Constitution can only be sought after obtaining judgment in proceedings in a recourse under Article 146.1; that since there is a probability that damage might have been caused to applicant No.1 as a result of the sub judge decisions for the period during which they remained in force she is entitled both in law and in fact to obtain a judgment in these proceedings; accordingly the sub judge decisions must be annulled. 20 25

(2) That whatever agreement applicant No.1 had entered into with applicants 2, 3 and 4 in connection with the importing on their account some of the books mentioned in the sub judge decisions or the sale of such books to them after the importation of same, is a question of private law regulating contractual relations between applicant No.1 on the one hand and applicants 2, 3 and 4 on the other and thus applicants 2-4 have no existing legitimate interest as persons in the sense of Article 146.2 of the Constitution; that, further, applicants 30 35

do not have an existing legitimate interest as "members of a community" or as "a class of persons": accordingly their recourse should fail.

- 5 (3) That after taking into consideration the facts and circumstances of this case there will be awarded £62 towards the costs of applicant No.1 against the respondents.

*Recourse of applicant No.1 succeeds.
Recourse of applicants 2, 3 and 4 dismissed.*

Cases referred to:

- 10 *Malliotis v. The Municipality of N'sia* (1965) 3 C.L.R. 75 at p. 94;
Christodoulides v. Republic (1978) 3 C.L.R. 189;
Kyriakides v. Republic, 1 R.S.C.C. 66 at p. 74.

Recourse.

- 15 Recourse against the decision of the respondents prohibiting the importation of certain books.

K. Talarides, with *Chr. Melides*, for the applicants.

M. Photiou, for the respondents.

Cur. adv. vult.

- 20 LORIS J. read the following judgment. All four applicants impugned by means of the present recourse the decisions of the respondents appended to it marked exhs. 1 and 2 respectively, the first one being the decision of the Director of Customs (included in his letter dated 29.1.83 addressed to counsel for
25 applicant No. 1) and the second that of the Senior Customs Officer of Limassol included in his letter of 1.2.83 likewise addressed.

- 30 The decision - exh. 1 - prohibits the importation of certain books referred to therein, as obscene, whilst decision - exhibit 2 - emanating from the Senior Customs Officer of Limassol informs applicant No. 1 that the importation of the books therein enumerated is prohibited by Law 53/76 and "thus they are seized".

Applicants in the present recourse pray for a declaration to the effect that both aforesaid decisions are null and devoid of any legal effect whatever. The legal grounds on which the present recourse is based are set out explicitly in paras. 1 - 6 of the recourse and I do not intend repeating them; suffice it to say that they boil down to two broad issues, notably that (a) the alleged obscenity in a publication has to be decided by a competent Court and cannot be left to the discretion of the Director of Customs and (b) seizure of books can only be effected - if at all - in a proper case by strictly adhering to the procedure envisaged by the relevant law, notably Law 82/67 as amended, which was not followed in the present case.

Respondents in their opposition to the main recourse support their aforesaid decisions as rightly and lawfully reached at and maintain, inter alia, that applicant 2, 3 and 4 have no "existing legitimate interest" in the sense of Article 146.2 of the Constitution.

Applicants filed the present recourse on 5.3.83 and at the same time they filed an application seeking a provisional order suspending the effect of the said administrative decisions of both respondents; the respondents filed an opposition to this application as well, but finally the application for a provisional order was withdrawn on 29.3.83 in view of the fixing of the main recourse for hearing on 11.4.83. Today when the hearing of the main recourse commenced counsel appearing for respondents stated before me in quite clear and unambiguous terms that the respondents recall both sub judice decisions and notice of such recall in writing will be given to applicant No. 1 within the day adding at the same time that the respondents are ready to submit to an order of this Court as applied declaring null and devoid of any legal effect the decisions in question although counsel made it clear that the respondents insist in maintaining - as they originally did - that applicants 2, 3 and 4 have no existing legitimate interest in the present recourse in the sense of Article 146.2 of the Constitution and in consequence thereof the respondents are not prepared to submit to an order in favour of applicants 2 - 4 similar to the one they have indicated their intention to submit in favour of applicant No. 1, as stated above.

Leading counsel for applicants stated that the applicants do not intend to withdraw the present recourse despite the recall of

the sub judge decisions by the respondents in view of the fact that applicants have suffered damage - as he alleged - due to the initial decisions of the respondents. He submitted that the Court should proceed to declare both decisions null and void as applied; he maintained further that all applicants have and had at all material times an existing legitimate interest in the sense of Article 146.2 of the Constitution and in support of this submission he called the first applicant who gave evidence before me on this issue.

10 Finally, leading counsel for applicants claimed the costs of the present recourse amounting to £124.250 mils for one advocate. On the question of costs counsel for respondents submitted that the Court in exercising his discretion should not award costs against respondents in view of the fact that a recourse by the same applicants on the same subject matter was withdrawn as premature on the 29.3.83 and on that occasion the respondents did not claim costs.

It is clear from the above that I have to decide three issues, i.e.

- 20 (a) Whether I should proceed in pronouncing the annulment of the sub judge decisions in view of the fact that both decisions are recalled today by respondents.
- (b) If I were to annul the sub judge decisions should that annulment operate in favour of all applicants or in favour of applicants No. 1 only; in other words have applicants 2, 3 and 4 "existing legitimate interest" envisaged by Article 146.2 of the Constitution?
- 25 (c) The last issue which falls for determination is the question of costs.

30 As regards the first issue two aspects have to be considered. The legal aspect and the factual aspect of the present case.

In connection with the legal aspect it is abundantly clear from the authorities that an administrative act of "limited duration", which before ceasing to be effective has produced results, can be annulled even though the legal situation created by it has subsequently ceased to exist (*Malliotis v. The Municipality of Nicosia* (1965) 3 C.L.R. 75 at p. 94). In the case of *Christodoulides v.*

The Republic (1978) 3 C.L.R. 189 the aforesaid case of *Malliotis (supra)* was followed and the learned President of this Court proceeded in declaring null and void the administrative decision in this case holding that the recourse could not be treated as abated owing to the fact that it had produced results before ceasing to be effective. 5

In the case of *Christodoulides v. The Republic* (1978) 3 C.L.R. 193 the learned President of this Court decided that the applicant was entitled to have his recourse determined in spite of the fact that the applicant in that case was eventually discharged from the National Guard whilst his recourse against the refusal to discharge him was still pending. In this latter case it was stressed that "one of the reasons for which the applicant was entitled to pursue his recourse up to the stage of final judgment notwithstanding his discharge from the National Guard in the meantime, is that he could only seek compensation under Article 146.6 of the Constitution after he would obtain judgment in these proceedings." The above proposition was relied on the case of *Kyriakides v. The Republic*, 1 R.S.C.C. 66 at p. 74 which reads as follows: 10 15 20

"Article 172 lays down the general principle that the Republic is made liable 'for any wrongful act or omission causing damage committed in the exercise or purported exercise of the duties of officers or authorities of the Republic'. It is clearly aimed at remedying the situation existing before the coming into force of the Constitution whereby the former Government of the Colony of Cyprus could not be sued in tort. 25

The principle embodied in Article 172 has been given effect, inter alia, in the Constitution by means of paragraph 6 of Article 146 in respect of all matters coming within the scope of such Article 146. 30

Therefore, in the opinion of this Court, in respect of all wrongful acts or omissions referred to in Article 172 and which acts or omissions come within the scope of Article 146 an action for damages lies in a civil Court only under paragraph 6 of such Article, consequent upon a judgment of this Court under paragraph 4 of the same Article, and in such cases an action does not lie direct in a civil Court by virtue of the provisions of Article 172." 35 40

Reverting to the facts of this case in respect of this issue it is significant to note that it was not disputed by counsel for respondents that both decisions were defective and should be recalled, although an attempt was made to present the defect as procedural; nevertheless it was never argued on their behalf that I should not proceed to declare the sub judge decisions null and void and of no legal effect whatever; On the contrary it was clearly stated that in respect of applicant No. 1 they are ready to submit to an order to that effect, and I say rightly so, because from the material placed before me I am satisfied that both decisions were defective.

Leading counsel appearing for applicants laid emphasis on the right of the applicants to obtain a judgment in these proceedings maintaining that damage was suffered as a result of the sub judge decisions which remained in force for a period over two months (29.1.83 - 11.4.83) whilst counsel for respondents in declaring the intention of the respondents to submit to an order annulling both decisions clearly stated that he disputes on behalf of the respondents that any damage whatever was caused to applicant No. 1 or anyone of the applicants if they are ultimately found to have present legitimate interest in the present recourse. It is not within my province to decide the nature and extent of the alleged damage and I shall confine myself in saying that there is a probability that damage might have been caused to applicant No. 1 as a result of the sub judge decisions for the period during which they remained in force.

For the above reasons applicant No. 1 is entitled both in law and in fact to obtain a judgment in these proceedings.

The second issue which has to be determined is the question whether applicants 2, 3 and 4 have an existing legitimate interest in the present recourse as envisaged by Article 146.2 of the Constitution. On this issue I have the evidence of applicant No.1 given viva voce before me in Court as well as the several exhibits and other documents which appear in the file of this recourse.

It is abundantly clear from all this material before me that applicant No. 1 had at all material times of the present recourse an existing legitimate interest in the sense of Article 146.2. She

was and still is the owner and/or the person in charge of the book shop in question for whose account the books referred to in the sub judice decisions were imported. All letters to the respondents were addressed by her or on her behalf exclusively and at the same time all letters of the respondents including the sub judice decisions were addressed by the respondents to applicant No. 1 or to counsel acting on her behalf only. It is obvious from the evidence of applicant No. 1 that whatever agreement she had entered into with applicants 2, 3 and 4 in connection with the importing on their account some of the books mentioned in the sub judice decisions or the sale of such books to them after the importation of same, is a question of private law regulating contractual relations between applicant No. 1 on the one hand and applicants 2, 3 and 4 on the other and thus applicants 2 - 4 have no existing legitimate interest as persons in the sense of Article 146.2 of the Constitution. I say, as persons, because it was submitted on their behalf they have an existing legitimate interest as class of persons, i.e. booksellers or in the alternative as members of the community who have been adversely and directly affected by the sub judice decisions as they are interested about the outcome of a case which concerns a serious constitutional issue, notably an issue touching censor of literature. I do not intend to explain the meaning of "a member of a community" referred to in Article 146.2 of the Constitution as it is abundantly clear what that means and it is quite inapplicable in the case in hand. On the other hand the submission that applicants 2 - 4 belong to a class of persons i.e. booksellers and as such they have an existing legitimate interest envisaged by Article 146.2 of the Constitution is absolutely untenable.

For the above reasons applicants 2, 3 and 4 unlike applicant 1 have no existing legitimate interest and therefore their application is doomed to failure.

As to the question of costs having considered the matter in the light of submissions advanced by both sides and having taken into consideration the facts and circumstances of this case I have decided to award only £62.- towards the costs of applicant No. 1 against respondents.

In the result the sub judice decisions are hereby declared null

and void and of no effect whatever in the application of applicant No. 1.

The application of applicants 2, 3 and 4 is hereby dismissed.

Respondents to pay £62.- towards the costs of applicant No.1.

5

Sub judice decision in respect of applicant 1 annulled. Recourse by applicants 2, 3 and 4 dismissed.