1984 September 21

[LORIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

RAYMONDA FARRAN,

Applicant,

v.

THE REPUBLIC OF CYPRUS THROUGH,
1. MINISTRY OF INTERIOR,
2. MIGRATION OFFICER,

Respondents.

(*Case No.* 273/83).

Administrative Law—Administrative acts or decisions—Executory act—A subsequent act or decision, though identical to a pre-existing one may qualify as an executory one if it springs from a new inquiry into the facts of the case.

Administrative Law—Misconception of fact—Or failure to make a due inquiry causing lack of knowledge of material facts—Results in the invalidity of the relevant administrative action—Rejection of alien's application to be employed in Cyprus by an off-shore company on the ground that she did not belong to its managerial staff, though in fact she did belong to the Managerial Staff—Had respondents carried out a due inquiry they would have ascertained this fact—And their failure to make a due inquiry resulted to a misconception as to a material fact which must invalidate the sub judice decision.

The applicant, a Palestinian refugee, applied to the respondents for the renewal of her temporary resident's permit in Cyprus and for permission to take up employment in Cyprus as Journalist-General Manager with Sharq Press Ltd., an off-shore company registered in Cyprus. Both her applications were turned down by the respondents by means of a letter dated 9.4.1983. On 16.4.1983 applicant addressed a new application submitting new supplementing facts and praying for reconsider-

ation by the respondents of their original decision. The respondents rejected again her application by means of their letter dated 5.5.1983 and hence this recourse. According to the opposition the rejection was based on the ground that applicant did not belong to the Managerial Staff of the off-shore company Sharq Press Ltd.; and on the basis of the established policy, she did not fulfil the conditions for her engagement in the said company. According to a certificate from the Ministry of Commerce and Industry, however, the applicant was one of the Directors of the above off-shore company; and in her aforesaid applications she was described as "General Manager and shareholder of Sharq Press Ltd" and "Director of the Company".

Held (1) *on the preliminary objection that the decision of* 5.5.1983 *is not of an executory character but simply confirmatory of the previous decision of* 9.4.1983:

That a subsequent act or decision of the administration, though identical in effect to a pre-existing one may qualify as an executory if it springs from a new inquiry into the facts of the case; that respondents by their letter of 5.5.1983 stated that the applicant's application was "examined carefully but it was not approved"; that in the absence of any other material to the contrary it can be presumed, relying on the presumption of regularity that the respondents had carried out a new inquiry on the basis of new supplementary facts submitted to them before giving their new decision contained in the letter of 5.5.1983 and it is immaterial whether this second decision was in the result the same as their first one because what counts is not the result but the new inquiry; and that, therefore, the decision of the respondent contained in the letter of 5.5.1983 is of an executory character; and that, accordingly, it is justiciable.

Held (2) *on the merits of the recourse:*

That a misconception as to a material fact or a failure to make a due inquiry causing lack of knowledge of material facts results due to contravention of well settled principles of Administrative Law, in the invalidity of the relevant administrative action; that a due inquiry based at least on the material provided by the applicant on the aforesaid two occasions, would have led to eliciting the truth which has been certified by the Ministry of Commerce and Industry; that instead, the respondents carried

out an inquiry which was absolutely inadequate; that due to such inadequate inquiry they reached the conclusion that the applicant did not belong to the managerial staff of the off-shore company in question a material fact which is not correct and on which the respondents relied in reaching their aforesaid decision by virtue of which the applicant was refused stay in Cyprus; that, thus, the failure of the respondents to make a due inquiry resulted to a misconception as to a material fact which must invalidate the whole administrative decision impugned; that, further, the reasoning of the respondent is invalidated because it is relying on the same incorrect fact.

Sub judice decision annulled.

Cases referred to:

Pieris v. *Republic* (1983) 3 C.L.R. 1054 at p. 1062;

Karran v. *Republic* (1983) 3 C.L.R. 199.

Recourse.

Recourse against the refusal of the respondents to renew applicant's temporary resident's permit in Cyprus.

G. M. Michaelides, for the applicant.

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

Cur. adv. vult.

LORIS J. read the following judgment. The applicant in the present case, a Palestinian refugee, applied to the respondents for the renewal of her temporary resident's permit in Cyprus (Vide Appendix 3 attached to the opposition dated 17.3.1983) and for permission to take up employment in Cyprus as Journalist—General Manager with Sharq Press Ltd, an off-shore company registered in Cyprus (vide Appendix A attached to the opposition dated 14.3.1983).

Both aforesaid applications were turned down by the respondents in a letter dated 9.4.1983 (vide ex. B attached to the recourse) allegedly received by the applicant on 15.4.1983.

Another application on the same lines addressed to the respondents on 16.4.1983 (vide ex. F attached to the recourse) by counsel on behalf of the applicant, furnishing further details and praying for reconsideration of their decision in ex. B was

again turned down by the respondents (vide their letter dated 5.5.1983—ex. D attached to the recourse).

Both these decisions of the respondents contained in their aforesaid letters of 9.4.1983 and 5.5.1983 respectively are now being impugned by the applicant by means of the present recourse filed on 29.6.1983, which prays for a declaratory judgment to the effect that the decisions aforesaid are null and devoid of any legal effect.

The grounds of law on which the present recourse relies are mainly three:

1. Misconception of fact.

2. Violation of the convention dated 20.7.1951 relating to the status of Refugees (obviously what is meant here is the Convention relating to the Status of Refugees signed at Geneva on 28.7.1951—which was extended by a protocol deposited at the United Nations General Assembly at its 1495th plenary to cover persons who became refugees after the 1.1.1951; the said protocol to which Cyprus is a signatory was ratified by Law 73/68.)

3. Lack of due reasoning.

The respondents in their opposition after raising two preliminary objections, to which I shall be referring immediately hereinbelow, allege that "the decision impugned is duly reasoned, reached at correctly and lawfully pursuant to the relevant provisions of the Constitution, the Laws and Regulations, after due exercise of the powers vested in the respondents and after taking into consideration all the substantial facts and circumstances of the case".

The 1st objection relates to the decision of 9.4.1983 (vide ex. B) and goes to the jurisdiction, as it alleges that the present recourse is out of time having been filed, as stated above, on 29.6.1983.

It is true that in the statement of facts (para. 5) it is stated that the letter of 9.4.1983 was received by the applicant on 15.4. 1983; further, after the filing of the written addresses and the clarification stage, the present case was re-opened on the appli-

cation of the applicant; the application for re-opening was accompanied by an affidavit dated 10.3.1984 sworn by the applicant where it is clearly and positively stated that the letter of the respondents dated 9.4.1983 was received by the applicant on 15.4.1983. This fact was conceded on 14.3.1984 by learned Counsel appearing for the respondents and on the same day this preliminary point was dismissed by this Court.

The second objection impugnes the decision contained in the letter of the respondents dated 5.5.1983 (ex. D); this objection goes to the justiciability of this decision in the sense that same is not of an executory character but simply confirmatory of the previous decision of 9.4.1983. Inspite of the fact that this objection was never pursued by the respondents any further in their written address or otherwise, (and I could therefore treat it as abandoned) I intend to deal with it.

It was repeatedly stated in the past and was recently reiterated by the Full Bench of this Court (vide *Pieris* v. *The Republic* (1983) 3 C.L.R. 1054 at p. 1062) that a subsequent act or decision of the administration, though identical in effect to a pre-existing one, may qualify as an executory "If it springs from a new inquiry into the facts of the case....."

In the case under consideration the applicant applied to the respondents submitting to the respondents Appendices A and B dated 14.3.1983 and 17.3.1983; the respondents on 9.4.1983 by letter ex. B turned down the said applications. On 16.4.1983 counsel for applicant addressed new application (ex. Γ) submitting new supplementary facts and praying for reconsideration by the respondents of their original decision. The new supplementary facts submitted were the following;

(i) A clear and unambiguous statement contained in the application of 16.4.1983 to the effect that the applicant was a director of the off-shore company in question.

(ii) A contract of lease which is Appendix E attached to the opposition.

(The above facts are admitted by the respondents in paragraph 6 of their opposition).

To the application of 16.4.1983, containing the aforesaid

new facts, the respondents replied by their letter of 5.5.1983 —ex. D—wherein it is stated clearly that "your application was examined carefully but it was not approved". In the absence of any other material to the contrary I can presume, relying on the presumption of regularity, that the respondents had carried out a new inquiry on the basis of new supplementary facts submitted to them before giving their new decision contained in ex. D; and it is immaterial whether this second decision was in the result the same as their first one. What counts is not the result, but the new inquiry which preceded on the supplementary information submitted as above (vide The Conclusions of the Greek Council of State 1929–1959 at p. 241).

Under the circumstances the decision of the respondents contained in ex. D dated 5.5.1983 is of an executory character, therefore justiciable and the second preliminary objection is doomed to failure and it is accordingly dismissed.

I shall now proceed to examine the first ground of Law on which the present recourse is based namely 'misconception of fact'.

The general principles of Law in connection with misconception of fact have been authoritatively thus stated:

> "A misconception as to a material fact or a failure to make a due inquiry causing lack of knowledge of material facts results due to contravention of well-settled principles of Administrative Law, in the invalidity of the relevant administrative action.....
>
> A misconception as to facts may consist of either the taking into account of non-existing facts or the non taking into account of existing facts".

(*Ioannides* v. *The Republic* (1972) 3 C.L.R. 318 at p. 325).

> "According to the principles of administrative law there exists a presumption that an administrative decision is reached after a correct ascertainment of relevant facts; but such presumption can be rebutted if a litigant succeeds in establishing that there exists at least a probability that a misconception has led to the taking of the decision complained of....."

(*HjiMichael* v. *The Republic* (1972) 3 C.L.R. 246 at p. 252).

In the present case, ground 1, which contains the general allegation that the respondents acted under misconception as to facts proceeds to enumerate the particular alleged misconceptions in six separate paragraphs (a)-(ζ) forming part of ground 1.

In order to avoid confusion, I feel that the contents of paragraphs (b) and (d) should be examined together with ground 2 with which they are closely interwoven.

From the remaining four paragraphs of ground 1 the applicant seems to attach paramount importance to the allegation contained in para. (e) which reads as follows: (Respondents) "Wrongly mistook the employment of the applicant as one of non-managerial nature" (μή διευθυντικής φύσεως).

In order to elicit this particular complaint I have to examine what the respondents said on this matter.

In paragraph 9 of the opposition the respondents set out the grounds for their refusal to allow applicant's stay in Cyprus; one of these grounds is thus stated in para. (b):

"9(β) ή αίτήτρια δέν άνήκει είς τό Διευθυντικόν Προσωπικόν τῆς ὑπερποντίου 'Εταιρείας Sharq Press Ltd., καὶ ὡς ἐκ τούτου βάσει τῆς χαραχθείσης πολιτικῆς δέν πληροῖ τὰς προϋποθέσεις διὰ τὴν ἀπασχόλησιν της είς τὴν τοιαύτην ἑταιρείαν".

(The applicant does not belong to the Managerial Staff of the off-shore company Sharq Press Ltd., therefore on the basis of the established policy, she does not fulfil the conditions for her engagement in the said company).

Paragraph 9(b) of the opposition, to my comprehension contains (a) A positive averment that the applicant does not belong to the Managerial staff of the off-shore company in question; (b) A statement of Government Policy: As she *is not in the managerial staff of the off-shore company in* question she does not—on the basis of established policy—qualify for her engagement in the said company, therefore her application for employment in Cyprus is refused.

In consequence of the aforesaid contents of paragraph 9(b) of the opposition the following questions arise:

Is the above averment of the respondents correct?

If not, did the respondents carry out a due inquiry in order to elicit the true fact?

This is the crucial issue in this case.

I have before me exh. A attached to the recourse; it is a certificate from the Ministry of Commerce and Industry dated 1.3.1983 which certifies to the effect that the applicant in the present case is one of the directors of Sharq Press Ltd., the off-shore company in question. The respondents say in their written address that no such certificate was ever placed before them by the applicant; it is true that there is nothing on record which indicates that the certificate itself was ever produced to the respondents. But we have the following facts which indicate that the respondents would have been in a position to know whether the applicant was one of the Directors of the off-shore company in question had they carried out a proper inquiry;

1. In her application of 17.3.1984 (vide Appendix B attached to the opposition) she is described as "General Manager and shareholder of Sharq Press Ltd."

2. In the application dated 16.4.1983 addressed to the respondents on her behalf she is referred to as "Director of the Company" — Διευθύντρια τῆς Ἑταιρείας (vide paragraph four of exh. Γ attached to the recourse).

I hold the view that a due inquiry, based at least on the material provided by the applicant on the aforesaid two occasions, would have led to eliciting the truth which is being certified in ex. A; I would even go further and say that a due inquiry could reveal ex. A itself.

Instead, the respondents carried out an inquiry which in my opinion was absolutely inadequate; due to such inadequate inquiry they reached the conclusion appearing in paragraph 9 (b) of the opposition, namely that the applicant does not belong to the managerial staff of the off-shore company in question; a material fact which is not correct and on which the respondents relied in reaching their aforesaid decision by virtue of which the applicant was refused stay in Cyprus. Thus the failure of the respondents to make a due inquiry resulted to a misconception as to a material fact which must invalid the whole administrative decision impugned.

My finding as above on ground 1 (b) of the recourse covers ground 1(a) as well; under the circumstances I need not proceed to examine whether due inquiry was carried out by the respondents in respect of other matters referred to in grounds 1(γ) and 1(ζ) of the recourse.

Ground 2 and the interwoven matters in grounds 1(b) and 1(d) were not fully argued before me; although raised in the recourse quite vaguely they were not pursued any further in the written address of the applicant; and the respondents in this connection, confined themselves in stating that "the Convention in respect of Refugees is not applicable to the applicant at least so far as regards the obligation of Cyprus in this particular instance to accept the applicant to Cyprus" (vide paragraph 9(δ) of the opposition).

Having in mind the aforesaid stand of both sides on this issue but predominantly taking into consideration that my pronouncement on ground 1(e) has decided the fate of this recourse I feel that I should not pronounce on ground 2. Instead I shall confine myself in repeating what I have stated on a similar occasion in the past; "if the applicant is a 'refugee' within the meaning envisaged by Article 1 of the *Geneva Convention* (supra), a matter which I leave entirely open, I would like to draw the attention of the responsible authorities to the provisions of Article 32 of the Geneva Convention referred to above in connection with 'expulsion' from the Republic....." (vide *Riad Karram* v. *Republic* (1983) 3 C.L.R. 199). I leave this matter in the hands of the responsible authorities trusting that they will bear it in mind when re-examining this case as my finding on ground 1(c) above, requires.

Coming now to ground 3 namely "reasoning"; it is well settled that administrative decisions have to be duly reasoned; and the reasoning may be found either in the decision itself or in the administrative file related thereto.

In the instant case on the face of both decisions exhibits B and D, attached to the recourse, no reasoning whatever appears. No administrative file was produced and in none of the documents produced any reasoning whatsoever could be traced. The only reasoning for the decisions impugned can only be

traced in paragraph 9 of the opposition where the grounds for the refusal of applicant's stay in Cyprus are set out.

Learned counsel for respondents in his written address after elaborating on the relevant provisions of the Aliens and Immigration Law, Cap. 105 and the Regulations made thereunder, submitted relying on *Kyriakopoulos* (*The Greek Administrative Law*, 4th edition Vol. B at p. 387) that inadequate reasoning or even lack of any reasoning in cases of this nature cannot lead to the annulment of the impugned decisions of the administration.

With respect to learned counsel, that is not the problem in this case. I am well aware of the wide discretionary powers granted to the respondents under the Aliens and Immigration Law, Cap. 105 and the Aliens and Immigration Regulations (Vol. II of the 1953 ed. of the Subsidiary Legislation) but the fact remains in this case that the grounds given in paragraph 9 of the opposition and in particular para 9(b) thereof are based on a fact which is not correct, as I have already held. I repeat: The statement—reason given in paragraph 9(b) to the effect that the applicant does not belong to the managerial staff (Διευθυντικὸν Προσωπικὸν) of the said off-shore company is not correct; it was established beyond any doubt by the Certificate of the Ministry of Commerce and Industry dated 1.3.1983, which is exh. A before me that the applicant is one of the Directors of the said company; in other words she belongs to the Managerial staff of Shaiq Press Ltd. off-shore company.

The question therefore is not absence of reasoning, or inadequate reasoning. The issue is: reasoning relying on an incorrect fact; and in the same way the decision of the respondents is invalidated due to the misconception under which they were labouring in connection with this material fact, their reasoning is invalidated as well because it is relying on a wrong material fact. For this reason ground of Law 3 of the recourse succeeds as well.

In the result present recourse succeeds and both decisions impugned are hereby annulled on the grounds that the respondents have acted under a misconception of material fact (relying

on a proven incorrect fact) and also for their specific reasoning also based on the same incorrect fact as stated above.

Taking into consideration the particular circumstances of this case, including the re-opening of this case at the instance of the applicant, I have decided to make no order as to the costs thereof.

Sub judice decisions annulled.
No order as to costs.