

1986 July 11

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

ANDREAS SOPHOCLIDES AND CO. LTD.,

Applicants,

v.

1. THE MINISTER OF COMMERCE AND INDUSTRY
2. THE REPUBLIC OF CYPRUS, THROUGH
THE ATTORNEY-GENERAL.

Respondents.

(Case No. 570/84).

Constitutional Law—Right to practise any profession or to carry on any occupation, trade or business—Restrictions or conditions in the public interest—Constitution, Article 25—Whether section 3 of the Import (Regulation) Law 49/62, as amended by Law 7/67 and the contents of the Regulatory Order relating to cheese published by virtue of the said section on 20.1.83 violate the said right safeguarded by Article 25 of the Constitution—Whether a decision refusing the grant of a licence for the importation of cheese on the ground that the quota of the applicant for the period in question had been covered by a previous licence violates said Article of the Constitution. 5 10

Constitutional Law—Equality—Constitution, Article 28—Decision restricting the grant of licences for the importation of Edam cheese to regular importers—Complaint by a regular importer that such decision violates the principle of equality, as being discriminatory against new importers—Applicant, being a regular importer, is not entitled to raise such an issue. 15

Administrative Law—Discretion of administration—Judicial con- 20

trol—This Court will not substitute its own discretion for that of the administration.

The Imports (Regulation) Law 49/62, as amended by Law 7/67—Section 3.

5 *Legitimate Interest—Constitution, Article 146.2.*

Administrative act—Executory—Confirmatory.

10 By an order made by respondent 1 under s. 3 of Law 49/62, as amended by Law 7/67, and published on the 20.1.83, the importation of cheese falling within the customs classification 0.4.04 was placed under control and as such, for its importation an import licence was required by respondent. 1.

15 Respondent 1 decided to restrict the importation of cheese as from the beginning of the second half of 1984 for the purpose of protecting and encouraging local production and especially the disposition of surplus “halloumi” cheese

20 After several consultations with the various organisations concerned the respondent Minister decided, inter alia, that “licences should also be granted too for the importation of Edam ... cheese to all regular importers of such cheese, to be cleared after 31.10.84”, and that the relevant quantities of cheese will be apportioned to the importers entitled on the basis of statements concerning
25 their imports ... for the years 1981, 1982, 1983 and 1984”. At the request of the Foodstuffs Importers’ Association the period to be covered by the statements was agreed as the period between 1.9.81 and 31.8.84.

30 The quota approved for the applicant company, which was a regular importer of cheese, was fixed at 14,307 kilos for the last four months of 1984.

35 On 21.9.84 respondent 1 approved the issue of an import licence for 17 tons of Edam cheese, to cover the whole of the applicant’s quota for the said period. One of the conditions endorsed on the said licence was as follows: “In future you will not insist on the importation of

goods for which an import licence is required without first having secured an import licence.”

On the 12.10.84 the applicant company submitted a new application for the importation of an additional quantity of 17 tons of Edam cheese. The application was turned down, on the ground that applicant’s quota had been covered by virtue of the first licence granted to the applicant. 5

As a result the present recourse was filed. Counsel for the respondent raised the preliminary objection that applicant lost its legitimate interest, because it failed to challenge the decision embodied in the said condition indorsed on the first licence granted to the applicant. Counsel for the applicant complained, inter alia, of violations of Articles 24, 25 and 28 of the Constitution. In support of his contention as regards the violation of Article 28 he argued that the criteria used for the fixing of the quota were unreasonable, creating discrimination between those who had already been importing cheese and new importers. 10 15

Held, dismissing both the preliminary objection and the recourse (A) As regards the preliminary objection: The arguments that the sub judice decision is merely confirmatory of the previous decision and that the applicant has lost its legitimate interest by having accepted unreservedly the previous decision are not supported by the material before the Court. The condition indorsed on the first licence was, on the one hand, a mere hopeful expectation by respondent 1 that the applicant would have been satisfied by the quantity in respect of which such licence was issued and, on the other hand, no absolute prohibition on importation of new quantities was imposed. 20 25 30

(B) As regards the issue of the constitutionality of section 2 of Law 49/67 as amended by Law 7/67, the contents of the Regulatory Order published on 20.1.83 and the sub judice decision: (1) Article 25.2 of the Constitution recognises the imposition of conditions or restrictions to the right safeguarded by Article 25, namely the right to practise any profession or to carry on any occupation, trade or business, necessary, inter alia, in 35

the public interest. There is no doubt that in the modern state it is often found desirable to subject certain commodities to some form of governmental control for the purpose of in'ci alia, the protection of local produce and its marketability in the interests of the country as a whole

The applicant failed to satisfy the Court that the restriction in question in this case was not aimed at the above purpose and was arbitrarily imposed by the respondent Minister. This Court will not substitute its discretion for that of the administration, even if it would have reached a different conclusion, had it been called upon to exercise its own discretion on the merits

In conclusion the restrictions imposed in this case were within the ambit of Article 25.2 of the Constitution and in the circumstances do not violate Article 25 or any other Article of the Constitution and the discretion of respondent 1 was properly exercised

(2) The applicant does not fall within the category of new importers, but belongs to the category of the regular importers. It follows that the question as to whether there is an absolute prohibition of new importers is an academic one. As it was said in *Constantinou v The Republic* (1966) 3 C.L.R 572 "an instance of discrimination can only arise, if different treatment is meted out in two cases, which are similar in all material respects". What the applicant was entitled to prove was whether there was any discrimination between him and other importers of similar goods, which he failed to do. It follows that Article 28 of the Constitution has not been violated in this case

Recourse dismissed
£50 costs in favour of respondents

Cases referred to

Irfan and Others v The Republic, 3 R.S.C.C 39

Impalex Agencies Ltd v The Republic (1970) 3 C.L.R 361

Psaras v. The Ministry of Commerce and Industry (1971)
3 C.L.R. 151;

Iacovides v. The Republic (1966) 3 C.L.R. 212;

Constantinou v. The Republic (1966) 3 C.L.R. 572

Recourse.

5

Recourse against the refusal of the respondents to grant applicants a licence to import 17 tons of Edam cheese.

P Angelides, for the applicants.

St. Ioannides, (Mrs.), for the respondents.

Cur. adv. vult. 10

SAVVIDES J. read the following judgment. By this recourse the applicant company challenges the decision of the Minister of Commerce and Industry (respondent 1) communicated to it by letter dated 16.10.84, refusing the grant of a licence to the respondent to import into Cyprus 17 tons of Edam cheese. as being unconstitutional, ultra vires and illegal. 15

The legal grounds on which the recourse is based. are the following:

(a) The sub judge decision was based on regulations which are ultra vires the relevant law. 20

(b) The law and regulations on which the sub judge decision was based, violate Articles 23, 24, 25 and 26 of the Constitution.

(c) The sub judge decision amounts to unreasonable discrimination and violation of the principle of equality under Article 28 of the Constitution. 25

The facts of the case are briefly as follows:

The applicant is a company of limited liability and is trading, inter alia, with the importation of cheese of the brand "Edam". 30

Relying on section 3 of the Imports (Regulation) Law, 1962, (Law 49/62), as amended by Law 7/67, respondent

I issued an order published in Supplement No. III of the official Gazette of the Republic dated 20.1.83, under Notification 7/83, whereby the importation of cheese falling within the customs classification 0.4.04, was placed under control and as such, for its importation an import licence was required by respondent 1.

Respondent 1, for the purposes of the protection and encouragement of the local production of products and especially the disposition of the surplus of "halloumi" cheese, decided to restrict the importation of cheese as from the beginning of the second half of 1984. After several consultations with the various organisations concerned respondent 1 came to the following decision which was communicated to the Secretary of the Cyprus Chamber of Commerce and Industry (KEBE) and to the Secretary of the Foodstuffs Importers' Association, by letter dated the 24th September, 1984 signed by the Director-General of the Ministry of Commerce and Industry:

"I have instructions to inform you that the Ministry of the Commerce and Industry after having studied the views of all persons concerned with regard to the question of importation of cheese, came to the following decisions:

- (a) Licences would be granted for the importation of reasonable quantities of luxury cheese.
- (b) Permission should be granted immediately for the importation of cheese of the types Edam, Cheddar, and Processed to importers who will produce evidence that they have bought "Halloumi" from the Cyprus Milk Industry Organisation.

The percentage will be one to three.

Licences should also be granted for the importation of Edam, Cheddar and Processed cheese to all regular importers of such cheese, to be cleared after 31.10.84:

It is understood that in all three cases the quantities of cheese which will be granted will be apportioned to the importers entitled on the basis of sta-

tements concerning their imports which they were requested to submit for the years 1981, 1982, 1983 and 1984."

At the request of the Foodstuffs Importers' Association the period to be covered by the statements was agreed as the period between 1.9.1981 and 31.8.1984. 5

On the basis of the statements submitted, a quota was fixed for each importer based proportionately on his imports for such period. The quota approved for the applicant was assessed at 14.307 kilos for the last four months of 1984. 10

On the 18th September, 1984, the applicant submitted an application for the importation of 17 tons of Edam cheese. Respondent 1 for the purpose of facilitating the applicant to make use of the space in one container, a facility which was usually afforded by the respondent to other importers as well, approved on 21.9.1984 the issue of an import licence for 17 tons of Edam cheese, to cover the whole of his quota for the period 1.9.1984 to 31.12. 1984 and the following was one of the conditions indorsed on the said licence: 15 20

"In future you will not insist on the importation of goods for which an import licence is required without first having secured an import licence."

The applicant on 12.10.1984 submitted a new application for the importation of an additional quantity of 17 tons of Edam cheese. On the 16th October, 1984, respondent 1 refused the grant of such permit and on the endorsement of Part C of the application, he gave his reasons as follows: 25 30

"Because you have covered your quota for the period 1.9.1984 to 31.12.1984 (15,000 kilos) by virtue of import licence No. N/9/1874/1984 which was granted to you on 21.9.84 for 17,000 kilos of cheese."

As a result applicant filed the present recourse, challenging the said decision

By his written address counsel for applicant contended that Law 49/62, as amended by Law 7/67 to the extent
5 that it allows the imposition of restrictions on the importation of cheese is unconstitutional as violating Article 24 of the Constitution. Any restriction, counsel submitted, to the importation of cheese could be effected by the increase of the import duty and not by imposing quotas and restricting its importation. He contended that the provisions
10 of Article 24 are special provisions which supersede the general provisions of Article 25 of the Constitution. In any event, counsel submitted, the provisions of Law 7/67 cannot be applied in the present case, as cheese of the type of Edam is used for the making of pizza and there is no local cheese suitable for such purpose for the protection of which a restriction could be imposed. In any event, counsel added if it is found that Law 7/67 does not violate
15 the provisions of Article 25 of the Constitution, the regulations which were made classifying Edam cheese in the category of foodstuffs the importation of which could be restricted, are illegal and unconstitutional.

Counsel finally submitted that the criteria used for the fixing of a quota violate Article 28 of the Constitution, in
25 that such quota is based on the average of the quantities previously imported by the same importers. Such criteria are in his submission, unreasonable and violate the principle of equality under Article 28 of the Constitution, creating discrimination between those who had been importing
30 cheese and new importers, thus establishing a privileged class of existing importers and excluding absolutely new importers.

Counsel for the respondent by her written address raised a preliminary objection that the applicant lost its legitimate
35 interest to challenge the decision, in view of the fact that it had failed to challenge the decision of the respondent which was embodied in the conditions indorsed on the import licence granted to him on 21.9.1984.

Counsel submitted that the refusal by respondent 1 of

the application of the applicant of the 12th October, 1984 and the grounds given for such refusal are merely confirmatory of the previous decision of 21.9.1984. Counsel in her written address went at some length to expound on the principles governing legitimate interest and also the effect of an acceptance of an administrative act without protest which deprives a person of his legitimate interest to challenge a decision taken in that respect. 5

It was counsel's contention that the applicant accepted the decision of respondent 1 of 21.9.1984 without any protest and without reservation of rights, and, therefore, it lost any legitimate interest to challenge a subsequent prohibition based on such decision. 10

In dealing with the substance of the case, counsel submitted that the restrictions imposed by respondent 1 do not violate the Constitution and that under the provisions of Article 25 of the Constitution, respondent 1 was entitled to impose any restrictions which were absolutely necessary, inter alia, in the public interest. Counsel contended that the protection of locally produced cheese was a matter of public interest and for the protection of its consumption and disposition, respondent 1 had a duty to take steps by restricting the importation of cheese from abroad. 15
20

Counsel concluded her argument by submitting that in the circumstances of the case there has been no violation of the principle of equality and that in any event applicant failed to prove such violation. 25

I shall deal first with the preliminary objection raised by counsel for respondents. Though lengthy argument has been advanced on the principles as to the nature of an executory act and the existence of a legitimate interest, I find that such principles have no application in the circumstances of the present case. Neither the contention of counsel for the respondents that the sub-judice decision is not of an executory character but is merely confirmatory of a previous decision, nor the contention that the applicant by having accepted the previous decision of 21.9.1984 unreservedly, has lost its legitimate interest, can be substantiated from the material before me. What is stated 30
35

in the conditions subject to which the import licence of 21.9.1984 was granted was, on the one hand, a mere hopeful expectation by respondent 1 that the applicant would have been satisfied by the quantity in respect of which such licence was issued, ("in the future you will not insist") and on the other hand, no absolute prohibition on importation of new quantities was imposed but the only restriction mentioned therein was the one requiring an import licence for future importation of such goods ("for the importation of goods for which an import licence is required *without first having secured an import licence*").

In the result, I find that the preliminary objections cannot be sustained and I shall proceed to deal with the substance of the case.

Sub-section (1) of section 3 of Law 49/62, as set out in section 2 of Law 7/67 by which it was replaced, provides as follows:

«(1) Ὁ Ὑπουργός δύναται, ὡσάκις καθίσταται ἀναγκαῖον ἐν τῷ δημοσίῳ συμφέροντι ὅπως περιορισθῆ καὶ ρυθμισθῆ ἡ εἰσαγωγὴ ἐμπορευμάτων ἵνα ἐνθαρρυνθῆ ἡ τοπικὴ παραγωγὴ καὶ βιομηχανία βελτιωθῆ το ἐμπορικὸν ἰσοζύγιον, τηρηθῶσιν αἱ διεθνεῖς ὑποχρεώσεις ἢ ἀναπτυχθῆ ἡ οἰκονομία τῆς Δημοκρατίας, διὰ Διατάγματος δημοσιευομένου ἐν τῇ ἐπίσημῳ ἐφημερίδι τῆς Δημοκρατίας, νὰ περιοριζῆ καὶ ρυθμίζῃ τὴν εἰσαγωγὴν τῶν ἐν τῷ Διατάγματι καθοριζομένων ἐμπορευμάτων».

("Whenever it becomes necessary in the public interest to restrict and regulate the importation of goods for the encouragement of local production and industry, the improvement of the balance of trade, compliance with international obligations or the development of the economy of the Republic, the Minister may, by order published in the official Gazette of the Republic, restrict and regulate the importation of the goods specified in the Order.")

By virtue of the above powers which were vested in the Minister of Commerce and Industry, the Minister issued an

order published in the official Gazette of the Republic of 20.1.83 under Notification 7 restricting and regulating the importation of certain goods set out in the Schedules therein included, for the reasons as stated therein that "it has become necessary in the public interest to restrict and regulate the importation of goods for the purposes mentioned in sub-section (1) of section 3 of the Imports (Regulation) Law". Amongst the goods so restricted, as set out in Schedule 1 of the Law, was cheese. 5

I shall examine first the ground whether either the provisions of Law 7/67 or the contents of the regulatory act of the Minister amount to a restriction of the right of the applicant to exercise its trade in violation of paragraph 1 of Article 25 of the Constitution, as it was contended by counsel for applicant. 10 15

The question as to whether the imposition of restrictions on imports violates Article 25 of the Constitution, came up for consideration in a number of cases both before the Supreme Constitutional Court and this Court. In *Hussein Irfan and 4 others and the Republic*, 3 R.S.C.C. 39, the Court had this to say at pages 42, 43: 20

"In the opinion of the Court, having regard to the impact on the economy of the country through the change of sovereignty and the creation of the Republic, it cannot be said that such powers to restrict and regulate imports as those given under the Regulations in question were not necessary in the public interest in the sense of paragraph 2 of Article 25, at the time of the coming into operation of the Constitution and at the relevant time, i.e. February 1961. 25 30

The period of time during which such Regulations would continue to be considered as 'necessary', in the above sense, is a question of fact which does not call for a decision in this Case.

(c) Regulation 3 of the Defence (Importation of Goods) Regulations, 1956, lays down that the importation of any goods is prohibited save under the authority of a licence for the purpose. The relevant power to grant or refuse a licence, was exercised, in 35

the present case, in the public interest, i.e. for the purpose for which it was granted. The fact that by the exercise of such power the interests of a certain part of the population, i.e. the vine-growers, for whose protection the Vine Products Scheme exists, may have been served at some expense to the interests of traders and consumers of sugar in general, due to the importation of the more expensive U.S.S.R. sugar, is not sufficient to lead the Court to the conclusion that the power in question was exercised in abuse or excess thereof.”

In *Impalex Agencies Ltd. v. Republic* (1970) 3 C.L.R. 361 we read the following in the judgment of A. Loizou, J. at pp. 371, 372 and 373:

“It would be observed that the Minister of Commerce and industry, has power to restrict and regulate the importation of goods into the Republic, by an order published in the Official Gazette, after taking into consideration the public interest, and quite rightly in my view, counsel for the applicants conceded that the regulation of the importation of the potato seed was in the public interest and was approved by the Applicants.

.....

I would like to begin by stating that in the modern state it is often found desirable to subject specified activities to some form of Governmental control. The purposes of such controls 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 controls can be imposed is the licence, and in the case in hand, the applicant company, like any other importer who desires to carry on with the business of importation of potato seed, is required to secure a licence from the Minister of Commerce and Industry, who is the licensing authority under the provisions of s. 4(1) of Law 49/62

(as amended). These import licences, I may add, are usually granted in pursuance of protectionist policies.

.....

The purpose of section 3(1) of Law 49/62, and the order made under that section is not the regulation of any profession, occupation, trade or business, but the regulation and the control of importation of potato seed. The mere fact, therefore, that the importation of this commodity is a necessary means for carrying on the business of importation, cannot justify the conclusion that the regulation and control of this commodity and the refusal of the Minister interfere directly with the right, as such, of the applicant company to carry on the business of an importer. I would add that in this case, it is clear, that the company has not been granted a licence for the importation of potato seed, simply because it did not conform to the test laid down by the Ministry, and that because for a period of three years prior to the decision of the Minister the Company decided not to trade with this commodity for reasons explained by Mr. Hadjisoteriou, one of the directors of the company.

In my judgment, therefore, I find that the decision or act of the Minister is not repugnant to the provisions of Article 25 of the Constitution.

I would like, however, to state that even assuming that I was wrong in this finding, and that the decision or act of the Minister directly interfered with the right of the company to carry on the trade or business of importer of potato seed, then again I would have had no difficulty in my judgment to make a finding that such formalities, conditions or restrictions which are prescribed by this Law, are only necessary for the protection of the rights and liberties guaranteed by the Constitution, as provided for by paragraph 2 of Article 25 of the Constitution."

In *Psaras v. The Ministry of Commerce and Industry* (1971) 3 C.L.R. 151, the Court had this to say at pp. 160, 161:

5 "In the light of what has been stated hereinabove
as to the relevancy of the Cyprus Potato Marketing
Law, 1964, to the sub judice decision, I do not find
that the determination of the constitutionality of this
Law or any part thereof is necessary for the purposes
of these proceedings. Had it been necessary, however,
10 to adjudicate upon it, I would have no hesitation in
deciding that this law is not unconstitutional, as it
comes within the ambit of para. 3 of Article 25.

15 The next point for determination is (a) the unconsti-
tutionality or not of section 3 of the Imports (Re-
gulation) Law, 1962, and the order made thereunder,
under which the decision complained of was taken,
and (b) the unconstitutionality or not of the said de-
cision.

20 (a) Article 25 of the Constitution safeguards the
right of the individual to practise any profession or
to carry on any occupation, trade or business. Para-
graph 2 thereof provides that 'the exercise of this
right may be subject to such formalities, conditions or
25 restrictions as are prescribed by Law and are inter
alia necessary only... in the public interest.' It re-
gulates, therefore, the conditions under which a pro-
fession, trade or business may be exercised. The re-
quirement of a licence for the importation of a parti-
cular type of goods does not amount to a prohibition
30 to carry out a profession or occupation. One may
still become an importer in respect of these goods or
other goods subject to certain conditions which are
necessary inter alia in the 'public interest'. I hold,
therefore, that section 3 of Law 49/1962 as amended
35 is constitutionally valid so long as the restriction or
regulation of the importation of goods is made, as it
is the case under consideration, in the public interest
or for any other of the objects set out in the said
section i.e. the encouragement of local production
40 and manufacture, the improvement of the balance of

trade, compliance with international obligations and the development of the economy of the Republic, all being objects that bring it within the ambit of para. 2 of Article 25, the very terms of which render it manifestly a provision of Law necessary in the public interest." 5

With the above in mind, I find myself unable to agree with the argument of counsel for applicants that the decision or act of the Minister in imposing restrictions on the importation of cheese is contrary to the provisions of Article 25 of the Constitution. Article 25 safeguards the right to practise any profession or to carry on any occupation, trade or business subject to such formalities, conditions or restrictions, as provided by the Law. 10

Paragraph 2 of Article 25 recognises the imposition of conditions or restrictions to such right, necessary, inter alia, in the public interest. There is no doubt that in the modern state it is often found desirable to subject certain commodities to some form of governmental control for the purpose of, inter alia, the protection of local produce and its marketability in the interest of the country as a whole. 15 20

In the case under consideration the applicant has failed to satisfy the Court that such restriction was not aimed at the above purpose and was arbitrarily imposed by the Minister of Commerce and Industry. 25

It has been repeatedly stressed that the Court will not interfere by substituting its own discretion for that of the administration even if the Court would have reached a different conclusion had it been called upon to exercise its own discretion on the merits. (*Iacovides v. The Republic* 30 (1966) 3 C.L.R. 212).

In the circumstances of the present case I find:

(a) That the restrictions imposed by respondent 1 were within the ambit of paragraph 2 of Article 25 of the Constitution and that in the circumstances of the case they do not violate Article 25 or any other Article of the Constitution. 35

(b) That the discretion of respondent 1 was properly exercised and no case has been made for interference by this Court with the exercise of such discretion

5 I finally come to the contention of counsel for applicant that there is a violation of Article 28 of the Constitution in that an absolute prohibition is imposed on persons who were not previously importers of cheese in case they wished to import such product

10 The applicant does not fall within the category of a new importer but was one of the importers who were previously importing cheese. The question as to whether there is an absolute prohibition of new importers is an academic one in the present case as the applicant does not fall within the category of such persons and in consequence he cannot
15 raise a legitimate claim on this ground

In *Constantinou v The Republic* (1966) 3 C.L.R. 572 it was said at page 581

20 "But an instance of discrimination can only arise if different treatment is meted out in two cases which are similar in all material respects;"

What the applicant was entitled to prove, was whether there was any discrimination between him and other importers of similar goods which he failed to do. I, therefore, find that the contention of counsel for violation of Article
25 28 of the Constitution, has not been substantiated and has no place in this case

In the result, this recourse fails and is hereby dismissed with £50 - against costs in favour of the respondent

30 *Recourse dismissed*
Applicant to pay £50 - costs