

1986 February 12

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

RUTH GOTTLIEB, OF FRANCE NOW RESIDENT
IN CYPRUS,

Applicant.

v.

THE DEPARTMENT OF CUSTOMS AND EXCISE
THROUGH THE MINISTRY OF FINANCE.

Respondent.

(Case No. 34/83).

5 *The Customs and Excise Duties Law 18/78, s.11—Orders 151/81 and 6/82 of the Council of Ministers made under s.11(2) of the said Law—Item 01 of sub-heading 20 of the Fourth Schedule—The Customs and Excise Duties*
10 *Law 82/67, s.161(1)—Application for the refund of duty paid in respect of importation of applicant's car—Applicant entitled to exemption under item 01 sub-heading 20—If she had submitted her application at the time of importation, she would have been granted relief—The*
15 *Director of the Department of Customs had no power under existing customs legislation to order a refund of the duty paid—Therefore, he rightly turned down the application for refund.*

Constitutional Law—Constitution, Articles 24 and 28.

15 *Administrative Law—Due reasoning of an administrative act—Due inquiry.*

20 On the 17.5.80 the applicant who is a French national and had arrived in Cyprus on 3.12.79 as a temporary visitor imported to Cyprus her motor car by virtue of a provisional importation licence. Subsequent extensions to the temporary circulation in Cyprus of the said car were

given till the 30.9.81. On the 2.10.81 the applicant applied for the importation of the said car and paid the prescribed import dues. As a result the car was cleared from the customs and was imported to Cyprus for home use.

On 22.3.1982 applicant addressed a letter to the Director of the Department of Customs and Excise (hereinafter referred to as the Director) stating that she arrived in Cyprus on 3.12.79 with the intention of living here permanently and claiming a refund of the import dues she paid for the said car. In the course of the examination of the said application it was ascertained that applicant's case was covered by the provisions of the Fourth Schedule of the Customs and Excise Laws and in particular sub-heading 20 of item 01 as she satisfied the conditions that she was not carrying any profession in Cyprus and that the importation was made within a reasonable time from her arrival in Cyprus. If the applicant had applied for relief at the time of the importation of her car, she would have been entitled to relief, pursuant to the provisions of section 11* of Law 17/78, and the order made by the Council of Ministers under s. 11(2) of the said Law Notification No. 151/81 replaced by order under Notification No. 6/82**.

Respondent turned down applicant's said request for refund. As a result the applicant filed the present recourse.

The main questions in this case are: (a) Whether under the existing legislation the Director of the Department of Customs and Excise had any power to refund the tax paid, (b) Whether the sub judice decision was duly reasoned, (c) Whether the Director carried out a due inquiry at the time of the importation of the goods (d) Whether there was a violation of Article 24 of the Constitution (e) Whether there was a violation of Article 28 of the Constitution and (f) Whether the applicant has a legitimate interest.

Regarding question (d) above counsel for the applicant

* Quoted at pp. 74-75 post.

** Quoted at pp. 75-76 post

argued that Article 24 provides expressly that no tax or duty can be levied save by or under the authority of the law. No doubt, he submitted, a contrario this provision means that in case of tax or duty unduly paid refund thereof does not need any specific provision by or under the authority of the Law.

Regarding question (e) above counsel for the applicant complained that whereas under the provisions of sub-headings 18 and 19 of item 01 or Order 151/81 the Director issued press-communicues and specific notices of the relief therein provided, he failed so to do under item 01 of sub-heading 20 within which applicant's case falls. It should be noted that applicant alleged that she did not know at the time of payment of the duty that she was entitled to relief.

Regarding question (f) above counsel for the respondent submitted that the applicant had no legitimate interest as she had unreservedly paid the relevant import duty.

It should be noted that s.11(1) of Law 18/78 provides that the relief can be granted if the application for exemption is submitted before the goods are removed from customs control.

Held, dismissing the recourse: (1) The only provision in Law 18/78 empowering the Director to grant relief is s.11(1). The relief can only be granted at the time of the importation and before removal of the goods from customs control. In the absence of any other provision in Law 18/78 or any other law, the Director was fully justified in refusing the application for the refund. The present case does not fall under the provisions of s.161 of Law 82/67. The Director had no power to refund duty paid by mistake.

(2) The letter of the Director dated 18.11.82 gives sufficient reasoning for his refusal, such reason being that under the existing legislation he had no authority to grant such a relief.

(3) The contention of failure to carry out a due inquiry at the time of importation of the goods cannot be accepted as at such time the Director acted on the basis of the facts

brought to his knowledge by the applicant. On the basis of such facts he had no alternative but to demand payment of the duty.

(4) The provisions of s 11(1) of Law 18/78 provide for a time limit for making a claim for exemption. Such a provision does not violate the Constitution as it does not deprive a person from exercising his right, but is only limiting the time within which a claim may be raised

(5) The applicant does not belong to any of the categories under sub-headings 18 and 19 which are classes covering a large number of persons and not isolated cases as is the case with sub-heading 20. The applicant might have had a case if any case falling within sub-heading 20 was treated in a different way. But there is no evidence in this respect. It follows that the contention as to the violation of Article 28 is unfounded

(6) In view of the above it is unnecessary to deal with the issue of legitimate interest

Recourse dismissed

Cases referred to

Kritikos v The Republic (1985) 3 C L R 2638;

HadjiKyriacos and Sons Ltd v The Director of the Department of Customs and Excise (Case No 270/81 delivered on 25 1 86. to be reported in (1986) 3 C L R)

Recourse

Recourse against the refusal of the respondent to refund to applicant the import duty paid by her on the importation of her car to Cyprus.

K. Chrysostomides, for the applicant

M. Photiou, for the respondent.

Cur. adv. vult.

SAVVIDES J read the following judgment. Applicant by the present recourse, challenges the refusal of the respondent to refund the import duty paid by her on the importation

of her car to Cyprus to which she contends to be entitled under the provisions of sub-heading 20 of item 01 of the Fourth Schedule to the Customs and Excise Law, No. 18/78.

- 5 The applicant is a French national and holder of a French passport. She arrived in Cyprus on the 3rd December, 1979, as a temporary visitor. On the 19th July, 1980 she applied to the appropriate authority of the Republic for a temporary resident's permit which was granted to her on the 2nd
10 May, 1981, valid till the 1st November, 1981. According to such permit the applicant was permitted to remain in Cyprus on condition that the permit might be revoked at any time before its expiration by giving to her 14 days notice to that effect.
- 15 On the 17th May, 1980, the applicant imported to Cyprus her motor car Honda make, by virtue of a provisional importation licence No. C. 104 issued under the provisions of the Temporary Importation (Private Cars and Aircrafts) Regulations of 1968 made under section 35 of
20 Law 82/67. Subsequent extensions to the temporary circulation in Cyprus of the said car were given till the 30th September, 1981. On the 2nd October, 1981, the applicant attended the customs office at Larnaca and applied for the importation of the said car for use in Cyprus and
25 paid the prescribed import dues, as a result of which the car was cleared from the customs and was imported to Cyprus for home use. Five months later and in particular on the 22nd March, 1982, applicant addressed a letter to the Director of Customs and Excise attaching thereto an
30 application form for relief from import duty in respect of her car. The contents of such letter read as follows:

"Dear Sir,

- I first arrived in Cyprus on 3.12.79 with the intention of living here permanently. I imported my car
35 to Cyprus on 17th May, 1980 and had a duty free extension until 30.9.81 after which date I paid the customs for my car.

- I have recently learned that, because of Law No. 18/78, I need not have been charged this duty. I feel
40 that I should have been informed of this and under-

stand that I am now entitled to a refund. Enclosed please find your form CR 01.20 duly completed giving full details of my residence status."

The applicant was invited at the customs office and produced for inspection the necessary documents referred to in her application. No reply was given to her and on the 17th August, 1982 she applied again for such relief by submitting to the Director of the Department of Customs of Nicosia the prescribed form duly filled and signed by her. According to the contents of such form and the particulars given therein she was an artist painter by profession and of adequate financial standing with sources deriving solely from abroad and that her family consisted of herself and another person, the relation with whom is not described in the application; also that she was the owner of a Honda saloon car which she acquired abroad and first brought to Cyprus on the 17th May, 1980, under a temporary permit which expired on the 30th September, 1981, after which date she paid the import duty on the said car on the 2nd October, 1981. Her application for relief was based on the provisions of sub-heading 20 of item 01 of the Fourth Schedule to Law No. 18/78.

In the course of the examination of her application it was ascertained that her case was covered by the provisions of the Code for Exemption 01.20 as she satisfied the conditions that she was not carrying out any profession in Cyprus and that the importation of the said car was made within a reasonable time from her arrival to Cyprus. The question, however, arose as to whether under the existing customs legislation, on the basis of which the application was made, the Director of the Department of Customs and Excise had any power to refund the tax paid by the applicant, in the light of the provisions of section 11(1) of Law 18/78 which expressly provides that for an application for exemption in respect of goods set out in the Fourth Schedule to the Law, the application should be submitted before the goods are removed from the customs control unless otherwise provided by the law.

In view of the above, the respondent by his letter dated

the 18th November, 1982, rejected applicants request. The contents of such letter read as follows:

5 "I refer to your application. dated 22nd March. 1982, by which you requested refund of the import duty paid on a motor-vehicle, under the provision of sub-heading 20 of item 01 of the Fourth Schedule to Law No. 18/78 and would inform you that the circumstances of your case have been very carefully examined but according to existing customs legislation 10 your request could not be acceded to."

As a result, applicant filed the present recourse. The legal grounds raised in support thereof, are that the sub 15 judge decision is contrary to law and Articles 24 and 28 of the Constitution and is based on a misconceived construction of the relevant legal provisions. Furthermore, that the sub judge decision is not duly reasoned and it was taken without proper and/or due inquiry into all relevant facts and circumstances.

20 Counsel for the respondent raised by his opposition a preliminary objection that the applicant lacks legitimate interest in the sense of Article 146.2 of the Constitution in that willingly and without any reservation she paid the relevant import dues on her car. Subject to the above, he refuted the contentions of counsel for applicant that there 25 was lack of proper inquiry and due reasoning or any violation of the law and the Constitution and contended that under the provisions of the Customs and Excise Law, the applicant had no right to claim any refund of import duty in the circumstances of the present case.

30 By his written address counsel for applicant expounded on the legal grounds raised. His argument may be summarised as follows:

35 (a) With regard to the preliminary objection raised by counsel for respondent, of lack of legitimate interest due to the unreserved acceptance by the applicant to pay the import duty in question, he contended that her consent was not free and voluntary but out of fear of adverse consequences for her in that she had either to pay import duty

on the car, or export it and that in any event for her assent to be genuine, she should have been informed by the Customs Authorities at the time of the importation of the car. of her right to have the said car imported without duty.

(b) That the letter of the Director of the Department of Customs and Excise did not give sufficient reasoning for rejecting applicant's request, but he expressed himself in a vague, general and insufficient way. 5

(c) That the respondent failed to carry out a due inquiry and he acted all along under a misconception of material facts. In the submission of counsel for applicant the respondent, before proceeding to collect the import duty on applicant's motor-vehicle, had a duty to ascertain the correct factual situation. 10

(d) That the sub judice decision violates Article 24 of the Constitution. In so far as section 11(1) does not allegedly entitle refund of duty improperly paid is unconstitutional because if a person entitled to duty relief does not apply at the time of the payment for such relief, he loses his right and the "fiscus" may retain monies unjustly paid because there are no provisions as to their refund. He concludes his argument on Article 24 as follows: 15 20

"Article 24 of the Constitution is very express to the effect that no duty or tax can be levied save by or under the authority of a law. No doubt, a contrario, this constitutional provision means that whenever a law absolves an individual from paying any taxes, duties, etc. to any authority then (a) such authority may in no way and under no circumstances collect duty which under such law is not payable and (b) in case such tax or duty is unduly paid refund thereof does not need any specific provision by or under the authority of the law." 25 30

(e) That the applicant has been the victim of unlawful discrimination by the appropriate authority in that, whereas in cases under the provisions of sub-headings 18 and 19 of item 01 of the regulatory Administrative Act No. 151/81, i.e. off-shore companies and repatriated Cypriots, the 35

Director of the Department of Customs and Excise issued press-communicés and specific notices of their entitlement to claim relief from duty on the importation of motor-vehicles. he failed to do so in cases under item 01 sub-heading
5 20 within which applicant's case falls.

Counsel for respondent by his written address contended-

(a) That the applicant had no legitimate interest as she had unreservedly paid the relevant import duty.

(b) The applicant paid such duty out of her own free
10 will and unreservedly and that she raised this question for the first time five months later when for the first time she brought to the notice of the respondent her intention to live in Cyprus permanently.

(c) Ignorance of the law on behalf of the applicant is
15 not a ground for claiming relief.

Counsel further contended that there is no violation of Articles 24 and 28 of the Constitution and that section 11(1) does neither directly or indirectly infringe Article 24 of the Constitution but even if an indirect infringement is
20 to be found, it is not such as to render a law unconstitutional. As to the alleged violation of Article 28 of the Constitution in that no circular explaining the entitlement of foreigners, who come to Cyprus with the intent of permanently residing here, to customs relief from import duty
25 on motor-vehicles, counsel submitted that respondent had no legal duty whatsoever to issue circulars explaining every provision of the law. The cases of off-shore companies and repatriated Cypriots were numerous, whereas cases of this nature are very exceptional. The applicant, counsel added,
30 could only claim that there was a violation of Article 28 if cases similar to hers were treated in a different way.

In concluding counsel submitted that the burden of showing that at the time of the payment she did not freely consent to the payment of the duty and that she was
35 induced by fear of consequences was upon the applicant to discharge.

When the case was fixed for oral clarifications counsel

for respondent in further expounding on his argument submitted that the provisions of section 11(1) are not unconstitutional as it is not contrary to the Constitution to provide in the relevant law a time limit for making a claim for an exemption under the law. Under such provisions she could claim exemption before the removal of the motor car from the customs control i.e. before she went and paid the relevant duty on the 2nd October, 1981. There was no obligation on the respondent to ask the applicant whether she satisfied the criteria specified in the relevant regulatory administrative Act No. 151/81 so as to grant her a relief. There is a presumption, counsel added, that everybody knows the law and applicant to be entitled to such relief she should in addition to the other requirements satisfy the authorities, at the material time that she was not working in Cyprus.

It is apparent in this case that the complaint which gave cause to the present recourse is the letter of the Director of Customs and Excise dated 18th November, 1982 whereby he informed the applicant that according to existing legislation her request could not be acceded to.

Before embarking on the substance of the case, I find it necessary to make a brief reference to the relevant order allowing exemption from duty to foreigners who come to Cyprus with intent to settle, as well as to the powers of the Director of the Department of Customs and Excise to refund import duty which is unduly paid.

Section 11 of the Customs and Excise Law, 1978, (Law 18/78) provides as follows:

«(1) Ἀνεξαρτήτως οἰασδῆποτε νομοθετικῆς διατάξεως δυνάμει τῆς ὁποίας εἶναι δυνατὴ ἡ ἀτελῆς εἰσαγωγή εἰδικῶς καθοριζομένων ἐμπορευμάτων πρὸς χρῆσιν αὐτῶν ὑπὸ ὠρισμένων προνομιοῦχων προσώπων, ὀργανισμῶν, ἀρχῶν καὶ ὀργανώσεων, καὶ ὑφ' οὗς ὄρους ὁ Διευθυντῆς ἤθελεν ἐπιβάλλει πρὸς διασφάλισιν τῶν δημοσίων προσόδων, ἐμπορεύματα τοῦ ἐν τῷ Τετάρτῳ Πίνακι καθοριζομένου εἴδους ἀπαλλάττονται, ὑπὸ τὰς ἐν τῷ εἰρημένῳ Πίνακι ὀριζομένας περιστάσεις καὶ

5 ὄρους ἐκτός ἐάν ἄλλως προνοῆται ἐν τῇ τετάρτῃ στήλῃ τοῦ ἰδίου Πίνακος, τοῦ εἰσαγωγικοῦ δασμοῦ ἢ φόρου καταναλώσεως ὅστις ἄλλως θὰ ἐπεβάλλετο δυνάμει τοῦ παρόντος Νόμου, νοουμένου ὅτι ἡ αἴτησις ἀπαλλαγῆς ὑποβάλλεται ὑπὸ ἢ διὰ τὸν εἰσαγωγέα πρὶν ἢ τὰ ἐμπορεύματα ἀπομακρυνθῶσι τοῦ τελωνειακοῦ ἐλέγχου, ἐκτός ὡς ἄλλως ρητῶς προνοεῖται ἐν τῷ παρόντι Νόμῳ.

10 (2) Διὰ Διατάγματος αὐτοῦ δημοσιευθησομένου ἐν τῇ ἐπίσημῳ ἐφημερίδι τῆς Δημοκρατίας, τὸ Ὑπουργικὸν Συμβούλιον δύναται νὰ προσθέτῃ, διαγράφη, μεταβάλλῃ ἢ ἄλλως τροποποιῇ τὰς κλάσεις ἢ οἰασθήποτε τούτων, ὡς αὐταὶ ἐκτίθενται ἐν τῷ Τετάρτῳ Πίνακι.»

15 The English translation reads as follows:

20 (“11.(1) Notwithstanding any legal provision by virtue of which the duty free importation of specified goods for use by certain privileged persons, corporations, authorities and organisations, under any conditions that the Director may impose for the safeguard of the public revenue, goods of the classes specified in the Fourth Schedule are exempted, under the circumstances and conditions stated in the said Schedule unless otherwise provided in the fourth column of the same Schedule, from import or excise duty which 25 would have otherwise been imposed by virtue of this Law, provided that the application for exemption is submitted by or for the importer before the goods are removed from customs control, unless otherwise expressly provided in this Law.”)

35 By virtue of the powers vested in it under section 11(2) of Law 18/78, the Council of Ministers issued Notification No. 151/81, which has been replaced by Notification No. 6/82, published in Supplement No. III, Part I, of the official Gazette of the Republic No. 1745, dated 15.1. 1982. Notification No. 6/82, reads as follows:

«Μηχανοκίνητα οχήματα των κλάσεων 87.02.11 και 87.02.19 εἰσαγόμενα ὑπὸ αλλοδαπῶν ἐρχομένων εἰς τὴν Δημοκρατίαν δια νὰ κατοικήσωσι μονίμως ἐν αὐτῇ

άνευ εξασκήσεως οιονδήποτε επαγγέλματος νοουμένου
 ότι η εισαγωγή γίνεται κατά τον χρόνον της αφιξεώς
 των ή εντός ευλόγου χρονικού διαστήματος προ ή με-
 τά την άφιξίν των κατά την κρίσιν του Διευθυντού:

Νοείται περαιτέρω ότι η απαλλαγή δεν τυγχάνει ε- 5
 φαρμογής εάν οιονδήποτε μέλος της οικογενείας εξα-
 σκή επάγγελμα εν τη Δημοκρατία.»

The English translation reads as follows:

("Motor vehicles of classes 87.02.11 and 87.02.19 10
 imported by foreign persons coming in the Republic
 for permanent settlement without exercising any pro-
 fession provided that the importation is made at the
 time of their arrival or within a reasonable time be-
 fore or after their arrival at the discretion of the Di- 15
 rector.

Provided further that the exemption does not apply
 if any member of the family exercises any profession
 in the Republic.")

It is common ground that applicant's case fell within 20
 the provisions of the Fourth Schedule of the Customs and
 Excise Laws and in particular sub-heading 20 of item 01
 and had she applied for such relief at the time of the im-
 portation for home use of her car she would have been
 entitled to such relief. Also that the applicant at the time of
 the importation of her car did not bring to the notice of 25
 the Customs Authorities that she was a person entitled to
 such relief nor did she apply for such relief before the car
 was removed from customs control.

Having carefully considered the provisions of the Customs 30
 and Excise Duties Law, 1978, Law 18/78, I find that the
 only provision empowering the Director of the Department
 of Customs and Excise to grant relief from payment of
 import duty on goods is that under section 11(1) of the
 Law. In accordance with such provision the relief can 35
 only be granted at the time of the importation of the goods
 and before they are removed from customs control. In the
 absence of any other provision in Law 18/78 or any other
 law empowering the Director of Customs and Excise to

grant relief, he was fully justified in refusing the application of the applicant for refund of duty paid by her, which application was made more than five months after the payment of the import duty. Therefore, the Director, in replying as he did, acted within the scope of his powers and any
5 decision to the contrary would have been ultra vires.

The present case does not fall either under the provisions of section 161 of the Customs and Excise Law, 1967 (Law 82/67), by which, in cases of disputes as to whether any
10 or what customs duty is payable in respect of goods imported a procedure is contemplated, subject to certain time limits, for either referring the case to arbitration or applying to a competent Court for a declaration as to the amount of duty, if any, properly payable on the goods. The provisions of section 161(1) have been considered in Case No. 140/84, *Kritikos v. The Republic* (judgment delivered on
15 9.12.1985, not yet reported)* and in *Hadjikyriacos & Sons Ltd. v. The Director of the Department of Customs and Excise* (Case No. 270/81 in which judgment was delivered
20 on 25.1.1986 but is not yet reported).** In the latter case the Court found that there is no legislative provision in the Customs and Excise Laws allowing the Director of Customs and Excise to refund duty paid by mistake.

In view of the above, I have reached the conclusion that
25 applicant's recourse fails on this ground as in the circumstances of the case there was no power to the Director of Customs and Excise to refund any duty paid by mistake. As to the argument of counsel for applicant that there is unjust enrichment of the fiscus if it is allowed to retain
30 fees paid by mistake this Court is not the proper forum for pursuing such claim as such claim might have been the subject of a different procedure before another competent Court or organ.

Concerning applicant's contention that the decision of
35 the respondent is not duly reasoned I find myself unable to agree with him. The letter of the Director of Customs and Excise dated 18th November, 1982 gives sufficient

* Reported in (1985) 3 C.L.R. 2638.

** To be reported in (1986) 3 C.L.R.

reasoning for his refusal to accede to applicant's request, such reason being that under the existing customs legislation he had no authority to grant such relief.

I cannot either accept the contention of failure by the respondent to carry out a due inquiry at the time of the importation of the goods as at such time the respondent acted bearing in mind all the facts which were brought to his notice by applicant i. e. the fact that she was applying for the importation of a car in Cyprus, and on the basis of such information he had no alternative but to demand the payment of the duty payable for such car. It was the duty of the applicant, if aware of any matters entitling her to relief, to bring such matters to the knowledge of the customs authorities at the time of the importation of her car and she could only complain if the customs authorities refused to act upon it or make a due inquiry into the correctness of any allegation which might have been advanced by the applicant concerning her entitlement to relief.

I come next to consider whether there is violation of Article 24 of the Constitution.

The duty in the present case was levied under the authority of the law. The provisions of section 11(1) provide for a time limit for making a claim for exemption under the law. Under such provisions applicant was entitled to claim exemption before the removal of the car from Customs control. A provision fixing a time limit within which a person has to raise a claim or pursue his right is not violating the Constitution as it is not depriving a person from exercising his right in this respect but is only limiting the time within which a claim may be raised.

I come next to consider whether there is violation of Article 28 of the Constitution.

I find the complaint of applicant for discrimination as unfounded. The issue by the Director of the Department of Customs and Excise of press-communicés and specific notices to off-shore companies and repatriated Cypriots of their entitlement to claim relief from duty on the importation of motor-vehicles under sub-headings 18 and 19 does

not amount to an unlawful discrimination as the applicant does not belong to any of the categories under sub-headings 18 and 19 which, as explained by counsel for respondents, are classes covering a large number of persons and not
5 isolated cases under sub-heading 20 of item 01. The applicant might have had a good cause to complain for discrimination if any case falling under the same category with her, i. e. that of sub-heading 20 was treated in a different way but no evidence has been adduced in this respect.

10 Having dealt with the substance of the case I find it unnecessary to deal with the preliminary objections raised by counsel for respondent concerning lack of legitimate interest in that applicant had unreservedly paid the relevant import duty or that her claim was made out of the time limit of
15 75 days from the date of the payment of the import duty by her.

For all the above reasons this recourse fails and is hereby dismissed but in the circumstances I make no order for costs.

20

*Recourse dismissed with
no order as to costs.*