1987 June 3

[A LOIZOU J]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ELENI HERODOTOU,

Applicant,

v

THE REPUBLIC OF CYPRUS, THROUGH
THE DIRECTOR OF CUSTOMS AUTHORITIES,

Respondent

(Case No 341/86)

Customs and Excise — Duty free importation of goods — Power to impose conditions for the exemption — The Customs and Excise Duties Law 18/78 — Paragraph 1 of the 4th Schedule and section 11(1) — Breach of condition that could be lawfully imposed — Effect — Power to confiscate the goods in question — The Customs and Excise Law 82/67, section 158

Customs and Excise — Compounding of offences — The Customs and Excise Law 82/67, section 178 — Breach of a condition imposed for the duty free importation of goods — As it constitutes an offence under section 121(a), the respondent had power to compound such offence

Acts or decisions in the sense of Art 146 1 of the Constitution — Compounding of offences in virtue of section 178 of the Customs and Excise Law 82/67 — So closely interwoven with criminal proceedings, that it is outside the ambit of Art 146 1

Administrative Law — Discretion of administration — Exercise of — Judicial control — Principles applicable

Words and Phrases «Dependent of a person» — Daughter, aged 36, lecturer at the Higher Technological Institute — Not a «dependent» of her mother

The applicant was upon her repatriation granted a permit for the duty free importation of a motor car on certain conditions, one of which reads as follows

«The vehicle shall only be used by you and your dependents and shall not be lent, hired, exchanged, given away or otherwise disposed of in the Republic without the prior written authority of the Director of Customs, upon your application»

When it was discovered that the car was possessed and systematically used by applicant's daughter, aged 36, a lecturer at the Higher Technological Institute, the respondent decided to confiscate it. Following the confiscation the respondent proposed to compound the customs offences, which have been committed, for an amount of £300. The applicant paid such amount, but with reservation of her rights.

By means of the present recourse the applicant prays for: (a) A declaration that the decision to confiscate the car was illegal, (b) A declaration that the decision to impose a payment of £300.- by way of compounding is illegal, and (c) A declaration that the term in respondent's letter dated 6.5.86 imposing a new condition is null and void.

Counsel for the applicant argued, inter alia, that as the respondent knew that neither the applicant nor her husband had a driving licence, applicant was entitled to expect that the respondent would not act controversially.

Held, *dismissing the recourse:* (1) The sub-judice confiscation was effected in virtue of section 158 of Law 82/67. In accordance with such section confiscation may be resorted to when the conditions, which were imposed for the exemption from payment of import duty, have not been complied with. It follows that the questions, which arise for determination are (a) Whether the condition in question could be imposed and (b) whether there was a breach of such condition.

(2) The condition in question was imposed under the first paragraph of Schedule 4 of Law 18/78* by giving a wider interpretation to the word «persons» in that there were included therein, besides applicants, her dependents. In any event the condition could have been imposed by virtue of section 11(1)** of the same law. It follows that the condition in question could have been lawfully imposed.

(3) The Regulatory Administrative Act 296/73 contained a definition of the word «dependent», whereas the relevant for this case Regulatory Administrative Act 188/82 does not. Even if the definition of Act. 296/73 does not apply, the term «dependent» must be given its ordinary meaning. Applicant's daughter cannot possibly be considered as applicant's dependent. It follows that it was reasonably open to the respondent to find that the applicant broke the said condition.

(4) Applicant's inability to drive was her problem and, therefore, the argument of counsel hereinabove referred to cannot be accepted.

(5) The breach of the aforesaid condition constituted an offence under section 121(a) of Law 82/67 and, therefore, the respondent had the power to compound it in accordance with section 178 of the same law.

* *Quoted at p 879 post.*
** *Quoted at p. 879 post.*

(6) In the light of the aforesaid legislative provisions relating to respondent's power to impose conditions, the respondent had a discretionary power to impose the impugned new condition. This Court cannot interfere with the exercise of the discretion, if due weight has been given to all material facts and if it has not been based on a misconception of fact.

(7) This Court is entitled to raise ex proprio motu the issue of its jurisdiction.

(8) From mere reading of section 178 it is clear that compounding is resorted to in lieu of criminal proceedings. It follows that it is so closely connected with criminal proceedings that it is outside the ambit of Art. 146.1 of the Constitution. This Court cannot entertain prayer (b). If applicant had cause to contest the compounding, she ought to have declined payment of £300 and fight her case before the criminal Court One cannot elect to accept compounding with reservation and, thus, avoid criminal proceedings. Applicant's attitude was nothing but a device to change forum.

Recourse dismissed.
No order as to costs

Cases referred to:

Merck v. The Republic (1972) 3 C L R. 548,

Makantou v. The Republic (1984) 3 C L.R. 100;

S. Raftis Co. Ltd. v. The Municipality of Paphos (1981) 3 C.L.R. 497;

Xenophontos v. The Republic, 2 R.S.C.C. 89;

Pitsillos v. Aristodemou (1969) 3 C.L.R. 226

Recourse.

Recourse for a declaration that the decision of the respondent to confiscate motor vehicle RV 373 belonging to applicant and to impose on the applicant an obligation to pay the amount of £300- by way of compounding is null and void and of no legal effect.

A.S. Angelides, for the applicant.

St. Theodoulou, for the respondent

Cur. adv. vult.

A. LOIZOU J. read the following judgment. On December 1st 1984, applicant was upon her repatriation granted a permit to import a car free of import duty by virtue of the provisions of sub-heading 19 of item 01 of the Fourth Schedule to the Customs and

Excise Duties Law. The permit was granted under certain conditions (see appendix A to the opposition) one of them - condition (d) - being as follows:

«1. The vehicle shall only be used by you and your dependents and shall not be lent, hired, exchanged, given away or otherwise disposed of in the Republic without the prior written authority of the Director of Customs, upon your application.»

Following the importation of the car, the respondent discovered that it was possessed and systematically used by Despina Charalambidou, aged 36, a lecturer at the Higher Technological Institute for purposes of her own, and who is the daughter of the applicant. On the 14th March, 1986, the competent Customs Authorities found the car in the complex of the Higher Technical Institute and confiscated same by virtue of the provisions of the relevant legislation. In the statements which were given by the applicant and her said daughter to the competent Customs Authorities it was stated that the car was used by applicant's daughter for purposes of her own (see appendices 'B' and 'C' to the opposition). The respondent Director of Customs in exercise of his powers, by virtue of the relevant law, by his letter dated 21st April 1986, proposed to return the car to the applicant upon payment by her of an amount of £300 by way of compounding of the Customs offences which she had committed. The applicant accepted the proposal of the respondent Director and on the 21st April 1986 she did pay the amount of £300. By her letter of the same date she stated that she accepts to pay the amount of £300 «with full reservation of her rights».

By his letter dated 6th May 1986, the respondent Director informed the applicant that her acceptance to pay the amount of £300 «constitutes an admission of having committed the offences» and acceptance of the compounding which had been proposed to her. In the same letter stress was laid on the conditions on which the permit had been granted.

After receiving the aforementioned letter the applicant filed the present recourse whereby she prayed for the following relief:

«(1) A declaration of the Court that the decision of the respondent to confiscate vehicle RV 373 (Mercedes 190E) belonging to the applicant was illegal null and void and of no legal effect whatsoever.

(2) A declaration of the Court that the decision of the respondent to impose on the applicant an obligation for the payment of an amount of £300 by way of compounding in respect of a non-existent offence is illegal, null and void and of no legal effect whatsoever.

Learned counsel for the applicant in his written address mainly contended:

a) That once applicant had made known to the administration that both she and her husband had no driving licence and that she will reside with her unmarried daughter who was the only member of the family that was holding a driving licence; and that once on the above facts the exemption dated 1st December 1984 was granted to her, applicant was entitled to expect that the respondent would not act controversially in the future;

b) The term which has been imposed by means of the letter of the 6th May, 1986 and given that applicant is not the holder of a driving licence, is tantamount to annulment of the exemption.

c) Order 188/82 does not introduce restrictions as to who of the members of the family will use the car.

Prayer (1)

The sub judice confiscation was effected by virtue of the provisions of section 158 of The Customs and Excise Law 1967, which reads as follows:

«158.-(1) If by virtue of any provision of this or any other Law or under any practice whereby-

(a) goods chargeable with a duty of customs are allowed to be delivered without payment of that duty on condition that they will not be sold or will be re-exported or upon any other like condition; or

(b) the amount of customs duty payable on any goods depends on their being imported on any such condition,

any goods are allowed to be delivered without payment of duty or on payment of duty calculated in accordance with that provision or practice, and the condition is not observed, the goods, shall, unless the non-observance was sanctioned by

the Director, be liable to forfeiture.

(2) The provisions of this section shall apply whether or not any undertaking or security has been given for the observance of the condition or for the payment of the duty payable apart therefrom, and the forfeiture of any goods under this section shall not affect any liability of any person who has given any such undertaking or security.»

It is clear from a mere reading of the above section that confiscation may be resorted to when the conditions, which were imposed for the exemption from payment of import duty are not complied with And the questions which arise are (a) whether the conditions in question - condition (d) could be imposed-and (b) whether there was a breach of such condition.

The condition in question was imposed in exercise of powers under the first paragraph of the 4th Schedule of the Customs and Excise Duties Law 1978 (Law No. 18 of 1978), which provides:

«Goods of the classes described in each of the following sub-headings, imported by or on behalf and for use by the persons, bodies, authorities or organisations mentioned therein.»

The exemption was formulated on the basis of the above provisions but by giving a wider interpretation to the term «persons» in that it included, besides applicant, her dependents. But even in the absence of the above legislative provisions the respondents could, by virtue of s. 11(1) of the same law impose conditions and restrictions.

Section 11(1) reads:

«... goods may be imported free of import duty for use by certain privileged persons under such conditions as the Director may impose for the protection of the revenue.»

In view of the above legislative provisions the Director was entitled in Law to impose condition (d).

In resolving the issue whether the said condition was infringed need arises to consider the notion of dependent. In the relevant Regulatory Administrative Act No. 188 of 1982 there is no definition of the term «dependent» though we find such a definition in Regulatory Administrative Act No. 296 of 1973

which provides:

«Dependent of a person means:-

(a) His wife or her husband; and

(b) Includes any other person fully or mainly maintained by him or found under his supervision and care.»

But even if such definition is not applicable we have to give to the term dependent its ordinary meaning. It being an undisputed fact that applicant's daughter is aged 36 and is employed on a permanent basis, as a lecturer at the Higher Technological Institute, she cannot be considered as the applicant's dependent. And, also, it being an undisputed fact that the car was solely used by her for her own purposes we cannot but arrive at the conclusion that there was a breach of condition.

In view of this conclusion the respondent was fully entitled in law, by virtue of the aforesaid section 158 to proceed with confiscation; and his decision so to do was reasonably open to him on the basis of the material before him.

The submission of learned counsel under (a) above is clearly untenable. This is so because in effect it questions the validity of the original decision which was taken on 1st December 1984. In such decision condition (d) was included in express, clear and unequivocal terms and applicant was perfectly entitled to question it within the time prescribed by the Constitution. And once she failed to do so at the appropriate time she cannot claim relief belatedly by contending that as respondent had knowledge of her inability to drive he could not act controversially. The inability to drive, and the importation of the car, notwithstanding such inability, as well as the acceptance of condition (d) are her own problem and affair and she cannot blame the administration. Therefore, in view of all the above prayer (1) must fail.

Prayer (2)

The confiscation was made in the exercise of powers under section 178 of Law No. 82 of 1967 which provides:-

«178-(1) Save in respect of any of the offences under sections 9 and 10 the Director and any officer authorised in that behalf by the Council of Ministers, may compound any offence or act committed or reasonably suspected of having

been committed by any person against or in contravention of the provisions of any Customs and Excise Laws, on such terms and conditions as he, in his discretion, thinks proper, with full power to accept from such person a payment in money not exceeding the maximum penalty incurred or alleged to have been incurred under any Customs Laws for such offence or act.

(2) On payment of such sum to the Director or authorised officer, no further proceedings in regard to that particular offence or act shall be taken against the person who has so compounded and, if he is in custody, he shall be discharged.»

As the breach of condition (d) constitutes an offence under section 121(a) of the above Law, the respondent could lawfully compound the offence. Therefore the confiscation cannot be faulted on any ground and prayer (2) is bound to fail too.

Prayer (3)

I have already dealt with the legislative provisions which empower the Director to impose conditions. Once the Director is under the law empowered to impose conditions, his imposition of the new condition was reasonably open to him in the light of the material before him and in particular the breach by applicant of condition (d).

After all the imposition of conditions and all the action taken by the respondent is by virtue of the relevant legislation a matter within the discretion of the respondent and it is well established that this Court cannot interfere with such discretion if due weight has been given to all material facts and if it has not been based on a misconception of law or fact. None of these prerequisites have been satisfied by the applicant in this case (See inter alia *Merck v. The Republic* (1972) 3 C.L.R. 548).

Having concluded as above I would deal ex proprio motu with the jurisdiction of this Court to take cognizance of prayer (2) even if such issue has not been raised by the parties (See *Makaritou v. The Republic* (1984) 3 C.L.R. 100 at p. 104, where it was held that «it is permissible for the Court to raise at any stage of the proceedings on its motion matters affecting the jurisdiction of the Court».

In *S. Raftis Co., Ltd., v. The Municipality of Paphos* (1981) 3 C.L.R. 497, I said at pp. 501-502:

«The revisional jurisdiction of this Court under Article 146 of the Constitution is confined to decisions and acts or omissions of any organ authority or person exercising any executive or administrative authority and does not extend to other acts that do not come within this category In the case of *Phedias Kyriakides and The Republic*, 1 R S C C p 66, it was held that acts of the police manifestly necessary to lead up to and closely interwoven with prospective criminal proceedings did not constitute an exercise of 'executive or administrative authority' within the meaning of Article 146 of the Constitution

A fortion punishments imposed by Courts in the exercise of their criminal jurisdiction and their execution do not constitute an exercise of «executive or administrative authority» within the meaning of the said Article

Also in the case of *Charilaos Xenophontos and The Republic*, 2 R S C C p 89 it was held that the exercise of the authority of the Attorney-General to institute criminal proceedings was not within the ambit of Article 146 1 of the Constitution as being closely related to judicial proceedings in criminal cases and therefore this Court had no jurisdiction in the matter

In the case of *Modestos Pitsillos v Elias Aristodemou* (1969) 3 C L R p 226, Hadjianastassiou J at p 230 had this to say -

'With regard to the true construction of paragraph 1 of Article 146, it becomes very clear, in my view, from what I have already said, that the jurisdiction of this Court is confined only and exclusively to matters concerning a decision, act or omission of any organ, authority or person exercising executive or administrative authority and has no jurisdiction of competence to deal with the decision of the Appeal Court, complained of in this recourse, because it is a judicial decision and, therefore, cannot be made the subject of a recourse to this Court under the said Article 146 of the Constitution'

No doubt the proceedings and the judgments of civil and criminal Courts and the sentences imposed in c iminal cases are judicial acts and do not come within the ambit of Article 146 of the Constitution Likewise the execution of such judgments and the enforcement of punishments are a corollary of the judicial process and in any event are so closely connected with judicial acts that do not come within the ambit

f the said Article See *White Hills Ltd and others v The Republic* (1970) 3 C L R p 132 at p 134 and where reference is made also to *Xenofontos and The Republic* 2 R S C C 89 »

Furthermore reference may be made to the case of *Makantou v The Republic* (1984) 3 C L R p 100

It is clear from a mere reading of section 178, which governs compounding that compounding is resorted to in lieu of criminal proceedings and that after compounding the taking of any Court proceedings in respect of the alleged offence is prohibited

This being the position I hold that compounding is closely interwoven with criminal proceedings and as such it does not constitute an exercise of «executive or administrative authority» within the meaning of Article 146 of the Constitution

One cannot even with reservation of rights, elect to accept compounding and thus avoid criminal proceedings and the consequences therefrom, which include imprisonment and then question the validity of compounding before the Supreme Court The compounding clearly arose from the commission of criminal offence, punishable by the customs legislation and if applicant had cause to question the validity of the compounding, she ought to have declined to pay the amount of £300 and fight her case before the proper forum, the Criminal Court The attitude of the applicant in this case is nothing but a device to change forum It is for these reasons that I think, that the act of compounding is so closely interwoven with the institution of judicial proceedings that it cannot amount to the exercise of executive or administrative authority in the sense of Article 146 1 of the Constitution, therefore this Court has no jurisdiction to take cognizance of relief (2)

In the result the recourse must fail and is hereby dismissed There will, however, be no order as to costs

Recourse dismissed
No order as to costs