

1988 May 17

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

SYDNEY ALFRED MOYO AND ANOTHER,

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH

- 1. THE MINISTER OF INTERIOR,
- 2. THE MIGRATION OFFICER,
- 3. THE CHIEF OF POLICE,

Respondents.

(Case No. 311/88).

Aliens—The Deportation (British Subjects) Law, Cap. 108—Flagrantly inconsistent with the treaties, whereby the Republic of Cyprus was created and with its constitution—It ceased to be a good law as from the Independence of Cyprus.

Aliens—The Aliens and Immigration Law, Cap. 105—The definition of "alien"—No longer good law—As from the Independence of Cyprus alien is a person, who is not a citizen of the Republic.

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Provisional order—When granted—Principles applicable—In case of conflict, public interest should prevail over private interest.

Aliens—The right of the State to expel them.

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Applicant 1 is a holder of a passport of Zimbabwe. Applicant 2 a holder of a British passport. Following information concerning their activities with regard to national security, they were declared prohibited immigrants and there were issued deportation and detention orders.

Hence this recourse and the present application for provisional orders

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5 suspending the effect of the sub judice decision. They complained of "flagrant illegality" in that no notice was served on them under section 5 of Cap. 108. They alleged that if the Court does not issue the provisional order sought, they will suffer irreparable damage in that they will not have the opportunity to continue their job and studies, respectively, nor be able to be heard by the Court in the recourse.

10 *Held, dismissing the application:* (1) Cap. 105 was enacted in an era, when the British Empire was still at its height and Cyprus a Colony. It separated British subjects into two categories. British subjects who "belonged to the colony" and "immigrant British subjects". The object was to regulate the deportation of the latter.

15 The substratum of Cap. 108 was washed away by the Independence of Cyprus. British subjects are now aliens. Cap. 108 is flagrantly repugnant and inconsistent with the International Documents, whereby the Republic was established, and to the Constitution of the Republic. It has been repealed in virtue of Art. 188 of the Constitution.

As Cap. 108 is no longer law, the aforesaid issue of flagrant illegality fails.

20 (2) The definition of "alien" in Cap. 105 is no longer good law. An "alien" is now any person, who is not a Citizen of the Republic.

(3) Applicants failed to establish irreparable damage. Even if they had succeeded in proving such damage, public interest (national security) would have prevailed over their private interest.

25 (4) A state has a discretionary power to decide whether to expel an alien present in its territory, but this power must be exercised in such a way as not to infringe the rights under International Convention of the person concerned.

30 (5) The concept of "fair trial" (Art. 30 of the Constitution) does not require applicants' presence in Cyprus. We live in an era of advanced technology. The means of external communications of this country are so adequate that no difficulty exists in the prosecution of the case because of the absence of the applicants abroad, especially so, having regard to the nature of the proceedings under Art. 146.

*Application dismissed.
No order as to costs.*

Cases referred to:

Joyce v. Director of Public Prosecutions [1946] 1 All E.R. 181;

Michaelidou v. The Republic (1985) 3 C.L.R. 1836;

Rodat v. The Republic (1988) 3 C.L.R. 937;

AGEE v. The United Kingdom (Application No. 7729/76) 7 D.R., p. 164;

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Karaliotas v. The Republic (1987) 3 C.L.R. 1701.

Application for provisional order.

Application for a provisional order prohibiting the respondents from taking any measure for the implementation of the decision to deport applicants until the determination of the recourse against decision.

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N. Pirillides, for applicants.

P. Clerides, for respondents.

Cur. adv. vult.

STYLIANIDES J. read the following decision. By means of this application the applicants seek a provisional order "prohibiting all and each one of the respondents to take any measure for the implementation of the decision to deport the applicants, or any of them and/or to take any act for the aforesaid purpose until the determination of this recourse".

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An organization by the name "Youth With A Mission (Cyprus) Ltd.", of foreign origin with activities for the Middle East was registered under the Companies Law in this country. The seat of this company is Nicosia. Its declared activities appear in the Memorandum of Association, page 1 of which was attached to the affidavit sworn in support of the application by Jonathan Kel-

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ly Dieter of U.S.A., now of Limassol, the responsible for the activities of the said company in the town and District of Limassol.

5 Applicant No. 1 is a holder of a passport of Zimbabwe. On the 20th September, 1987, a temporary residence was granted to him to remain in Cyprus as student of this Youth With a Mission. This temporary permit expired on 10th March, 1988. On 10th February, 1988 he submitted an application for renewal of his resident permit in order to take-up employment as a staff worker/teacher with this Mission.

10 The applicant No. 2 is the holder of a British passport and he was in the Republic by virtue of a temporary licence as a student of the Youth With A Mission.

15 The Head of the Central Information Service of the Republic, by report to the Minister of the Interior gave him information concerning the movements and activities of the applicants with a Turk citizen in the old Limassol port, which were connected with the security of the State.

20 The Minister of the Interior, having considered the material placed before him, declared the applicants prohibited immigrants, decided their deportation and instructed and authorized the Director General of the Ministry to exclude both applicants from the country and proceed with the issue of Deportation and Detention Orders.

25 On 22nd March, 1988, Deportation and Detention Orders were made. These Deportation and Detention Orders were sent to the Commander of the Police for due execution.

30 On 26th March, 1988, the applicants were informed both of the Deportation and Detention Orders. They were arrested and they were told that they would be deported as soon as arrangements were made for the purpose.

The applicants immediately afterwards, 30.3.1988, filed this

recourse praying for the annulment of the decision of 22nd March, 1988 for their deportation and all actions taken for the deportation and detention.

They, also, filed this application for provisional order. The facts relied upon are set out in the affidavit sworn by Jonathan Kelly Dieter of U.S.A., now of Limassol, District Manager of this Mission at Limassol. 5

In paragraphs 18 and 19 of that affidavit it is stated that the administrative acts complained of - the Deportation and Detention Orders - are a flagrant violation of the Laws of the Republic and that applicants were never informed of the reasons of their detention and intended deportation; they were not allowed to make representations with regard to their alleged breaches of the Law. That if the Court does not issue the provisional order sought, the applicants will suffer irreparable damage in that they will not have the opportunity to continue their job and studies, respectively, nor be able to be heard by the Court in the recourse. Moreover the applicants' right to receive a reply to their applications for renewals of their permits will be defeated. 10 15

The application was opposed. The opposition was supported by affidavit of Christos Christoudhias, a member of the staff of the Migration office, in which he relates the facts as set out above and that on 7th April, 1988, the Minister of the Interior revoked the Order for the Detention, but not the decision declaring them prohibited immigrants and the Deportation Order. He deposed, further, that the decision to exclude the applicants and the Deportation Order was taken and issued in accordance with the Constitution, the Laws, and the Regulations. It is not in any way faulty in law or in fact. That suspension of the execution of that order will create serious problems to the Administration, to the preservation of the public order and security. That the applicants will not suffer any irreparable damage, and the administration of justice in their case will not, in any way, be hindered. If the provisional order is granted the Administration and the preservation of legality will be substantially and irreparably impaired, as the chal- 20 25 30 35

lenged order was issued for the security of the Republic.

5 The application is based on section 32 of the Courts of Justice Law, 1960, (Law No. 14/60), sections 11 and 17 of the Administration of Justice (Miscellaneous Provisions) Law, 1964, (Law No. 33/64), the Rules of the Supreme Constitutional Court, 13 and 18 and the Aliens and Immigration Law, Cap. 105.

At the request of counsel for the applicants, Christoudhias was cross-examined. The file of the Administration was produced.

10 Learned counsel for the applicants submitted that the interlocutory relief sought is the suspension of the execution of the administrative acts challenged by the recourse. Though this is slightly different from what is prayed in the application, nevertheless, having regard to the principles obtaining in the interpretation of recourses and applications in the sphere of Administrative Law, I
15 accept that this is the interlocutory order sought. It appears that counsel was influenced by section 32 of Law 14/60 governing the issue of interlocutory orders in the domain of Private Law.

20 He argued that there is a flagrant violation of the provisions of the Deportation (British Subjects) Law, Cap. 108 of the 1959 edition, of the Laws of Cyprus, in that the notice required under section 5 was not given; that the applicant was not presented before a Judge, and generally there was no compliance at all with the requirements prescribed by Cap. 108. He said that it applies to both
25 applicants, as the one is a British subject and the other is a citizen of a Colony of the Commonwealth.

30 That the applicants will suffer irreparable damages, as they will be deprived of their right to pursue properly their recourse, and this would not be done if they are out of the country, and will suffer, also, irreparable damage in that they will not have the opportunity to continue their job and studies, respectively, with the Mission.

The Deportation (British Subjects) Law was enacted on 21st

May, 1937. The island of Cyprus was a British Colony; the Cypriots were British subjects, either by the Cyprus Annexation Orders in Council 1914-1943, or by birth, or by reason of the grant by the Governor of a certificate of naturalization and/or otherwise.

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Cap. 108 of the Deportation (British Subjects) Law separated the British subjects in two categories: British subjects who "belong to the Colony" and the "immigrant British subjects". With regard to the immigrant British subjects the deportation, if their stay in the country was for a period of less than three months, could be decided by the Governor in Council after certain procedure, prescribed by the law, was followed. If they stayed in the country for a period longer than the one provided under section 2 (3), the approval of the Secretary of State for the Colonies was required before any deportation of an immigrant British subject could be made.

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At the time of the enactment of this Law, the British Empire was covering almost the one fourth of the globe and it was being said that the sun did not set in that Empire. Hundreds of millions of persons in the British Empire were British subjects. The British subjects owed allegiance to the British Sovereign and were entitled to the protection extended to British subjects. The effect of the possession of the passport is stated in the Judgment of Lord Jowitt L.C., in *Joyce v Director of Public Prosecution* [1946] 1 All E.R. 181 at p. 191. Ever since, cataclysmic events took place.

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The decades that followed the second world war witnessed the decline and dissolution of the Empire. The wind of freedom swept away the Empire. New states were born or created in the place of the Empire. Most of these states formed the Commonwealth, which is a loose link of states.

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On the 16th August, 1960, the International Status of Cyprus changed. The Republic of Cyprus was established.

5 The citizenship of the new State is governed by the provisions of Article 198 of the Constitution and the Treaty of Establishment, that is the Treaty concerning the establishment of the Republic of Cyprus between the Republic, the Kingdom of Greece (now Republic of Greece), the Republic of Turkey and the United Kingdom of Great Britain and Northern Ireland.

10 Pursuant to the provisions of Article 198, the Republic of Cyprus Citizenship Law, 1967, (Law No. 43/67) was enacted and came into operation on 1st December, 1969. The provisions of Annex "D" of the Treaty of Establishment have been adopted as part of the definition of "citizen of the Republic" and are found in section 3 of this Statute - (see *Aliki Michaelidou v. Republic* (1985) 3 C.L.R. 1836).

15 The object of that Law was to provide grounds and machinery for the deportation from a British Colony (Cyprus) British subjects - immigrant British subjects, persons who owed allegiance to the same Sovereign, as the British subjects belonging to the then Colony. Both the substratum and the substantive provisions of this Law were washed away by the change of the status of this country in the international field. This is no more a British Colony. The Secretary of State of the British Government is a Minister of a Foreign Power with no right, power, or authority whatsoever in the Republic of Cyprus. The British subjects are aliens and have no more rights than any other foreign citizen, except as
20 may be provided by Bilateral or International Agreement. This Law was in force on the date of the coming into operation of the
25 Constitution. It is flagrantly repugnant and inconsistent with the International Documents, whereby the Republic was established, and to the Constitution of the Republic.

30 Therefore, in virtue of the provisions of Article 188, which provides that laws pre-existing the Constitution shall be construed and applied with such modification as may be necessary to bring into conformity with the Constitution, the Deportation (British Subjects) Law, Cap. 108 was repealed. "Modification" includes
35 repeal. As from 16th August, 1960 it is no more in force. It is not

part of the Law of the country.

An "alien" in Cap. 105 was defined at the time of the enactment of this Law - 19th June, 1952, "a person who is not a British subject or the citizen of the Irish Republic or a native of the Colony". This is no more good law. "Alien" now means a person who is not a citizen of the Republic. The applicants are aliens - (see Aliens and Immigration Regulations 1972). 5

In view of the above the non-compliance with Cap. 108 - a dead law - is not a flagrant illegality, nor an illegality at all.

The provisional order in Administrative Law is different from an interlocutory order in the domain of Private Law. Section 32 of the Courts of Justice Law is not applicable. The principles and the grounds on which a provisional order is given in Administrative Law differ from those obtaining in Civil Law. 10

A provisional order is a drastic remedy which would be sparingly given. It is granted when the administrative act is tainted with flagrant illegality, that is illegality which is palpably identifiable on the face of the recourse. 15

Provisional order, also, may be granted when there is clear evidence of irreparable damage, which must be specifically and succinctly pleaded. 20

As a provisional order is an exceptional discretionary measure, the general interest should not be sacrificed and it should prevail over the private interest of the applicant - (see, inter alia, *Monica Rodat, v. The Republic* (1988) 3 C.L.R. 937). 25

Article 32 of the Constitution provides that the Republic is not precluded from regulating by law any matters relating to aliens in accordance with the International Law.

International Law includes Bilateral or Multilateral Conventions.

5 It has been constantly held that the right of an alien to reside in the territory of the country is not as such guaranteed by the European Convention on Human Rights. On the contrary, it is clearly implied by Article 5(1)(f) of the Convention and Article 11.2(f) of the Constitution, that the High Contracting Parties and the Republic of Cyprus intended to reserve to themselves the power to deport aliens from their territory. A state has a discretionary power to decide whether to expel an alien present in its territory, but this power must be exercised in such a way as not to infringe the rights under International Convention of the person concerned - (see *AGEE v. The United Kingdom*, Application No. 7729/76, 7 D.R., p. 164 at pp. 172-173; *Karaliotas v. Republic*, (1987) 3 C.L.R. 1701.

The irreparable damages pleaded are: -

- 15 (a) That the applicants will lose their job and student-ship, respectively with this Youth With A Mission; and
- (b) That they will be deprived of the right to be present throughout the prosecution of their recourse.

20 They have no right to remain in this country, unless the authorities of the country in the exercise of the territorial supremacy grant such a right to them, and they have not been granted such a right to remain in the country.

25 The loss of a temporary job and the discontinuance of student-ship in a Mission of the nature of this company is not irreparable damage. Even if it were, it would not be such as to tip the scales in favour of the grant of a provisional order contrary to public interest - national security.

The second leg is based on Article 30 of the Constitution, which corresponds to Article 6 of the European Convention on Human Rights.

A perusal of the recourse and of the opposition and the affidavit in support of this application indicates that the determination of the recourse will be basically based on documents. The file of the Administration is before the Court. If, at any stage, the testimony of the applicants is necessary, such testimony may be furnished, either in the form of affidavit sworn abroad, or by other procedures. This Court will deal with them, if and when the need arises.

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We live in an era of advanced technology. The means of external communications of this country are so adequate that no difficulty exists in the prosecution of the case because of the absence of the applicants abroad, especially so, having regard to the nature of the proceedings under Article 146 and the procedure followed by this Court in its Inquisitorial Revisional Jurisdiction.

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In sum, the applicants are aliens. They have no right to remain in this country without permission from the competent authorities of the Republic.

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The Deportation (British Subjects) Law, Cap. 108, was, as from the establishment of the Republic, repealed, by being repugnant and inconsistent and not in conformity with the provisions of the Constitution.

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The applicants have not discharged the burden of persuading the Court that they will suffer irreparable damage. Even if the allegations of the applicants constitute irreparable damages, which the Court finds that they do not, they are not such as to prevail over the general interest.

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In the result, the application for provisional order is dismissed with no order as to costs.

*Application dismissed
with no order as to costs.*

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