

1988 December 15

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CHARALAMBOS BOYADJIS,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE DIRECTOR OF CUSTOMS,

Respondent.

(Case No. 478/86).

Customs and Excise Duties—Duty free importation of goods (Motor vehicles, importation of by Cypriots)—Power to impose conditions for the exemption—The Customs and Excise Duties Law 18/78, sub-heading 19 of item 01 of the 4th Schedule—Breach of condition that could be lawfully imposed—Effect—Power to confiscate the goods in question—The Customs and Excise Law, 1967 (Law 82/67), section 158.* 5

Customs and Excise Duties—Duty free importation of goods (Motor vehicles, importation of by Cypriots)—Whether following confiscation for breach of a condition (section 158 of the Customs and Excise Law, 1967 (Law 82/67) there is power to demand the payment of normal import duty as a condition of returning the goods to their owner— Question determined in the affirmative—Herodotou v. The Republic (1987) 3 C.L.R. 874 followed—Judicial control of the exercise of such discretionary power—Principles applicable. 10

Acts or decisions in the sense of Art. 146.1 of the Constitution—Customs and Excise Duties—Compounding of offences—The Customs and Excise Law, 15

* The condition in this case was that the vehicle shall only be used by the applicant and his dependants and shall not be lent, hired, exchanged, given away or otherwise disposed of in the Republic without respondent's prior written consent.

1967 (Law 82/67), section 178—The compounding is so closely interwoven with criminal proceedings that it is outside the ambit of Art. 146.1 of the Constitution—*Herodotou v. The Republic* (1987) 3 C.L.R. 874 followed.

5 The facts of this case are very similar to those in *Herodotou v. The Republic* (1987) 3 C.L.R. 874. The condition imposed in this case for the duty free importation of a motor vehicle appears in the footnote. Following evidence that the car in question was used by applicant's son and daughter-in-law, the respondent ordered its confiscation. Later, he decided to compound the offence and returned the car on condition that the normal import duty would be paid. Hence this recourse, whereby the applicant challenged the condition of payment and the compounding. The recourse was dismissed. The legal principles emanating from the decision sufficiently appear from the headnote to this case.

15 *Recourse dismissed.*
No order as to costs.

Case referred to:

Herodotou v. The Republic (1987) 3 C.L.R. 874;

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

Recourse.

20 Recourse against the decision of the respondent to order applicant to pay the import duty of car R.R. 928 and also to pay £300.= fine for contravening the condition imposed on the permit granted to him to import the said car duty free as a repatriated Cypriot.

25 *L. Georghiadou (Mrs.)*, for the applicant.

D. Papadopoulou (Mrs.), for the respondents.

Cur. adv. vult.

30 SAVVIDES J. read the following judgment. By the present recourse the applicant challenges the decision of the respondent Director of Customs and Excise communicated to him by letter da-

ted 20th June, 1986, depriving him of the benefit to possesss a duty-free car and ordering the payment of the import duty on the said car and also of a fine in respect of customs offences.

The applicant is a repatriated Cypriot who having settled in the United States for a number of years returned to Cyprus for the purpose of permanent settlement. 5

Under the provisions of sub-heading 19 of item 0.1 of the Customs and Excise Duties Law, the applicant being entitled to a duty-free car upon his repatriation, was permitted to import a Mercedes car under Registration R.R. 928 free of import duty. 10 The permit was granted under certain conditions which appear in Appendix A to the opposition one of which, condition (d), was as follows:

"The vehicle shall only be used by you and your dependants 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." 15

In May, 1986, it came to the knowledge of the respondent that the said car was possessed and used by the son of the applicant and his daughter-in-law in breach of the condition endorsed on the permit for the grant of a car free of import duty. In pursuance with the investigation in question customs officials visited the house of his son and found the car parked in the parking place of his house and confiscated same by virtue of the provisions of the relevant legislation. Applicant's daughter-in-law made a statement to the effect that the car was driven by her and her husband but they were mostly using it for applicant 's benefit. A few days later applicant's son attended the customs department and handed over a letter addressed to the respondent the contents of which read the follows: 20 25 30

"I am the owner of a Mercedes car under registration RR 928. I understand that the permit which was granted to me to circulate the said car has been suspended and I request that the

necessary arrangements be made for the payment of the import duty claimed as I am not in a position to drive such car."

5 On the 22nd May, 1986, the applicant addressed a new letter to the respondent requesting the return of his car because he needed it for the purposes set out in the said letter which were:

(a) That he was an invalid and could not drive; and

10 (b) The car was used daily by his son and daughter-in-law for his transportation to the doctor for physiotherapy, his transportation to the club and generally for his needs. The reason why the car was parked at the house of his son and daughter-in-law according to his letter was because had it been parked near his own house it would have been difficult for his son and daughter-in-law to use it for serving him.

15 Written statements were taken from the applicant and his son (Appendices E.F.G. to the opposition) in which it is admitted at that the car was in the possession of applicant's son and daughter-in-law but it is alleged that they were using it for applicant's needs. Applicant's son tried to throw the blame to the customs officials who granted the permit to his father without having explained to him the condition that the car should be possessed and
20 used exclusively by the applicant and not by any other person.

On the 20th June, 1986, the Customs Department informed the applicant and his son that their contraventions amounted to customs offences which could be settled with the payment of £300.-
25 fine each and that the car would be returned to them if they paid the import duty on the said car amounting to £14,027.26.

30 Applicant by letter of his advocate dated 27th June, 1986 addressed to the respondent, asked for information concerning the reasons for the confiscation of his car, particulars of the alleged customs offences and the reasons relied upon for reaching a decision that the applicant was not entitled to import duty relief for his car.

By letter dated 14th July, 1986, the respondent supplied the information requested. The contents of such letter read as follows:

"I refer to your letter dated 27.6.86 and wish to inform you that the aforesaid car has been confiscated as liable to confiscation on the basis of s. 158 of the Customs and Excise Law, 1967 because it has been ascertained that there has been a violation of the conditions of relief from import duty.

5

Criminal proceedings may be instituted against Charalambos Boyadjis for contravention of the conditions for the relief granted to him by virtue of s. 192 A and/or for fraudulent evasion of duties by virtue of s.191 (1) (b) and against Antonios Boyadjis for fraudulent evasion of import duties and/or unlawful possession by virtue of Article 191(1) (a) of the aforesaid Law.

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I have not decided that your client is not entitled to relief from import duty but I have ascertained that the conditions of item 01.19 of the Fourth Schedule of the Customs and Excise Duties Law, 1978 have been violated and the car is subject to confiscation.

20

Within the margins of a settlement, a power granted to me by s.178 of the Customs and Excise Law, 1967, I will be prepared instead of taking criminal proceedings to accept a cash payment of £300.- by each of the suspects and instead of proceeding to confiscate the car to return same after the import duties amounting to £14,027.26 are paid."

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In reply to the above letter counsel for applicant by letter dated 18th July, 1986, informed the respondent that his clients were prepared to pay the sums mentioned in the letter of the 14th July, 1986, with reservation of their rights and at the same time denied that they committed any offence in respect of the forfeited car.

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The respondent in the exercise of his power under s. 178 of

the Customs and Excise Law, 1967, accepted the offer, compounded the offences and returned the car to the applicant. Subsequently, the applicant filed the present recourse challenging the decision of the respondent and praying for:

- 5 (a) A declaration of the Court that the decision of the respondent Director of Customs and Excise dated 20th June, 1986, that the applicant cannot possess such car without the payment of duty is null and void and of no effect whatsoever; (b) that the decision of the respondent dated 20th June, 1986, to order the payment of
10 the import duty for car RR 928 and the relevant fine is null and void and of no effect whatsoever.

The grounds of law on which the recourse is based as set out therein are:

- 15 That the sub judice decision is contrary to the law and the regulations; it is arbitrary, unreasonable and oppressive and violates the vested right of the applicant and is contrary to the rules of natural justice; it was taken in excess and/or in abuse of powers; it lacks due reasoning and was taken by a wrong procedure.

- 20 Counsel for applicant by her written address expounded on the grounds of law advanced in support of the recourse. She submitted that the fact that applicant was an invalid was known to the respondent as at the time of his arrival in Cyprus and visit to the customs' offices he was supported by crutches and, therefore, this fact should have been taken into consideration by the respondent in exercising his discretion to impose condition (d) on the
25 permit granted to the applicant. The applicant authorized the use of the car by his son and daughter-in-law for the purpose of driving it in order to serve his own needs in the same way as if he had hired a driver to drive it. Under the law a repatriated family is entitled to one car and such car can be driven by the members of the family of the person importing the car. Therefore, the interpretation given by the respondent that dependent persons means persons who are depended on the person entitled to such relief is
30 wrong. In the circumstances, counsel added, there was no alter-

native for the applicant who was an invalid but to ask his son to drive same on his own account and for his benefit.

She further contended that the imposition of a fine and the confiscation of the car were illegal and that the respondent has never given any reason for his decision. 5

Counsel for the respondent, on the other hand, contended that the decision of the respondent dated 20th June, 1986, is not an executory administrative act and what should have been challenged in this case is the decision of the 15th May, 1986, for the confiscation of the car. She further contended that the applicant 10 accepted the administrative act and offered to pay the import duty in question and by his letter shortly after the confiscation of the car accepted to pay tax without any protest against the decision of the respondent to confiscate the car and without any reservation, thus, having deprived himself of any legitimate right he might 15 have had.

She finally contended that the sub judice decision was properly taken under the provisions of the law as the applicant clearly contravened the conditions subject to which the relief from import duty was granted to him. 20

I shall deal first with the first prayer of applicant.

The sub judice confiscation was effected by virtue of the provisions of s. 158 of the Customs and Excise Law, 1967 (Law 82/67) which provides as follows:

"158.- (1) Εάν δυνάμει οιασδήποτε διατάξεως του παρόντος ή ετέρου τινός Νόμου ή εθίμου, δι' ης - 25

(α) επιτρέπεται όπως εμπορεύματα υποκείμενα εις τελωνειακόν δασμόν παραδοθώσιν άνευ της πληρωμής του αναλογούντος αυτοίς δασμού, επί τω όρω ότι ταύτα δεν θα πωληθώσιν ή θα επανεξαχθώσιν ή επί παρομοίω 30 τινί όρω ή .

(β) το ποσόν του πληρωτέου εφ' οιωνδήποτε εμπορευμάτων δασμού ήρτηται εκ της εισαγωγής αυτών επί παρομοίω όρω, επιτραπή η παράδοσις εμπορευμάτων άνευ πληρωμής του αναλογούντος αυτοίς δασμού ή επί τη πληρωμή δασμού υπόλογισθέντος συμφώνως προς την εν λόγω διάταξιν ή έθιμον και ο όρος δεν τηρηθή, τα εμπορεύματα υπόκεινται εις δήμευσιν, εκτός εάν η μη τήρησις του όρου έτυχεν της εγκρίσεως του Διευθυντού.

(2) Αι δατάξεις του παρόντος άρθρου τυγχάνουσιν εφαρμογής, ανεξαρτήτως εάν παρεσχέθη δέσμευσις ή εγγύισις, δια την τήρησιν του όρου ή δια την καταβολήν του πληρωτέου ανεξαρτήτως της τοιαύτης δεσμεύσεως ή εγγυήσεως δασμού, η δε δήμευσις εμπορευμάτων δυνάμει του παρόντος άρθρου ουδόλως επηρεάζει την ενοχήν του παρασχόντος την τοιαύτην δέσμευσιν ή εγγυήσιν πρόσωπου."

and in English it reads:

"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 not 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 the above that confiscation may be resorted to when the conditions, which are imposed for the exemption from payment of import duty are not complied with. The questions which arise are: 5

(a) Whether the condition in question, condition (d) in the present case, could be imposed, and;

(b) Whether there was a breach of such condition. 10

The aforesaid questions and the question of confiscation of a car imported duty-free when there is a breach of such condition were recently considered and decided in the case of *Eleni Erodotou v. The Republic* (1987) 3 C.L.R. 874 by A. Loizou, J. (as he then was). The facts in that case were substantially the same as in the present case and the law applicable has been extensively and lucidly stated by my brother Judge A. Loizou (now President of this Court). He had this to say in his judgment at pp. 879, 880: 15

"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: 20

'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.' 25

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 30

law impose conditions and restrictions.

Section 11(1) reads:

5 '..... 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).

10 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:-

- 15 (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.'

20 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.

25 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." 5 10

I fully adopt the above opinion for the purposes of the present case. 15

It is an undisputed fact in the present case that the son of the applicant and his daughter-in-law are not dependent on the applicant. Applicant's son is a merchant and he lives separately from the applicant with his family consisting of his wife and three children. Applicant's son owned a Mercedes car which he sold in 1985 the same year in which applicant was granted a permit to import the car in question duty-free. By no stretch of imagination, in the circumstances of the present case, can applicant's son be considered as a dependent of the applicant within the meaning of the Law. 20 25

In the circumstances of the case there has been clearly a breach of the condition imposed and the respondent was fully entitled, in the exercise of his powers under s. 158 of the Customs and Excise Law, 1967, to confiscate the car. 30

What the applicant however, is challenging by this prayer is not the confiscation of the car which was effected on the 15th May, 1986, but the decision of the respondent that applicant is not entitled to a duty-free car.

5 Once the act of confiscation, which as I have already found was lawfully taken, has not been challenged, it was within the powers of the respondent under s.158 to impose conditions for the return of the car and claim the payment of the import duty due on such car. The matter was one of exercise by him of his discretion and it is well settled that this Court cannot interfere with such discretion if due weight has been given to all material facts and it has not been based on a misconception of law or fact. (See, inter alia, *Merck v. The Republic* (1972) 3 C.L.R. 548, etc)

10 The only question which remains, from the second prayer, to be considered, is the question of the imposition of the fine to the applicant. It is clear that the decision of the respondent to impose a fine of £300.- on his son is not being challenged as his son has not filed a recourse in respect thereof.

15 In *S. Raftis Co. Ltd. v. The Municipality of Paphos* (1981) 3 C.L.R. 497 at pp. 501, 502 it was decided as follows:

20 "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 *Phe-
dias 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.

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30 A fortiori 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 au-

thority 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 Pistillos 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 or 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 criminal 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 of the said Article. See *White Hills Ltd. v. The Republic* (1970) 3 C.L.R. 132 p. 134 and where reference is made also to *Xenofontos and The Republic*, 2 R.S.C.C. 89."

Section 178 of Law 82/67 provides as follows:

"178.- (1) Εξαιρουμένης της περιπτώσεως αδικημάτων δυνάμει των άρθρων 9 και 10, ο Διευθυντής και πας επί τούτω εξουσιοδοτημένος υπό του Υπουργικού Συμβουλίου δύνανται να συμβιβάζωσιν οιονδήποτε αδίκημα ή

πράξιν, ήτις ήθελε διαπραχθή ή δι' ην υπάρχει εύλογος υποψία ότι διεπραχθή υπό τινός προσώπου κατά παρέκκλιση ή παράβασιν των διατάξεων οιουδήποτε των περί Τελωνείων ή Φόρων Καταναλώσεως Νόμων, υπό 5 όρους καθοριζομένους υπ' αυτών κατά το δοκούν, κέκτηνται δε πλήρη εξουσίαν, όπως αποδέχωνται εκ του προσώπου τούτου χρηματικήν πληρωμήν, μη υπερβαίνουσαν την ανώτατην χρηματικήν ποινήν την προβλεπομένην υπό τινός τελωνειακού νόμου δια το τοιούτο αδίκημα ή πράξιν.

(2) Επί τη πληρωμή του τοιούτου ποσού εις τόν Διευθυντήν ή εξουσιοδοτημένον λειτουργόν, απαγορεύεται η λήψις περαιτέρω δικαστικών μέτρων δια το εν λόγω 15 αδίκημα ή πράξις εναντίον του ούτω συμβιβασθέντως, εάν δε ούτος τελή υπό κράτησιν αφίεται ελεύθερος."

and in English it reads:

"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 20 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 conditions as they may think proper, with full power to accept from such person a payment in money, not exceeding the maximum fine provided for under any customs law for such offence or act.

(2) On payment of such sum to the Director or authorized officer, further legal proceedings in respect of that particular offence or act against the person who has been so compounded are prohibited and, if he is in custody, he shall be 30 discharged."

It is clear from the contents of the above section that compounding is resorted to in lieu of criminal proceedings and that af-

ter compounding the taking of any Court proceedings in respect of the alleged offence is prohibited.

In this respect I share the view expressed by A. Loizou, J. in *Erodotou v. The Republic* (supra) "that the compounding is closely interwoven with criminal proceeding and as such it does not constitute an exercise of executive or administrative authority within the meaning of Article 146 of the Constitution".

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Having found as above I consider it unnecessary to deal with any other legal objections.

In the result this recourse fails and is hereby dismissed but in the special circumstances of this case I make no order for costs.

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*Recourse dismissed.
No order as to costs.*