

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ANDREAS K. PSARAS,

Applicant,

and

THE MINISTRY OF COMMERCE AND INDUSTRY,

Respondent.

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(Case No. 286/70).

Imports (Regulation) Law, 1962 (Law No. 49 of 1962, as amended by Law No. 7 of 1967), section 3—Restriction or regulation of the importation of goods—Order made by the Minister of Commerce and Industry under said section 3, regarding, inter alia, importation of potato seed i.e. subjecting such importation to licence to be issued by the Minister—See this Order under Notification No. 327, published in Supplement 3 of the Official Gazette of the Republic No. 654 dated 24th May, 1968—Refusal of such import licence—Neither section 3 and the said Order made thereunder nor such refusal can be said to be repugnant to any provision of the Constitution, particularly Article 25 thereof—So long as such restriction or regulation of the importation of goods, or such refusal are made, as in this case, in the public interest in general or for any other object set out therein—In the instant case, considering the benefits to the economy of the country as a whole it cannot be said that such powers, restricting and limiting the importation of potato seed, were not necessary in the public interest—Cf. Article 25.2 of the Constitution.

Imports (Regulation) Law, 1962, supra—Restrictions of importation of goods made thereunder not limited solely to importers—traders.

Constitutional law—Article 25 of the Constitution—Right to exercise or carry on any profession, occupation, trade or business—Scope and effect—Refusal to grant import licence for importation of potato seed—Not unconstitutional—Restrictions placed on the importation of such goods as well as the subject refusal to issue the import licence in question, held to be necessary in the public interest within the provisions of paragraph 2 of Article 25 of the Constitution.

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Potato seed—Refusal to grant the applicant a licence for the importation into Cyprus of 200 tons of potato seed—Discretion of the Minister—Such refusal held not to contravene either Article 25 of the Constitution or any provision of the said Law No. 49 of 1962 (as amended by Law No. 7 of 1967) (supra) or any principle of administrative law—Issue of such licence a matter within the discretion of the Minister under section 4 of that Law—Relevant discretion properly exercised in the public interest and for the purposes for which such power was granted to the Minister—Therefore, there has been no excess or abuse of powers in the instant case.

Discretionary power—Properly exercised—No abuse or excess of powers—No infringement of any principle of administrative law—Or of any constitutional or statutory provision—See supra.

Potato Marketing Law, 1964 (Law No. 59 of 1964)—Not unconstitutional—In view of the provisions of paragraph 3 of Article 25 of the Constitution.

Constitutionality of legislation—Nature of the judicial control of the constitutionality of legislation and of the powers of the Supreme Court to exercise judicial supervision of the constitutionality of legislation on a recourse under Article 146 of the Constitution directed solely against administrative acts or decisions (or omissions).

By this recourse the applicant, who is a potato grower, seeks to challenge the validity of the decision of the Minister of Commerce and Industry, dated the 26th September 1970, refusing to grant him a licence to import into Cyprus potato seed for the winter season, as being unconstitutional (*viz.* contrary to Article 25.1 of the Constitution), contrary to the relevant legislation (*supra*), *ultra vires* and contrary to law *i.e.* contrary to the general principles of administrative law and in excess and abuse of powers.

Rejecting all the above submissions by counsel for the applicant, the Court dismissed the recourse.

Section 3(1) of the Imports (Regulation) Law, 1962 (Law No. 49 of 1962) as amended by Law No. 7 of 1967 lays down that :—

“ Whenever it becomes necessary in the public interest to restrict and regulate the importation of goods for the encouragement of local production and manufacture, the

improvement of the balance of trade, compliance with international obligations or the development of the economy of the Republic, the Minister (*viz.* the Minister of Commerce and Industry) may by order published in the Official *Gazette* of the Republic restrict and regulate the importation of the goods specified in the order ”.

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Potato seed is one of the commodities the importation of which was thought necessary to be restricted and regulated as appearing in the First Schedule to the Order made by the Minister under the said section and which was published under Notification No. 327 in Supplement 3 of the Official *Gazette* of the Republic No. 654 of the 24th May, 1968. There was, thus, legal authority to subject the importation of potato seed to the requirement of a licence. By refusing in the instant case to issue the import licence in question for the reasons given in his decision (see *infra* in the judgment), the Minister was held to have exercised his discretion properly in the public interest for the purpose for which this power was granted by the statute.

On the other hand, Article 25.1 and 2 of the Constitution, relied upon by counsel for the applicant in support of his plea of unconstitutionality of section 3 of the said Law No. 49 of 1962 as well as of the aforesaid Order of the Minister and his subject decision, reads as follows :

“ 25.1. Every person has the right to practise any profession or to carry on any occupation, trade or business.

2. The exercise of this right may be subject to such formalities, conditions or restrictions as are prescribed by law and relate exclusively to the qualifications usually required for the exercise of any profession or are necessary only in the interests of the security of the Republic or the constitutional order or the public safety or the public order or the public health or the public morals or for the protection of the rights and liberties guaranteed by this Constitution to any person or in the public interest :

Provided that no such formalities, conditions or restrictions purporting to be in the public interest shall be prescribed by a law if such formality, condition or restriction is contrary to the interests of either Community. ”

Dismissing the recourse, the Court :—

Held, (1). Article 25.1 of the Constitution safeguards the right of the individual to practise any profession or to

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carry on any occupation, trade or business. Paragraph 2 thereof provides that “the exercise of this right may be subject to such formalities, conditions or restrictions as are prescribed by law and are *inter alia* necessary only.... . . . in the public interest”. It regulates, therefore, the conditions under which a profession, trade or business may be exercised. The requirement of a licence for the importation of a particular type of goods does not amount to a prohibition to carry on a profession or trade or business. One may still become an importer in respect of these goods or other goods subject to certain conditions which are necessary *inter alia* in the public interest.

(2) I hold, therefore, that section 3 of the Imports (Regulation) Law, 1962 (Law No. 49 of 1962) as amended by Law No. 7 of 1967, is constitutionally valid so long as the restriction or regulation of the importation of goods is made, as in the present case, in the public interest or for any other of the objects set out in the said section *i.e.* the encouragement of local production and manufacture, the improvement of the balance of trade, compliance with international obligations and the development of the economy of the Republic, all being objects that bring it within the ambit of paragraph 2 of Article 25 (*supra*), the very terms of which render it manifestly a provision of law necessary in the public interest. (*Hussein Irfan and Others and The Republic*, 3 R.S.C.C. 39, *reasoning thereof followed*).

(3) Regarding the argument of counsel for the applicant that limitations might be imposed for importers but not for a potato grower as the applicant who is not exercising a trade or profession other than that of a farmer, I am in agreement with counsel for the respondent that Article 25 of the Constitution applies to cases of restrictions regarding the person who will engage in a trade or business but it does not limit the power of the legislator to control the manner in which a trade will be carried out. (*Sec Impalex Agencies Ltd. v. The Republic* (1970) 3 C.L.R. 361). To my mind, however, limitations on the importation of goods can in a proper case be considered as violating Article 25 of the Constitution and this is borne out by the decision in *Hussein Irfan and Others and The Republic* (*supra*). In the present case, however, there is nothing to suggest that more restrictions were placed on the applicant than were necessary in the public interest in violation of Article 25 of the Constitution.

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(4) The issue or not of a licence is left to the discretion of the Minister as set out in section 4(2) of the aforesaid Law No. 49 of 1962 (*supra*) and so long as the Minister exercises his discretion within the object of the law the exercise of same is lawful. Furthermore, the discretion is exercised in a lawful manner, if in its exercise all material considerations have been taken into account, due weight is given to material facts and has not been based on a misconception of law or fact. A defective exercise of discretionary power may, therefore, amount to an excess or abuse of power. In the present case nothing has been suggested to show that the discretion was not exercised in a proper way or that the Minister has acted contrary to law *i.e.* contrary to any settled principle of administrative law.

*Application (recourse) dismissed.
No order as to costs.*

Per curiam : (As to the nature of the judicial control of the constitutionality of legislation) : It is pertinent to quote here a passage from the judgment of Triantafyllides, J. (as he then was) in the case of *Christodoulos Kyriakides (No. 2) v. The Council for Registration of Architects and Civil Engineers* (1965) 3 C.L.R. 617, (approved on this point on appeal by the Full Bench : See (1966) 3 C.L.R. 640) where at p. 623 it is stated :

“ The power of this Court to exercise judicial supervision over the constitutionality of legislation, is not the exercise of any substantive power to review and annul acts of the legislature, but it is only part of the discharge of judicial power vested in this Court for the purposes of these proceedings under Article 146 of the Constitution ; it is a necessary concomitant of the power to hear and dispose of a case properly before the Court by bringing to bear upon its determination the test and measure of the law (*vide Adkins v. Children's Hospital and Lyons*, 261 U.S. 525 ; 67 Law. Ed. 785). A corollary thereof is that constitutional questions should be decided only when necessary ”.

Per curiam : (As to the alleged unconstitutionality of the *Potato Marketing Law*, 1964) :

I do not find that the determination of the constitutionality of this Law or any part thereof is necessary for the purposes of these proceedings. Had it been necessary, however, to adjudicate upon it, I would have no hesitation in deciding

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that this Law is not unconstitutional, as it comes within the ambit of paragraph 3 of Article 25 of the Constitution.

Note : Paragraph 3 of Article 25 reads as follows :

“ 3. As an exception to the aforesaid provisions of this Article a law may provide, if it is in the public interest, that certain enterprises of the nature of an essential public service or relating to the exploitation of sources of energy or other natural resources shall be carried out exclusively by the Republic or a municipal corporation or by a public corporate body created for the purpose by such law and administered under the control of the Republic, and having a capital which may be derived from public and private funds or from either such source only :

Provided that, where such enterprise has been carried out by any person, other than a municipal corporation or a public corporate body, the installations used for such enterprise shall, at the request of such person, be acquired, on payment of a just price, by the Republic or such municipal corporation or such public corporate body, as the case may be. ”

Cases referred to :

Kyriakides (No. 2) v. The Council for Registration of Architects and Civil Engineers (1965) 3 C.L.R. 617, at p. 623 (approved on appeal on this point by the Full Bench : See (1966) 3 C.L.R. 640).

Adkins v. Children's Hospital and Lyons, 261 U.S. 525 ; 67 Law. Ed. 785 ;

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

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

Recourse.

Recourse against the refusal of the respondent to grant to applicant a licence to import potato seed.

Chr. Mitsides, for the applicant.

K. Talarides, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

The following judgment was delivered by :—

A. LOIZOU, J. : By the present application the applicant seeks to challenge the validity of the decision of the Mi-

nister of Commerce and Industry, communicated by letter dated the 26th September, 1970, refusing to grant him a licence to import into Cyprus potato seed for the winter season, as being unconstitutional, *ultra vires* and illegal.

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The application is based on the following grounds of law :

1. " Section 25. 1 of the Constitution does not impose any restrictions on the importation of Potato seed so long as it is certified that it is free from any phytopathological disease and is proper and fit for planting into Cyprus.
2. That Law 59/64 does not and cannot impose any conditions on the importation of sound potato seed.
3. That the said act or decision of the respondents restrain and/or restrict unlawfully the free activities of the individual contrary to the constitution."

The facts of the present case are as follows : The applicant and his family are potato growers from the village of Xylophagou, planting approximately 200 donums of potatoes every year. On the 16th September, 1970, the applicant addressed to the Director-General of the Ministry of Commerce and Industry, Nicosia, the following application, which is *exhibit* 1. It reads as follows :

«16η Σεπτεμβρίου, 1970.

Γενικόν Διευθυντήν,

Υπουργείου Ἐμπορίου καὶ Βιομηχανίας,

Λευκωσίαν.

Ἐντιμε Κύριε,

Ἐξαιτούμαι ἄδειαν εἰσαγωγῆς πατατοσπόρου ποικιλίας Aggan Banner καὶ up-to-date ἢ οἰασδήποτε ἄλλης ποικιλίας τὴν ὁποίαν ἐγκρίνει τὸ Ὑπουργεῖον Γεωργίας διὰ τὴν χειμερινὴν σαίζον 70-71, ἢ ποσότης ἢ ὁποία χρειάζομαι εἶναι 200 τόνοι.

Ἐλπίζω νὰ ἔχω τὴν εὐνοϊκὴν ἀπάντησίν σας τὸ συντομώτερον πρὸς ἀποφυγὴν περαιτέρω προστριβῶν.

Μετὰ τιμῆς,
(Ὑπ.) Ἀνδρέας Κ. Ψαρᾶς.»

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By letter dated 26th September, 1970, photocopy of which is attached to the application the said Director replied as follows :

«ΥΠΟΥΡΓΕΙΟΝ ΕΜΠΟΡΙΟΥ
ΚΑΙ ΒΙΟΜΗΧΑΝΙΑΣ,
ΛΕΥΚΩΣΙΑ.

Ἄρ. Πρωτ. 229/vi

26η Σεπτεμβρίου, 1970.

Κύριε,

Ἐνετάλην ὅπως ἀναφερθῶ εἰς τὴν ἐπιστολὴν σας ὑπὸ ἡμερομηνίαν 16ην Σεπτεμβρίου 1970, δι' ἧς αἰτεῖσθε ὅπως σᾶς παραχωρηθῆ ἄδεια δι' εἰσαγωγὴν 200 τόννων πατατοσπόρου καὶ σᾶς πληροφωρήσω ὅτι καὶ ἐφέτος ἀπεφασίσθη ὅπως ἡ εἰσαχθησομένη ποσότης πατατοσπόρου περιορισθῆ καὶ ὅπως υἱοθετηθῆ ἡ ἰδίᾳ, ὡς καὶ κατὰ τὰ προηγούμενα ἔτη ἀκολουθηθεῖσα διαδικασία, ὅτε παρεχωρήθησαν ἄδειαι βάσει τῶν πραγματοποιηθεισῶν εἰσαγωγῶν ἐκάστου εἰσαγωγέως κατὰ τὴν τριετίαν 1965-66, 1966-67 καὶ 1967-68.

Ἐν ὄψει τῶν ἀνωτέρω, ὡς καὶ τοῦ γεγονότος ὅτι συμφώνως πρὸς τὰ εἰς χεῖρας μας στοιχεῖα οὐδεμία εἰσαγωγὴ πατατοσπόρου ἐγένετο ὑφ' ὑμῶν, κατὰ τὰς ὡς ἄνω περιόδους, λυποῦμαι νὰ σᾶς πληροφωρήσω ὅτι τὸ ἡμέτερον Ὑπουργεῖον δὲν δύναται νὰ ἐκδώσῃ εἰς ὑμᾶς οἰανδήποτε ἄδειαν εἰσαγωγῆς πατατοσπόρου.

Μετὰ τιμῆς,

διὰ Γενικὸν Διευθυντήν.

Κον Ἄνδρέαν Ψαρᾶν,
Ξυλοφάγου,
Λάρνακα.»

By direction of the Court, three affidavits were filed on behalf of the applicant setting out the facts relied upon in support of his contentions. They emanate from three potato growers, co-villagers of the applicant.

Their effect within the context of the present case is that some farmers did import their potato seed in the past and the refusal of the respondent to issue an import licence to the applicant would mean a financial loss of £400 to £500.

The respondent in his notice of opposition states that the importation of potato seed was restricted for the second year running and regulated for the purposes mentioned

in section 3 (1) of the Imports (Regulation) Law, 1962, as amended by Law 7/67 and the Order made thereunder, Notification No. 327 published in Supplement No. 3 of the Official *Gazette* of the 24th May, 1968. The refusal of an import licence to the applicant was made on the strength of the aforesaid Order, on the criteria set out in the said decision to wit that the quantity of potato seed to be imported was decided to be limited and that the same procedure was followed as in previous years when import licences were issued on the basis of the imports of each importer made during the preceding years, *i.e.* 1965-1966, 1966-1967, 1967-1968. It is also averred that the Ministry of Commerce and Industry acted objectively in the public interest and for the purpose of restricting the quantity to be imported for the achievement of the intended objective.

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The argument of learned counsel for the applicant was twofold. That the Minister-respondent—whether he acted under the Cyprus Potato Marketing Law 59/64, or the Imports (Regulation) Law, 1962, as amended and the order made thereunder, (a) had no authority under either of the said laws to refuse an import licence to the applicant; and (b) that if either of the aforesaid two laws gives such authority, same is unconstitutional as being contrary to Article 25.1 of the Constitution because limitations may be imposed for importers but not for a potato grower who is not exercising a trade or business. Though learned counsel for the applicant at first argued against the constitutionality of the whole of the said laws, in the course of the addresses he confined his argument to section 3 of the Imports (Regulation) Law, 1962 as amended.

I shall deal with the second point first: The Cyprus Potato Marketing Law of 1964 relied upon by the applicant in his present application, was neither invoked by the respondent for the refusal of the licence, nor has any bearing in the present proceedings. In fact the applicant never applied to the Board set up under that law for any licence nor has the Director-General of the Ministry of Commerce and Industry purported to have acted in this case in any other capacity but as a Director-General acting for and on behalf and on the instructions of the Minister of Commerce and Industry. It is pertinent to quote here a passage from the judgment of Triantafyllides, J. (as he then was) in the case of *Christodoulos Kyriakides (No. 2) v. The Council for Registration of Architects and Civil Engineers* (1965) C.L.R. Part III, p. 617 (approved on appeal on this point

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by the Full Bench see (1966) 3 C.L.R. 640) where at p. 623 it is stated :

“ The power of this Court to exercise judicial supervision over the constitutionality of legislation, is not the exercise of any substantive power to review and annul acts of the legislature, but it is only part of the discharge of judicial power vested in this Court for the purposes of these proceedings under Article 146 of the Constitution ; it is a necessary concomitant of the power to hear and dispose of a case properly before the Court by bringing to bear upon its determination the test and measure of the law (*vide Adkins v. Children's Hospital and Lyons*, 261 U.S. 525 ; 67 Law. Ed. 785). A corollary thereof is that constitutional questions should be decided only when necessary.”

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

The next point for determination is (a) the unconstitutionality or not of section (3) of the Imports (Regulation) Law, 1962, and the order made thereunder, under which the decision complained of was taken, and (b) the unconstitutionality or not of the said decision.

(a) Article 25 of the Constitution safeguards the right of the individual to practise any profession or to carry on any occupation, trade or business. Paragraph 2 thereof provides that “ the exercise of this right may be subject to such formalities, conditions or restrictions as are prescribed by law and are *inter alia* necessary only in the public interest ”. It regulates, therefore, the conditions under which a profession, trade or business may be exercised. The requirement of a licence for the importation of a particular type of goods does not amount to a prohibition to carry out a profession or occupation. One may still become an importer in respect of these goods or other goods subject to certain conditions which are necessary *inter alia* in the “ public interest ”. I hold, therefore, that section 3 of Law 49/1962 as amended is constitutionally valid so long as the restriction or regulation of the importation of goods is made, as it is the case under consideration,

in the public interest or for any other of the objects set out in the said section *i.e.* the encouragement of local production and manufacture, the improvement of the balance of trade, compliance with international obligations and the development of the economy of the Republic, all being objects that bring it within the ambit of para. 2 of Article 25, the very terms of which render it manifestly a provision of law necessary in the public interest.

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The judgment of the Supreme Constitutional Court in the case of *Hussein Irfan and Others and The Republic of Cyprus through The Minister of Commerce and Industry*, 3 R.S.C.C. p. 39 has been of great assistance to me in deciding the issue raised in the present case. The issue raised in the aforesaid case was the unconstitutionality of the Defence (Importation of Goods) Regulations, 1959—which is analogous to the law under review—and it was held that :—

“ the Regulations in question are not unconstitutional in so far as they enable the appropriate authorities to impose restrictions on imports which are necessary in the public interest, in the sense of paragraph 2 of Article 25 of the Constitution.

It is to be observed that in deciding what is necessary in the sense of paragraph 2 of Article 25, regard must be had to the circumstances prevailing at the relevant time.”

In this respect considering the benefits to the economy of the country as a whole one cannot say that such powers restricting and limiting the importation of potato seed were not necessary in the public interest. In any event nothing has been suggested to show that such restrictions were unnecessary.

(b) Regarding the second leg of the argument of learned counsel for the applicant, namely that the said decision is unconstitutional, as being contrary to Article 25.1 of the Constitution, as limitations might be imposed for importers but not for a potato grower who is not exercising a trade or profession other than that of a farmer, learned counsel for the respondent has argued that Article 25 applies to cases of restrictions regarding the person who will engage in a trade or business and it does not limit the power of the legislator to control the manner in which a trade will be carried out. He relied on the decision of a Judge of this Court where this point was considered and decided upon with regard to an identical act or decision by the Minister of Commerce and Industry. It is the case of *Impalex*

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Agencies Ltd. v. The Republic etc. (1970) 3 C.L.R. p. 361, where Hadjianastassiou, J. concluded that such decision was not repugnant to the provisions of Article 25 of the Constitution. With this conclusion I agree as it is equally applicable to the facts of the present case. To my mind, however, limitations on the importation of goods can in a proper case be considered as violating Article 25 of the Constitution and this is borne out by the decision in *Hussein Irfan and Others* and *The Republic (supra)*.

In the present case, however, there is nothing to suggest that more restrictions were placed on the applicant than were necessary in the public interest in violation of Article 25 of the Constitution, or that the provisions of the Imports (Regulation) Law, 1962, were in any way disregarded. I am afraid I cannot agree with the distinction made by learned counsel for the applicant to the effect that the importation of potato seed by a farmer for his own needs gives different context to this case than where the importation is made by a trading firm for the purposes of trading. Such distinction is not borne out by the definition of 'importer' given in the order made under section 3 of the law, (see Notification 327 in the *Gazette* No. 654 of the 24th May, 1964), where it is stated that an 'importer' means (a) every permanent resident of the Republic carrying on business in the Republic. The applicant comes within that definition which does not limit the restrictions applicable solely to importers-traders. In any event the applicant in his application of the 16th September, 1970, made no reference to his capacity as a farmer. He merely applies for an import licence and says "the quantity which I need is 200 tons", from which one could not reasonably infer that he was a farmer.

Before concluding, I would like to deal with one more point, which covers also the first leg of the argument of the applicant. The applicant in his prayer for relief, claims, apart from the unconstitutionality issue, that the refusal of the respondent is "*ultra vires* and illegal". In para. 5 of the facts relied upon in support of the application it is stated: "Further, the said act or decision of the respondent is arbitrary and unreasonable and contrary to law".

I take the aggregate effect of the aforesaid contentions as raising the issue that the respondent acted contrary to law and in excess or abuse of power. And by "law" in this context it is meant not only the law in question but any principle of Administrative law that has been introduced into our jurisprudence by Article 146 of the Con-

stitution. Section 3 of Law 49/ 1962 as amended by Law 7/1967, lays down that—

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

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Potato seed is one of the commodities the importation of which was thought necessary to be restricted and regulated as appearing in the First Schedule to the Order made under the said section. There was legal authority therefore to subject the importation of potato seed to the requirement of a licence. By refusing to grant one the respondent in the present case, for the reasons given in his decision, exercised his discretion in the public interest for the purpose for which this power was granted. There has been nothing to suggest that this was not so. The fact that by the exercise of such power the interests of the applicant and by inference the interests of a class of the population have, to a certain extent, been affected, is not sufficient to lead this Court to the conclusion that the respondent acted contrary to Law and in abuse or excess of power.

The issue or not of a licence is left to the discretion of the Minister as set out in section 4 of the Law 49/1962, and so long as the Minister exercises his discretion within the object of the law the exercise of same is lawful. Furthermore the discretion is exercised in a lawful manner, if in its exercise all material considerations have been taken into account, due weight is given to material facts and has not been based on a misconception of law or fact. A defective exercise of discretionary power may, therefore, amount to an excess or abuse of power. In the present case it has not been argued, and nothing has been suggested to show, that the discretion was not exercised in a proper way.

For the reasons given in this judgment this application cannot succeed and is hereby dismissed. No order as to costs.

Application dismissed.
No order as to costs.