IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

NICOLAOS EKKESHIS,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH THE COUNCIL OF MINISTERS,

Respondent.

(Case No. 267/70).

Administrative decisions—Validity—Misconception of fact—Consequently the sub judice *decision has to be annulled—See futher herebelow.*

*Immovable Property—Property lacking access to a public road—Claim for such access over state land—Section 11A of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224 (as amended by Laws 10/66) and 75/68—*Sub judice *decision of the Council of Ministers refusing such access annulled as being one which is vitiated by a material misconception of fact—Because the respondent Council of Ministers appears to have acted on the basis of a misconception that what the applicant was seeking was access through the Nicosia Industrial Area whereas in fact he was seeking such access "along a boundary" of said Industrial Area.*

Material misconception of fact—Vitiates the administrative decision concerned—See supra.

The facts sufficiently appear in the judgment of the Court. annulling the *sub judice* decision on the ground that it was taken under a material misconception of fact.

Cases referred to :

Nicolaides v. The Greek Registrar of Co-operative Societies (1965) 3 C.L.R. 585;

Xapolytos and Others v. The Republic (1967) 3 C.L.R. 703;

Mikrommatis and The Republic, 2 R.S.C.C. 125 at p. 131;

Matsis v. The Republic (1969) 3 C.L.R. 245.

Recourse.

Recourse against the validity of the decision of the respondent not to grant to applicant an access to a public road over state land in respect of a piece of immovable property of his at Kaimakli.

E. Efstathiou, for the applicant.

L. Loucaides, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

The following judgment * was delivered by :-

TRIANTAFYLLIDES, P. : In this case the applicant challenges the validity of the respondent's decision not to grant to him, in respect of immovable property of his at Kaimakli, an access to a public road over state land. This decision was communicated to the applicant by letter dated 29th June, 1970, in which it was stated that his relevant application was refused as the access in question was within (ἐντὸς) the Nicosia Industrial Area.

The applicant had applied for such access on the strength of section 11A of the Immovable Property (Tenure, Registration and Valuation) Law (Cap. 224), as amended by the Immovable Property (Tenure, Registration and Valuation) (Amendment), Law, 1966 (Law 10/66) and the Immovable Property (Tenure, Registration and Valuation) (Amendment) Law, 1968, (Law 75/68).

* For final judgment on appeal see (1976) 1 J.S.C. 137 to be published in due course in (1975) 3 C.L.R.

The said section 11A reads as follows :-

"11A.—(1) Notwithstanding the provisions of this Law, if any immovable property is, for any reason, in such a way enclaved as to be lacking the necessary access to a public road, or if the existing access is inadequate for its proper use, development or utilization, the owner of such immovable property shall be entitled to claim an access over the adjacent immovable properties on payment of a reasonable compensation.

For the purposes of this sub-section 'access' includes the right of conducting water through channels or pipes or any other suitable means.

(2) The route of the access and the extent of the right to the use thereof, as well as the compensation payable shall be determined by the Director after previous notice to all interested parties.

(3) There shall be no obligation of the neighbours to provide an access if the communication of the immovable property to the public road has ceased through a voluntary act or omission of the owner thereof.

(4) If, as a result of the alienation of a part of the immovable property, the communication of the part alienated or of the remainder to the public road has been cut off, the owner of the part through which the communication had hereto before been made shall be obliged to provide an access. The alienation of one or more immovable properties belonging to the same owner shall be assimilated to the alienation of a part.

(5) If, as a result of the opening of a new access or for any other reason, the need for the access established has ceased, the owner of the immovable property over which it is exercised shall be entitled to claim that it be abolished on his returning the compensation paid.

(6) An access granted under this section shall

be deemed to be a right, easement or advantage acquired under the provisions of section 11 of this Law, and the provisions of this Law shall apply to any such access.

(7) The Council of Ministers may make regulations regulating any matter requiring to be regulated for the better application of this section and, in particular, the procedure to be followed for the purposes thereof :

Provided that regulations made under this sub-section shall be laid before the House of Representatives which shall within fifteen days of such laying decide thereon. In the event of approval or amendment of the regulations so laid, they shall come into operation as approved by the House of Representatives.

(8) The provisions of this section shall not apply to state land of any nature, without a specific decision of the Council of Ministers in this respect and on such terms and conditions as may be provided in the decision."

On the survey maps produced during the hearing of this case the property concerned of the applicant appears as plots 93 and 94 and the Industrial Area as plot 74 (or 301); it is quite clear, and it is not in dispute, that the property of the applicant is in such a way enclaved as to be lacking the necessary access to a public road and it, thus, comes within the ambit of sub-section (1) of section 11A.

Whereas the applicant would be "entitled" to claim an access to a public road if such access was going to be over privately owned land, in the present instance there was required, in view of sub-section (8) of section 11A, a decision of the Council of Ministers granting him the access applied for, as the access would be over state land; actually, as it appears from the aforesaid maps, the access would be a strip of land along a boundary of the Industrial Area.

Before I proceed any further I would like to state at

this stage that I cannot accept the contention of counsel for the applicant that sub-section (8) offends against the principle of equality, which is safeguarded by Article 28 of the Constitution: The difference in nature between state land and privately owned land is such that it was quite reasonably open to the Legislature to include a provision such as sub-section (8), in section 11A, thus differentiating, in effect, between cases of access over state land and over privately owned land. (See, in this respect, *inter alia, Mikrommatis* and *The Republic*, 2 R.S.C.C. 125, at p. 131 and *Matsis* v. *The Republic* (1969) 3 C.L.R. 245).

The Council of Ministers reached its aforesaid decision (No. 9729) on the 1st June, 1970. The matter had been placed before the Council by means of a submission prepared by the Ministry of Interior (No. 391/70, dated the 19th May, 1970); in this submission the Minister of Interior was proposing that the request of the applicant for the access in question be granted. But, as it appears from the minutes of the meeting of the Council of Ministers of the 1st June, 1970, the Minister of Commerce and Industry objected to the grant of the access on the ground that it was an access through («διά μέσου») the Industrial Area and that it would affect adversely the use of such Area; also, that there were pending other applications for grants of access and if they were to be approved then the usefulness of the Industrial Area would be diminished considerably.

Though it was mentioned in the submission No. 391/70 that the position of the access sought by the applicant was shown on a map forwarded to the Secretariat of the Council of Ministers, it was repeated about six times in the submission that the access would be "through" («διά μέσου») the Industrial Area; and the submission is, actually, headed "Grant of access through state land." Moreover, on the 1st June, 1970, when the application for access was refused by the Council of Ministers, the Minister of Commerce and Industry objected — as already mentioned — to the grant of access "through" the Industrial Area and in the Council's relevant decision it is stated that the applicant had applied for access "through" state land.

I shall now deal with the validity of the said decision:

I agree with learned counsel for the respondent that this Court cannot interfere in a matter of Administrative policy; but I think that there can be no doubt that this Court can examine the validity of a decision relating to such a matter in order to ascertain whether the decision has been reached by a proper exercise of the relevant discretionary powers; and if it is found that the said powers were not properly exercised then the decision in question has to be annulled.

It cannot be said that discretionary powers have been exercised properly if the organ concerned has acted on the basis of a misconception about a material fact; in such a case the decision reached is contrary to law, in the sense that the law has been applied on the basis of a factual situation other that the correct one (see Στασινοπούλου Δίκαιον τῶν Διοικητικῶν Διαφορῶν—Stasinopoulos on the Law of Administrative Disputes—1964, pp. 220—222). The burden of establishing that an administrative decision was reached on the basis of a misconception about a material fact lies on the person challenging the validity of such decision on this ground; but the existence of the misconception may, also, be derived from relevant official records (see Stasinopoulos, *supra*). Furthermore, a decision may be annulled if an administrative court is satisfied that it is very probable that such decision was reached as a result of a factual misconception; in such a case the annulment is not ordered because factual misconception has been established but in order to rid the administrative decision concerned of the suspicion that it was based on a factual misconception (see Στασινοπούλου Δίκαιον Διοικητικῶν Πράξεων—Stasinopoulos on the Law of Administrative Acts—1951, p 305).

In the present case I have reached the conclusion that it is not only very probable but virtually certain that the respondent Council of Ministers acted, due to the contents of the submission, on the basis of the misconception that the applicant was seeking an access "*through*" («διὰ μέσου»), and not *only along a boundary* of, the Nicosia Industrial Area; and once the matter was presented—

obviously due to an unintended inexact mode of expression —as a request for access "through" the Industrial Area *and* it was, also, said by the Minister of Commerce and Industry that there were pending other applications for access, which if granted would adversely affect the Industrial Area, the matter to be decided by the Council became one of policy, irrespective of the actual position in the Industrial Area of the access requested by the applicant; therefore, it can hardly be reasonably assumed that the Council of Ministers thought fit, in such circumstances, to adopt the course of calling for, and studying, the map which showed the exact position of the applied for access and which, as stated, had been forwarded to the Secretariat of the Council; actually, if that had been done, and the misdescription of the access had been discovered, the expression "through" («διὰ μέσου») would not have been used either in recording the view of the Minister of Commerce and Industry in the minutes of the Council dated the 1st June, 1970, or in phrasing the otherwise very precisely worded—with all essential details—*sub judice* decision of the Council of Ministers, which was reached on the said date.

There can be no doubt that granting access *through* the Industrial Area to the applicant, as well as, quite probably, to others who had applied for such an access, was a matter entirely different from granting access *along one of the boundaries* of the Area; it is obvious that the former course could affect quite adversely the Area while the latter one, depending on the particular circumstances of an individual case, might or might not do so.

I have, therefore, to annul the *sub judice* decision as being one which is vitiated by a material misconception of fact (see, *inter alia, Nicolaides* v. *The Greek Registrar of Co-operative Societies* (1965) 3 C.L.R. 585); indeed, as a result of such misconception the Council of Ministers was prevented from seeing the matter before it as it *actually* was (see, *inter alia, Xapolytos and Others* v. *The Republic*, (1967) 3 C.L.R. 703).

In the light of all the foregoing the said decision of the respondent is declared to be null and void and of no effect whatsoever.

As the application of the applicant for access will have to be reconsidered I would like to make it abundantly clear that nothing in this judgment should, or can, be taken as indicating that the Council of Ministers should grant an access to the applicant, from his property to a public road, along the boundary of the Nicosia Industrial Area. This is a matter to be decided, in the proper exercise of its discretionary powers, by the Council of Ministers; so I am leaving it entirely open.

Bearing in mind all relevant considerations I am of the view that this is not a proper case in which to make an order for costs against the respondent.

Sub judice decision annulled;
no order as to costs.