1984 July 6

[L. Loizou, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

THE DHALI HOGS BREEDING LTD.,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE COUNCIL OF MINISTERS AND OTHERS,

Respondents.

(*Case No.* 467/72).

Act or decision in the sense of Article 146.1 *of the Constitution—Which can be made the subject of a recourse—It must be that of an organ, authority or person exercising executive or administrative authority—Acts of a legislative nature not amenable to a recourse under the above Article—Order of the Council of Ministers, under section* 12(2) *of the Customs and Excise (Duties and Drawbacks) Laws,* 1967-1972 *amending class* 35 *of the 4th Schedule to the Law—Is an act of legislation—Recourse challenging directly the order as such and not through any specific administrative act not amenable to the jurisdiction of this Court under the above Article.*

The Council of Ministers in exercise of its powers under section 12(2)* of the Customs and Excise (Duties and Drawbacks) Laws, 1967-1972 made an Order amending class 35 of the 4th schedule to the law.

On the question - examined by the Court ex proprio motu - whether a recourse against the above Order of the Council of Ministers as such was amenable to the jurisdiction of this Court under Article 146.1** *of the Constitution:*

Held, that for a decision, act or omission to be amenable to

* Section 12(2) reads as follows:

"The Council of Ministers may by order published in the Official Gazette of the Republic add, delete, vary or otherwise amend the classes or any of them, as set out in the 4th Schedule hereto".

** Article 146.1 is quoted at p. 909 post.

the jurisdiction of this Court under Article 146 of the Constitution it must be that of an organ, authority or person exercising executive or administrative authority; that acts of a legislative nature are not amenable to a recourse under Article 146 of the Constitution; that given that the above Law is a legislative enactment and s.12(2) is an enabling section conferring on the Council of Ministers powers to add, delete, vary or amend a specific part of that law, any addition or amendment should also be considered as part of the law; and that, consequently, the sub judice order of the Council of Ministers should be treated as an act of legislation being effected by the Council of Ministers in the exercise of the powers conferred on it by s.12(2) of the law in the form of delegated legislation; and that since the present recourse challenges directly the order of the Council of Ministers as such and not through any specific administrative act it is not amenable to the jurisdiction of this Court under Article 146 of the Constitution and must, therefore, be dismissed.

Application dismissed.

Cases referred to:

PA.SY.D.Y. v. Republic (1978) 3 C.L.R. 27;

Ioannou v. E.A.C. (1981) 3 C.L.R. 280;

Papaphilippou v. Republic, 1 R.S.C.C. 62;

Theodoridou and Others v. Republic (1965) 3 C.L.R. 41;

Demetriades v. Republic (1969) 3 C.L.R. 557;

Police v. Hondrou, 3 R.S.C.C. 82;

Philippou and Others v. Republic (1972) 3 C.L.R. 123;

Apostolides v. Republic (1982) 3 C.L.R. 928 at p. 936;

Mikrommatis v. Republic, 2 R.S.C.C. 125;

Kyriakides (No. 2) v. Council for Registration of Architects and Civil Engineers (1965) 3 C.L.R. 617;

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

Evlogimenos and Others v. Republic, 2 R.S.C.C. 139 at p. 142;

Antoniades and Others v. Republic (1979) 3 C.L.R. 641;

Voyias v. Republic (1974) 3 C.L.R. 390.

Recourse.

Recourse for a declaration that the provisions of para. 7 of Order No. 169 of the Council of Ministers published in Supple-

ment No. 3 of the Gazette of the 22nd September, 1972 are null and void and of no effect whatsoever.

A. S. Myrianthis, for the applicants.

Cl. Antoniades, Senior Counsel of the Republic, for the respondents.

Cur. adv. vult.

L. LOIZOU J. read the following judgment. The applicants, a limited liability company, by this recourse pray for the following relief:

1. A declaration of the Court that the provisions of para. 7 of Order No. 169 of the Council of Ministers published in Supplement No. 3 to the Gazette of the 22nd September, 1972, are null and void and of no effect whatsoever.

2. A declaration of the Court that the said provisions of the Order of the Council of Ministers, in so far as they affect the applicant company and/or its business and/or its industry are null and void and of no effect.

Para. 7 of Order 169 reads as follows:

"7. Η κλάσις ὑπ' ἀρ. 35 τοῦ Τετάρτου Πίνακος τοῦ Νόμου, διὰ τοῦ παρόντος τροποποιεῖται διὰ τῆς διαγραφῆς τῶν λεπτομερειῶν ἐξαιρέσεως τῶν ἀναφερομένων ἔναντι τῆς τοιαύτης κλάσεως ἐν τῇ δευτέρᾳ στήλῃ τοῦ ἐν λόγῳ Πίνακος καὶ τῆς ἀντικαταστήσεως τούτων διὰ τῶν ἀκολούθων:

"Ὑλικὰ (ἐξαιρουμένων τῶν ὑλικῶν συσκευασίας) πρὸς χρῆσιν ἐν τῇ ἀεροστεγῇ ἐγκυτιώσει (canning) ἐντὸς μεταλλίνων δοχείων κρέατος ἢ παρασκευασμάτων κρέατος τῶν κλάσεων 16.01-16.03'".

("Class No. 35 of the 4th Schedule to the Law is hereby amended by the deletion of the details of the exemptions appearing opposite the said class in the second column of the said Schedule and their substitution by the following:

'Materials (except packing materials) for use in the vacuum packing (canning) in metal containers of meat and meat preparations of the class 16.01-16.03)' ".

The applicant company was formed and registered in Cyprus since 1948 carrying on the business of manufacturers of preserved meat and meat preparations. According to the evidence

of the Chairman of its Board of Directors its products consist of frankfurters, sausages, salami, mourtatella, bacon, ham, smoked ham and luncheon meat which are packed in air-sealed plastic containers.

On the 13th February, 1970, an Order made by the Council of Ministers under the provisions of s.12(2) of the Customs and Excise (Duties and Drawbacks) Laws, 1967-1972 was published in Supplement No. 3 to the Gazette under Notification 118 by virtue of which materials imported for the production of preserved meat and meat preparations were relieved from import duty. The relevant part of this Order is class 35 which was added to the 4th Schedule of the Law and which reads as follows:

"35 Καρυκεύματα (τῆς κλάσεως 21.04.90), ἐκχυλίσματα κρέατος (τῆς κλάσεως 16.03) καὶ προϊόντα τῆς κλάσεως 35.04.90, πρὸς χρῆσιν εἰς τὴν κονσερβοποιΐαν κρέατος καὶ παρασκευασμάτων κρέατος."

("Seasonings (of class 21.04.90), meat extracts (of class 16.03) and products of class 35.04.90, for use in the preservation of meat and meat preparations".)

Thereafter the applicants were importing the above materials free of duty until some time in 1971 when the Customs Authorities, being of the opinion that item 35 applied only to materials imported for the canning of meat and meat preparations, discontinued the relief.

As a result the applicants filed recourse No. 312/71 challenging respondents' refusal to allow relief from import duty with regard to certain specific consignments of the articles in question imported by them. That recourse was settled and the respondents refunded to the applicants the import duty paid by them under protest.

As stated above on the 22nd September, 1972, the Council of Ministers amended class 35 of the 4th Schedule with the result that the relief was restricted only to materials imported for use in the air-tight packing of meat and meat preparations of the classes mentioned therein, in metal containers.

As a result the applicants filed the present recourse challenging the validity of the Order in question. The recourse is based on the following grounds of law:

1. The aforesaid provisions which are challenged by the present recourse create unequal treatment and are contrary and/or incompatible with the provisions of Article 28 of the Constitution which provides, inter alia, for equal treatment.

2. The above provisions cause financial ruin of the business and/or industry of the applicants and/or will result in the hindrance of the exercise of the business of the applicants, which exists for many years, contrary to the provisions of Articles 23 and 25 of the Constitution.

3. By the aforesaid Order and/or provisions the Council of Ministers exercises legislative powers contrary to Articles 54 and/or 61 of the Constitution.

4. In any event the said provisions were made in excess of powers and/or are arbitrary, unjust, unreasonable and/or unconstitutional and/or were reached without the previous due consideration of the matter.

In the course of the hearing counsel for the applicants abanoned the third ground and stated that he will confine his case only on grounds 1 and 2.

Before proceeding any further I consider it appropriate and necessary to examine, ex proprio motu, another point which goes to the jurisdiction of the Court. The point is whether a recourse against the Order of the Council of Ministers as such is amenable to the jurisdiction of this Court under Article 146 of the Constitution.

Jurisdiction to try recourses is vested in the Supreme Court by virtue of Article 146.1 of the Constitution which reads as follows:

> "1. The Supreme Constitutional Court shall have exclusive jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, an act or omission of any organ, authority or person, exercising any executive or administrative authority is contrary to any of the provisions of this Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person."

It is clear from the wording of this Article that the decision, act or omission must be that of an organ authority or person

exercising executive or administrative authority. It is, therefore, for consideration whether the sub judice order of the Council of Ministers comes within the abmit of Article 146 and more particularly whether the order in question was made by the Council of Ministers in the exercise of its executive or administrative authority or whether it is an act of a legislative nature.

The Supreme Court has treated, in a number of cases, certain acts of the executive to be of a legislative nature. Thus, the approval of schemes of service by the Council of Ministers has been held to be in the exercise of its legislative powers (see for instance the cases of *Pankyprios Syntechnia Dimosion Ypallilon and Others* v. *The Republic* (1978) 3 C.L.R. 27; and *Ioannou* v. *The E.A.C.* (1981) 3 C.L.R. 280). In the case of *Papaphilipou* v. *The Republic*, 1 R.S.C.C. 62 it was held that an omission on the part of the Council of Ministers to consider a bill to be introduced to the House of Representatives was not an omission in the sense of the exercise of executive or administrative authority but an act preparatory to a legislative act and thus not amenable to a recourse under Article 146. Likewise in the case of *Theodoridou and Others* v. *The Republic* (1965) 3 C.L.R. 41 a claim by widows of public officers who were contributors to the Widows and Orphans Pension Fund against the failure of the Republic to apply the balance provided by section 5(d) of the Widows and Orphans Pension Fund (Special Provisions) Law, 1962 to the benefit of the applicants and other persons entitled under the fund was held to amount to a complaint against an alleged legislative omission and was not, therefore, entertainable under Article 146. In the case of *Demetriades* v. *The Republic* (1963) 3 C.L.R. 557 (a Full Bench case on appeal from the judgment of a Judge of this Court) it was held that a decision of the Minister of Health not to amend the Second Schedule of the Pharmacies and Poisons Law, Cap. 254 so as to include certain items in it amounted to an exercise of legislative power and not to a decision or act "of any organ, authority or person exercising executive or administrative function" within the meaning of Article 146 of the Constitution. Finally in the case of *Police* v. *Hondrou*, 3 R.S.C.C. 82 an Order of the Council of Ministers provided that the handling or the putting into operation of a gaming machine, as defined in the said Order, shall be a game for the purposes of s.6(1) of the Betting Houses, Gaming Houses

and Gambling Prevention Law, Cap. 151. That Order was made by the Council of Ministers under s.6(2) which provides that "the Council of Ministers may, by Order, declare any game to be a game for the purposes of sub-section (1) of this section in addition to the games specified therein _____". It was held at p. 85 that:

> "There can be no doubt that the exercise of such power as the making of an Order under sub-section (2) is the exercise of 'legislative power' in the accepted sense of that term in Constitutional Law."

This case has been cited with approval and followed by the Full Bench in the *Demetriades* case (supra).

In this respect useful reference may also be made to the judgment of Triantafyllides, P. in the case of *Pankyprios Syntechnia Dimosion Ypallilon* v. *The Republic* (supra) where at pp. 30-31 a distinction is made between the position in Greece and Cyprus as to the test applicable with regard to the jurisdiction concerning administrative recourses.

Reverting now to the present case, the sub judice Order was made by the Council of Ministers in the exercise of the powers vested in it by s.12(2) of Law 81/67 which reads as follows:

> "(2) Διὰ Διατάγματος αὐτοῦ δημοσιευθησομένου ἐν τῇ ἐπισήμῳ ἐφημερίδι τῆς Δημοκρατίας, τὸ 'Υπουργικὸν Συμβούλιον δύναται νὰ προσθέτῃ, διαγράφῃ, μεταβάλλῃ ἢ ἄλλως τροποποιῇ τὰς κλάσεις ἢ οἱασδήποτε τούτων, ὡς αὗται ἐκτίθενται τῷ συνημμένῳ τῷ παρόντι Τετάρτῳ Πίνακι."
>
> ("The Council of Ministers may by order published in the Official Gazette of the Republic add, delete, vary or otherwise amend the classes or any of them as set out in the 4th Schedule hereto".)

Given that Law 81 of 1967 is a legislative enactment and s.12(2) is an enabling section conferring on the Council of Ministers powers to add, delete, vary or amend a specific part of that law, any addition or amendment should also be considered as part of the law; and consequently the sub judice order of the Council of Ministers should be treated as an act of legislation being effected by the Council of Ministers in the

exercise of the powers conferred on it by s.12(2) of the law in the form of delegated legislation.

In my view the decision in the present case is analogous to that of the cases of *Hondrou* and *Demetriades* (supra).

In the light of the above cases there is no doubt that the aforesaid order was made in the exercise of legislative powers delegated to the Council of Ministers and cannot be challenged by a recourse as such under the provisions of Article 146.

Of course, as it has been held by this Court in a number of cases, a legislative provision may be challenged as to its validity or constitutionality, indirectly, by a recourse made against an administrative act or decision which is based on such legislative provision. (See in this respect *Philippou and Others* v. *The Republic* (1972) 3 C.L.R. 123). In the more recent case of *Apostolides* v. *The Republic* (1982) 3 C.L.R. 928 Pikis, J. had this to say at p.936:

> "The revisional jurisdiction of the Supreme Court is not the forum for a review of the constitutionality of laws in abstracto. Litigants cannot move the Supreme Court to exercise its revisional jurisdiction for the challenge of the constitutionality of laws. Issues of constitutionality may be determined incidentally, if necessary, for the purpose of adjudicating upon the propriety of an act, decision or omission of organs of public administration."

The present recourse challenges directly the order of the Council of Ministers as such and not through any specific administrative act. In fact going through the record one cannot discern any particular administrative act that could be challenged by this recourse and it is not even clear whether the sub judice order was ever applied at all by the respondents with regard to the importation of any materials by the applicants at any time after its enactment and before the recourse was filed.

Having already decided that the order challenged by this recourse is of a legislative nature, I find, on the basis of the foregoing, that this recourse being directed against the order itself and not through an administrative act is not amenable to the jurisdiction of this Court under Article 146 of the Constitution and must, therefore, be dismissed.

Although this disposes of the case, I propose, nevertheless to deal very briefly with the remaining grounds of law 1 and 2 based on Articles 28 and 23 and 25 of the Constitution respectively.

With regard to the first ground it was applicant's case that because another company in Cyprus, Viagrex, which manufactures, inter alia, products similar to those manufactured by the applicant company, packed two of their products i.e. luncheon meat and ham in tins, whereas the applicants placed those products in plastic containers, the Order, the validity of which is challenged, is discriminatory in that with regard to these two products the two companies are not treated on an equal basis because relief from the import duty is allowed, under the provisions of the Order, only for the products packed in tins. The short answer to this ground is that what Article 28 safeguards is equality among persons and things similarly circumstanced. In other words it may be said generally that the equality envisaged by Article 28 means that the rights of all persons must rest upon the same rule under similar circumstances. There is a wealth of authority with regard to this Article. (See, inter alia, *Mikrommatis* v. *The Republic,* 2 R.S.C.C. 125; *The Republic* v. *Arakian* (1972) 3 C.L.R. 294; *Kyriakides* (No. 2) v. *The Council for Registration of Architects and Civil Engineers* (1965) 3 C.L.R., 617 and *Matsis* v. *The Republic* (1969) 3 C.L.R. 245).

Nothing that has been said in the present case supports the view that the classification of the items entitled to relief from import duty by Order 169 is arbitrary or unjustified; and the mere fact that the other manufacturers who place two of their products in tin containers are relieved from import duty with regard to such products whereas the applicants who place them in plastic containers are not, is not a ground for saying that the Order is unconstitutional on the ground of discrimination. And it must not be lost sight of that the issue in this recourse relates to taxation legislation and that a wide discretion is allowed in matters regarding classifications for taxation purposes.

Equally without foundation is the second ground. Article 23 safeguards the right to acquire, own, possess, enjoy or dispose of any movable or immovable property and protects such right

from State interference except as provided in paragraphs 3 and 4 thereof. In *Evlogimenos and* 2 *Others* v. *The Republic,* 2 R.S.C.C. 139 at p. 142 it is stated:

> "Further, the Court in examining the provisions of Article 23 of the Constitution has proceeded on the well-settled principle that the right to property safeguarded by an Article such as this is not a right in abstracto but a right as defined and regulated by the law relating to civil law rights in property and the word 'property' in paragraph 1 of Article 23 has to be understood and interpreted in this sense.
>
> Paragraph 2 of Article 23, in the opinion of the Court protects the aforesaid right of property from deprivation or restriction or limitation effected in the interest of the State or public bodies and not merely under a law regulating civil law rights in property."

Article 25, on the other hand, safeguards the right to practice any profession or to carry on any occupation, trade or business. It does not seem to me that this Article is at all relevant as the Order challenged by this recourse does not restrict such right and does not, therefore, come within the ambit of the provisions of the Article which does not purport to safeguard any right to relief from taxation. (See *Antoniades and Others* v. *The Republic* (1979) 3 C.L.R. 641 and *Voyias* v. *The Republic* (1974) 3 C.L.R. 390).

As stated above this recourse fails and it must be dismissed. There will be no order as to costs.

Recourse dismissed. No order as to costs.