1986 December 17

[A. LOIZOU, MALACHTOS, SAVVIDES, JJ.]

ISTAMBOULI BROS.,

Appellants-Defendants,

v.

DIRECTOR DEPARTMENT OF CUSTOMS & EXCISE.

Respondent-Plaintiff,

(Civil Appeal 6300)

Customs and Excise—Importation of goods contrary to any prohibition or restriction for the time being in force—Forfeiture—Section 39(b) of the Customs and Excise Law 82/67—The proviso to section 39(b)—Discretion where the proviso is applicable—Goods imported by aircraft—Relevant manifest/entry stated that they were destined for Larnaca—Allegation that they were in transit—In view of the said entry, proviso (ii) was not applicable—Section 24(3) of the said Law—Inaccuracy due to inadvertence—In this instance said entry not due to inadvertence—Therefore, appellants could not have the protection of s. 24(3).

Criminal Law—Sentence—Forfeiture—Review of cases involving forfeiture of goods.

Constitutional Law—Disproportionate punishment—Constitution, Article 12.3—Forfeiture of imported goods—Section 6 of the Second Schedule to the Customs and Excise Law 82/67—Nature of such forfeiture—As it is an administrative measure and not a punishment, it cannot offend Article 12.3.

Constitutional Law—Civil proceedings—Constitutionality of Statutes—A legal issue in a broad sense—Need not be specifically pleaded—The decision in the Improvement Board of Eylenja v. Constantinou (1966) 1 C.L.R. 167 *is rather in the nature of a directive, not laying down hard and fast rules.*

Civil procedure—Pleadings—Points of law—Need not be specifically pleaded—The Civil Procedure Rules, Ord. 19, rr. 4 and 13 and Ord. 27, r. 1—The old English Rules, Ord. 19, r. 15, Ord. 25, r. 2 incorporated respectively by the R.S.C. (1962) Revision) into Ord. 18, r. 8 and Ord. 18, r. 11—Constitutionality of Statutes—A legal issue in a broad sense—Need not be specifically pleaded.

Two consignments of firearms belonging to the appellants were transported by aircraft of Olympic Airways to Cyprus on 3.2.78 and 15.3.78 respectively. The firearms were seized under the provisions of section 1 of the Second Schedule to the Customs and Excise Law 82/67, but, as the appellants disputed the seizure and served a notice of claim under section 3 of the same Schedule, the Director (respondent-plaintiff) instituted condemnation proceedings.

The defendants (appellants) contended that the goods in question were intended for re-export to Lebanon, but this fact had not been stated in the relevant manifests of the planes because the appellants "were afraid from secret agents of Israel in Cyprus".

The trial Court found that inasmuch as the importation of Firearms without a licence for the Council of Ministers is prohibited (Section 4(1) of Law 38/74), the two consignments were liable to forfeiture. The trial Court considered the position and concluded that no discretion was vested in it to withhold the condemnation order. In its opinion the only issue for consideration in condemnation proceedings is whether the goods are liable to forfeiture, the burden of proof, including legality of import, being at all times on the defendant. In his final address before the trial Court counsel for the appellants attempted to raise the issue of constitutionality of section 6 of the Second Schedule to the said Law arguing that, notwithstanding that the issue had not been properly raised, the Court had nevertheless discretion to examine it. The Court, however, held that it had no power to do so. As a result a condemnation order was issued.

Hence the present appeal.

Counsel for the appellants argued that section 6, which leaves no discretion, but directs the forfeiture of the goods

in question infringes Article 12.3 of the Constitution, which provides that "no law shall provide a punishment which is disproportionate to the gravity of the offence" as it amounts to a disproportionate punishment. On the other hand counsel for the respondent submitted that section 6 relates to the power of the Director of Customs to seize goods with a view to their ultimate forfeiture, a matter against which a remedy exists under Article 146 of the Constitution.

Held, dismissing the appeal: (1) The goods in question were entered (stated in the relevant manifests) as destined for Larnaca and in such entry (manifest) they were not described as being in transit. It follows that proviso (ii) to Section 39(B)* of Law 82/67 is not applicable and, therefore, the Director did not have any discretion in the matter, but was under a duty to order the forfeiture of the goods. In the light of the evidence given by the appellant the inaccuracy of the entry/manifest cannot be considered as "inadvertent" and, therefore, the appellant could not claim the protection of sub-section (3) of section 24** of the said Law.

(2) The issue of constitutionality, being a legal issue in a broad sense, need not have been specifically pleaded*** All facts, which were essential for its determination were pleaded And the issue had to be resolved only by comparing and weighing the provisions of the Law with the provisions of the Constitution claimed to have been offended. The decision in the *Improvement Board of Eylenja* v. *Constantinou* (1966) 1 C.L.R. 167 is more in the nature of a directive rather than laying down hard and fast rules to be followed at all times.

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* The provisions of section 39(b) and its proviso are quoted at pp. 472-473

** Sub-sections (1), (2) and (3) of section 24 are quoted at pp. 473-474.

*** In arriving at this conclusion the Court referred to and considered Order 19, rules 4 and 13 and Order 27, rule 1 of the Civil Procedure Rules as well as the relevant English Rules (Order 19, rule 15 and Order 25, rule 2 of the old English Rules, incorporated respectively by the R.S.C. (Revision 1962) into Order 18, rule 8 and Order 18, rule 11) and the authorities in respect thereto

(3) As regards the substance of the issue of constitutionality raised by the appellant, two points arise for consideration, namely whether Article 12.3 applied to proceedings other than criminal and, if it does, whether secetion 6 of Law 82/67 is in fact unconstitutional.

In the present instance the appellants have not been convicted of any offence nor have they been charged with such. The forfeiture in question does not constitute a punishment, but is an administrative measure against which the proper redress would be a recourse under Article 146 of the Constitution. As the forfeiture in question does not amount to a punishment, it cannot infringe Article 12.3.

Appeal dismissed with costs.

Cases referred to:

In re Robinson's Settlement, Gant v. Hobbs [1912] 1 Ch. 717;

Independent Automatic Sales Ltd. v. *Knowles and Foster* [1962] 3 All E.R. 27;

The Improvement Board of Eylenja v. *Constantinou* (1966) 1 C.L.R. 167;

Georghiades v. *The Republic* (1969) 3 C.L.R. 386;

Mourtouvanis v. *The Republic* (1966) 3 C.L.R. 108;

Chief Customs Officer v. *Associated Agencies Ltd.*, 3 R.S.C.C. 36;

Lambrou v. *The Republic* (1972) 3 C.L.R. 379;

Choraitis v. *The Republic* (1986) 3 C.L.R. 838;

Kantara Shipping Ltd. v. *The Republic* (1969) 3 C.L.R. 95;

Commissioners of Customs and Excise v. *Sokolow's Trustee* [1954] 2 All E.R. 5;

Gendarmarie v. *Englezos*, 3 R.S.C.C. 7;

Gendarmerie v. *Yiallouros*, 2 R.S.C.C. 28;

District Officer Kyrenia v. *Salih*, 3 R.S.S.C. 69;

Gendarmerie v. *Zavros*, 4 R.S.C.C. 63;

Application 4274/69 (Yearbook of the European Convention on Human Rights No. 13, p. 888).

Application 4519/70 (Yearbook of the European Convention on Human Rights, No. 14, p. 616).

Appeal.

Appeal by defendants against the judgment of the District Court of Larnaca (Pikis, P.D.C. and Michaelides, D. J.) dated the 9th July, 1981 (Actions Nos. 96/80 and 97/80) whereby it was found that it was not open to the Court to question the constitutionality of section 6 of Law No. 82/67 by virtue of which the Court ordered the condemnation of goods, i.e. firearms liable to forfeiture.

A. Theofilou, for the appellant.

R. Gavrielides, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

A. Loizou J. read the following judgment of the Court. This is an appeal from the judgment of the Full District Court of Larnaca by which it was found that it was not open to the Court to question the constitutionality of Section 6 of the Second Schedule to the Customs and Excise Law, 1967 (Law No. 82 of 1967), hereinafter to be referred to as the Law, by virtue of which the Court ordered condemnation of goods liable to forfeiture, not having been pleaded before the Court that the aforesaid Law 82 of 1967 or any part of it were unconstitutional.

The facts which do not seem to be in dispute are as follows:

Two consignments of firearms belonging to the appellant, that is one of 600 pistols and 100 revolvers and another of 200 pistols and 200 revolvers, which were transported on board an aircraft of Olympic Airways on the 3rd February 1978, and 15th March 1978, respectively, from Athens to Larnaca were seized under the provisions of

Section 1 of the Second Schedule to the Law by the Department of Customs and Excise and the notice of seizure was served on the representative of the appellant.

The seizure was disputed and notice of claim under Section 3 of the Second Schedule to the Law was served on the Director who raised proceedings for the condemnation of the goods pursuant to the provisions of Section 6 of the Second Schedule of the Law.

The Court considered the position and provisions of the Law, that is that no discretion was vested in the Law to withhold the condemnation order, the only issue arising for consideration in condemnation proceedings was whether the goods were liable to forfeiture, the burden of proof, including legality of import, being at all times on the defendant.

It was held by the Court that: "The power of the Director to refrain from seizing goods, the import of which is prohibited, is of a purely discretionary character and may be exercised upon facts disclosed either in the manifest or in the statement of clearance. Certainly the Director is not bound to await clearance before proceeding to seize the goods. Further, it is abundantly clear, on a consideration of the provisions of Section 39 in their entirety, that goods imported in contravention to the Law are liable to forfeiture. And inasmuch as the importation of firearms without a licence from the Council of Ministers is prohibited (see Section 4(1), Law 38/74) the two consignments of firearms, subject matter of these proceedings, are liable to forfeiture. The defendant made no attempt to prove that a licence for their importation had been secured and in our judgment none existed.

Section 6 of the second schedule lays down that upon a finding that the goods were liable to forfeiture the Court has no further discretion in the matter and must therefore condemn them.

It was found that the contention of the owner that he intended to re-export the goods to Lebanon (as stated in the airway bills) were in conflict with the plane's manifest in which their destination was declared as Larnaca.

As regards a submission made by counsel for the defendants in his final address that notwithstanding the fact that it had not properly been raised before the Court, the Court nevertheless had a discretion to consider the constitutionality of Section 6 of the Second Schedule to the Law, it was stated by the Court:

"... any suggestion of unconstitutionality must be specifically raised and become an issue in the cause in the definitive manner indicated by the Court in case of *The Improvement Board of Eylenja* v. *Constantinou* (1967) 1 C.L.R. 167. In this way issues pertaining to the constitutionality of legislation are defined in the solemn manner that the gravity of the issue necessitates. Laws enacted by the House of Representatives are deemed to come within the framework of the Constitution unless the contrary is proved beyond doubt. (See, inter alia, *The Board for Registration of Architects & Civil Engineers* v. *Christodoulos Kyriakides* (1966) 3 C.L.R. 640). No written or oral, for that matter, submissions were made that any part of Law 82/67 is unconstitutional. Therefore it is not open to the Court to question the constitutionality of Section 6 to the second schedule of the Law making it mandatory for the Court to order condemnation of goods liable to forfeiture. The case of *Costas Mourtouvanis & Sons Limited* v. *The Republic of Cyprus through 1. Minister of Finance and 2. Director of Customs* (1966) 3 C.L.R. 108, where the question of the constitutionality of forfeiture provisions of Cap. 315, that was repealed by Law 82/67, was examined, to which no reference was made by counsel, is distinguishable from the present case for the Court there was concerned both with the interpretation of legislation that was enacted prior to the establishment of the Republic and therefore it was pertinent for the Court to construe such legislation in the manner laid down by Article 188.1 of the Constitution, and the question of constitutionality was specifically raised. If a question of constitutionality had been raised the Court would inevitably have to examine whether the provisions of Article 12.3 apply

to civil proceedings in rem, although one might argue that what is of essence is the ultimate loss to the owner and not the form in which it is expressed. This of course may arise for consideration at a future date and nothing that is said in this judgment is designed to answer the question."

Hence the present appeal.

It was argued by the appellants that the trial Court erred in considering that the 'carriers' manifests were conclusive and that the goods were destined for Larnaca as stated therein, but that instead the Court should have considered the matter in the light of the contents of the airway bills reference to which was made in the manifests and in which the firearms in question are described as being in transit; in view of this, it was argued the Director had a discretion under Section 39 of Law 82 of 1967 whether to take proceedings for condemnation. Therefore, the trial Court had wrongly decided that the provisions of the Law were mandatory and that it had thus no discretion whether to condemn the goods or not.

Section 39 (b) provides:

"Where

(b) any goods are imported, landed or unloaded contrary to any prohibition or restriction for the time being in force with respect thereto under or by virtue of any enactment;

those goods shall be liable to forfeiture."

In the proviso thereto it is stated:

"Provided that where any goods the importation of which is for the time being prohibited or restricted by or under any enactment are on their importation either -

(i) reported as intended for exportation in the same ship, or aircraft; or

(ii) entered for transit or transhipment; or

(iii) entered to be warehoused for exportation or for use as stores,

the Director may, if he sees fit, permit the goods to be dealt with accordingly."

In the present instance the goods were entered (stated in the manifest) as destined for Larnaca and in such entry (manifest) they were not described as being in transit. Proviso (ii) to Section 39 therefore cannot be considered as applicable and consequently the Director cannot exercise the discretion given under the proviso but he is under a duty to order forfeiture of the goods.

Moreover, under Section 24(1) of the Law;

"The importer of any goods shall deliver to the proper officer an entry thereof in such form and manner and containing such particulars as the Director may direct:"

An importer is therefore clearly under a duty to comply with this provision of the law.

Under Section 24(2)

"Goods may be entered under the section:-

(a) for home use, if so eligible;

(b)

(c) for transit or transhipment:"

And under Section 24(3):

"If, in the case of any goods which are not dutiable goods, any such entry as aforesaid is inaccurate in any particular, the importer shall, within fourteen days of the delivery of the entry or such longer period as the Director may in any case allow, deliver to the proper officer a full and accurate account of the goods; and if such an account is so delivered and the Director is satisfied that the inaccuracy was inadvertent and immaterial except for statistical purposes, then notwithstanding anything in this Law or in any

public instrument made thereunder the goods shall not be liable to forfeiture, or the importer to any fine, by reason only of the inaccuracy of the entry."

The appellants stated in evidence before the trial Court that the goods were destined for Lebanon but it had not been stated so in the manifests because they "were afraid from secret agents of Israel in Cyprus". Therefore the inaccuracy in the entry/manifest, that is the failure to state that the guns were in transit to be transhipped to Lebanon, cannot be considered as "inadvertent" and they cannot therefore claim the protection of Section 24(3).

We would consider in the circumstances that this ground of appeal must fail.

The next ground of appeal is that the trial Court erred by basing its decision on Section 6 of the Second Schedule to the Law which being contrary to the provisions of Article 12.3 which provides that "no law shall provide a punishment which is disproportionate to the gravity of the offence", is unconstitutional. It was contended that Section 6, leaves no discretion but makes it mandatory upon the Court to impose a condemnation order; and since legal provisions which impose mandatory punishments irrespective of the gravity of the offence have been held to be unconstitutional as being contrary to Article 12.3, it is argued that Section 6 must be held to be unconstitutional.

It was also contended that the Court further erred by failing to examine such question of constitutionality on the ground that it had not been raised in the pleadings before it, however, it was argued, in accordance with Order 19 rule 4 and Order 27 of the Civil Procedure Rules, the parties are not bound to raise before the Court such matter in order that it may be examined.

Order 19, rule 4 referred to by the appellant does indeed provide that every pleading shall contain in a summary form all the material facts, but not the evidence. But we would consider that a question of constitutionality is not a matter of evidence. Furthermore in Order 19 rule 13 it is provided that a party must raise in his pleadings

"all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law,...."

This rule corresponds to the Old English Order 19, rule 15, which provides as follows:

"The defendant or plaintiff (as the case may be) must raise by his pleading all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds."

At page 356 of the Annual Practice 1956 it is stated in relation thereto:

"It often is not enough for a party to deny an allegation in his opponent's pleading; he must go further and dispute its validity in Law."

The aforesaid Old English Order 19, rule 15 was incorporated by the R.S.C. (Revision 1962) into Order 18, rule 8, where it is provided: (See Annual Practice 1964 pp. 373-374).

"8-(1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality -

(a) which he alleges makes any claim or defence of the opposite party not maintainable; or

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading."

And in the note thereto it is stated at p. 374:

"This Rule enforces one of the cardinal principles of the present system of pleading, viz., that every defence or reply must plead specifically any matter which makes the claim or defence in the preceding pleading not maintainable or which might take the opposite party by surprise or raises issues of fact not arising out of the preceding pleading. Put shortly, wherever a party has a special ground of defence or raises an affirmative case to destroy a claim or defence, as the case may be, he must specifically plead the matter he relies on for such purpose. 'The effect of the rule is, for reasons of practice and justice and convenience to require the party to tell his opponent what he is coming to the Court to prove' (per Buckley, L. J., in *In re, Robinson's Settlement, Gant* v. *Hobbs*, [1912] 1 Ch. 717, 728): but the rule does not prevent the Court from giving effect in proper cases to defences which are not pleaded (ibid., and see *Price* v. *Richardson*, [1927] 1 K.B. 448, 453)."

In re, Robinson's Settlement (supra) it was held at pp. 727 - 728:

"But then it is said Stevens has not pleaded this point. Paragraph 3 of his defence is not very plain, so I will assume that he has not done so. The first answer is to be found in Lindley and A. L. Smith L. JJ.'s judgment in *Scott* v. *Brown, Doering, McNab & Co.* [1892] 2 Q.B. 724, of which the Master of the Rolls has has already read part. Beyond that it seems to me that Order XIX., r. 15, on which the plaintiff relies as excluding Stevens from setting this up, has not that effect. Order XIX., r. 15, provides that the defendant must by his pleading do various things, but it names no consequence if he does not do those things. It is not confined, as Mr. Cave contended, to a case where a statute is the thing to be pleaded: it applies to all cases of grounds of defence

or reply which if not raised would be likely to take the opposite party by surprise or raise issues of fact not arising out of the pleadings.

Where the defendant ought to plead things of that sort the rule does not say that if he does not the Court shall adjudicate upon the matter as if a ground valid in law did not exist which does exist. If in the course of the proceedings it was proved that the deed sued upon was a forgery and the defendant does not plead it or did not know it was forgery, the Court would not give judgment upon the deed on the footing that it was a valid deed. The effect of the rule is, I think, for reasons of practice and justice and convenience to require the party to tell his opponent what he is coming to the Court to prove. If he does not do that the Court will deal with it in one of the two ways. It may say that it is not open to him, that he has not raised it and will not be allowed to rely on it; or it may give him leave to amend by raising it, and protect the other party if necessary by letting the case stand over. The rule is not one that excludes from the consideration of the Court the relevant subject-matter for decision simply on the ground that it is not pleaded. It leaves the party in mercy and the Court will deal with him as is just. Therefore it was open to Stevens, and on that ground I think he succeeds."

Order 27, rule 1, which corresponds to the Old English Order 25, rule 2 (now incorporated into Order 18 rule 11, by the R.S.C. (Revision) 1962) provides that:

"Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the Court at any stage that may appear to it convenient."

The aforesaid English Order 18 rule 11 provides:

"A party may by his pleading raise any point of law."

In the note following it it is stated at p. 245 of the Supreme Court Practice 1967:

"If a party intends to raise a point of law on the facts as pleaded, it is a convenient course to do so in the pleading. But nevertheless he may, at the trial, raise a point of law open to him even though not pleaded *(Independent Automatic Sales, Ltd.,* v. *Knowles & Foster,* [1962] 3 All E.R. 27). In a proper case, the Court will allow a party to amend his pleading so as to raise a point of law for argument before the trial, as in *Lever* v. *Land Securities Co.,* 70 L. T. 323; or keep the point open for argument in the House of Lords, as in *Cummings* v. *London Bullion Co.,* [1952] 1 K. B. 327, C.A.; or allow a preliminary point of law to be argued under 0.33 r. 3, without any pleadings, as in *Ramage* v. *Womack,* [1900] 1 Q.B. 116, and *Roberts* v. *Charing Cross,* etc., Ry., 87 L. T. 732."

In the case of *Independent Automatic Sales Ltd.,* v *Knowles and Foster* (supra), it was held at pp. 29-30:

"The defendants have not raised this point specifically in their pleading. It is, it is true, a pure point of law. Nevertheless, it is a point taken by the defendants which, in substance, is a demurrer to the action, and I have had to consider R.S.C., Ord. 25, rr. 1, 2 and 3, which are the rules which now apply in cases where, under the old procedure, a defendant would have demurred to the plaintiff's action. Rule 1 provides that no demurrer shall be allowed. Rule 2 provides that

'Any party shall be entitled to raise by his pleading any point of law, and, unless the Court or a Judge otherwise orders, any point so raised shall be disposed of by the Judge who tries the cause at or after the trial.'

Rule 3 is:

'If, in the opinion of the Court or a Judge, the decision of such point of law substantially disposes of the whole action or of any distinct cause of action, ground of defence, set-off, counterclaim, or reply therein, the Court or Judge may

thereupon dismiss the action or make such other order therein as may be just.'

One knows that in practice, where a defendant demurs to a plaintiff's action, one course open to him is to raise the ground of demurrer in the pleading and bring that point of law on to be heard and determined as a preliminary point with a view to avoiding having to incur the costs preparing for the full trial of the action before that point is disposed of. Nevertheless, counsel for the defendants here says that at the trial the defendants are not precluded by these rules from raising a pure point of law which disposes of the action, or may dispose of the action, notwithstanding that it is not mentioned at all in the pleading.

At first glance it appears to me that r. 2 of R.S.C., Ord. 25, is somewhat against the submission of counsel for the defendants; but we have to bear in mind the terms of R.S.C., Ord. 19, r. 4, which provides that

'Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies:...';

and undoubtedly, a party is not bound, and indeed normally ought not, to plead points of law but to plead the facts on which he relies. In the notes to R.S.C., Ord. 25, r. 3, I find, under the heading 'Objection in point of law', the following note:

'If a party intends to apply for determination of point of law he must raise it on his pleading. But at the trial itself he may raise a point of law open to him even though not pleaded.'

The first sentence there must be intended to relate to the determination of the point of law as a preliminary point, not at the trial. The right view for me to take, in the circumstances, is that the defendants here are not precluded from raising this point by the fact that they have not expressly taken

it in their pleading. But where there is a substantial point of law which may dispose of the whole action, it is not a convenient course to be followed normally that no mention should be made of the point of law in the pleading, because, if no mention of it is made in the pleading, the other side may be lulled into a sense of false security in that particular respect, and may very probably appear before the Court less ready and able to argue what may be a difficult matter. However, this present point is not one of very great complexity, and the plaintiff company will not really be exposed to any great embarrasent by not being told till this morning that this point was going to be taken by the defendants."

The trial Judge referred in his judgment to the case of *The Improvement Board of Eylenja* v. *Andreas Constantinou* (1966) 1 C.L.R. 167. Therein it was held at pp. 183-184:

"Before concluding this judgment, however, I would like to make certain observations with regard to the procedure followed in this case in the District Court. As already stated, the question of the unconstitutionality of the Law was not raised in the pleadings and was not raised at all until the final address of the respondent's counsel. It is true that following the decision of this Court in the case of the *Attorney-General* v. *Ibrahim*, 1964 C.L.R. 195, at page 200 it is no longer necessary to follow the procedure for a reference, under Article 144 of the Constitution, by any Court to the Supreme Constitutional Court, and that all questions of alleged unconstitutionality should be treated as issues of law in the proceedings, subject to revision on appeal in due course. But that does not mean that questions of constitutional importance may be raised in an offhand way without giving the opportunity to the other side of being heard. I am of the view that where a party in a civil proceeding wishes to raise the question of the unconstitutionality of any law. he should follow one of two courses:

(a) he should either raise it specifically with full particulars in his pleading, and refer to the spe-

cific provision of the Constitution which is alleged to have been violated by the impugned statute, thus giving the opportunity to the other side of replying by his own pleading; or

(b) if he wishes to raise such a question at a later stage of the proceedings — and indeed it would seem that he has the right to raise such a question at any stage thereof — (see Article 144.1) —then he should do so formally in writing, formulating the question raised in detail, as in paragraph (a) above, so as to give the opportunity to the other side of being heard on the point.

It should, perhaps, be added that if such a question were raised in the course of the hearing, the trial Court might have to exercise its discretion of granting an adjournment to the other side to enable it to prepare its case. Needless to say that the question of unconstitutionality thus raised must be material for the determination of any matter at issue in such proceedings (Article 144.1)."

From the above we have reached the conclusion that the question of the constitutionality of the relevant provisions of the Customs and Excise Law, 1967, in relation to Article 12.3, being a legal issue in a broad sense need not have been specifically pleaded; all facts which were essential for its determination were pleaded, such as the seizure, the notice etc. And such issue of constitutionality had to be resolved only by comparing and weighing the provisions of the Law as regards the articles of the Constitution claimed to have been offended.

We have taken notice of the aforesaid *Eylanja case* (supra) and would consider that it is more of a directive rather than laying down hard and fast rules to be followed at all times.

In the circumstances we feel that it was open to the trial Court to consider such question of constitutionality. However, in view of the fact that leave was given to the appellants to argue such matter before us, we would con-

sider that this ground of appeal to be more of an academic importance rather than affecting the outcome of this appeal.

The main issue in this appeal is the constitutionality of Section 6 of the Second Schedule to Law 82 of 1967. Two points arise for consideration.

(a) whether Article 12.3 applies to proceedings other than criminal, and

(b) if it does, whether Section 6 is in fact unconstitutional.

It has been suggested by the parties that Article 12.3 of the Constitution may apply not only to criminal proceedings but also to civil proceedings in rem, such as the present proceedings and the cases of *Lefkos Georghiades* v. *Republic* (1969) 3 C.L.R. 396, and *Costas Mourtouvanis* v. *The Republic* (1966) 3 C.L.R. 108 were cited in support of such proposition.

It has been further argued on behalf of the respondents that in any event Section 6 of the Second Schedule to Law 82 of 1967 is not unconstitutional because its provisions relate to the power of the Director of Customs to seize goods with a view to their ultimate forfeiture; a matter against which a remedy exists under Article 146 of the Constitution being an administrative decision and "a perfectly usual and proper provision relating to customs management"; the case of the *Chief Customs Officer* v. *Associated Agencies Ltd of Limassol*, 3 R.S.C.C. 36 at p. 37 and the *Mourtouvanis* case (supra) were cited in support.

As to whether Article 12.3 applies to proceedings other than criminal ones a review of the relevant case law on the matter is necessary.

In the Supreme Constitutional Court, the relative cases were by way of reference under Article 144.1 of the Constitution in the course of hearings of criminal cases before the District Courts. Therein the question arose whether the particular provisions under attack amounted

to punishment, in which case any provisions for disproportionate punishment being of a mandatory nature were held to be unconstitutional as offending Article 12.3.

The case of *Costas Mourtouvanis* v. *Republic* (1966) 3 C.L.R. 108 referred to by both parties, which was a recourse under Article 146 of the Constitution against the failure of the Customs Authorities to return to the applicant company goods and exemption certificates seized under the Customs Management Law, Cap. 315 for any alleged offence giving rise to a customs prosecution, it was held therein that the provisions of Section 187 of Cap. 315 (which is now paragraphs 1, 2 and 3 of the 2nd Schedule to Law 82 of 1967) did not contravene Article 12.3 of the Constitution in view of the provisions of Section 189 of Cap. 315 (now paragraphs 5 and 6 of the Second Schedule to Law 82 of 1967) the provisions prescribing a time limit of fifteen days for claiming the goods seized, being a "perfectly proper and usual provision relating to customs management." (See also *Chief Customs Officer* v. *Associated Agencies Ltd.*, 3 R.S.C.C. 36 at p. 37).

It was not touched upon therein by the Court whether Article 12.3 applies to proceedings other than criminal, but in any event since the seizure was in contemplation of criminal proceedings, the matter was not in issue.

On the other hand, in the case of *Lefkos Georghiades* v. *Republic* (1969) 3 C.L.R. 396, the matter was considered by the Court in relation to the provisions of Article 7(1) of the European Convention on Human Rights in its English and French texts and it was stated at p. 404:

> "In my opinion no safe conclusion can be drawn, about the exact effect of Article 12.1 of the Constitution, from a comparison of the English and French texts of Article 7(1) of the Convention with the English text of our said Article 12.1, which text is not, after all, its official text."

And further down in the same page:

> "In the light of the foregoing I cannot accept that the first part of paragraph (1) of Article 12 of the

Constitution—with which, only, we are concerned at this stage—can, or should, be construed so as to render applicable to disciplinary matters concerning public officers the principle of nullum delictum sine lege (or, nullum crimen sine lege)."

In the Digest of Strasbourg Case Law relating to the European Convention on Human Rights, Vol. 1, the folowing was stated at p. 1 on the general principles of interpretation of the Convention.

"Thus confronted with two versions of a treaty which are equally authentic but not exactly the same the Court must, folowing established international law precedents, interpret them in a way that will reconcile them as far as possible. Given that it is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the parties. Judg. Court, 27 June 1968, Wemhoff Case, § 8. Publ. Court A. Vol. 7 p. 23, 17 January 1970, Delcourt Case, § 25. Publ. Court A, Vol. 11 pp. 14 - 15."

The aforesaid Article 7(1) provides as follows:

"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

In the French text the word "infraction" appears for the words "criminal offence" which substantially means a "breach of a law or reputation".

From a careful consideration of the aforesaid *Georghiades* case (supra) no inference can be drawn as leading to a conclusion that Article 12.3 applies to proceedings other

than criminal. In any case, as already seen, the matter was left open.

However, in the Digest of Strasbourg Case Law Vol. 3, from a perusal of the relevant cases reported therein in relation to Article 7(1) of the Convention, it transpires that violations of Article 7 refer to criminal offences. At pp. 20-21 thereof reference is made to Application No. 4274/69, 24 July 1970, published in the Yearbook of the European Convention on Human Rights No. 13 p. 888 wherein it is stated at p. 890:

> "Whereas the Commission has had regard to the applicant's complaint that, as a result of the disciplinary proceedings opened against him, he was found guilty on account of acts which did not constitute an offence under national or international law, and that Article 7 of the Convention was thereby violated; whereas Article 7(1) provides that 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed'; whereas, however, the subject of the disciplinary proceedings opened against the applicant was not the determination of the applicant's guilt as regards any criminal offence but was in connection with disciplinary offence; whereas the Commission has previously held that the notion of a 'criminal offence' as mentioned in Article 6(2) and (3) of the Convention, does not envisage disciplinary offences (cf. Application No. 734/69, Collection of Decisions, No. 6, p. 32); whereas this finding applies equally to the interpretation of these words as mentioned in Article 7(1) of the Convention; whereas, consequently, the guarantees under this Article are not applicable in the applicant's case;"

And in Application No. 4519/70, 5 February, 1971, which appears in the Yearbook No. 14, p. 616, it is stated at p. 620:

> '.... Article 6(2) and (3) applies exclusively to persons charged with criminal offences, whereas in the

present case there is no doubt that the proceedings against the applicant were disciplinary proceedings and that she cannot be considered as a person charged with a criminal offence within the meaning of Article 6(1), (2) and (3);"

And further down at p. 622:

"Whereas, moreover, the applicant alleges that the fact that she was found guilty of an alleged disciplinary offence amounts to a violation of Article 7 of the Convention; whereas Article 7 provides that 'no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed....'; whereas, however, the proceedings of which the applicant complains, which took place before disciplinary tribunals and concerned the practice of medicine, quite obviously were not prosecutions for alleged violations of the criminal law; whereas the Commission's interpretation of Article 6 of the Convention, according to which the term 'criminal offence' in paragraphs (2) and (3) does not include disciplinary offences, applies equally to the same term as used in Article 7(1) of the Convention, whereas it follows that the applicant's allegations on this point do not fall within the scope of the safeguards provided by Article 7;"

Similarly in our case law it was held in the case of *Lambrou* v. *Republic* (1972) 3 C.L.R. 379 at pp. 386-387 in respect of our Article 30.2 which corresponds to Article 6(1) of the European Convention that:

"A disciplinary charge is not, of course, a criminal charge; also, in view of the decisions of the Commission of Human Rights of the Council of Europe in cases 423/58 (see Collection of Decisions of the Commission No. 1) and 1931/63 (see Yearbook of the European Convention on Human Rights No. 7 at p. 212), I am of the opinion that the disciplinary proceedings against the present applicant were not proceedings for the determination of any civil right or obligation of his."

Also in the case of *Choraitis* v. *Republic* (1986) 3 C.L.R. 838 at 849 on whether a decision of the Chief of Police to withhold emoluments deducted during a period of interdiction, was a violation of Article 12.3, it was held:

> "In the present case we are not dealing with criminal proceedings but with a measure taken in furtherance of an administrative decision, that of the interdiction of the applicant pending disciplinary proceedings against him on serious charges for neglect of duty."

In the case of *Kantara Shipping Ltd.*, v. *Republic* (1969) 3 C.L.R. 95, the imposition of a 5% surcharge for non-payment of tax on the due date by virtue of Section 8(1) of the Tax Collection Law 1962, Law 31 of 1962, was held not to constitute "punishment", and the non-payment "offence" within the meaning of the words in Article 12.3 of the Constitution and it was stated by the Court at p. 103:

> "In my view it is quite clear from the wording of Article 12 that its provisions do not apply to and cannot be invoked in cases such as the present one; and the fact that the rules in this Article may be applicable to disciplinary offences as well, as was held in the case of *Haros and The Republic*, 4 R.S.C.C. p. 39 at p. 44, does not in my opinion affect the issue one way or the other."

Likewise we would consider that in the present instance the appellants have not been convicted of any offence nor have they been charged with such. The forfeiture in question does not constitute a punishment but is an administrative measure against which the only proper redress would be under Article 146 of the Constitution by way of recourse. See, *Associated Agencies* case (supra), where it was held that a provision in the Customs Management Law, Cap. 315 that customs duty shall be payable on demand in respect of dutiable goods which are not accounted to the satisfaction of the collector, was not a punishment but "a perfectly usual and proper provision relating to customs management".

Support for our view can be found in *Commissioners of Customs and Excise* v. *Sokolow's Trustee* [1954] 2 All E.R. 5 where in respect of proceedings for forfeiture and condemnation of goods it was stated at p. 7:

> "In such circumstances, is such an action a suit for an offence against the Customs Act? In my view, it is not. It is a suit to determine the legality of the seizure. It may be true that the fact that the goods were goods the import of which was restricted or forbidden and that they were seized are matters which must be proved unless, as in this case, they are admitted. But the proceedings are not for the offence which led to the seizure; they are proceedings to establish that the seizure which followed the offence has resulted in the customs authorities having a good title to the goods, and, therefore, one which they could pass to a purchaser of the goods from them."

A distinction was made therein between Criminal Proceedings under the Act and forfeiture as a penalty incurred in consequence of the doing of something which the Act prohibits and suits to establish the liability to forfeiture of goods seized.

Before concluding it would be useful to refer to the cases of our Courts dealing with forfeiture. All, as already stated above, were related to criminal proceedings before the District Courts.

In Morphou *Gendarmerie* v. *Englezos,* 3 R.S.C.C. 7 provisions under the Firearms Law, Cap. 57 for mandatory forfeiture of firearms in respect of which an offence has been committed were considered as disproportionate punishment and therefore contrary to Article 12.3. See also *Gendarmerie* v. *Yiallouros,* 2 R.S.C.C. 28 i. e. provisions under the Game Protection Law, Cap. 65 for forfeiture of licence, forfeiture of the gun, in addition to any other penalty for pursuing birds during a closed season.

In the *District Officer Kyrenia* v. *Adem Sahil,* 3 R.S.C.C. 69, the forfeiture of goats was held to be disproportionate

punishment for an offence of allowing such goats to graze in a prohibited area.

But in the case of *Gendarmerie* v. *Zavos*, 4 R.S.C.C. 63, the forfeiture of antiquities for being in possession of such antiquities contrary to the Antiquities Law was considered as not being punishment but the means of ensuring that the antiquities are restored to the State to which they rightfully belonged.

In conclusion, in view of what has been stated above we would consider that Article 12.3 of the Constitution has no application in the present proceedings, the forfeiture complained of being an administrative process, it does not amount to a punishment and therefore cannot infringe the provisions of Article 12.3.

For the reasons stated above, this appeal is therefore dismissed with costs.

Appeal dismissed with costs.