

1986 October 30

[A. Loizou, J.]

IN THE MATTER OF ARTICLE 146  
OF THE CONSTITUTION

H. AND D. HEALTH AND DIET FOOD CENTRE LTD..

*Applicant,*

v.

THE REPUBLIC OF CYPRUS, THROUGH  
1. THE DRUGS COUNCIL,  
2. THE MINISTER OF HEALTH.

*Respondents.*

(Case No. 681/84).

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5 *Executory act—Informatory act—The Drugs (Control of Quality, Supply and Prices) Law 6/67—Decision to classify goods as pharmaceutical preparations is executory, but part of letter informing applicants that such goods would be seized is of an informatory nature.*

10 *Drugs Council—The Drugs (Control of Quality, Supply and Prices) Law 6/67—Section 4—Competent to classify goods as pharmaceutical preparations—Meetings of council. proper constitution of—Section 3(2)—Absence of chairman for service reasons—Meeting properly chaired by one of the other members.*

*Administrative Law—Experts, conclusions of—The principle of non-reviewability of such conclusions.*

15 *Reasoning of an administrative act—Decision non reviewable because of the principle of non reviewability of conclusions of experts—The reasoning of the decision is, also, non reviewable.*

20 The respondent Council decided that some of the goods which had been imported by the applicants from Belgium were controlled pharmaceutical preparations in accordance

with the Orders issued by the Minister of Health by virtue of section 4 of the aforesaid law. As a result the Registrar of the Council informed the applicants that several of the said goods "are considered as controlled pharmaceutical preparations ..... and their marketing is not allowed unless you obtained a marketing licence from the Drugs Council" and, also, that "Authorised officers of the Pharmaceutical Services will proceed to seize the goods..." 5

Counsel for the respondents submitted that the sub judice decision is not an executory, but of an informative nature because the Council did not decide that the goods were or not pharmaceuticals since such goods are specified as controlled preparations in the relevant Order of the Minister of Health. 10

Counsel for the applicants submitted that the Council had no competency to decide whether the goods in question were pharmaceuticals or not, but was only empowered to grant or not a marketing licence, that the goods in question were food supplements and not pharmaceutical preparations, that the reasoning of the sub judice act is defective and that the Council at the relevant meeting was not properly constituted, because the chairman, namely the Director-General of the Ministry was absent for service reasons, and the meeting was chaired by one of its members, who had not been appointed in accordance with s. 3(2)\* of the aforesaid law. 15 20 25

*Held*, dismissing the recourse: (1) The decision to classify the goods as pharmaceuticals and not as food supplements, produced direct legal results and, consequently, it is of an executory nature capable of being challenged by a recourse, whereas the part of the Registrar's letter that the goods will be seized is of an informative nature, being a mere expression of the intention of the administration and, as such, cannot be made the subject of a recourse to this Court. 30 35

(2) The respondent Council had competency to classify the goods in question as pharmaceutical preparations (*H.*

\* Quoted at p 1538 post

and *D. Health and Diet Food Centre Ltd. v. Republic* (1985) 3 C.L.R. 2756 followed).

5 (3) It is a well established principle that subject to certain exceptions the conclusions of experts cannot be interfered with by this Court (*H. and D. Health and Diet Food Centre Ltd. v. The Republic* (*supra*) followed) and, consequently, the second of the aforesaid submissions of the applicants fails.

10 (4) The reasoning of the sub judice decision is directly connected with the reaching of the same which, in the light of the above, is not reviewable. It follows that the reasoning cannot be examined as such examination would amount to an indirect way of reviewing a non reviewable decision. In any event the sub judice decision is duly reasoned.

15 (5) The instrument of appointment as member of the Council of Dr. Stylianou was produced in Court. In the absence of the chairman for service reasons the chairing of the meeting by Dr. Stylianou was in accordance with s. 3(2) of the aforesaid Law. The principle relied by counsel for the applicants that in the very text of the decision there should be mentioned that in view of the inability of the regular member the alternate was attending is, without pronouncing on its applicability in Cyprus, distinguishable, because Dr. Stylianou did not chair the meeting as an alternate member, but as one of the members of the Council duly authorised so to do in the absence of the chairman.

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

Cases referred to:

*H. and D. Health and Diet Food Centre Ltd. v. The Republic* (1985) 3 C.L.R. 2756;

*Decision 681/1934 of the Greek Council of State.*

35 **Recourse.**

Recourse against the decision of the respondents whereby goods of the applicants were considered as pharma-

pharmaceutical preparations and the decision of the respondents that duly authorised officers of the Pharmaceutical Services would proceed to the seizure of the goods which were considered as controlled pharmaceutical preparations.

*N. Panayiotou*, for the applicant. 5

*N. Charalambous*, Senior Counsel of the Republic, for the respondents.

*Cur. adv. vult.*

A. LOIZOU J. read the following judgment. By the present recourse the applicant Company seeks the following relief: 10

(a) Declaration of the Court that the act and/or decision of the respondents by which the goods of the applicants were considered as pharmaceutical preparations, is null and void and of no legal effect whatsoever. 15

(b) Declaration that the decision of the respondents communicated to the applicant Company by letter dated 12th October 1984, that duly authorised officers of the Pharmaceutical Services would proceed to the seizure of goods which were considered as controlled pharmaceutical preparations is null and void and of no legal effect whatsoever. 20

The applicants are agents of what are described as Food Supplements (dietic preparations). On the 5th October, 1984, the applicants requested the Drugs Council to stamp an invoice of goods imported by them from the Belgian company "Ortis Sprl Aliments Naturels" to enable them to clear from Customs the goods referred to therein. 25

On the 6th October 1984, the applicants were informed by the Registrar of the Drugs Council that in the invoice here were included "controlled pharmaceutical preparations" for the importation of which there was required in accordance with the Drugs (Control of Quality, Supply and Prices) Law, 1967 (Law No. 6 of 1967) hereinafter to be referred to as the Law, a marketing licence to be issued by the Drugs Council. 30 35

As the applicants disputed that any of their goods were pharmaceuticals the Registrar requested a meeting of the Council for the 9th October 1984, for its views on the matter.

5       Meanwhile on the 8th October, 1984, the applicants informed the Registrar that as the Department of Customs had allowed the clearance of the goods, their stamp was no longer required.

10       The respondent Council met on the 9th October, 1984, considered the matter, examined the samples of the applicant and listed the goods which "are considered as controlled pharmaceutical preparations in accordance with the Orders issued by the Minister of Health by virtue of section 4 of the Law, and therefore a marketing licence is  
15       required for their marketing from the Board. These products and their contents are described in the various Pharmacologies and their prescriptions are specified in the various Pharmacopoeas, such as the British, American, European, for their quality control. They cannot be con-  
20       sidered as food supplements because they contain pharmaceutical substances and the purpose of these preparations is the administration of such substances. These drugs as well as other drugs must be supplied to the public by doctors and pharmacists for their correct use and the  
25       protection of its health. For similar preparations marketing licences have been issued by the Drugs Council to many importers."

30       In view of this decision the Registrar of the respondent Council wrote to the applicant Company on the 12th October 1984, inter alia as follows:

35       "With reference to the importation by your Company on the 8th October 1984 of certain goods, I wish to inform you that several of these are considered as Controlled Pharmaceutical Preparations... and their marketing is not allowed unless you obtain a marketing licence from the Drugs Council."

And also that:

"Authorised officers of the Pharmaceutical Services

will proceed to seize the goods which are considered as controlled pharmaceutical preparations.”

As a result of this letter the applicant Company filed the present recourse.

Before embarking into the arguments advanced on behalf of the applicant Company, I shall consider first the preliminary objection put forward on behalf of the respondents to the effect that the sub judice decision is not an administrative decision capable of being challenged under Article 146 of the Constitution, but is of an informative nature because the Drugs Council did not decide that the goods listed therein were or not pharmaceuticals since such are specified in the list of controlled preparations which was published in an Order of the Minister of Health, in the Third Supplement to the Official Gazette dated 10th April, 1970.

Also, it was argued that the decision that the goods would be seized was not executory, because the proposed seizure was an act related to proposed criminal proceedings.

I consider that the decision of the respondent Drugs Council to the effect that the goods were pharmaceuticals and not food supplements, is an executory administrative decision producing direct legal results and consequently capable of being challenged by means of the present recourse—See *H. and D. Health and Diet Food Centre Ltd., v. Republic* (1985) 3 C.L.R. 2756 at p. 2761.

As regards the part of the respondents' letter that the goods will be seized, I consider it to be as of an informative character, it is a mere expression of the intention of the administration which produces no direct legal results. (See Conclusions of the Case Law of the Greek Council of State 1929-1959 pp. 238-9) and it cannot therefore be challenged by means of the present recourse.

Having disposed of this matter, I shall proceed now to deal with the arguments of the applicant.

I consider that it is pertinent to deal first with the argument that the Drugs Council had no competence under the Law, to decide whether the goods were pharmaceu-

ticals or not but was only empowered to decide whether or not to grant marketing licences in respect of pharmaceuticals.

5 It was stated by this Court in relation to the same arguments in the "*H. and D. Health and Food Diet*" case (supra) at p. 2762 that:-

10 "The Drugs Council which was set up by virtue of the Drugs (Control of Quality, Supply and Prices) Law, 1967 is in accordance with section 4 of the Law, the appropriate organ to prepare 'a list of the substances which are to be treated as controlled pharmaceutical preparations' for the purposes of the Law; it is thus the appropriate organ to decide if a specified substance is a pharmaceutical preparation or not, as  
15 it has done in the present case."

Consequently this ground must fail.

20 The main argument put forward by the applicants is that the goods in question were food supplements and not pharmaceutical preparations, therefore the respondent Council was wrong in deciding that a marketing licence was required for their importation.

25 This matter was also extensively dealt with by this Court in the aforesaid case of *H. and D. Health and Food Diet* (supra) which I consider as directly relevant to this argument. The following was stated therein in relation to this, at pp. 2762-2764:

30 "As already stated above the appropriate organ to decide as to the nature of the goods is the Drugs Council and this Court cannot interfere with such expert opinion, as the non-reviewability, subject to certain exceptions to which I shall be referring shortly, of the conclusions of experts, is a well established principle. In this respect reference may be made to *Theodossis Ioannou v. Republic* (1982) 3  
35 C.L.R. 380, where Stylianides, J., had this to say at pp. 384-385:-

'With the advancement of science the ordinary

and general knowledge of a person are not sufficient to deal with matters which are considered technical or specialized. Special knowledge or capacities acquired by scientific study, training and experience are required for the facing, examination and determination of such matters. The value of specialized knowledge is uncontested, being the product, as it is, of intensive study, research and experience beyond the range of the ordinary man. In general, neither the administrative organ nor this Court can pass a judgment on the opinions of a body of experts. It is only when there is a misconception of fact by the taking into consideration of non-existing facts or by the failure to take into consideration existing ones that the Court can exercise judicial control over decisions based on such opinions.

The non-reviewable, subject to what was stated above, of the conclusions of the experts and particularly of medical experts, is well settled (*D. P. Economou—Judicial Control of Administrative Power*, 1966, p 253). It is normally beyond the competence of this Court in a case of this nature to examine the correctness from a scientific aspect of the report of the Medical Board (See *Decision No 2051/70 of the Greek Council of State Pitsillides v. Republic*, (1978) 3 C.L.R 99; *Kyriacos Diosmis v. Republic*, (1975) 3 C.L.R 461, 465). It is within the exclusive competence of the administrative organ to decide on the disability of a person (ικανότης ή ανικανότης) and its decision is not reviewable unless there is a reviewable defect. (Case No. 828/49 of the Greek Council of State).<sup>7</sup>

In any event such expert opinion was also taken in accordance with Notification No. 274 of 1970, published in Supplement III to the Official Gazette, that certain pharmaceuticals which are considered as controlled drugs can only be imported under licence and in this instance the applicants had no such licence.



Such expert opinion is also valid even if there may be existing opinion of other experts to the contrary. Such contrary opinion cannot lead to a conclusion that the expert opinion before the Court is wrong because in the present case, it is not before the Court on what this opinion of foreign experts to the contrary was based, nor what were the relevant provisions of their law.”

In view of the above, this ground must also fail.

As regards the argument of the applicants that the reasoning given in respect of the sub judge decision is defective, I consider it to be a matter directly connected with the reaching of the sub judge decision which as stated above is non-reviewable and which therefore cannot be examined as it would otherwise be an indirect way of entering into an examination of a non-reviewable decision. In any event the sub judge decision is duly reasoned in the circumstances.

I also consider that the sub judge decision is not contrary to Article 28 of the Constitution, because, the fact that goods, as alleged, similar to those of the applicant Company may be available in the market does not mean that no marketing licences have been obtained in respect of them or if it was done unlawfully, this does not give the applicant any right under the law to import the goods without a licence. But in any case the applicant Company has failed to establish that it was subject to any unequal treatment vis a vis other importers.

The final ground put forward by the applicant Company is that the Drugs Council at the relevant meeting of the 9th October 1984, was not properly constituted in that Dr. Stylianou, one of its members, who chaired that particular meeting during the absence of the Director-General, was not appointed in accordance with the provisions of Section 3(2) of the Law.

As there appeared not to have been adduced any evidence regarding the appointment of Dr. Stylianou by the

Minister to act as Chairman, directions were given to re-open the case and invite argument on this issue and at the same time offer the opportunity for the production of any evidence relevant thereto.

At the reopening of the case learned counsel for the respondents produced copies of the instrument of appointment of Dr. Stylianou, a Council member (exhibit XX) who chaired the meeting of the Drugs Council of the 9th October 1986, for the reason that—as stated therein—the Director-General of the Ministry could not preside for service reasons. This is in accordance with section 3(2) of the Law which provides:

“(2) The Director-General shall be the Chairman of the Drugs Council:

Provided that in the case of absence from the Republic or illness or incapacity to act for any reason of the Director-General, the Minister may appoint any member of the Drugs Council to be Chairman of the Council during such absence, illness or incapacity.”

Learned counsel for the applicants has argued that that was not sufficient in Law but that in the very text of the decision it should be mentioned that in view of the inability of the regular member the alternate was attending.

In respect of that proposition I was referred to the System of Administrative Law by PapaHadjis, 6th edition volumes A and B pp. 622-623 and to the Decision of the Greek Council of State No. 681/1934. I need not go deeper into the matter, it is sufficient to say that in the relevant minute of the respondent Drugs Council, Dr. Stylianou is described as Acting Chairman (Προεδρεύσας). Also the principle relied upon by learned counsel is distinguishable—without pronouncing on its applicability to Cyprus—as here we do not have the participation of an alternate member instead of a regular one but merely the chairing of a meeting by one of its members duly authorised under the Law so to do in view of the inability of the ex officio Chairman, the Director-General to be present at that meeting. This ground therefore also fails.

For all the above reasons the present recourse is dismissed but in the circumstances there will be no order as to costs.

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*Recourse dismissed.*

*No order as to costs.*