1988 June 10

[A. LOIZOU, P., DEMETRIADES, SAVVIDES, PIKIS, KOURRIS, JJ.]

1. SYDNEY ALFRED MOYO,
2. ROBIN MACLAREN WATSON,

Appellants,

v.

THE REPUBLIC OF CYRPUS, THROUGH
1. THE MINISTER OF THE INTERIOR,
2. THE MIGRATION OFFICER,
3. THE CHIEF OF POLICE,

Respondents.

(Revisional Jurisdiction Appeal No. 811).

Aliens—Right of the State to regulate their length of stay—An attribute of the sovereignty of the State.

Provisional Order—Its nature and aims—Why there is no jurisdiction to suspend a negative act—The prerequisites for granting it—Flagrant illegality and irreparable damage—Deportation order concerning an alien—Its non suspension will not cause in the circumstances such a damage.

Constitutional Law—Fair trial—Constitution, Art. 30—Entitles the litigant to be present at his trial, but does not give to an alien a right of stay in this country until the trial.

Aliens—The Internantional Convention on Civil and Political Rights ratified by Law 14/69, Article 13—Ambit of—It does not establish a right of hearing in case the deportation order is made on grounds of national security.

The applicants are foreign nationals. Appellant 1 applied for an extension of his permit to stay in this country. He did not receive a reply. He stayed in Cyprus, notwithstanding the expiration of his permit to stay therein.

Having declared both appellants as prohibited immigrants, the Minister of Interior issued deportation orders as well as detention orders. These orders were made the subject of a recourse. The applicants applied for a provisional order suspending the effect of the deportation order. The application was dismissed. Hence this appeal.

Held, dismissing the appeal: (A) *Per Pikis, J.: A. Loizou, P., Demetriades, J. and Kourris, J. concurring:* (1) A provisional order is an extraordinary remedy. A negative act cannot be suspended by such an order. The order may only suspend a positive act. The prerequisites of its issuance are flagrant illegality and irreparable damage.

(2) In this case the appellants failed to prove irreparable damage.

(3) The application of the first appellant is wholly misconceived. It aims not only at the suspension of the act of deportation, but at its supplementation too, i.e. an authorization to stay in the country. In the case of appellant 1 the deportation order cannot be suspended, because such suspension will not confer on him a right to remain in the country.

(4) The main contention of appellant 2 is that he was deported without being given a right of prior hearing and without a revocation of his residence permit. However, a revocation may be achieved in an indirect way.

(5) Appellants failed to establish manifest illegality. The right of the State to regulate the length of stay of an alien is an attribute of sovereignty. Art. 30.1 of the Constitution entitles the appellants to be present at their trial, but does not give a right to stay in the country pendente lite.

(B) Per Savvides, J.: (1) Appellant's contention that there has been a violation of Art. 13* of the International Convention on Civil and Political Rights (ratified by Law 14/69) is untenable, because in this case the order for deportation was made for reasons of national security.

(2) The principles applicable in case of an application for provisional order are by now well settled. The appellants failed to establish flagrant illegality. They, also, failed to discharge the burden of persuading the Court that they will suffer irreparable damage.

Appeal dismissed.

Quoted at pp. 1212-1213 post.

Cases referred to:

Amanda Marga Ltd. v. The Republic (1985) 3 C.L.R. 2583;

Sofocleous v. The Republic (1971) 3 C.L.R. 345;

Georghiades (No. 1) v. The Republic (1965) 3 C.L.R. 392;

Iordanou (No. 2) v. The Republic (1966) 3 C.L.R. 696;

Sofocleous v. The Republic (1981) 3 C.L.R. 360;

Frangos and Others v. The Republic (1982) 3 C.L.R. 53;

Economides v. The Republic (1982) 3 C.L.R. 837;

Sayigh v. The Republic (1986) 3 C.L.R. 277;

Colocassides v. The Republic (1985) 3 C.L.R. 1780;

Rodat v.The Republic (1988) 3 C.L.R. 937.

Appeal.

Appeal against the judgment of a Judge of the Supreme Court of Cyprus (Stylianides, J.) given on the 17th May, 1988 (Revisional Jurisdiction Case No. 311/88)* whereby applicant's application for a provisional order prohibiting the respondents from taking any measure for the implementation of the decision to deport applicants until the determination of the recourse against such decision was dismissed.

E. Serghides, for the appellants.

P. Clerides, for the respondents.

Cur. adv. vult.

A. LOIZOU P.: The judgment of the Court will be deliverd by H. H. Mr. Justice Pikis; save that H. H. Mr. Justice Savvides

* (1988) 3 C.L.R. 976

will add reasons of his own.

PIKIS J.: The appellants are foreign nationals, citizens of Zimbabwe and Britain, respectively. They were admitted and were licensed to stay in the country for a limited period of time for the express purpose of studying at "YOUTH WITH A MISSION", a limited company dedicated to the promotion, according to the Memorandum of Association, of Christian faith as perceived by their Association and, Christian charity. Why an association with purely religious and charitable objectives was registered as an offshore limited company, is a matter that does not concern us in these proceedings.

Appellant 1 was licensed to stay in the country upto 10.3.88. The permit of appellant 2 extended to 31.7.88.

On 10th February, 1988, appellant 1 applied for an extension of his permit and revision of its terms in a way that would entitle him, in addition to receiving instructions as a student, to teach as well at the YOUTH WITH A MISSION, at its Limassol branch. Notwithstanding the expiration of his permit on 10.3.88 appellant 1 continued his stay in Cyprus. On 22.3.88 an order of deportation was made by the Minister, following the declaration of both appellants as prohibited immigrants. The order was accompanied by an order for their detention. On 30.3.88 the appellants challenged the validity of the order of deportation and incidentally thereto the order of detention founded thereupon. The initiation of the recourse was followed by an application for a provisional order staying the orders of deportation and detention of the appellants pending the determination of the recourse. The application for a provisional order was dismissed, the Court holding that appellants had failed to establish the prerequisites for such remedy. The appellants failed to make out either a case of irreparable damage such as would warrant a provisional order or substantiate the allegation that the sub judice decision is flagrantly illegal.

Counsel for the appellants renewed before us the submission that the sub judice decision is manifestly illegal and invited us to

make a provisional order and put an early end to the breaches of the law. He pursued with less vigour the submission that appellants are likely to suffer irreparable damage if the order of deportation is not suspended pending the determination of the recourse. It is truly difficult to contemplate the occurrence of anything in the nature of irreparable damage, that is, damage irretrievable by any of the remedies available to a successful party upon the annulment of administrative action, considering the circumstances of the appellants, particularly the absence of an unqualified right to work in the country.

Counsel for the appellants founded his submissions of flagrant illegality - in the case of appellant 1 - on the failure of the Authorities to give prompt reply to his application for extension of his permit to stay and the right allegedly accruing thereupon to a foreign subject to stay in the country pending the determination of such application. Invited by the Court to support his proposition by authority, if available, he referred us to English statutory provisions that have no application in Cyprus. Our legislation - Aliens and Immigration Law, Cap. 105 - and Regulations made thereunder, recognise no such right to an alien; nor indeed any right to stay beyond the time expressly limited by the permit authorising his stay in the country.

Counsel for the Republic submitted that appellant 1 remained illegally in the country after 10.3.88. The Constitution of Cyprus expressly recognises a right to the Republic to regulate matters relating to aliens in accordance with international law (Article 32). In *Amanda Marga Ltd. v. Republic* (1985) 3 C.L.R. 2583 it was explained that the right of a country to refuse entry to aliens is, in accordance with international law an incident of the sovereignty of the country; a sovereign right that cannot be abridged except by binding treaty or convention. The right of the State to regulate the length of stay of an alien in the country is likewise an attribute of the sovereignty and territorial integrity of the country. Professor Jacobs observes in his work on the interpretation and application of the European Convention on Human Rights, neither the Convention nor the protocols thereto impose any restrictions on the

right to expel an alien from the country (Clarendon Press, Oxford 1975, p. 31).

The principles relevant to the making of a provisional order were reviewed by A. Loizou, J., in *Sofocles Sofocleous v. Republic* (1971) 3 C.L.R. 345 (see, also, *Cleanthis Georghiades (No. 1) v. Republic* (1965) 3 C.L.R. 392; and *Iordanis G. Iordanou (No. 2) v. The Republic* (1966) 3 C.L.R. 696) and were the subject of discussion and analysis in a number of subsequent decisions. (See inter alia, *Sophocleous v. Republic* (1981) 3 C.L.R. 360; and *Frangos and Others v. Republic* (1982) 3 C.L.R. 53). The principles governing the exercise of the jurisdiction of the Court to make a provisional order, institutionalised by rule 13 of the Supreme Constitutional Court Rules 1962, are the following:

(A) A provisional order is an extraordinary remedy in that an order is made outside the context of the trial or inquiry into the merits of the case, the natural forum for the exercise of the administrative jurisdiction of the Supreme Court and the award of the remedies incidental thereto.

(B) a provional order may be made in the face of-

(i) Evidence of irreparable damage, that is damage that cannot be remedied by any of the remedies available upon annulment of the impugned administrative act. Even in the face of such damage, the Court may, nonetheless, refuse an order if it is likely to place insuperable obstacles in the way of the Administration. And

(ii) flagrant illegality. For the illegality to qualify as flagrant, it must be glaring and as such self-evident and immediately identifiable. (See, inter alia, *Frangos and Others v. Republic* (1982) 3 C.L.R. 53; *Economides v. Republic* (1982) 3 C.L.R. 837 (F.B.).

Applying these principles to the facts relevant to the deportation of the appellants, we notice that:-

(a) The appellants wholly failed to prove - the burden being on the appellants (See, *Colocassides v. Republic* (1985) 3 C.L.R. 1780) - anything approximating irreparable damage. Also,

(b) the application of appellant 1 for a provisional order is wholly misconceived for, in effect, it aims not merely the suspension of the act of deportation but its supplementation too, by an order of the Court authorising him to stay in the country notwithstanding the expiration of his licence.

The foremost purpose for which a provisional order is made is to preserve the status quo, that is, the situation that obtained before the making of the impugned administrative act. A provisional order, like every interim measure, must be a remedy of a kind that is in the jurisdiction of the Court to make. In effect, it is a provisional annulment of the act until the final order of the Court.

Where the act challenged is a negative one, that is, a decision leaving unchanged the legal regime, its suspension can have no consequences on the right of the subject. For this reason there is no amenity to suspend by a provisional order a negative act because the suspension can have no noticeable consequences on the rights of the pursuer. This is explained in *Sayigh v. Republic* (1986) 3 C.L.R. 277 alongside with reference to Greek caselaw. There is no jurisdiction to reverse by a provisional order a negative act which is precisely what appellant 1 is seeking to achieve in these proceedings. The jurisdiction of the Court under article 146 is confined to a review of the legality of administrative action with a view to its annulment where illegal. The assumption of further jurisdiction would transgress the limits set by article 146 and offend the principle of separation of powers enshrined in the Constitution.

The suspension of the decision would be of no assistance to appellant 1, as it would confer no right to him to stay in the country. This being the position it is doubtful whether he has a legitimate interest to impugn the sub judice act. Direct prejudice of

an existing interest is a prerequisite for the invocation and exercise of the jurisdiction of the Supreme Court under article 146.1. We shall say no more on that aspect of the case, as the jurisdiction is intrinsically connected with the merits of the case.

There is no suggestion that the order of deportation was made by an incompetent organ. The contention of counsel in relation to appellant 2 is that , like appellant 1, he was not given a right to be heard in the matter of his deportation and that he was deported without prior revocation of his permit authorising his stay in the country. Counsel for the Republic submitted that the revocation was in itself an act revocatory of the permit. The revocation of an administrative act may, counsel pointed out, be achieved in an indirect way, as the Greek caselaw established. (See, Conclusions from the Greek Council of State, 1929-1959, pp. 199, 201).

The appellants failed to establish that the decision is manifestly illegal. The arguments raised in support of the appeal were primarily directed to the merits of the decision which will be the subject of review on the hearing of the application. The human right acknowledged by article 30.1, safeguarding unimpeded access to the Court, does not require that aliens be allowed to stay in the country pending the hearing of a judicial proceeding. What this article entitles the appellants, is to be present at the trial of their case. (See, *Sayigh v. Republic* (1986) 3 C.L.R. 277).

SAVVIDES J: This is an appeal against the refusal of a Judge of this Court sitting in the first instance to grant a provisional Order in recourse 311/88 "prohibiting all and each one of the decision to deport the applicants or any of them and/or take any act for the aforesaid purpose until the determination of this recourse".

Appellants are foreign nationals, citizens of Zimbabwe and Britain, respectively, and filed the aforesaid recourse challenging the decision of the Minister of Interior declaring appellants prohibited immigrants and issuing deportation and detention orders.

I need not embark on the facts of the case as they appear in de-

tail in the decision of the trial Judge which was delivered on the 17 May, 1988, and in the judgment just delivered by Mr. Justice Pikis. The learned trial Judge dismissed appellant's application for an interim Order on the ground that they "have not discharged the burden of persuading the Court that they will suffer irreparable damage. Even if the allegations of the applicants constitute irreparable damage, which the Court finds that they do not, they are not such as to prevail over the general interest".

The learned trial Judge after a lucid exposition of the principles governing the grant of provisional Orders in Administrative Law he pronounced as follows:

"The provisional order in Administrative Law is different from an interlocutory order in the domain of Private Law. Section 32 of the Courts of Justice Law is not applicable. The principles and the grounds on which a provisional order is given in Administrative Law differ from those obtaining in Civil Law.

A provisional Order is a drastic remedy which would be sparingly given. It is granted when the administrative act is tainted with flagrant illegality, that is illegality which is palpably identifiable on the face of the recourse.

Provisional Order, also, may be granted when there is clear evidence of irreparable damage, which must be specifically and succinctly pleaded.

As a provisional order is an exceptional discretionary measure, the general interest should not be sacrificed and it should prevail over the private interest of the applicant - (see, inter alia, *Monica Rodat, v. The Republic of Cyprus,* (1988) 3 C.L.R. 937 and cases cited therein)."

A number of grounds have been set out in the notice of appeal which may be summarized to three which were the grounds argued by counsel for the appellants.

The first contention was that there had been flagrant illegality in view of the fact that appellant No. 2 was and still is lawfully resident in Cyprus pursuant to a provisional permit dated 1st March, 1988 which expires on the 31st July, 1988, and which has never been revoked or cancelled by the respondents. Also, that though appellant's No. 1 permit had expired the respondents have failed to take a decision on his application of renewal of his permission to stay in Cyprus and in any event had never communicated any decision refusing such extension.

It was the submission of counsel for appellants that the finding of the trial Court that there was no flagrant illegality in the present case was wrong and contrary to the evidence adduced on behalf of the appellants. Counsel further argued that the trial Court failed to correctly appreciate and apply the rules of natural justice regulating the exercise of the respondents power and authority to issue deportation orders in that it failed properly to consider the evidence adduced as to the grounds for the issue of the deportation orders.

The second contention was that irreparable damage will result to the appellants by the refusal of the granting of a provisional order and argued that the trial Court was wrong in finding to the contrary.

The third contention of counsel is that the act of the respondents not to afford the appellants the opportunity to make an objection and be heard by the appropriate authority amounts to a violation of Article 13 of the International Convention on Civil and Political Rights ratified by Law 14/69.

I shall first deal with the last contention of counsel for appellants.

Article 13 of the International Convention on Civil and Political Rights, ratified by Law 14/69, reads as follows:

" Αλλοδαπός, νομίμως ευρισκόμενος εν τη εδαφική επι-

κρατεία τινός των Συμβαλλομένων Κρατών, δύναται να απελαθή εξ αυτής μόνον συνεπεία αποφάσεως νομίμως ειλημμένης και, εκτός οσάκις άλλως επιβάλλωσιν ισχυροί λόγοι εθνικής ασφαλείας, δέον όπως επιτρέπηται εις αυτόν να υποβάλη ένστασιν εναντίον της απελάσεώς του και ζητήση αναθεώρησιν της οικείας αποφάσεως, παριστάμενος πρός τούτο ενώπιον της επί τούτω αρμοδίας αρχής ή προσώπου ή προσώπων ειδικώς οριζομένων υπό της αρμοδίας αρχής."

The translation in English read as follows:

"An alien being lawfully within the territorial jurisdiction of the states parties to the Convention may be deported from it only upon a decision lawfully taken and, unless otherwise imposed by strong reasons of national security, it should be permitted to him to submit an objection against his deportation and ask for a reconsideration of the relevant decision, presenting himself for this purpose before the relevant appropriate authority or person or persons especially appointed by the appropriate authority."

The deportation of the appellant in the present case was, as appearing on the order for deportation, due to reasons of national security and, therefore, the provisions of s. 13 do not come into operation. Nevertheless in the present case the appellants were informed by the police of the reasons of their deportation and were afforded the opportunity of making a statement explaining anything they wished to say against their deportation.

I come now to the other two grounds. The principles relevant to the making of provisional orders are well settled by a series of decisions of this Court. In the case of *Sofocleous v. The Republic* (1971) 3 C.L.R. 345, A. Loizou, J. after making reference to the cases of *Cleanthis Georghiades (No. 1) v. The Republic* (1965) 3 C.L.R. p. 392, *Iordanou (No. 2) v. The Republic* (1966) 3 C.L.R. 696 and to Greek authors such as Professor Tsatsos in his book "The Recourse for Annulment before the

Council of State", 2nd ed., p. 284, Vegleris on "The Compliance of the Administration to the Decision of the Council of State", 1934 at pp. 112, 114, 115, concluded as follows at pp. 352-353:

"The principle that the manifest illegality of an administrative act is a ground upon which an order for a stay may be granted has also been accepted in American jurisprudence, more explicitly than in the jurisprudene of other countries. It can be seen in Jaffe 'Judicial Control of Administrative Action' p. 692, where it is stated that where the administrative action is illegal the concern with the public interest is on its face easily resolved. The American authorities for this proposition are: *Group v. Finletter,* 108F Supp. 327 (D.D.C. 1952), and *Armour v. Freeman,* 304F 2d. 404 (D.C. Cir. 1962). In fact such a ruling on an application for a provisional order usually in the United States makes vain a pursuit of the merits. It may, therefore be said with certainty that when an administrative act is flagrantly illegal a provisional order may be granted. It is, however, a ground to be approached with the utmost caution, as it may be tantamount to disposing the case on its merits, something discouraged by Rule 13 of the Supreme Constitutional Court Rules, though this rule cannot be held as divesting this Court from being the watchdog of legality."

Rule 13 of the Supreme Constitutional Court Rules to which reference is made in the above decision provides as follows:

"13.- (1) The Court, or in proceedings under Article 146 any two Judges acting in agreement, may, at any stage of the proceedings, either ex proprio motu or on the application of any party, make a provisional order, not disposing of the case on its merits, if the justice of the case so requires.

(2) A provisional order made under this rule may, either on the ground of urgency or of other special circumstances, be made without notice and upon such terms it may be deemed fit in the circumstances;

Provided that all parties affected by an order made under this paragraph shall be served forthwith with notice thereof so as to enable them to object to it and upon such an objection the Court, after hearing arguments by or on behalf of the parties concerned, may either discharge, vary or confirm such order under such terms as it may deem fit."

Having heard the agrument of counsel for the appellants on the question of illegality I have not been persuaded in the present case that the appellants have shown a good cause for the granting of a provisional order restraining their deportation on the ground of flagrant illegality.

Without going into the merits of the case which will be the subject of adjudication if, after the hearing of the recourse the Court reaches the conclusion that the deportation of the appellants was illegal the appellants will be entitled to the remedies contemplated by Article 146.6 of the Constitution.

I come now to the last point, that of irreparable damage.

I agree with the finding of the trial Judge that the appellants had not discharged the burden of persuading the Court that they will suffer irreparable damage and this applies to this appeal, after hearing argument by counsel for the appellants. But again the question of irreparable loss is a matter which if the recourse succeeds on the merits may give rise to a claim for damages by the appellants. It is well settled however that even in case where the non-making of the order will cause irreparable damage to the applicant such matter will not be allowed to prevail over the general interest. In *Cleanthis Georghiades (No. 1)* (supra) at p. 395 we read the following:

"It is a cardinal principle of administrative law that where a provisional order is sought in an administrative recourse and where on the one hand the non-making of the order will cause damage, even irreparable, to the Applicant but on the other hand the making of such an order will cause serious obstacles

to the proper functioning of the administration then the personal interest of the Applicant has to be subjected to the general interest of the public and the provisional order should not be granted. It goes without saying that where the non-making of the provisional order will not cause to an Applicant irreparable damage such an order will not be made, in any case, on the strength of the application made by Applicant for the purpose."

For all the above reasons I find that the appellants failed to satisfy the Court that the decision of the learned trial Judge in dismissing the application for a provisional order was wrong in principle or amounted to a wrong exercise of his discretion. Before concluding I wish to endorse what was said by Pikis, J. in his judgment that the authorities should afford an opportunity to the appellants to enter the country for the purpose of being present at the trial of their recourse.

Appeal dismissed.