1988 June 30

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

THOMAS SAVVIDES,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE MINISTER OF COMMERCE AND INDUSTRY,

Respondents.

(Case No. 766/85).

Importation of goods —The Imports (Regulation) Law, 1962 (Law 49/62), section 3, as amended by section 2 of Law 7/67—The Imports Regulation (Control and Regulation of Goods) Order, 1968 Reg. 3—Neither the law nor the regulations adopt a distinction between "traditional" (παραδοσιακοί) and other importers—The ambit of section 3—The Minister has no power beyond its scope.

General principles of administrative law—Discretionary power—When deemed as exercised in a lawful manner.

"Fertilizers" were declared a "controlled commodity" for protection of the local industry G.C.I. Ltd. The operation of the latter, however was suspended "temporarily" in October 1983. For the following the suspension period the Ministry decided to allow importation of limited quantities. The applicant's application for importation of fertilizers was rejected on the ground that he was not a "traditional importer" of fertilizers. Hence this recourse.

Held, annulling the sub judice decision: (1) The notion of traditional (παραδοσιακός) importer does not appear anywhere, either in the Law, or the Regulations made thereunder.

(2) In the present case no - one of the grounds set out in section 3 of the Law exists. The refusal to grant a licence to the applicant could not be valid-

ly said that it was made for the encouragement of local production or industry. The local industry was defunct and non - operative. The need for importation led to the issue of import licences as hereinabove said.

(3) Enactments allegedly establishing monopolies have to be construed strictly. The restriction that should be imposed was as to the total quantity of fertilizers to be imported. The issue of licences only to those who were characterized as traditional importers is outside the ambit, wording, or object of the Law.

Sub judice decision annulled.
No order as to costs.

Cases referred to:

Irfan and others v. The Republic, 3 R.S.C.C. 39;

Impalex Agencies Ltd. v. The Republic (1970) 3 C.L.R. 361;

Psaras v. The Ministry of Commerce and Industry (1971) 3 C.L.R. 151;

Sofoclides and Co. Ltd. v. The Republic (1986) 3 C.L.R. 1302;

Sofoclides and Co. Ltd. v. The Republic (1987) 3 C.L.R. 15;

The Director United States Cable Ltd. v. The Anglo - American Telegraph Company Ltd. [1877] 2 A.C. 394.

Recourse.

Recourse against the refusal of the respondents to grant applicant an import licence for fertilizers.

Chr. Vakis, for the applicant.

N. Charalambous, Senior Counsel of the Republic, for respondent.

Cur. adv. vult.

STYLIANIDES J. read the following judgment. The applicant by means of this recourse seeks the annulment of the decision of the Respondents contained in letter dated 30th July, 1985, whereby they rejected his application for import licence of fertilizers.

The Imports (Regulation) Law, 1962 (Law No. 49/62), section 3, as amended by section 2 of Law 7/67, provides that the Minister (of Commerce and Industry) "whenever it becomes necessary in the public interest to restrict and regulate the importation of goods for the encouragement of local production and industry, the improvement of the balance of trade, compliance with international obligations or the development of the economy of the Republic, may, by Order published in the Official Gazette of the Republic, restrict and regulate the importation of the goods specified in the Order."

By virtue of Regulation 3 of the Imports Regulation (Control and Regulation of Goods) Order, 1968 - (see Official Gazette No. 654 of 24th May, 1968, Supplement III):-

"3. Η εισαγωγή εν τη Δημοκρατία οιωνδήποτε εμπορευμάτων δεν επιτρέπεται ειμή υπό εισαγωγέως και κατόπιν αδείας του Υπουργού:"

("3. The importation into the Republic of any goods is not permitted save than by an importer and after a permit by the Minister.")

In the first Schedule to the above Order there are included the goods in respect of which an import licence is required. One of such goods is "fertilizers". They were included in the first Schedule by means of Regulatory Administrative Act 170/82 of 21st May, 1982.

According to the opposition of the Respondents the fertilizers were declared a "controlled commodity" for the purpose of protection of the local industry, namely the "Ελληνικές Χημικές Βιομηχανίες Λτδ." (Greek Chemical Industries Ltd.), (hereinaf-

ter the local industry). The local industry commenced operating in 1982 and was producing the mixed or compound type of fertilizers, i.e. 16 - 20 - 0, 12 - 20 - 7 and 15 - 15 - 7, for the local market. For the purpose of protection of the said local industry the importation of the above type of fertilizers was absolutely prohibited.

The operation of the local industry was suspended "temporarily" in Order 1983. It has not as yet reoperated. The question of viability and re - operation of this local industry is continuously under consideration by the House of Representatives.

During the period September 1982 to October 1983 the local industry produced all or more than the fertilizers necessary for the satisfaction of the local market so far as quality, quantity and prices were concerned.

For the period 1983 - 1984 the Ministry of Commerce and Industry decided to issue licences for the importation of limited quantities of mixed or compound fertilizers, in order to satisfy the needs of agriculture in this country. The object of such decision was the non - importation of fertilizers more than actually needed and in order to avoid rendering problematic the re - operation of the factory of the local industry. The same policy of limited importation was followed for the next fertilizing periods.

The Ministry, in order to determine the quota for licences of importation to be issued, asked the traditional importers to submit a statement showing the quantity of compound fertilizers imported by them during 1979, 1980, and 1981. The Ministry, in exercise of their power under section 3 of Law 49/62 as amended by Law 7/67, followed the policy to take into consideration the importations in respect of the three years preceding the quantitative restriction.

The Ministry of Agriculture and Natural Resources assessed the yearly needs of the country in compound fertilizers at about 40,000 tons.

The applicant on 10th July, 1985, submitted an application for licence for the importation of 3,000 tons of compound fertilizers from Rumania. His such application was rejected on the ground that import licences are issued only to "παραδοσιακούς εισαγωγείς" (traditional importers) on the basis of their previous imports.

The same Ministry on 23rd November, 1982 issued a licence to the applicant to import 1,000 metric tons of fertilizers - UREA 46 - 0 - 0 - from Portugal.

It was submitted by counsel for the applicant that: -

1. Section 3(1) of the Law does not empower the Minister to select or restrict "the importers" to whom import licences will be granted. The reference to "regulation of the importation" cannot refer to persons and does not empower the selection of persons to whom import licences will be given. The restriction of licensees to importers of the period 1979 - 1981 is arbitrary and not based on any authorization for any reason.

2. According to the Ministry the object of the restrictions was the protection of the local industry. It is common ground that the local production stopped in October, 1983, but the relevant Order had not been revoked. The sub judice refusal was not justified, since there is no local production of the commodity and there were no positive prospects of the reoperation of the factory.

3. The exercise of the Minister's power was made on the basis of non - existent facts because there was no local production at the material time.

4. The policy of imposing restrictions on the importation of the commodity which has been produced locally for a short period of time, in conjunction with the granting of import licences only to persons who have effected importations in the distant past is arbitrary, unjustified and promotes monopoly and labours adversely to the public interest.

Importer is defined in the 1968 Regulations as follows:-
"εισαγωγεύς" (importer) σημαίνει-

(α) πάντα μόνιμον κάτοικον της Δημοκρατίας ενασκούντα εργασίαν εν τη Δημοκρατία, ή

(β) πάντα οργανισμόν προσώπων αποτελούντα νομικόν πρόσωπον ή μη και ενασκούντα εργασίαν εν τη Δημοκρατία, όστις είναι μέλος Εμπορικού Επιμελητηρίου εγγεγραμμένου δυνάμει του άρθρου 20 του περί Εταιρειών Νόμου, αλλά δεν περιλαμβάνει οιανδήποτε υπερπόντιον εταιρείαν εγγράψασαν γραφείον εργασίας εν τη Δημοκρατία μετά την ημερομηνίαν της δημοσιεύσεως του παρόντος Διατάγματος εν τη επισήμω εφημερίδι της Δημοκρατίας."

The notion of traditional (παραδοσιακός) importer does not appear anywere, either in the Law, or the Regulations made thereunder.

The Minister issued import licences to the traditional importers as follows:-

(a) Gentral Co - operative Bank 88% - 37,701 metric tons.

(b) N.P. Lanitis 8% - 1,550 metric tons.

(c) P.M. Tseriotis 3% - 200 metric tons.

(d) Various Others - 1%.

In *Hussein Irfan and Four Others and the Republic,* 3 R.S.C.C. , 39, at p. 42 it was said:-

" (c) Regulation 3 of the Defence (Importation of Goods) Regulations, 1956, lays down that the importation of any goods is prohibited save under the authority of a licence for the purpose.The relevant power to grant or refuse a licence, was

exercised, in the present case, in the public interest, i.e. for the purpose for which it was granted. The fact that by the exercise of such power the interests of a certain part of the population, i.e. the vine - growers, for whose protection the Vine Products Scheme exists, may have been served at some expense to the interests of traders and consumers of sugar in general, due to the importation of the more expensive U.S.S.R. sugar, is not sufficient to lead the Court to the conclusion that the power in question was exrcised in abuse or excess thereof."

The Law 49/62 was judicially considered in *Impalex Agencies Ltd. v. Republic* (1970) 3 C.L.R. , 361; *Psaras v. The Ministry of Commerce and Industry* (1971) 3 C.L.R., 151; *Sofoclides & Co. Ltd. v. Republic* (1986) 3 C.L.R. 1302 and on appeal (1987) 3 C.L.R. 15.

In the last case the restriction was clearly imposed for the encouragement of local production and industry.

In the present case no - one of the grounds set out in section 3 of the law exists. The refusal to grant a licence to the applicant could not be validly said that it was made for the encouragement of local production or industry. The local industry was defunct and non - operative. The need for importation led to the issue of import licences as herein above said.

Counsel for the Respondents, both in his opposition and in his written address, contended that the Ministry was acting within the ambit of section 3(1) of Law 49/62 as amended by Law 7/67 in taking into consideration the importation of goods for the last three years before issuing licences and granting the quota.

With respect, the Law does not give a general unrestricted power to the Minister. His power is subject to the specific provisions laid down in the law.

Enactments allegedly establishing monopolies have to be construed strictly - (*The Director United States Cable Company, Ltd.*

v. The Anglo - American Telegraph Company, Ltd. [1877] 2 A.C. 394, at p. 412).

The restriction that should be imposed was as to the total quatity of fertilizers to be imported. The issue of licences only to those who were characterized as traditional importers is outside the ambit, wording, or object of the Law.

To sum - up the local industry was not operative. There was ascertained a need of importation of 40,000 tone of fertilizers. The applicant in 1982 was issued a licence and imported 1,000 tons of fertilizers - UREA. The Ministry issued licences mainly - 99% - to three main importers whom they called as "παραδοσιακούς" (traditional) importers. They decided to refuse the application of this applicant because he was not a traditional importer.

This decision cannot be validly sustained under the provisions of section 3 of the Imports (Regulation) Law, as it is outside the scope and ambit of the Law, intends to affect the interest of the public and the individual applicant concerned. The Law merely restricts and regulates the importation. The Regulations limit the right of importation to importers only.

The applicant was and is an importer in the sense of the Regulation.

There is no reasoning in the *Psaras* case (supra) supporting the administrative act challenged.

The ground on which the sub judice decision was taken and the differentiation of the importers is arbitrary unjustified, not supported by Law and/or is contrary to Law.

It is a well established principle that a discretionary power must be exercised for the purpose for which it was given. It must be exercised, in a lawful manner. A discretion is exercised, of course, in a lawful manner, if in its exercise all material consider-

ations have been taken into account, due weight is given to material facts, and has not been based on a misconception of Law or fact. A defective exercise of a discretion may, therefore, amount to an excess or abuse of power - (*Impalex Agencies Ltd. v. Republic* (1970) 3 C.L.R , 361).

Furthermore it should not be lost sight of the fact that fertilizers were declared a control commodity for the sole purpose of protection of the local industry, which it ceased to operate more than two years prior to the complained of decision.

For all the above reasons, the sub judice decision is a product of misconception of fact and law and was taken in excess and or abuse of power.

It is hereby declared null and void and of no effect. Let there be no order as to costs.

Sub judice decision annulled.
No order as to costs