

1988 October 15

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

KIKOYLLA N. ZEMPASHI,

*Applicant,*

v.

THE IMPROVEMENT BOARD OF AYIA NAPA,

*Respondents.*

*(Case No. 270/86).*

*The Villages (Administration and Improvement) Law, Cap. 243, sections 21 (n), 24(1)(a)—Hawking—Bye-Law 155(1) of the Villages (Administration and Improvement) Pedhoulas Bye-Laws, 1951 in force in Ayia Napa—Not ultra vires enabling law, i.e. section 21(n) and 24(1)(a) of Cap. 243.*

5 *Constitutional Law—Right to exercise a trade—Constitution, Art. 25—Ambit of—The Villages (Administration and Improvement) Law, Cap. 243, sections 21(n) and 24(1)(a)—Restrictions imposed thereby—Necessary "in the public interest" and for public health.*

10 *Reasoning of an administrative act—Review of principles applicable—Refusal of licence for hawking—In the circumstances of this case the decision was not duly reasoned.*

*Recourse for annulment—Remedies—Constitution, Art. 146.6—Claim for declaration that respondents had no power to refuse the grant of a licence to hawk—No jurisdiction to grant such a remedy.*

15 *The facts of this case appear sufficiently in the judgment of the Court.*

*Sub judice decision annulled.*

*No order as to costs.*

Cases referred to:

*Republic v. Gava* (1968) 3 C.L.R. 322;

*Christodoulou v. The Republic*, 1 R.S.C.C. 1;

*Spyrou and Others (No.2) v. Republic* (1973) 3 C.L.R. 627;

*Papaxenophontos and Others v. Republic* (1982) 3 C.L.R. 1037;

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*Ethnikos v. K.O.A.* (1984) 3 C.L.R. 1150;

*Lefkatis and Others v. Republic* (1985) 3 C.L.R. 1372;

*Mouzouras and Others v. The Improvement Board of Ayia Napa*, (1988) 2  
C.L.R. 26;

*Municipal Corporation of the City of Toronto v. Virgo* [1896] A.C. 88;

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*District Officer Nicosia v. Ioannides*, 3 R.S.C.C. 107;

*Police v. Liveras*, 3 R.S.C.C. 65;

*Panayis v. The Ports Authority of Cyprus* (1988) 3 C.L.R. 1095;

*Georghiades and Others v. Republic* (1967) 3 C.L.R. 653;

*HjiSavva v. Republic* (1972) 3 C.L.R. 174;

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*Republic v. Georghiades* (1972) 3 C.L.R. 594;

*Tsoulouftas and Others v. The Republic* (1983) 3 C.L.R. 426;

*Marangos v. The Republic* (1983) 3 C.L.R. 682;

*Co-Operative Society of Alona v. The Republic* (1986) 3 C.L.R. 222.

**Recourse.**

Recourse against the decision of the respondents refusing the grant of a hawker licence to the applicant within the area of the Improvement Board of Ayia Napa.

5 *G. Pittatzis*, for the applicant.

*P. Angelides*, for the respondents.

*Cur. adv. vult.*

10 STYLIANIDES J. read the following judgment. The applicant by this recourse seeks:

10 "(a) Declaration that the decision of the Respondents communicated to her by letter dated 21st March, 1986, whereby they refused to grant to the applicant hawker licence within the area of the Improvement Board of Ayia Napa is void and/or illegal

15 (b) Declaration that the Improvement Board of Ayia Napa has no right or power to refuse to grant hawker licence within the area of Ayia Napa to the applicant."

20 The applicant is from Paralimni. At the material time she was the owner of a motor car, Registration No. RK 175, which was adapted to be used as a mobile canteen, which however was registered in the name of her son. By letter of her advocate, dated 13th December, 1985, she applied for a hawker's licence for the period 1st March, 1986, to 31st December, 1986, within the areas of the Improvement Boards of Ayia Napa and Paralimni. This letter was addressed to the District Officer of Famagusta in his capacity as Chairman of the said two Boards.

25 On 14th January, 1986, the respondent Improvement Board of Ayia Napa, considered the aforesaid application and decided to examine it with other similar applications in March.

On 6th March, 1986, the members of the Improvement Board met. At that meeting representatives of the Ministry of the Interior, the Planning Bureau, The Cyprus Tourism Organization, the Public Works Department, Town Planning and Housing were in attendance. The relevant part of the record of the meeting reads:

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"VII ΑΔΕΙΕΣ

Διαβάσθηκε τηλεγράφημα του Συνδέσμου Ξενοδόχων με το οποίο εκφράζεται η αντίθεση τους σε περίπτωση χορηγήσεως από το Συμβούλιο αδειών λειτουργίας κινητών περιπτέρων επί της παραλίας και αποφασίσθηκε να πληροφορηθεί ο ανωτέρω Σύνδεσμος ότι το Συμβούλιο δεν προτίθεται να εκδώσει τέτοιες άδειες."

10

The Chairman of the Improvement Board on 21st March, 1986, informed applicant's advocate that the application of his client dated 13th December, 1985, for the grant to her hawkers' licence within the Improvement Board of Ayia Napa was examined and dismissed.

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Hence this recourse.

Counsel for the Respondents objected that the recourse cannot be proceeded with, as the relief prayed is outside the ambit of Article 146 and beyond the jurisdiction of this Court.

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The revisional jurisdiction is conferred on this Court by Article 146 of the Constitution. The object of the review is a decision, act or omission of any organ, authority or person, exercising any executive or administrative authority. The power of the Court is set out in paragraph 4 as follows:

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"4. Upon such a recourse the Court may, by its decision

(a) confirm, either in whole or in part, such decision or act or omission; or

(b) declare, either in whole or in part, such decision or act to be null and void and of no effect whatsoever; or

(c) declare that such omission, either in whole or in part, ought not to have been made and that whatever has been omitted should have been performed."

The power of the Court under (b) is "declare... null and void and of no effect whatsoever" the decision impugned. It is not open to this Court to decide to grant the second relief prayed in this recourse. (See *Republic (Public Service Commission) v. Kika Gava* (1968) 3 C.L.R. 322).

(1) Bye-Law 155(1) of the Villages (Administration and Improvement) Pedhoulas Bye-Laws 1951, which is in force in Ayia Napa Improvement Board, is ultra vires the enabling Law, Cap. 243.

(2) Section 21 (n) and Bye-Law 155(1) are unconstitutional, as they infringe Article 25 of the Constitution.

(3) The sub judice decision lacks due or any reasoning and it was reached without due inquiry.

The sub judice decision has to be annulled and be declared null and void and of no effect whatsoever if it was based on invalid law. Law includes subsidiary legislation. (See *Miltiades Christodoulou and The Republic (Collector of Customs Nicosia)*, 1 R.S.C.C. 1; *Savvas Chr. Spyrou and Others (No. 2) v. Republic (Licensing Authority)* (1973) 3 C.L.R. 627; *Papaxenophontos and Others v. Republic* (1982) 3 C.L.R. 1037; *Ethnikos v. K.O.A.* (1984) 3 C.L.R. 1150 and *Lefkatis and Others v. Republic* (1985) 3 C.L.R. 1372).

The submission of counsel is that Bye-Law 155(1), which is subordinate legislation, is ultra vires as to its extent and contents.

When a sub judice legislation is examined with a view to decide it, on a contention that it is ultra vires, the answer to this question

depends, in every case, on the true construction of the relevant enabling power concerned.

Section 21(n) of the Villages (Administration and Improvement) Law, Cap. 243 reads:

"21. Subject to the provisions of this Law and of any other Law in force for the time being, the Board shall, within the limits of the improvement area and in so far as its resources permit-

.....

(n) provide for the establishment, regulation and use of markets and prohibit or regulate the hawking of any goods in any place other than such markets;"

Section 24(1)(a) provides:

"24.(1) A Board may, from time to time, make bye-laws not inconsistent with the provisions of this or any other Law in force for the time being, for all or any of the following purposes, that is to say:

(a) to enable or assist a Board to perform any of the duties assigned to it by section 21 or 23 and to provide for the payment of any rates, fees, rents, tolls or charges in connection therewith;"

It was submitted that section 21(n) empowers the Improvement Board only to regulate where and how hawkers may sell their goods but not to require or issue licence or impose conditions for such licences or prohibit hawking. This matter was recently determined by the Court of Appeal in *Antonis Mouzouras and Others v. The Improvement Board of Ayia Napa*, (1988) 2 C.L.R. 26 at p.32 as follows:

"We turn now to the second ground of appeal. It was argued that paragraph (n) of section 21 of the Law should be

read as a whole, that is that an Improvement Board cannot regulate the hawking of any goods and subject such function to a licence, unless markets are established and in the case of Ayia Napa this had not been done.

5 On a true construction of the said statutory provision the establishment, regulation and use of markets is one function and the prohibition and regulation of hawking of any goods in any place other than such markets is another. In our view the establishment of a market is not a condition precedent to the regulation of hawking. Bye-law 155(1) therefore which does not refer to the establishment of a market before hawking but only to the establishment of a licence first obtained and lays down by paragraph 2 thereof the fees to be paid, is *intra vires* the Law."

15 In the present case counsel for the applicant relying on *Municipal Corporation of the City of Toronto v. Virgo* [1896] A.C. 88, submitted that the enabling law does not confer power on the Improvement Board to "prohibit" hawking within the limits of its area. Lord Davey said the following in the *Virgo* case (*supra*) at pp. 93, 94:

25 "It appears to their Lordships that the real question is whether under a power to pass by-laws 'for regulating and governing' hawkers, & c., the council may prohibit hawkers from plying their trade at all in a substantial and important portion of the city, no question of any apprehended nuisance being raised. It was contended that the bye-law was *ultra vires*, and also in restraint of trade and unreasonable. The two questions run very much into each other, and in the view which their Lordships take it is not necessary to consider the second question separately.

30 No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise both as to time and to a certain extent as to place where such restrictions are in the opinion of the public authority necessary to prevent a

nuisance or for the maintenance of order. But their Lordships think there is marked distinction to be drawn between the prohibition or prevention of a trade and the regulation or governance of it, and indeed a power to regulate and govern seems to imply the continued existence of that which is to be regulated or governed. An examination of other sections of the Act confirms their Lordships' view, for it shews that when the Legislature intended to give power to prevent or prohibit it did so by express words. 5

But through all these cases the general principle may be traced, that a municipal power of regulation or of making by-laws for good government, without express words of prohibition, does not authorize the making it unlawful to carry on a lawful trade in a lawful manner." 10

In the present case the law empowers with express words both the prohibition and the regulation of hawking. In view of the aforesaid the contention that Bye-Law 155(1) is ultra vires fails. 15

The Constitution of the Republic of Cyprus in a number of Articles guarantees to the individual certain social and economic rights, which are to be exercised within the framework of public interest and common welfare. 20

Article 25 safeguards the right to practice any profession or to carry out any occupation, trade or business subject to such formalities, conditions, or restrictions as provided for therein. What is guarded against are infringements in the exercise of this right as such; but controls in respect of objects which might be necessary for the exercise of such right are not excluded by this Article. (*District Officer, Nicosia and Georghios Ioannides*, 3 R.S.C.C. 107 at p. 109.) 25

Article 25 guards only against direct interference with the right safeguarded thereunder - (*Police and Georghios D. Liveras*, 3 R.S.C.C. 65). 30



The exercise of such right is not absolute and the State has power, for certain purposes specifically set out in paragraph 2, to prohibit or regulate it.

The provisions of section 21(n) of Cap. 243 and Bye-Law 155(1) are necessary "in the public interest" and for "the public health". (*Police and Georghios D. Liveras*, 3 R.S.C.C., 65; *District Officer, Nicosia and Georghios Ioannides*, 3 R.S.C.C. 107, at p. 109.) They are not repugnant or inconsistent with Article 25.

10 **Reasoning:**

The requirement of due reasoning in administrative decisions has been stressed repeatedly by this Court. The requirement of reasoning is that its presence excludes arbitrariness on the part of the administrative organ and protects the administration against itself by preventing it from taking a hasty decision. At the same time it protects the persons affected by such decision. The reasoning must be clear, that is to say, the concrete factors on which the administration based its decision for the case under consideration must be specifically mentioned in such manner as to render possible its judicial control. It must contain the way of thinking of the administrative organ on the relevant facts which constitute the foundation for the decision. A reasoning which does not satisfy these conditions cannot be considered as due reasoning. The reasoning may be supplemented from the material in the file of the administration. (*Soteris L. Panayis v. The Ports Authority of Cyprus*, (1988) 3 C.L.R. 1095; *Athos G. Georghiades and Others v. Republic (Public Service Commission)* (1967) 3 C.L.R. 653, 666; *Georghios HjiSavva v. Republic (Council of Ministers)* (1972) 3 C.L.R. 174; *Republic (Public Service Commission) v. Lefkos Georghiades* (1972) 3 C.L.R. 594; *Andreas Tsouloftas and Others v. The Republic of Cyprus* (1983) 3 C.L.R. 426; *Marangos v. The Republic* (1983) 3 C.L.R. 682 and *Co-operative Society of Alona v. The Republic of Cyprus* (1986) 3 C.L.R. 222. See, also, Decisions of the Greek Council of State, 470/1970, Volume A', p. 686 and Π.Δ. Διαγνώου - General Admi-

nistrative Law, α' 1977, pp. 166-167 and γ'/1 1981, pp. 285-286.)

The sub judge decision produced to the Court is not reasoned. It does not convey the reasons why the Respondents decided not to grant any licence to hawkers including the applicant. The reasoning for the sub judge decision can neither be ascertained nor supplemented from the material in the file of the Respondents produced before the Court. 5

Thus the sub judge decision was taken by exercise of the Respondents' discretion in a defective manner and in excess of power. The sub judge decision is bound to be annulled. 10

In the result the sub judge decision is declared null and void and of no effect whatsoever under Article 146.4(b).

Let there be no order as to costs.

*Sub judge decision annulled.*  
*No order as to costs.* 15