

1988, May 9

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

MONICA RODAT,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH

1. THE COUNCIL OF MINISTERS,
2. THE MINISTER OF INTERIOR,
3. THE MIGRATION OFFICER,

Respondents.

(Case No. 557/85).

Provisional Order—Jurisdiction to grant—Derives and is incidental to the competence under Art. 146—Rule 13 of the Supreme Constitutional Court—Rule does not extend the Jurisdiction to grant a provisional order.

Provisional order—Negative act—Cannot be suspended.

- 5 *Provisional order—The necessary prerequisites for granting it—Flagrant illegality—What constitutes such an illegality—Irreparable damage—What constitutes such a damage—Conflict between the public and private interest—Former should prevail.*

Aliens—Every State is competent to exclude them from its territory.

- 10 *International Law—Aliens—Reception of—A matter of discretion—Competence to exclude them from state's territory.*

Constitutional Law—Fair trial—Constitution, Art. 30—Fair trial entails the right to prosecute a case and equality of arms—Whether it entails obligation

to allow an alien to enter the Republic—Recourse against decision declaring applicant a prohibited immigrant—It appears that the recourse will be determined on the basis of the material in the file—Modern means of communication enable applicant to conduct her case from abroad—No power to issue an order allowing applicant to enter the Republic. 5

The applicant was deported from the Republic, having first been declared a prohibited immigrant. Hence this recourse.

Applicant applied for a provisional order ordering respondent to allow her to come to Cyprus, until determination of the recourse. The affidavit in support of the application contained an allegation that her presence in the country is necessary to enable her to collect necessary particulars and give better instructions to her advocate for the prosecution of the recourse. It must be noted that the applicant did not apply to the Administration for entry for the particular purpose stated in the affidavit of her counsel. 10

In the light of the principles summarized in the hereinabove headnote, the Court dismissed the application. 15

*Application dismissed.
No order as to costs.*

Cases referred to:

Georgiades (No. 1) v. The Republic (1965) 3 C.L.R. 392; 20

Artemiou (No. 2) v. The Republic (1966) 3 C.L.R. 562;

Sepos v. The Presidential Election Returning Officer (1968) 3 C.L.R. 82;

Georgiou (No. 1) v. Republic (1968) 3 C.L.R. 401;

Goulelis v. Republic (1969) 3 C.L.R. 583;

Sofocleous v. Republic (1971) 3 C.L.R. 345; 25

Miltiadous & Others v. Republic (1972) 3 C.L.R. 341;

C.T.C. Consultants Ltd. v. Cyprus Tourism Organisation (1976) 3 C.L.R. 390;

Tyrokomou v. Republic (1976) 3 C.L.R. 403;

Papacleovoulou v. Republic (1979) 3 C.L.R. 223;

Tikki and Others v. Republic (1981) 3 C.L.R. 250;

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

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

Karram v. Republic (1983) 3 C.L.R. 199;

Colakides & Associates and Others v. Republic and Others (1985) 3
C.L.R. 1780;

Karaliota v. Republic (1985) 3 C.L.R. 2049;

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

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

Zakaria Navigation v. Republic (1986) 3 C.L.R. 621;

Suleiman v. The Republic (1987) 3 C.L.R. 224;

Kouppis v. The Republic (1977) 2 C.L.R. 361.

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Application for provisional order.

Application for a provisional order, ordering, respondents to allow applicant to enter the Republic and stay here until the final determination of the recourse against the deportation order issued against her.

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Chr. Mitsides, for the applicant.

A. Vladimirov, for the respondents.

Cur. adv. vult.

STYLIANIDES J. read the following decision. Monica Rodat, a German national, in 1981 was granted temporary residence and employment permit.

From 1982 to 1984 she was granted only temporary residence permit as a visitor. 5

On 16.3.1984 she was granted temporary residence and employment permit to work as Guest Relation Officer at Golden Bay Larnaca. This permit was for a year expiring on 15.3.1985.

Due to her conduct and acts, certain information was passed to Commander of the Police. 10

On 12.3.1985 the applicant was notified that, on the expiry of the aforesaid permit, it would not be renewed and she should make the necessary arrangements for her departure from the country. She failed to comply and continued to stay on in Cyprus. The Chief Immigration Officer issued on 13.5.1985 a Deportation and Detention Order, were executed on 18.5.1985. 15

A few days later - 10.6.1985 - the applicant filed the present recourse, whereby she seeks the annulment of a decision that she was a prohibited immigrant and of the Deportation Order.

Counsel for the applicant took out a summons, whereby he applied for a provisional order, ordering the respondents to allow her to enter the area of the Republic and stay here until the final determination of the recourse; and, further, order to lift the prohibition of her entry to the country and not to deport her, until the final determination of this recourse and allow free entrance and uninterrupted stay of the applicant in this country. 20
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The application is supported by an affidavit sworn by her counsel. In the affidavit it is contended that the sub judice administrative acts were taken without due inquiry; that they are punitive measures, they are the product of abuse of power, they are tainted with misconception of fact; they are contrary to law and 30

the result of wrong exercise of discretionary power.

5 In the penultimate paragraph it is deposed that her presence in the country is necessary to enable her to collect necessary particulars and give better instructions to her advocate for the prosecution of the recourse; and finally that, if the provisional order is granted, the Administration will suffer no harm, whereas the applicant will suffer, if it is not given.

The application was hotly contested.

10 It is based on Article 146 of the Constitution and Rules 13 and 19 of the Rules of the Supreme Constitutional Court.

The principles upon which a provisional order may be granted are by now well settled by the Case-Law of this Court.

15 The Court exercising jurisdiction under Article 146, can only assume competence in relation to a matter referred to it in the manner envisaged therein. The jurisdiction to grant a provisional order is incidental thereto. Order 13 does not extend the jurisdiction of the Court under Article 146.

20 Article 135 of the Constitution, under which the said Rules were made, provides that Rules of Court shall be made for regulating the Practice and Procedure of the Court in the exercise of the jurisdiction conferred upon it by the Constitution. (See, inter alia, *Cleanthis Georghiades (No. 1)* and *The Republic of Cyprus* (1965) 3 C.L.R. , 392; *Nicos Artemiou (No. 2)* and *The Republic of Cyprus* (1966) 3 C.L.R., 562; *Loizos Philippou Sepos v. The Presidential Election Returning Officer* (1968) 3 C.L.R., 82; *Niki Chr. Georghiou (No. 1) v. Republic* (1968) 3 C.L.R. , 401; *Soterios Goulelis v. Republic* (1969) 3 C.L.R. , 583; *Sofocles Sofocleous v. Republic* (1971) 3 C.L.R. , 345; *Georghios Miltiadous & Others v. Republic* (1972) 3 C.L.R. , 341; *C.T.C. Consultants Ltd., v. Cyprus Tourism Organisation* (1976) 3 C.L.R. , 30
30 390; *Yiannoulla F. Tyrokomou v. Republic* (1976) 3 C.L.R. , 403; *Papacleovoulou v. Republic* (1979) 3 C.L.R. , 223; *Tikki*

and Others v. Republic (1981) 3 C.L.R. , 250; *Sofocleous v. Republic* (1981) 3 C.L.R. , 360; *Frangos and Others v. Republic* (1982) 3 C.L.R. 53; *Riad Karram v. Republic* (1983) 3 C.L.R., 199; *Colakides & Associates and Others v. Republic and Others* (1985) 3 C.L.R. , 1780; *Karaliota v. Republic* (1985) 3 C.L.R., 2049; *Amanda Marga Ltd v. Republic* (1985) 3 C.L.R. , 2583; *Sayigh v. Republic* (1986) 3 C.L.R., 277; *Zakaria Navigation v. Republic* (1986) 3 C.L.R. , 621; *Abtul Rashim Suleiman v. The Republic of Cyprus* (1987) 3 C.L.R. 224.) 5

A provisional order in Administrative Law is a drastic remedy which should be sparingly given. It is granted when the act is tainted with flagrant illegality. The Court, however, in determining the issue of flagrant illegality must avoid going to the merits of the recourse, in order to avoid prejudging the recourse on such an early stage. 10
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Illegality to be flagrant should be such as to be identifiable on the face of the recourse.

Provisional order may be granted when there is clear evidence of irreparable damage, which must be specifically and succinctly pleaded. What constitutes irreparable damage is not simply a question whether in fact a loss will be irrecoverable. 20

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.

Negative administrative decisions cannot be suspended by means of a provisional order. 25

Article 32 of the Constitution provides that the Republic is not precluded from regulating by law any matters relating to aliens in accordance with International Law.

According to the principles of International Law the reception of aliens by a State is a matter of discretion; and every State is by 30

reason of its territorial supremacy competent to exclude aliens from its territory - (Oppenheim's International Law, 8th ed., vol. 1, pp. 675 - 676).

5 The Administration has a very wide discretionary power in permitting an alien to enter in the Republic.

The applicant in the present application does not apply for the suspension of the operation of the administrative acts challenged by the recourse.

10 An alien, subject to any rights that may be conferred by convention or bilateral treaty, has no right to enter the country. His only right is that an application to enter the country should be considered by the competent authorities of the Republic in good faith.

15 Counsel for the applicant referred to Article 30 of the Constitution and argued that if the applicant is not allowed to come in Cyprus, then she will be deprived of the fundamental right safeguarded by Article 30 of the Constitution.

20 Article 30 of the Constitution corresponds to Article 6 of the European Convention on Human Rights, which was ratified by Law 39/62 and has superior force over Domestic Legislation. It safeguards the right of every person to vindicate his rights before a Court of Law and have a fair trial. Within the notion of "fair trial" is the right to prosecute one's case and the right of equality of arms - (*Kyriacos Nicola Kouppis v. The Republic* (1977) 2
25 C.L.R., 361).

The applicant did not apply to the Administration for entry for the particular purpose stated in the affidavit of her counsel.

30 The power of this Court to make a provisional order does not extend to give a right to enter the Republic and stay in the absence of permission by the Migration Authorities. This Court cannot substitute the Administration by granting the relief prayed in this

application. This is within the power of the Administration under the provisions of the Aliens Law, Cap. 105 as amended.

The file of the Administration was produced. The opposition of the respondents was filed.

A perusal of the application and the opposition indicates that the determination of this recourse will be basically based on documents. If, in addition to documents, the testimony of the applicant is necessary, such testimony may be furnished, either in the form of affidavit sworn abroad, or by other procedures. The Court will deal with them, if and when need arises. 5
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It appears that the applicant encountered no difficulty in giving instructions to her counsel, either in the filing of the recourse, or in the cross-examination of Christos Christoudias, whom he really cross-examined at length. We live in an era of advanced technology, the communications between this country and Germany are so adequate that no difficulty exists in the prosecution of the case because of the absence of the applicant abroad, especially so, having regard to the nature of the proceedings under Article 146 and the procedure followed by this Court in its Inquisitorial Revisional Jurisdiction. 15
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For all the foregoing, the application for provisional order is dismissed.

Let there be no order as to costs.

Application dismissed.
No order as to costs. 25