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"Public order, national security and the rights of the third-country nationals in immigration and citizenship cases"

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Mr. Justice Leonidas Parparinos, Supreme Court of Cyprus

ACA-Europe questionnaire

Public order, national security and the rights of the third-country nationals in immigration and citizenship cases

Introduction- Immigration and Citizenship

The competent public body has wide discretionary powers to allow or prohibit entry or revoke permits for any third-country national within the territory of the Republic. Such discretion derives from the power of any nation to control its territorial sovereignty and retain its integrity[1]. In other words, it is an inherent and inalienable right of every sovereign and independent nation. Unless bound by an international treaty to the contrary, states are not subject to a duty to admit aliens[2] or any duty thereunder not to expel them[3]. Despite not being absolute and conditional to being exercised in good faith[4], the discretion widens when grounds of public order and national security are invoked[5]. The principle of good faith provides the single essential check on those discretionary powers[6]. The public body is presumed to have acted in good faith unless evidence to the contrary is shown. It therefore serves as a presumption to be rebutted[7]. The same principles are also applicable in citizenship cases[8]. Citizenship is chained to the sovereign right of the Republic to choose its citizens[9].

As per Mr. Justice Pikis (as he then was): "The right to review conferred by Article 146 is not confined to nationals or citizens of the country but extends to everyone, provided administrative action affects a legitimate interest of his in the sense of para. 2 of Art. 146. The discretion of the authorities, on the other hand, to exclude an alien is not abridged by the fact that its exercise is subject to judicial review. By the terms of the Aliens and Immigration Law, Cap. 105, the discretion of the State to exclude aliens is very wide, as broad as it can be in law, consistent with the supremacy and territorial integrity of the State; But not absolute. It is subject to the bona fide exercise of the discretion. So long as the discretion is exercised in good faith, the Court will query the decision no further. 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 in good faith.

[1] Ahmed Jammoul and others v. Republic (1987) 3 C.L.R. 2088

[2] In Re Uckac (1988) 1 C.L.R. 271

[3] Tabalo v. Republic (1988) 3 C.L.R. 2353

[4] Amanda Marga Ltd v. Republic (1985) 3 C.L.R. 2583, Karaliotas v. Republic (1987) 3 C.L.R 1693, Moyo and others v Republic (1998) 3(B) C.L.R. 1203, Pontopiou v. Republic, Case No. 1069, Date 19/12/1991, Yiangou and others v. Republic, Case No. 696/92, Date 21/5/1993, Dogan v. Police (1995) 1 C.L.R. 301

[5] Mushtaq v. Republic (1995) 4(C) C.L.R. 1479

[6] Amanda Marga Ltd v. The Republic (1985) 3 C.L.R. 2583, Leventis v. Republic (1988) 3 C.L.R. 2483

[7] Suleiman v. Republic (1987) 3 C.L.R. 224, Suman Mia v. Republic, Case No. 482/2012, Date 21/2/2014, Yuri Kolomoets v. Republic (1999) 4A C.L.R. 443

[8] Angela Siomina Iroa v. Republic (2005) 3 C.L.R. 307

[9] Tulin Sabahatin Veysel and others v. Republic, Case No. 184/2008, Date. 6/7/2010, Boulatnikova v. Republic, Case no. 1082/2005, Date 31/5/2007, Yusife Mohamad v. Republic (2010) 3 C.L.R. 18, Republic v. Z.M (2011) 3 C.L.R 20 (plenary of bench of Supreme Court, Yusife followed), Mojtaba E.G. Meidan v. Republic, Case no. 1644/2010, Date 15/10/2013, Bekir Inge v. Republic, Case No. 1640/2010, Date 26/9/2013, Ejber Aydin v. Republic, Case No. 95/2013, Date 15/2/2017 (Administrative court)

Acknowledgement of any further obligation on the part of the State would be inconsistent with the sovereign right of the State to exclude aliens." (***Amanda Marga v. Republic (1985) 3(D) C.L.R. 2583***)

A. General questions. National judicial and legal framework in the field of migration of third-country nationals and in citizenship cases

The state may, under *Article 32 of the Constitution*, statutorily regulate any matter relating to third-country nationals, in a manner consistent with international law.

Question 1*:*

National framework on Immigration: Under *Article 11 of the Constitution* all persons enjoy the right to freedom and personal security. Limitations include inter alia, the lawful arrest of persons for unauthorised entry or persons against whom action is taken with a view to deportation or extradition. Similarly, under *Article 5(1)(f) of ECHR* the right may be deprived where a lawful arrest or detention of a person is made to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition. It is clear that the Republic and contracting parties have reserved the right and power to deport any third-country national from their territory[10].

Aliens and Immigration Act, Chapter 105 provides the legal framework on immigration. All relevant EU Directives have been transposed into this statute. *Section 10 of Chapter 105* explicitly provides that, no third-country national enjoys an absolute right of entry. *Section 6* provides for a definition on 'unwanted/prohibited immigrants' which includes, inter alia, any person whose conduct is evidently a risk to peace, public order and national security. All 'unwanted immigrants' are subject to deportation in accordance with *section 14 of Chapter 105*. The Act makes various references to national security and public order namely but non-exhaustively in 4 distinct types of immigration:

(a) a third-country national's request for long-term stay may be refused on grounds of public order and national security (*section 18IA*),

(b) a third country national's permit for long-term stay may be revoked on similar grounds (*section 18ID*) and be deported thereafter (*section 18IF*),

(c) a third-country national's request to immigrate to Cyprus may be refused on public order and national security grounds despite being a holder of long-term stay permit from another member state (*section 18KC*),

(d) a family member of a third-country national requesting entry and residence permit, may be refused or the permit may be revoked or not reissued on grounds of public order and national security.

Remedies: An aggrieved person may be remedied through an hierarchical recourse, with a subsequent right to contest that decision to the Administrative Court as the competent court of first instance under *Article 146 of the Constitution*. Judgments of

[10] Moyo and others v. Republic (1990) 3(C) C.L.R. 1975

the Administrative Court may be appealed to the Supreme Court as the competent court of last resort under *Administrative Court's Act 2015*, *131/2015 Act* and *Article 146 of the Constitution*. Third-country nationals who are asylum seekers of refugee status, will be examined by the Asylum Service which is the competent public body on refugee status applications (*Refugees Act 2000*). In case the status is refused the applicant may challenge the decision to the Refugees Review Authority which is a higher administrative authority, with a subsequent right to contest the Authority's decision at the Administrative Court. There is a further subsequent right to an appeal to the Supreme Court. In due time the Refugees Review Authority may cease its operations and all decisions of the Asylum Service will be contested directly to the Administrative Court.

Relevant information may be obtained from the website of the Civil Registry and Migration Department of the Republic of Cyprus at the following website: http://www.moi.gov.cy/moi/CRMD/crmd.nsf/index_en/index_en?OpenDocument. Quite unfortunately the English version of the site does not include a translated copy of *Chapter 105*. A copy of the Act as well as of relevant statutory instruments are only available in Greek.

Question 2:

National framework on Citizenship: Citizenship is governed by the *Population Registry Act 2002, 141(I)/2002 Act*, and in particular *Chapter 7, Part 1* of the said statute. *Section 111* lays down the conditions for acquiring citizenship. Quite notably, no reference to public order and national security considerations is made. However, *section 113* of the Act lays down the conditions under which citizenship may be revoked and includes inter alia, reasons relating to conduct demonstrative of lack of legal conformity and adversity to the Republic. Despite being presented in a different wording the resonance of national security and public order is still strong. Arguably, the discretion is equally wide. Although the Act does not make explicit reference to public order and national security, the scope of *section 113* is wide enough to include all grounds that would adversely affect the state such as grounds of national security and public order.

When citizenship is revoked, an aggrieved person may request for an investigation to be conducted by the Investigatory Committee appointed for this particular purpose under *section 113(7)*.

Remedies: An aggrieved person may challenge the decision of the competent public body to the Administrative Court under *Article 146 of the Constitution* with a subsequent right to an appeal to the Supreme Court under *131/2015 Act.* There is no remedy under an hierarchical recourse path.

Relevant information may be obtained from the website of the Civil Registry and Migration Department of the Republic of Cyprus at the following website: http://www.moi.gov.cy/moi/CRMD/crmd.nsf/index_en/index_en?OpenDocument. Once again, the site does not offer a translated copy of the Act. Legislation as well as the relevant statutory instruments are only available in Greek.

Question 3: Unfortunately, no electronic data processing system is currently in use and hence, data on immigration and citizenship cases is not easily and immediately accessible. Also, records held do not include a categorisation or taxology of cases. It is therefore quite regrettable that such figures cannot be provided.

Questions 4 and 5: There is no disparity between the judicial procedure followed in immigration to that followed in citizenship cases. The procedure is identical and governed by the same principles. Similarly, judicial review on immigration and citizenship cases is no different from any other administrative act under review.

Judicial Review is a remedy made available under *Article 146 of the Constitution* where the right may be exercised on both points of fact and law with a subsequent right to an appeal to the Supreme Court, on points of law alone (*131/2015 Act*). Under *Article 146 of the Constitution* the Administrative Court is the court of competent jurisdiction to judicially review acts or omissions of an administrative or executive nature on a number of grounds as laid down in *General Principles of Administrative Law Act 158(I)/1999,* with the aforementioned subsequent right to an appeal to the Supreme Court, on points of law alone (*Administrative Court's Act 2015, 131/2015 Act*). Most importantly, within Cyprus' legal framework for an administrative/executive act to be contested, leave of the court is not required. Equally, no leave of the Supreme Court is required for the first instance judgment to be appealed.

Judicial review within Cyprus' legal order, is not restricted to grounds of legality. It is extended upon several grounds including factual questions and circumstances. For example, the court reviews grounds such as misconception of fact and of course of law, lack of due reasoning/justification, absence of sufficient enquiry and abuse of power. The latter, denotes that first, the public body is entrusted with a scope of discretionary powers and secondly, that those powers can be judicially reviewed. The Administrative Court however, does not replace the public authority's judgement with its own nor does it engage in a primary appreciation of the facts. The Court will only intervene when after taking into account all facts, it is led to the conclusion that the findings of the administrative body are not reasonably sustainable, or they are a result of an error of facts or law or in excess of its discretionary powers[11]. In essence the court reviews it in order to ascertain whether:

- there is a clear statutory empowerment of discretion and its extent.
- the public body has exercised its discretionary powers.
- there has been sufficient enquiry of all relevant facts for the discretion to have been exercised correctly, reasonably and under no misconception.

Thus, the court reviews whether the public body has abused its discretionary powers or acted excessively or in an ill manner[12].

The overall legal framework is laid down in General Principles of Administrative Law Act 158(I)/1999 which is applicable under both judicial procedures, namely the first instance one (Administrative Court) as well as the last resort one (Supreme Court). It is also applicable to higher administrative bodies empowered to hierarchically review

[11] Republic v. Georghiades (1972) 3 C.L.R. 594, Yuri Kolomoets v. Republic (1999) 4 A C.L.R. 443
[12] Cyprus Administrative Law Manual, Nicos Charalambous, 3rd edition, 2016, Page 304-305

administrative acts or omissions. The statute safeguards the procedure by encapsulating the principles of fairness, competence, proper administration- bona fide and proportionality, legality, representation, natural justice- impartiality and right to be heard, equality, right to judicial review and to an appeal etc.

A concise outline of 158(I)/1999 Act's principles:

- Legality: A public authority does not act unlimitedly nor does it act as it pleases. Its powers and activities derive from statute and are hence determined explicitly and limited to the extent such a statute denotes (*Article 8*). The principle of legality is the most substantive and essential one to a democratic state which respects the rule of law and acts primarily for the public interest.
- Competence: A public authority's competence is determined by the Constitution or by Statute or Statutory Instruments/Regulations, enacted in accordance with the law (*Articles 15 and 17*).
- Proper administration:
  1. *Principle of bona fide/good faith*: A public authority must act in good faith. Measures conflict good faith if taken in bad faith, or in a contradictory or deceiving manner (*Article 51*).
  2. *Proportionality*: The principle of proportionality requires that a public authority's measures including imposition of sanctions must be proportionate (*Article 52*). Adverse effects cannot be disproportionate to the measure taken.
- Natural justice is regarded highly in administrative law. It is enshrined in *Article 30.2 of the Constitution*, which is identical to *Article 6(1) of ECHR*.
  1. *Impartiality- Nemo judex in causa sua*

  An administrative body must act in accordance with the principle of impartiality (*Article 42*).
  2. *Right to be heard- audi alteram partem*

  The right to be heard is enjoyed by any person who will be affected by the administrative act or measure of a disciplinary or sanction-like character or will, in any way, be adversely affected by it (*Article 43*).
- Reasoning/Justification: Administration must justify its decisions. Extent and details given may vary depending on the subject-matter. (*Article 26*).
- Representation: The right to be heard is exercised either as a litigant in person or via an attorney, either orally or in writing (*Article 43*).
- Equality is enshrined in *Article 28 of the Constitution*, which provides that all are equal before the law, administration and justice. Also, *Article 38 of 158(I)/1999* Act determines that a public body must act in accordance with the principle of equality which requires equal and uniform treatment of all civilians who are under the same or similar conditions.

B. Substantive issues. The notion of public order and national security.

Question 6: There is no single or exhaustive definition for public order or national security. No definition is offered by national legislation or precedence. The terms play a predominantly key role in national legislation without being narrowed down to any particular definition or meaning. As stated by the CJEU in the 1975 case of

Rutili[13] this is due to the fact that such matters are sensitive and fall within the sphere of the sovereign state and each state is free to regulate matters of public order and national security in accordance with each nation's current needs and values which of course might differ from state to state and from time to time. *Chapter 105* (immigration) and *Population Registry Act 2002* (citizenship) do not provide any definition whatsoever on 'public order' or 'national security' terms. *Section 113* of *Population Registry Act 2002,* provides that when a person has demonstrated conduct (verbal or actions) that denotes lack of legal conformity and adversity to the Republic its citizenship may be revoked. It allows for a still widely defined definition of 'public order' and 'national security'. The wideness of the discretion on what constitutes 'public order', 'national security' and even 'lack of legal conformity and adversity' remains intact. All terms are in the abstract. The interpretation of these terms lies within the discretion of the competent authority.

As precedent law puts it: *"When administration invokes reasons of public order and national security, its discretionary powers in allowing or not the stay of a third-country national are even more wide. Risks to public order and national security are of substantial consideration that justify the deportation of a third-country national. Administration is not obliged to give reasons for the deportation or for its decision not to allow the entry to a third-country national on grounds of public order and national security. The only right recognised to the third-country national is that his application will be examined in good faith. The Court does not examine the reasons given that pose a threat to national security, the sole judge of that is the executive power."* ***(Ivan Todorov v. Republic, case no. 109/00, Date 14/12/2000, Yuri Kolomoets v. Republic (1999) 4 A C.L.R. 443, Karaliotas v. Republic (1987) 3 C.L.R. 1701****)*

Question 7: The terms are 'defined' in innumerable ways and in such broad terms as to cover past and current needs and values which of course evolve and change from time to time. Their broad definition may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force. While the role of the judge does not change, the manner in which the performance of the balancing of interests is done does. In times when national security, public order or the interest of society are at stake, the judiciary will necessarily give greater weight to the governmental, more specifically the national security, interest.

Questions 8 and 9: All points raised in questions 8 and 9 must be answered in the affirmative. Public order and national security reasons constitute grounds for administration to proceed in the actions referred to in the said questions. For example, the right to deport a third-country national applies independent of the fact that the third-country national is within the territory of the state for temporary or permanent stay[14].

Article 8 of ECHR is identical to *Article 15 of the Constitution* and has been interpreted on numerous occasions by the ECtHR. According to the interpretation of

[13] C-36/75, 28/10/1975

[14] Mushtaq v. Republic (1995) 4(C) C.L.R. 1479, Yuri Kolomoets v. Republic (1999) 4(A) C.L.R. 443

ECtHR in ***Abdulamiz Cabales and Balkandali v. UK***[15] "The Court recalls that, by guaranteeing the right to respect for family life, Article 8 (art. 8) "presupposes the existence of a family" (see the Marckx judgment of 13 June 1979, Series A no. 31, p. 14, para. 31). However, this does not mean that all intended family life falls entirely outside its ambit. Whatever else the word "family" may mean, it must at any rate include the relationship that arises from a lawful and genuine marriage, such as that contracted by Mr. and Mrs. Abdulaziz and Mr. and Mrs. Balkandali, even if a family life of the kind referred to by the Government has not yet been fully established. Those marriages must be considered sufficient to attract such respect as may be due under Article 8 (art. 8). Furthermore, the expression "family life", in the case of a married couple, normally comprises cohabitation. The latter proposition is reinforced by the existence of Article 12 (art. 12), for it is scarcely conceivable that the right to found a family should not encompass the right to live together…. The duty imposed by Article 8 (art. 8) cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country".

Furthermore, in ***Moustaquim v. Belgium***[16] the ECtHR held that "the Court does not in any way underestimate the Contracting States' concern to maintain public order, in particular in exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry, residence and expulsion of aliens (see the Abdulaziz, Cabales and Balkandali judgment of 28 May 1985, Series A no. 94, p. 34, § 67, and the Berrehab judgment of 21 June 1988, Series A no. 138, pp. 15-16, §§ 28-29). However, in cases where the relevant decisions would constitute an interference with the rights protected by paragraph 1 of Article 8 (art. 8-1), they must be shown to be "**necessary in a democratic society**", that is to say justified by a **pressing social need and, in particular, proportionate to the legitimate aim pursued**". This is the reason why the ECtHR in ***Beldjudi v. France***[17] held that Article 8 of ECHR was breached in the case of an Algerian citizen who was deported from France despite of the fact that he had close and long-term ties with France and was married to a French woman.

In accordance with the aforementioned cases the *plenary* of the Supreme Court has ruled that the refusal of the competent authority to grant a residence permit to a third-country national married to a Cypriot woman did not breach the constitutional right to private and family life of *Article 15* since the family could have been maintained outside the territory of the Republic[18]. Similarly, nor was *Article 15 of the Constitution* breached when the entire family of third-country nationals was deported despite of the fact that their third child was born in Cyprus, since birth does not automatically grant citizenship[19].

[15] [1985] 7 EHRR 471, [1985] EHRR 471, [1985] ECHR 7, Application nos. 9214/80; 9473/81; 9474/81, Date 25/5/1985, Series A No. 94, Page 32 §62,68

[16] Application No. 12313/86, [1991] ECHR 3, 8 February 1991, §43

[17] A 234-A (1992)

[18] Balalas and others v. Republic (1988) 3 C.L.R. 2127

[19] Ahmed Ibrahim Kedoum v. Republic (2005) 3 C.L.R. 505, Jaroslav Joudine v. Republic (2006) 3 C.L.R. 500

The right against torture and inhuman or degrading treatment is protected *by Article 8 of the Constitution* which corresponds to *Article 3 of the ECHR.* It is often invoked by third-country nationals facing deportation to their country of origin. However, as stressed in the decisions of the European Commission of Human Rights the mere allegation does not justify the non-deportation of the third-country national. A real risk of such treatment must be proven with evidence[20].

Question 10: Case law examples that have fallen within the scope of public order and national security:

a. *Immigration cases*

- Burglaries and thefts[21]
- Conduct / Activities / Information relating to terrorism[22]
- Information on conspiring to commit an illegal act[23]
- Suspicious behaviour relating to national security threats[24]
- Marriage of convenience[25]
- Drug offences / information on drug related offences or involvement[26]
- Assault / Battery[27]
- Forgery[28]

b. *Citizenship cases*

- previous illegal entry and stay within the territory of the Republic[29]
- smuggling large quantities of cigarettes/tobacco/alcohol[30]
- trafficking of persons[31]
- illegal entry of one or both of the parents of the applicant[32]

[20] Abdolai Kadivari v. Republic (1992) 4 C.L.R. 2924, 2931
[21] Mushtaq v. Republic (1995) 4(C) 1479
[22] Qureshi Aqeel Ahmed v. Republic (2006) 3 C.L.R. 537, Kamran Sharajeel v. Republic, Case No. 725/2004, Date 17/3/2006, Baloch Rizwan Bashir v. Republic, Case No. 721/2004, Date 25/5/2006,
[23] Yuri Kolomoets v. Republic (1999) 4A C.L.R. 443
[24] Moyo and others v. Republic (1990) 3(C) C.L.R. 1975
[25] Munir Rifaee v. Republic, case No. 1579/2005, Date 6/7/2007, Asif Muhammad and others v. Republic, Case No. 6296/2013, Date 18/8/2016 (Administrative court), Mito Nura Alon v. Republic, Case No. 5707/2013, Date 9/12/2016
[26] Bou Karam Hanna Fayez v. Republic (1995) 4(B) C.L.R. 933
[27] Hayke Elias Ohanian v. Republic (2007) 4(A) C.L.R. 353
[28] Ahmad Houssein Yakhini v. Republic (2007) 4(A) C.L.R. 221
[29] Yousife Mohamad v. Republic (2010) 3 C.L.R. 18, Mahmoud Abdel Meneem v. Republic, Case No. 1552/07, Date 5/11/2008, Chrysostomou v. Republic, Case No. 1794/06, Date 17/12/2007, Khamzaeva v. Republic, Case No. 727/06, Date 16/7/2007
[30] Nawaf Mefaalani v. Republic (2011) 3A C.L.R. 383
[31] Nawaf Mefaalani v. Republic (2011) 3A C.L.R. 383

Question 11: When a third-country national enters the territory of a state, he is subject to its integrity and jurisdiction and he is responsible and accountable for all actions undertaken by him while in the territory of that particular state[33]. Hence, his personal conduct, the threat he poses to the State's society and the interest of the public are all factors taken into account by public authorities before deciding on the facts of each particular immigration or citizenship case. In ***Dogan v. Republic (1995) 4 C.L.R. 716*** the deportation of third-country national workers was considered essential as they posed a real threat to public interest (fundamental interest of society) and were considered dangerous on national security grounds. In the case of ***Bou Karam Hanna Fayez v. Republic (1995) 4(B) C.L.R. 933*** the residence permit of a third-country national was not renewed on public interest grounds, based on valid information held relating to his involvement in drug smuggling cases.

Question 12: 'National security' and 'public order' grounds cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated or of lesser severity threats to law and order. However, different aspects could be taken into account by public authorities, for example the impact the offence has on society, how many offences the third-country national has already committed, whether or not the offence has a profit-making nature, the period of time since the last conviction, circumstances in which the offence was committed, whether or not the third-country national is willing to reform. It is not necessary that the third-country national has been convicted to be considered a genuine, present and sufficiently serious threat to public order. The legislator has not limitedly specified that a danger for public order can only be determined on the basis of convictions or indictments. Deportation for example, is an administrative measure that does not require criminal convictions[34]. On numerous occasions the assessment whether or not a certain behaviour harms public order, is a discretionary power of the executive. Hence, the behaviour of a third-country national is paramount to determine whether or not a foreign national poses a danger to public order.

Sham marriages, received an explicit provision in *Chapter 105*. Under *section 7A of Chapter 105* if a third-country national has contracted a proven sham marriage, that is a marriage of convenience, he shall be deported, his residence permit will be annulled and may also face criminal charges.

Question 13: The right to private and family life is protected by *Article 15 of the Constitution* which is identical to *Article 8 of ECHR* as specified above. As case law directs, a public body's discretion cannot be exercised in a manner contrary to the provisions of the Constitution and international treaties that bind the Republic[35]. Therefore, when one's private and family life ought to be protected that takes precedent. Unless a marriage has been contested by the Advisory Committee, established under *section 7B of Chapter 105* and proven to be a sham, the courts will not question the validity of the marriage. Suspicion alone is not enough to

[32] Ejber Aydin v. Republic, Case No. 95/2013, Date 15/2/2017
[33] Mushtaq v. Republic (1995) 4(C) C.L.R. 1479
[34] Mushtaq v. Republic (1995) 4(C) 1479
[35] Karaliotas v. Republic (1987) 3 C.L.R. 1701, Tobalo v. Republic (1988) 3 C.L.R. 2353, Moyo and others v. Republic (1990) 3(C) 1975

override one's right to private and family life. In all other situations listed under a-i of question 12, the court will protect one's constitutional rights to private and family life by applying the test laid down in ***Moustaquim v. Belgium*** (supra) which stresses that interference with the rights protected by Article 8 of ECHR must be shown to be ""necessary in a democratic society", that is to say justified by a pressing social need and, in particular, **proportionate to the legitimate aim pursued**".

Question 14: In the case of ***Hayke Elias Ohanian v. Republic (2007) 4(A) C.L.R. 353*** the court protected the third-country national's right to maintain a relationship with his child, who was a national, despite of his conviction for assault and battery on his ex-partner. Furthermore, according to precedent law if expulsion would require terminating a child's schooling temporary stay may be granted for humanitarian reasons **(Gargik Arevshatyan and others v. Republic, Case No. 1614/2007, Date 7/9/2009)**.

Question 15: As illustrated by some of the examples given in question 10, terrorism, smuggling/trafficking of persons, child abuse, drug dealing and weapons trading are considered serious and threatening enough to jeopardise 'public order' and 'national security' and warrant the loss of nationality or the denial of a residence permit or the issuance of a return decision.

Question 16: Nowhere is this complex intersection more prevalent than in the exclusion from refugee status of those for whom there are 'serious reasons for considering' they are guilty of 'acts contrary to the purposes and principles of the United Nations' under Article 1F(c) of the 1951 Convention relating to the Status of Refugees. Articles 12(2)(b) and (c) of Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted exclude a person from being a refugee where there are serious reasons for considering that she/he has committed certain heinous acts. *Articles 12(2)(b) and (c) of the Qualification Directive* are based on *Articles 1F(b) and (c) of the 1951 Convention* relating to the Status of Refugees. *Section 5 of Refugees Act 2000* makes identical provisions and in particular that an applicant is excluded from refugee status, inter alia when there are serious reasons that he/she has committed:

- a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes, or
- a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes, or
- is guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

Under *section 6* of the said Act, refugee status will be refused or revoked if the Asylum Service ascertains that the applicant ought to have been excluded under the provisions of *section 5* or there are reasonable grounds that the applicant is a risk to national security or poses a threat to society due to a conviction for a serious offence.

In the case of ***Seif Eldin Mostafa Mohamed Emam v. Republic, Application No. 121/2016, Date 16/2/2017*** which concerned an application of habeas corpus, the applicant had applied for refugee status to the Refugee Service. He was responsible for a recent plane hijacking incident within the territory of the Republic. The competent authority despite being of the opinion that the applicant was eligible for a refugee status under *section 3 of Refugees Act 2000* and *Article 1A of the Convention relating to the Status of Refugees 1951,* it proceeded to exclude him based on his conduct of hijacking a plane which was contrary to *Section 5(1)(c)(iv)* of the relevant Act and *Article 1(F)(b) of the Convention relating to the Status of Refugees 1951*.

Question 17: As aforementioned, the ECtHR in ***Moustaquim v. Belgium*** (supra) held that the states' concern to maintain public order, in particular in exercising their right, to control the entry, residence and expulsion of aliens but, in cases where the relevant decisions would constitute an interference with the rights protected by Article 8(1), they must show that the interference is "**necessary in a democratic society**", that is to say justified by a **pressing social need and, in particular, proportionate to the legitimate aim pursued**".

This provides the test applied by national courts when public order is found to be at risk and in conflict with the right to family life. No cases where family life was given priority over national security could be located.

In the case of ***Hayke Elias Ohanian v. Republic (2007) 4(A) C.L.R. 353*** the third-country national was declared an unwanted immigrant under *Chapter 105*, due to his conviction for assault and battery for which he was sentenced to imprisonment. He was ordered to leave the country. He was the father of a child with his ex-partner who was a national. The Court held that deporting him would affect his relationship with his child. As per Mr. Justice Constantinides (as he then was): "The exercise of the right to expel a third-country national when it might interfere with constitutionally protected rights, must emerge as a reasonable finding after carefully considering all the merits of each case, in order to be held necessary in a democratic society, that is to be justified by a pressing social need and in particular, it must be proportionate to the legitimate aim pursued. The public interest protected by the deportation of a non-national must not only be specified in the decision but at the same time it must be demonstrated, in order to ensure and compensate the right of each person's family life."

In the case of ***Ahmad Houssein Yakhini and others v. Republic (2007) 4(A) C.L.R. 221***, the third-country national was convicted for forgery and was ordered to leave the country. He was married to a national. The court held that the public body did not examine the consequences deportation would have on his marriage and since no action was taken to challenge the nature and validity of the marriage, that is

whether the marriage was genuine, the decision of the public body was not justified enough as it did not take into account all of the facts of the case.

Question 18*:* In brief, the recent case of ***Seif Eldin Mostafa Mohamed Emam v. Republic, Application No. 121/2016, Date 16/2/2017*** mention to which was made in question 16, demonstrates that national security considerations will override any other consideration.

C. Procedural issues. Fairness of the procedure.

Question 19: Administrative decisions include both legal and factual reasons. The general rule is that administrative acts must be well and sufficiently justified (*section 26(1) of General Principles of Administrative Law Act 158(I)/1999*). Justification must be clear and not general or vague[36]. Otherwise, judicial scrutiny is hindered. What constitutes lack of sufficient reasoning is a matter of degree and depends on the nature of each particular case[37]. The shape and extent of justification as well as the extent of details given by administration vary depending on the subject-matter and the circumstances that surround each case (*section 26(2) of 158(I)/1999 Act*). Also, reasons given by administration to justify its decision must derive from the facts of the case[38]. Therefore, an administrative act under review where public order or national security grounds are invoked may be distinguished from any other act judicially reviewed, in that the degree of justification required may quite reasonably differ. Administration may be 'excused' for not providing an extended or detailed version of its reasoning. For example, administration is not obliged to give any reasons for its refusal to allow entry within the territory of the Republic when invoking national security[39]. "*The Court does not examine the reasons given that pose a threat to national security, the sole judge of that is the executive power." (**Ivan Todorov v. Republic, case no. 109/00, Date 14/12/2000, Yuri Kolomoets v. Republic (1999) 4 A C.L.R. 443, Karaliotas v. Republic (1987) 3 C.L.R. 1701**).* However, it may not abuse its powers. Regardless of the fact that the court will not substitute its judgement to that of the public body, public authorities cannot act arbitrarily.

Question 20: *Section 43(1) of General Principles of Administrative Law Act 158(I)/1999* provides that any person who will be affected by an administrative act or a measure of sanction-like or disciplinary character or of an act of adversary nature, has the right to be heard. Additionally, any person with a right to be heard, has also the right to access the documents included in his administrative file, upon a written request. The right may be deprived for reason's relating to the interest of the office or the interest of a third party. The right may also be bended when the public interest ought to be protected[40]. However, administration must provide reasons for its refusal. Furthermore, *section 37 of General Principles of Administrative Law Act 158(I)/1999*

[36] Kounounas v. Republic (2001), 3 C.L.R. 1163, Marina Neofytou v. Council of Ministers and others (2006) 3 C.L.R. 768

[37] Athos Georghiades and others v. Republic (1967) 3 C.L.R. 653, Renos Kyriakides v. Republic (1976) 3 C.L.R. 364

[38] Lambrou v. Republic (1970) 3 C.L.R. 75

[39] Karaliotas v. Republic (1987) 3 C.L.R. 1701

[40] Hadjidemetriou v. Republic (1999) 3 C.L.R. 361

provides that any person aggrieved by an administrative act may request an official copy of that decision. Again, access may be denied, wholly or partially, if that would jeopardise the interest of the office or the interest of a third party. The public authority however, must always provide reasons.

On the other hand, evidence is always available to the judge for an effective and independent judicial review, as explained further down more elaborately.

Question 21: During the judicial process, all relevant documents, evidence and the administrative file is submitted in court.

In the case of ***Moyo and other v. Republic (1990) 3(C) C.L.R. 1975***, the court had to examine the issue of judicial review on national security, and held that "Despite of the fact that matters of national security are sensitive and any disclosure may have catastrophic consequences, the court determines whether there is evidence to reasonably support such a finding of national security jeopardy". The court adhered the view that, "evidence may be admitted in close court (in camera) or through any other kind of procedural measures in order to ascertain and restrain the broadcast of those evidence. Administration cannot be the sole judge of national security grounds and judicial review cannot be excluded. Such exclusion would lead to abuse of power, in unwanted consequences and encroachment of substantial rights and liberties of the person".

Hence, the mere assertion of the government that they acted on security grounds is not enough. There must be evidence to confirm. But the courts will go no further, and will not question whether the steps taken were indeed necessary to protect national security. What is necessary is a matter on which the executive must have the last word. However, while public authorities enjoy a certain margin of appreciation when determining the 'necessity' of their actions, their decisions are subject to the judicial scrutiny of the court in determining whether these actions are "necessary in a democratic society" when fundamental rights are being 'overlooked'.

Question 22: Reiterating from ***Moyo*** (supra), all judges are allowed to adjudicate upon any case even cases that involve national security matters and information. Excluding a portion of the judiciary would be contrary to the provisions of the constitution which is characterised by the doctrine of strict separation of powers, the independence of the judiciary and their role as guardians of the democratic rule of law.

Question 23 and 24: It is settled law that administration's discretionary powers ought to be exercised in a manner that do not breach constitutionally protected rights. Including the constitutionally protected right to a fair trial.

Article 30.2 of the Constitution enshrines **judicial protection and the right to a fair trial,** in that in the determination of one's civil rights and obligations or against any criminal charge faced, a person has the right to a fair and public hearing within a reasonable time by an independent, impartial and competent court, established by law, identical to *Article 6.1 of ECHR.*

Cyprus' legal regime does not share the concept of 'closed material procedures' in courts and in judicial proceedings nor the use of 'special, vetted advocates' who are security-vetted lawyers permitted to participate in closed material proceedings and only permitted to disclose to clients a simplified summary or 'gist' of intelligence material used in secret hearings, while withholding specific details. Further, nor does the court consider 'secret material' in a closed session in the absence of the appellant and his/her legal advisers, but with the assistance of the special advocate who examines the relevance of the secret intelligence information to the case, its admissibility- whether it would prevent a fair trial and the legitimacy of its classification- whether disclosure would really harm national security.

Arguably, any probable use of 'closed material procedures' or any kind of similar procedure in courts would need to be assessed under the spectrum of the **doctrine of strict separation of powers entrenched in the Constitution of Cyprus, the independence of the judiciary paramount to Cyprus' legal order and the judiciary's utmost respect for the rule of law and fundamental human rights**, which are key principles in all democratic states. The said principles would be at stake, in light of the role vetted advocates would hold, i.e. instructed to protect the appellant's interests and argue against admitting material on the grounds that it would prevent a fair trial, but they would not be able to communicate with the appellant without the government's permission or proceed to communicate the secret evidence. Questions would arise as to the legal safeguards for ensuring a fair trial and whether there are sufficient guarantees to prevent misuse and abuse of the procedure.

Question 25: Judicial review trials are inquisitorial. They provide a contrast to the adversarial system of civil and criminal trials where the submittal of evidence burdens the parties. In the inquisitorial system, such initiative lies upon the Judge who may order the submission of evidence, call witnesses and set trial issues[41]. The 'peculiarity' of the administrative trial and the inquisitorial system in general, do not allow the submission of evidence and facts that were not before the public body and are hence not part of the administrative file, only but in very exceptional circumstances[42] and when the matter relates to asylum cases before the Administrative Court[43]. For the submittal of evidence which are not part of the administrative file leave of the court is required, conditional to the fact that evidence is relevant to the issues of the case[44] as to aid the court in administering justice[45]. It is for this reason that the administrative file or files that disclose and make the case are unswervingly accepted as evidence[46]. The above require that the aggrieved person can have access to his administrative file and other evidence that affect his legal rights. EU law takes into account the importance of such a right. *Article 41(2) of the Charter of Fundamental Rights of the European Union* denotes that proper administration means that every person has the right to have his or her affairs

[41] Cyprus Administrative Law Manual, Nicos Charalambous, 3rd edition, 2016, Page 39
[42] Iacovides v. Public Service Commission (1997) 3 C.L.R. 28
[43] Section 11(3) of 131(I)/2015 Act
[44] Petrolina Ltd and others v. Cyprus Port Authority, Case No. 223/2000, Date 4/4/2002, Zarvos v. Republic (1989) 3(B) Α.Α.Δ. 106, Kyriakides v. Republic, 1 RSCC 66
[45] Tasni Enviro Ltd and Telmen Ltd v. Republic, Case No. 862/2005, Date 26/6/2008
[46] Constantinou v. Water Board Council (No. 1) (1992) 4 C.L.R. 3330

handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union. This right includes:

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

(c) the obligation of the administration to give reasons for its decisions.

Similarly, within Cyprus' legal order, an aggrieved person has the right to have access and knowledge of his administrative file except if the public body refuses, wholly or partially, on grounds relating to the protection of a third party's interest or for the interest of the office. It is settled law that inspection and disclosure of evidence is allowed when the documents are relevant[47]. Relevance might be direct or indirect, one that helps the party requesting disclosure in the advancement of his case or in undermining the opposing party's case or even one that might lead to one of the two said consequences taking effect. Furthermore, all relevant facts and documents that surround the case must be disclosed, so that the court can scrutinise the legality of the act[48]. As stressed in the cases of ***Kyriaki Georgiou v. Republic***[49] and in ***FBME BANK LTD*** (supra), it is not for administration to decide what is necessary to be disclosed in court but ought to disclose fully all documents that led to the administrative decision taken and leave it to the court to evaluate the importance of each document.

Limiting disclosure would not be compatible with the right to a fair trial and the foundational principle of natural justice. All parties are entitled to see and challenge all the evidence relied upon before the court and to introduce evidence of their own in rebuttal.

Question 26: Full judgments are available to all parties to the proceedings. No restrictions or limitations exist nor is it acceptable practice for summaries of judgments to be made for a particular party to the proceedings, instead of full judgments. All parties receive full judgments with legal and factual findings included.

Question 27: The standards introduced and explained in this part of the questionnaire are exactly the same for nationals, EU nationals and third-country nationals in relation to access to classified and confidential information. There are no disparities amongst them.

Question 28: All judges of the Administrative Court as well as of the Supreme Court are eligible to hear cases relating to immigration and citizenship that raise issues or concerns of national security. Judges are entitled to grant priority to such cases

[47] The National Bank of Greece, S.A v. Paraskevas Mitsides (1962) C.L.R. 40, KEAN SOFT DRINKS and others v. Republic, Case No. 1247/05, Date 25/9/2007

[48] C.D. Hay Properties Ltd v. Republic (1992) 3 C.L.R. 238, FBME BANK LTD v. Central Bank of Cyprus and others, Case No. 1024/2014, Date 18/12/2015

[49] Case No. 629/2009, Date 28/9/2010

when listed for hearing mutatis of the procedural, preliminary and trial requirements laid down in the respective Procedure Rules.

Procedure before the Administrative Court- first instance: Pleadings and procedure are governed by the *Administrative Court (No.1) Procedure Rules of 2015 and Supreme Constitutional Court Procedure Rules of 1962.* Once pleadings have been submitted, written statements/skeleton arguments would need to be submitted in turn for advocacy submissions to be made thereafter. The administrative file is submitted to court at this latter stage.

Procedure before the Supreme Court- last instance: Pleadings are governed by the *Appeals (Judicial Review Jurisdiction) Procedure Rules of the Supreme Court of 1964*. Preliminary procedure and hearing are governed by *Appeals (Preliminary procedure, Skeleton arguments, Advocacy time limits and Summary procedure for striking out manifestly unfounded appeals) Procedure Rules of 1996*. During the preliminary procedure, all skeleton arguments are submitted within the time frames specified by the Procedure Rules, unless the Court directs otherwise. Time frames may be abridged if the court thinks fit. Under *Rule 5 of the Procedure Rules of 1996*, the Supreme Court has the power to enter a case for hearing without undertaking a preliminary procedure, whenever the court considers it to be just. However, the need for an expedient trial on the appeal is no reason for not following the preliminary procedure stage. Only where there are founded reasons for circumventing the procedure, will the Court regard it just to do so. A party to the proceedings may apply for such circumvention to the competent Registry[50].

[50] Supermarkets Association and others v. Republic (1997) 3 C.L.R. 142