1979 March 10

[TRIANTAFYLLIDES, P.]

SOTERIOS ECONOMIDES,

Applicant,

v.

MILITARY DISCIPLINARY BOARD,

Respondent.

(Civil Application No. 21/77).

Prohibition—Article 155.4 *of the Constitution—Jurisdiction—Disciplinary proceedings against Army Officer before Disciplinary Board set up under regulations* 12 *and* 23(*A*) *of the Army of the Republic Disciplinary Regulations,* 1962 (*as amended*)—*Amount to the exercise of administrative authority in the sense of Article* 146. 1 *of the Constitution—No jurisdiction to grant order of prohibition in relation to such proceedings, because the jurisdiction under Article* 155. 4 *and that under Article* 146. 1 *are clearly distinct and mutually exclusive*—Vassiliou and Another *v.* Police Disciplinary Committees (1979) 1 *C.L.R.* 46 *followed—Moreover, no jurisdiction to grant said order by applying relevant principles of English Law—And no jurisdiction to grant it even if in a comparable case it would be granted under Indian Law —Even if alleged lack of jurisdiction by respondent Board would expose applicant unnecessarily to Disciplinary proceedings this would not be sufficient to vest Court with competence to grant the order applied for.*

The applicant is a Major in the Cyprus Army who as from April 1969 has been seconded for service in the National Guard. On November 17, 1977, he was summoned to appear before the respondent Disciplinary Board in relation to charges against him concerning alleged disciplinary offences committed by him. The Disciplinary Board was set up under regulations 12 and 23(A) of the Army of the Republic Disciplinary Regulations, 1962 (as amended).

Upon an application for an order of prohibition, under Article 155. 4 *of the Constitution, prohibiting the respondent Disciplinary Board from dealing with the said charges:*

Held, (1) that as the proceedings which have been instituted against the applicant are of a disciplinary nature, and as these proceedings amount to the exercise of administrative authority in the sense of Article 146. 1 of the Constitution, even though, admittedly, the procedure to be followed in relation to such proceedings has some judicial characteristics, this Court has reached the conclusion, for the reasons set out in its decision in *Vassiliou and another* v. *Police Disciplinary Committees* (1979) 1 C.L.R. 46—which need not be repeated all over again in this judgment and which should be deemed to be incorporated herein—that in the present case it does not possess jurisdiction to grant the applied for order of Prohibition under Article 155. 4 of the Constitution, because the jurisdiction under the said Article and that under Article 146. 1 are clearly distinct and mutually exclusive (see, also, *Kyriakides* v. *Republic*, 1 R.S.C.C. 66 at p. 75).

(2) (*On the question whether the Court has jurisdiction to grant the order applied for by applying the principles of English Law in relation to the writs of Prohibition and Certiorari*): That the relevant principles of English Law have to be applied here within the ambit of the jurisdiction created by the Constitution by means of Article 155. 4, and cannot, consequently, be applied, in relation to a matter, such as the disciplinary proceedings against the present applicant, which is within the ambit of Article 146. 1 of the Constitution (see the *Vassiliou* case, *supra*).

(3) (*On the question whether the order applied for would be granted because in a comparable case in India it would be granted*): That in India there do not exist the mutually exclusive jurisdictions which have been created here by Articles 146.1 and 155.4 of the Constitution; and that in view of the way in which the nature of such jurisdictions has been explained in the case-law referred to in the *Vassiliou* case, *supra*, this Court is prevented from granting an order of Prohibition in a case such as the present one, even if it is correct that such a course would be open to a Court applying the law of India.

(4) That, moreover, even assuming that the respondent Board does not, as contended by counsel for the applicant,

have jurisdiction in the present instance, and as a result the applicant will be exposed unnecessarily to "the ordeal" of the disciplinary proceedings before such Board, this again would not be sufficient to enable this Court to overcome the obstacle of the absence of jurisdiction under Article 155.4 of the Constitution, inasmuch as the disciplinary proceedings in question come exclusively within the ambit of Article 146.1 of the Constitution; and that it is amply clear that in the exercise of the jurisdiction under Article 146.1 any alleged usurpation of competence by the Disciplinary Board concerned would, eventually, if established, render its decision *null* and *void* and of no effect whatsoever, as having been reached contrary to law and in excess or abuse of powers.

(5) (*In relation to the complaint of counsel for the applicant that if it is correct that the respondent Disciplinary Board does not possess jurisdiction this would result in an infringement of Article 8 of the Constitution, which prohibits "inhuman or degrading punishment or treatment"*): That even if it could be said that there existed such an infringement, this, again, would not have sufficed to vest this Court with the competence to grant, under Article 155.4, an order of Prohibition, which competence it does not otherwise possess in the present case; and that in any event, this Court is not prepared to agree that the exposure of the applicant to disciplinary proceedings before a Board, which allegedly does not possess jurisdiction to deal with the charges against him, could be held to amount to inhuman or degrading punishment or treatment in the sense of Article 8.

Application refused.

Cases referred to:

Vassiliou and Another v. *Police Disciplinary Committees* (1979) 1 C.L.R. 46;

Kyriakides v. *Republic*, 1 R.S.C.C. 66 at p. 75;

The King v. *Electricity Commissioners*, Ex parte *London Electricity Joint Committee Company* (1920), *Limited, and Others* [1924] 1 K.B. 171;

R. v. *Criminal Injuries Compensation Board*, Ex parte *Lain* [1967] 2 All E.R. 770 at p. 777;

R. v. *Barnsley Metropolitan Borough Council*, ex parte *Hook* [1976] 3 All E.R. 452 at p. 458.

Application.

Application for an order of prohibition prohibiting the respondent Military Disciplinary Board from dealing with the charges preferred against the applicant in respect of disciplinary offences committed by him.

L. Papaphilippou with *A. Haviaras*, for the applicant.

V. Aristodemou with *S. Papasavvas*, Counsel of the Republic, for the Disciplinary Board.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment. The applicant has applied for an order of Prohibition, under Article 155.4 of the Constitution, prohibiting the respondent Disciplinary Board from dealing with the charges preferred against him in respect of alleged disciplinary offences committed by him.

The applicant is a Major in the Cyprus Army and as from April 24, 1969, he has been seconded for service in the National Guard (see Not. 292 in the Third Supplement to the Official Gazette of May 2, 1969).

On November 17, 1977, he was summoned in writing to appear before the respondent Disciplinary Board on December 12, 1977, in relation to the aforementioned charges (see *exhibit A*).

The Disciplinary Board was set up under regulations 12 and 23(A) of the Army of the Republic Disciplinary Regulations, 1962 (see Not. 596 in the Third Supplement to the Official Gazette of November 26, 1962), as amended by the Army of the Republic (Amendment) Disciplinary Regulations, 1976 (see Not. 219 in the Third Supplement, Part I, to the Official Gazette of October 29, 1976) and by the Army of the Republic (Amendment) Disciplinary Regulations, 1977 (see Not. 202 in the Third Supplement, Part I, to the Official Gazette of September 16, 1977).

On December 6, 1977, the applicant sought leave to apply for an order of Prohibition as aforesaid (see Civil Application No. 20/77); on December 8, 1977, he was granted leave to apply to this Court for such order and, in the meantime, the proceed-

ings before the respondent Disciplinary Board were stayed until further order of this Court; the applicant filed his present application on December 9, 1977.

As the proceedings which have been instituted against the applicant are of a disciplinary nature, and as these proceedings amount to the exercise of administrative authority in the sense of Article 146.1 of the Constitution, even though, admittedly, the procedure to be followed in relation to such proceedings has some judicial characteristics, I have reached the conclusion, for the reasons set out in my decision given on February 10, 1979, in *Vassiliou and Another* v. *Police Disciplinary Committees* (in Civil Applications Nos. 2/79 and 3/79, not reported yet*)—which I need not repeat all over again in this judgment and which should be deemed to be incorporated herein—that in the present case I do not possess jurisdiction to grant the applied for order of Prohibition under Article 155.4 of the Constitution, because the jurisdiction under the said Article and that under Article 146.1 are clearly distinct and mutually exclusive; as pointed out in *Kyriakides* v. *The Republic*, 1 R.S.C.C. 66, 75, "...the decisive test is to look first at Article 146 in order to determine whether the particular matter is within the exclusive jurisdiction of this Court under such Article".

In an effort to persuade me that this is a case in which I possess a jurisdiction to grant the applied for order of Prohibition counsel for the applicant has referred to the case of *The King* v. *Electricity Commissioners. Ex parte London Electricity Joint Committee Company* (1920), *Limited, and Others* [1924] 1 K.B. 171, in which Lord Atkin L.J. said (at p. 205), in relation to the writs of Certiorari and Prohibition in England:-

> " Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

The above dictum of Lord Atkin L.J. has been referred to with approval in *R.* v. *Criminal Injuries Compensation Board*

* Now reported in (1979) 1 C.L.R. 46.

Ex parte Lain, [1967] 2 All E.R. 770, 777, and in *R.* v. *Barnsley Metropolitan Borough Council ex parte Hook* [1976] 3 All E.R. 452, 458.

As I have, however, explained in the *Vassiliou* case, *supra*, the relevant principles of English Law have to be applied here within the ambit of the jurisdiction created by our Constitution by means of Article 155.4, and cannot, consequently, be applied, for the reasons which I have given in my decision in the said case, in relation to a matter, such as the disciplinary proceedings against the present applicant, which is within the ambit of Article 146.1 of the Constitution.

Counsel for the applicant has referred me, also, to the corresponding position under the law of India and has submitted that in a comparable case an order of Prohibition would be granted in India. It is not necessary for me to decide in this judgment whether or not if I was a Judge sitting in India I would have possessed under the law of that country jurisdiction to grant in the present case the applied for order of Prohibition, because it is clear that, in this respect, the law of Cyprus and the law of India are different:

The relevant provisions of the Constitution of India are Article 32, which is to be found in Part III of such Constitution which relates to "Fundamental Rights", and Article 226 of the same Constitution which is to be found in its Part VI which relates to "The States".

The said Articles 32 and 226 read as follows:-

"32. (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other Court to exercise within the local

limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution."

"226.(1) Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(1A) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(2) The power conferred on a High Court by clause (1) or clause (1A) shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32."

In Basu's Commentary on the Constitution of India, 5th ed., vol. 3, pp. 561, 562, there are stated the following:-

" In some cases[1] the proposition has been asserted that instead of relegating the person affected to lengthy proceedings, the Court may, under Art. 226, issue an order in the nature of Prohibition, restraining an executive authority from acting ultra vires or without jurisdiction.

In *Calcutta Discount Co.* v. *I.T.O.*,[1] Das Gupta J., speaking for a majority of three observed -

'Mr. Sastri next pointed out that at the stage when

1. *E.g., Calcutta Discount Co.* v. *I.T.O.* A. 1961 S.C. 372 (380).

the Income-tax Officer issued the notices he was not acting judicially or quasi-judicially and so a writ of certiorari or prohibition cannot issue. It is well settled, however, that though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subject or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well settled, will issue appropriate orders or directions to prevent such consequences'.[1-2]

Of Course, cases like the foregoing are explicable in India on the assumption that in these cases the Court really granted mandamus though the party applied for prohibition inasmuch as, in India -

(a) It is possible for the Court, under Art. 32 or 226 to grant one writ though the party had sought another in his application (p. 415, *ante*);

(b) Mandamus has been issued in the prohibitory form, to restrain or prohibit some future action (p. 540, *ante*).

Nevertheless, a more serious question arises, in this context, as to whether it does any harm if the remedies by way of prohibition and certiorari or, at least, prohibition, are extended to control the ultra vires exercise of all statutory power, instead of confining them to those which the Court, in the facts of a particular case, may be inclined to call 'quasi-judicial'. An eminent English Author[3] has indeed asserted that the original object of these two prerogative writs was, in fact, the judicial control of all statutory power but it is the obtrusiveness of Judges which has left it to the financial sphere of 'quasi-judicial activities' and produced puzzling decisions like *Franklin* v. *Minister of Town and*

1 *Calcutta Discount Co* v *I T O*, A 1961 S C. 372 (380)

2 It is submitted that the above observations were not necessary inasmuch as the Court might have held that the quasi-judicial stage had started from the stage of issuing notice, where the subsequent assessment, following the notice, was admittedly a quasi-judicial function So it has been held in England in *R* v *Registrar of Building Societies*, [1960] 2 All E R 549 (560).

3 Wade, Administrative Law, 1961, pp. 102-3

Country Planning,[1] *Nakkuda Ali* v. *Jayaratne*[2] or *R.* v. *Metropolitan Police Commr.*[3] (and, in India, *Kishan Chand* v. *Commr. of Police*).[4]

Similar view has been expressed in the U.S.A., by another eminent scholar[5]–

'Many prohibition opinions revolve around the elusive question of what is judicial or quasi-judicial. In New York, Oklahoma, Oregon and West Virginia, prohibition has been held the right remedy to prevent railroad commissioners from exceeding their jurisdiction promulgating a schedule of rates, although in other Courts rate-fixing is deemed legislative and not judicial or quasi-judicial and therefore beyond the reach of prohibition. Which view is better?

The slightest thought about this question leads to the utter artificiality of the question, for judicial relief obviously ought to be available on the basis of need or lack of need for judicial protection, not on the basis of this kind of labelling. The litigant is forced to guess about the label, and the guides for guessing are confused and conflicting'.

To say that prohibition should be extended to restrain all kinds of ultra vires statutory action is, of course, not to mean that Government should be put to embarrassment by bringing under judicial review even those kinds of executive and administrative acts which are non-justiciable (Vol. I, p. 295), i.e., those well-recognised spheres of governmental action which are exempt from all forms of judicial review, and the category of power dependent on subjective satisfaction in emergencies and like conditions is one of them (see Vol. I, pp. 322, et seq.). The extension of the ambit of prohibition by the Courts will certainly be subject to these exceptions and the Courts may do good both to the State and the individual by devoting their attention to a scrutiny and development of the law relating to

1. *Franklin* v. *Minister of Town and Country Planning*, [1948] A.C. 87.
2. *Nakkuda Ali* v. *Jayaratne*, [1951] A.C. 66.
3. *R.* v. *Metropolitan Police Commr.* [1953] 1 All E.R. 717.
2. *Kishan Chand* v. *Commr. of Police* A. 1961 S.C. 705 (710).
5. K. C. Davis, Administrative Law Text, 1959, p. 446.

this non-reviewable sphere instead of chasing the 'quasi-judicial' blue-bird."

In India, however, there do not exist the mutually exclusive jurisdictions which have been created by Articles 146.1 and 155.4 of our Constitution; and in view of the way in which the nature of such jurisdictions has been explained in the case-law referred to in the *Vassiliou* case, *supra*, I am prevented from granting an order of Prohibition in a case such as the present one, even if it is correct that such a course would be open to a Court applying the law of India.

Moreover, even assuming that the respondent Board does not, as contended by counsel for the applicant, have jurisdiction in the present instance, and as a result the applicant will be exposed unnecessarily to "the ordeal" of the disciplinary Proceedings before such Board, this again would not be sufficient to enable me to overcome the obstacle of the absence of jurisdiction under Article 155.4 of our Constitution, inasmuch as the disciplinary proceedings in question come exclusively within the ambit of Article 146.1 of the Constitution; and it is amply clear that in the exercise of the jurisdiction under Article 146.1 any alleged usurpation of competence by the Disciplinary Board concerned would, eventually, if established, render its decision null and void and of no effect whatsoever, as having been reached contrary to law and in excess or abuse of powers.

As was pointed in the *Vassiliou* case, *supra*, resort to the remedy under Article 146.1 of the Constitution need not necessarily be limited till after the conclusion of disciplinary proceedings, because it might possibly be found, in relation to proceedings of such a nature, that they form a "composite administrative action", some intermediate stages of which could be challenged before the conclusion of the whole disciplinary process by recourse under Article 146, in case it is found that they amount to executory acts or decisions on their own.

Furthermore, in relation to the complaint of counsel for the applicant that if it is correct that the respondent Disciplinary Board does not possess jurisdiction this would result in an infringement of Article 8 of the Constitution, which prohibits "inhuman or degrading punishment or treatment", I have to observe that, even if it could be said that there existed such an

infringement, this, again, would not have sufficed to vest me with the competence to grant, under Article 155.4, an order of Prohibition, which competence I do not otherwise possess in the present case; but, in any event, I am not prepared to agree that the exposure of the applicant to disciplinary proceedings before a Board, which allegedly does not possess jurisdiction to deal with the charges against him, could be held to amount to inhuman or degrading punishment or treatment in the sense of Article 8.

I would like to conclude by stressing, without, however, committing myself in any way in this respect—as I have, also, done in the *Vassiliou* case—that my conclusion that the disciplinary proceedings against the applicant is a matter coming within the ambit of Article 146.1, and, therefore, not within the ambit of Article 155.4, is based on the material at present before me, and that I do not, ex abundanti cautela, exclude the possibility that when such proceedings are completed, it might be open to the applicant to put forward the contention that, on the totality of the material then available, their essential nature is such that they should be treated as not coming within the ambit of Article 146.1, but within the ambit of Article 155.4.

For all the foregoing reasons the present application for an order of Prohibition is refused and dismissed. But, in the light of all pertinent considerations, in this particular case, I have decided to make no order as to costs against the applicant.

Application dismissed. No order as to costs.