

1979 April 28

[TRIANTAFYLIDIS, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CHARALAMBOS PAPACLEOVOULOU,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH

1. THE MINISTER OF INTERIOR AND DEFENCE,
2. THE COMMANDER OF NATIONAL GUARD,

Respondents.

(Case No. 165/79).

Provisional Order—Rule 13 of the Supreme Constitutional Court Rules, 1962—Principles governing making of—Recourse against decision to prefer disciplinary charges—Application for provisional order restraining respondents from proceeding with hearing of said charges pending determination of the recourse—Subject matter of provisional order different from that of recourse—Serious doubts whether subject matter of recourse or provisional order constitutes executory administrative acts which can be challenged by recourse under Article 146 of the Constitution—Applicant will not suffer irreparable harm if the hearing regarding the said charges is proceeded with—Whereas it is in the public interest that charges of this nature should not remain pending for a period longer than is necessary—Applicant may be adequately compensated under Article 146. 6 of the Constitution if he is successful in the recourse—Not a proper case in which to make a provisional order.

Following the filing of a recourse, by means of which the applicant challenged the decision of the respondents to prefer disciplinary charges against him and the decision of respondent 1 to interdict him, in relation to such charges, he, also, filed an application for a provisional order restraining the respondents from proceeding with the hearing of the said disciplinary charges before the determination of the recourse.

Held, (1) that it is quite clear that this Court is called upon to make a provisional order in relation to a matter which is not the subject matter of this recourse because it is not the decision to proceed with the hearing of the disciplinary charges which has been challenged by the recourse but the decision to prefer disciplinary charges against the applicant; that there are serious doubts—though this matter is left open at this stage—whether either the decision to prefer the disciplinary charges against the applicant, or to proceed with the hearing of such charges, constitute executory administrative acts which can be challenged by a recourse under Article 146 of the Constitution; that on the basis of the material before this Court, it has not been satisfied that the applicant will suffer irreparable harm if the hearing regarding the said disciplinary charges is proceeded with, whereas it is obviously in the public interest that charges of this nature should not remain pending for a period longer than it is necessary, in order to avoid causing, through delay, any prejudice to the legitimate rights of either the State or the person charged; and that, therefore, counsel for the applicant failed to convince this Court that this is a proper case in which to make a provisional order under rule 13 of the Supreme Constitutional Court Rules and the onus was on him to persuade this Court that it should do so.

(2) That having in mind the principles governing the exercise of the powers vested in this Court under the above rule 13 (see *Yerasimou v. Republic* (1978) 3 C.L.R. 36); and that having, also, in mind that there is always the possibility of any harm suffered by the applicant, in case he is right that the said charges were wrongly preferred against him, being adequately compensated for under Article 146. 6 of the Constitution, if he succeeds in this recourse, or in any future recourse regarding the relevant disciplinary process, this Court has found no difficulty in dismissing this recourse.

Cases referred to:

Yerasimou v. Republic (1978) 3 C.L.R. 36. 35

Application for provisional order.

Application for a provisional order restraining the respondents from proceeding with the hearing of the disciplinary charges preferred against the applicant before the determination of the

recourse whereby the applicant challenges the decision of the respondents to prefer disciplinary charges against him.

A. Eftychiou, for the applicant.

Cl. Antoniadis, Counsel of the Republic, for the respondent.

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Cur. adv. vult.

10 TRIANTAFYLIDIS P. read the following decision. In this recourse, by the motion of relief in the Application, the applicant challenges the decision of the respondents to prefer disciplinary charges against him, which were communicated to him formally on February 1, 1979, and, also, the decision of respondent 1 to interdict him, in relation to such charges, as from March 15, 1979.

This recourse was filed on April 17, 1979.

15 By means of an application filed on April 27, 1979, the applicant seeks a provisional order restraining the respondents from proceeding with the hearing of the said disciplinary charges before the determination of the present recourse.

20 As it appears from an affidavit, sworn on April 26, 1979, and filed in support of the application for a provisional order, the said hearing is fixed on April 30, 1979, at 8 a. m.

25 I have heard what counsel for the applicant had to say in support of the application for a provisional order. Counsel for the respondents objected to the making of the applied provisional order, but I have not asked him to elaborate his arguments in relation to his said objection because counsel for the applicant failed to convince me that this is a proper case in which to make a provisional order under rule 13 of the Supreme
30 Constitutional Court Rules; and the onus was on him to persuade me that I should do so. Therefore, no useful purpose would be served by hearing at length counsel for the respondents in support of his objection against the making of the provisional order applied for.

My reasons for reaching my above conclusion are as follows:-

35 I have perused the application for a provisional order, the aforesaid affidavit filed in support of it, as well as the Application in this recourse and the documents attached thereto.

It is quite clear that I am called upon to make a provisional

order in relation to a matter which is not the subject matter of this recourse, because it is not the decision to proceed with the hearing of the disciplinary charges which has been challenged by the recourse, and of which decision, as it is stated in the aforementioned affidavit (see its paragraph 9) the applicant was informed after the filing of the recourse; what is complained of is the decision to prefer disciplinary charges against the applicant. 5

Secondly, I seriously doubt—though I leave this matter open at this stage, as I do not think that it is necessary, or proper, to decide it now finally—whether either the decision to prefer the disciplinary charges against the applicant, or to proceed with the hearing of such charges, constitute executory administrative acts which can be challenged by a recourse under Article 146 of the Constitution, such as the present one. 10 15

Thirdly, on the basis of the material before me, I have not been satisfied that the applicant will suffer irreparable harm if the hearing regarding the said disciplinary charges is proceeded with, whereas it is obviously in the public interest that charges of this nature should not remain pending for a period longer than it is necessary, in order to avoid causing, through delay, any prejudice to the legitimate rights of either the State or of the person charged. 20

Having in mind all the principles governing the exercise of the powers vested in this Court under rule 13 of the Supreme Constitutional Court Rules, as they have been expounded in numerous cases (see, for example, *Yerasimou v. The Republic*, (1978) 3 C.L.R. 36), and, also, having in mind that there is always the possibility of any harm suffered by the applicant, in case he is right that the said charges were wrongly preferred against him, being adequately compensated for under Article 146.6 of the Constitution, if he succeeds in this recourse, or in any future recourse regarding the relevant disciplinary process, I have found no difficulty in dismissing this application for a provisional order. 25 30 35

I reserve the question of the costs of this application to be decided at a later stage.

Application dismissed.