1981 September 12

[TRIANTAFYLLIDES, P.]

IN THE MATTER OF AN APPLICATION BY EMILIOS A. FRANGOS FOR ORDERS OF PROHIBITION AND CERTIORARI,

and

IN THE MATTER OF CASE NO. 3/80 BEFORE THE MEDICAL DISCIPLINARY BOARD.

(*Application No.* 9/81).

Certiorari—Prohibition—Orders of—Do not lie in relation to proceedings pending on this occasion before the Medical Disciplinary Board, set up under section 3 *of the Medical (Associations, Discipline and Pension Fund) Law,* 1967 (*Law* 16/67) (*as amended*)—*Article* 155.4 *of the Constitution—Comparison with position in England.*

Medical Disciplinary Board—Set up under section 3 *of the Medical (Associations, Discipline and Pension Fund) Law,* 1967 (*Law* 16/67) (*as amended*)—*Not a "Court" in the sense of the meaning of a "Court" either in Cyprus or in England—But an administrative tribunal—The acts or decisions of which come within the jurisdiction under Article* 146 *of the Constitution—Mutual exclusivity of jurisdictions under Articles* 146 *and* 155.4 *of the Constitution—Comparison with position in England—Whether remedy provided by section* 13(1) *of Cap.* 250 *makes the position different.*

Jurisdiction—Disciplinary proceedings before Medical Disciplinary Board—No jurisdiction to grant orders of certiorari and prohibition, under Article 155.4 *of the Constitution, in relation to such proceedings, because they come within the jurisdiction under Article* 146—*Mutual exclusivity of jurisdictions under Articles* 146 *and* 155.4.

The applicant, a medical practitioner, applied for orders of prohibition and certiorari in relation to disciplinary proceedings against him which were pending before the Medical Disciplinary Board, set up under section 3 of Law 16/67 (as amended). At the commencement of the hearing of the application, Counsel for the respondent raised the preliminary objection that this

Court did not possess jurisdiction to determine the application in view of the fact that the Medical Disciplinary Board was not a Court and did not perform a judicial function, but it was an administrative tribunal exercising administrative powers and therefore the disciplinary proceedings before it were administrative proceedings coming within the ambit of Article 146.1 of the Constitution, and not within the ambit of Article 155.4 of the Constitution, under which orders of certiorari and prohibition could be made.

Held, (*after dealing with the law in England in relation to the issue of what are regarded in England as being Courts and what are regarded there as being tribunals which are not Courts—vide pp.* 698–700 *post*) that the Medical Disciplinary Board is not a Court in the sense of the meaning of a "Court" either in Cyprus or in England; that it is an administrative tribunal which has, to a certain extent, to act quasi-judicially and though, if it was in England, prerogative orders might lie in respect of its proceedings or decisions, by way of judicial supervision, such orders cannot be, likewise, granted here, in view of the fact that the said Board is an administrative organ the acts or decisions of which come within the jurisdiction under Article 146 of the Constitution and in view, too, of the mutual exclusivity of the jurisdiction under Articles 146 and 155.4; and that, therefore, the application will be dismissed for lack of jurisdiction under Article 155.4 (observations in *Vassiliou* v. *Police Disciplinary Committees* (1979) 1 C.L.R. 46 at p. 54 and *Economides* v. *Military Disciplinary Board* (1979) 1 C.L.R. 177 at p. 187 repeated).

Held, further, (1) that the fact that the Chairman of the respondent Medical Disciplinary Board is a Judge is not of a decisive nature as regards the question of the existence of jurisdiction in the present instance under Article 146 of the Constitution.

(2) That even assuming that the remedy by way of appeal to the Supreme Court, under section 13(1)* of the Law, is still available as not being inconsistent with Article 146 of the Consti-

* Under this section any medical practitioner whose name is erased from the Register or who is suspended from practising for a specified period, as a result of a decision in disciplinary proceedings, may appeal to the Supreme Court.

tution, the relief sought in this case by the applicant, which essentially relates to administrative acts or decisions by means of which the case of the applicant was brought before the Medical Disciplinary Board, does not come at all within the ambit of the said section 13(1); and that, moreover, the availability of the special and very restricted in scope aforementioned section 13(1)—(assuming that such remedy still validly exists by way of a quasi-criminal appeal)—would not be a sufficient reason for treating the Medical Disciplinary Board as a Court, in relation to the decisions of which a prerogative order under Article 155.4 of the Constitution would lie, instead of being, as in essence it is, an administrative tribunal, the decisions of which are subject to the exclusive jurisdiction under Article 146 of the Constitution.

Application dismissed.

Cases referred to:

Vassiliou v. *Police Disciplinary Committees* (1979) 1 C.L.R. 46 at pp. 53-55;

Economides v. *Military Disciplinary Board* (1979) 1 C.L.R. 177 at pp. 181, 186, 187;

Romadan v. *The Electricity Authority of Cyprus and Another*, 1 R.S.C.C. 49 at pp. 53, 54;

Papasavvas v. *The Educational Service Committee* (1979) 1 C.L.R. 681;

In re C.H. an Advocate (1969) 1 C.L.R. 561;

Decisions of the Greek Council of State in cases 1042/51 and 1633/51;

Royal Aquari and Summer and Winter Garden Society, Limited v. *Parkinson* [1892] 1 Q.B. 431 at p. 447;

Attorney-General v. *British Boardcasting Corporation* [1978] 2 All E.R. 731;

United Engineering Workers Union v. *Devanayagam* [1967] 2 All E.R. 367;

Keramourgia "Aias" Ltd. v. *Christophorou* (1975) 1 C.L.R. 38;

King v. *Electricity Commissioners, Ex parte London Electricity Joint Committee Company* (1920) *Limited, and others* [1924] 1 K.B. 171 at p. 205;

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

R. v. *Criminal Injuries Compensation Board, ex parte Lain* [1962] 2 All E.R. 770 at pp. 777, 784;

Regina v. *Statutory Committee of the Pharmaceutical Society of Great Britain, ex parte Pharmaceutical Society of Great Britain* [1981] 1 W.L.R. 886 at p. 893;

Pelides v. Republic, 3 R.S.C.C. 13 at p. 19.

Application.

Application for orders of prohibition and certiorari in relation to disciplinary proceedings against the applicant in case No. 3/80 which is pending before the Medical Disciplinary Board.

A. Myrianthis, for the applicant.

V. Aristodemou, Senior Counsel of the Republic, with *I. Loizidou* (*Mrs.*) and *St. Nathanael*, for the Medical Disciplinary Board, respondent.

I. Loizidou (*Mrs.*) with *St. Nathanael*, for the Pancyprian Medical Association and the Board of the Pancyprian Medical Association, respondents.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the jollowing judgment. At the commencement of the hearing of this application counsel for the respondents raised the preliminary objection that this Court does not possess jurisdiction to determine it in view of the fact that the Medical Disciplinary Board is not a Court and does not perform a judicial function, but it is an administrative tribunal exercising administrative powers.

I had examined, prima facie, this issue of jurisdiction in Civil Application No. 7/81 when I granted to the applicant leave to apply for orders of certiorari and prohibition by means of the present application, No. 9/81, and at that time I was not prepared, on the basis of the material before me at that stage, to pronounce that the disciplinary proceedings against the applicant before the respondent Medical Disciplinary Board are, in view of their essential nature, administrative proceedings coming within the ambit of Article 146.1 of the Constitution, and, therefore, not within the ambit of Article 155.4 of the

Constitution, under which orders of certiorari and prohibition can be made.

I said then that the issue of the jurisdiction of this Court in the present instance would have to be decided finally when the merits of the application for certiorari and prohibition would be considered; so, I think that it was, indeed, very opportune that counsel for the respondents have raised this issue as a preliminary objection.

I am grateful to counsel on both sides for the valuable assistance which they have given me in this respect.

The aforesaid Board has been set up under the Medical (Associations, Discipline and Pension Fund) Law, 1967 (Law 16/67) and, in particular, under section 3 of that Law, as amended by section 2 of the Medical (Associations, Discipline and Pension Fund) (Amendment) Law, 1977 (Law 32/77). It is composed of a President of a District Court or a Senior District Judge, nominated by the Supreme Court, of a Counsel of the Republic, nominated by the Attorney-General of the Republic, of two Medical Officers nominated by the Minister of Health, as ex-officio members, and of three medical practitioners—two of whom must have practised the profession of medicine for at least fifteen years—who are elected for a period of three years by a general meeting of the Pancyprian Medical Association. The President of the District Court, or the Senior District Judge, as the case may be, is the Chairman of the Disciplinary Board and in case of his absence or incapacity the duties of the Chairman are exercised by the Counsel of the Republic.

The functions of the Board are set out in section 3(1) of Law 16/67, and they are essentially the exercise of control and disciplinary powers over medical practitioners, in accordance with the relevant legislative provisions.

I will not refer in detail to the procedure and to the powers of the Board, as they are set out in sections 3, 4 and 5 of Law 16/67, as amended by Law 32/77, but I have taken them very carefully into account in reaching my present decision on the preliminary issue of jurisdiction.

In *Vassiliou* v. *Police Disciplinary Committees*, (1979) 1 C.L.R. 46, 53–55, and *Economides* v. *Military Disciplinary Board*,

(1979) 1 C.L.R. 177, 181, 186, 187, this Court has adopted the approach, as regards the extent of its jurisdiction under Article 155.4 of the Constitution, which was initially adopted in *Ramadan* v. *The Electricity Authority of Cyprus and another*, 1 R.S.C.C. 49, 53, 54.

The gist of such approach is that whenever any act or decision is within the exclusive jurisdiction of Article 146 of the Constitution then that matter cannot be within the ambit of Article 155.4, and in such a case an order of certiorari or an order of prohibition cannot be made.

Disciplinary control in the *Vassiliou* and *Economides* cases, *supra*, was found to amount to the exercise of executive or administrative authority in the sense of Article 146.1 of the Constitution.

In the later case of *Papasavvas* v. *The Educational Service Committee*, (1979) 1 C.L.R. 681, I did leave open, in granting leave to apply for orders of certiorari and prohibition, the question of whether the particular proceedings, in that case, before the Educational Service Committee, might, in view of their nature, be regarded as coming within the ambit of Article 155.4 of the Constitution, but I had not the opportunity to pronounce finally on that matter, as subsequently the case was discontinued.

Counsel for the applicant has argued that the position in the present instance is the same as that in respect of the Advocates Disciplinary Board and, therefore, since under the relevant provisions of the Advocates Law, Cap. 2, the decisions taken by the Advocates Disciplinary Board have been made subject to appeal to the Supreme Court, the Medical Disciplinary Board should be regarded as being a body on the same footing, and its decisions should be treated as coming within the jurisdiction of the Supreme Court under Article 155.4 of the Constitution, and not as coming within the ambit of Article 146 of the Constitution.

In the case of *In re C.H. an Advocate*, (1969) 1 C.L.R. 561, the Full Bench of the Supreme Court held that there was no jurisdiction under Article 146 in relation to the decisions of the Advocates Disciplinary Board, because advocates are officers of the Court and disciplinary matters concerning them are considered as being related to the administration of justice.

On that occasion reference was, also, made (at p. 568) to the corresponding position in Greece and to the Decisions of the Council of State in Greece in cases 1042(51) and 1633(51) (as reported in Zacharopoulos Digest of the Decisions of the Council of State, 1935–1952, p. 300, paras. 46 and 47). Mr. Justice Josephides in delivering his judgment in that case stated the following (at p. 573):

> "One of the preliminary points taken by respondent's counsel, and later abandoned, was that the proceedings before the Disciplinary Board were of a nature which should be challenged under Article 146 of the Constitution and not as provided in section 17 of the Advocates Law, Cap. 2 (as amended). In addition to the authority quoted in the ruling of my brother Triantafyllides, J. earlier, it should, I think, also be stated that in France, which has the oldest system of droit administratif, although the disciplinary organs of the various public professions (such as medical practitioners, architects, dentists, pharmaceutical chemists and all levels of the teaching profession) are controlled by the administrative tribunals, significantly, the bodies controlling the legal profession are subordinated to the civil Courts and not to the Conseil d' Etat or any of the other inferior administrative tribunals (cf. Brown and Garner's French Administrative Law (1967), page 26)".

In Brown and Garner on French Administrative Law, 2nd ed. (at pp. 27 and 28) there is to be found the following passage:

> "On the other hand, perhaps the largest single group of French 'administrative tribunals' are ones which we should classify rather as domestic tribunals, namely the disciplinary organs of the various public professions, such as medical practitioners, architects, dentists, pharmaceutical chemists and all levels of the teaching profession. Significantly, the bodies controlling the legal profession are subordinated to the civil Courts".

It is correct that in Greece, subject of course to the relevant legislative provisions, disciplinary proceedings against medical practitioners are treated as matters within the jurisdiction of the Council of State, as the highest Administrative Court, and useful reference, in this respect, may be made to cases Nos. 522/65, 124/64 and 125/64, which were determined by the said Council.

The position in England is essentially different because, as pointed out already in the *Vassiliou* and *Economides* cases, *supra*, they do not have in England the two mutually exclusive jurisdictions under Articles 146 and 155.4 of our Constitution.

It might, however, be useful to refer to the law in England in relation to the issue of what are regarded in England as being Courts and what are regarded there as being tribunals which are not Courts.

The said tribunals are in England subject to judicial control by means of the prerogative orders of certiorari, prohibition and mandamus, which is now described as the process of "judicial review", but in Cyprus they come within the jurisdiction under Article 146, and not within that under Article 155.4 of the Constitution.

In Halsbury's Laws of England, 4th ed., vol. 10, p. 314, paragraph 702, there are stated the following:-

> "What is a Court in law. The question is whether the tribunal is a Court, not whether it is a Court of justice, for there are Courts which are not Courts of justice. In determining whether a tribunal is a judicial body the facts that it has been appointed by a nonjudicial authority, that it has no power to administer an oath, that the chairman has a casting vote, and that third parties have power to intervene are immaterial, especially if the statute setting it up prescribes a penalty for making false statements; elements to be considered are (1) the requirement for a public hearing, subject to a power to exclude the public in a proper case, and (2) a provision that a member of the tribunal shall not take part in any decision in which he is personally interested, or unless he has been present throughout the proceedings.
>
> A tribunal is not necessarily a Court in the strict sense of exercising judicial power merely because (1) it gives a final decision; (2) it hears witnesses on oath; (3) two or more contending parties appear before it between whom it has to decide; (4) it gives decisions which affect the rights of subjects; (5) there is an appeal to a Court; and (6) it is a body to which a matter is referred by another body.

Many bodies are not Courts even though they have to decide questions, and in so doing have to act judicially, in the sense that the proceedings must be conducted with fairness and impartiality. Examples are the benchers of the Inns of Court when considering the conduct of one of their members, the disciplinary committee of the General Medical Council when considering questions affecting the conduct of a medical man, a trade union when exercising disciplinary jurisdiction over its members, the chief officer of a statutory force exercising discipline over members of the force, the former assessment committees, or the former Court of referees which was constituted under the Unemployment Insurance Acts. A meeting of a county council for granting music and dancing licences is not a Court. Justices in petty sessions to whom the powers of a local authority to grant cinematograph licences under the Cinematograph Act 1909 and the Cinematograph Act 1952 have been delegated are not a magistrates' Court with power to state a case for the opinion of the High Court".

It is relevant, in this respect, to refer, also, to the case of *Royal Aquarium and Summer and Winter Garden Society, Limited* v. *Parkinson*, [1892] 1 Q.B. 431, 447, from which it is to be derived that the General Medical Council in England is not regarded as a Court, in the strict sense, possessing judicial capacity. The *Royal Aquarium case*, *supra*, was followed in the *Attorney-General* v. *British Broadcasting Corporation* [1978] 2 All E.R. 731.

The matter of what is judicial power in the strict sense, as distinguishable from administrative powers which require quasi-judicial functions to be performed sometimes by tribunals, has been examined in England in, *inter alia*, the case of *United Engineering Workers Union* v. *Devanayagam* [1967] 2 All E.R. 367, in an appeal to the Privy Council from the Supreme Court of what was at the time Ceylon; and this case was cited with approval by our Supreme Court in *Keramourgia "Aias" Ltd.* v. *Christophorou*, (1975) 1 C.L.R. 38.

I may refer, also, in relation to the exercise of judicial control in England over tribunals, which are not Courts in the strict sense, 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, where (at p. 205) Atkin L. J. stated the following:-

> "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".

This approach has been applied, also, in *R.* v. *Barnsley Metropolitan Borough Council, ex parte Hook*, [1976] 3 All E.R. 452, 458, and was explained in *R.* v. *Criminal Injuries Compensation Board, ex parte Lain*, [1962] 2 All E.R. 770, 777, 784.

A useful reference may, also, be made to the recent case of *Regina* v. *Statutory Committee of the Pharmaceutical Society of Great Britain, ex parte Pharmaceutical Society of Great Britain*, [1981] 1 W.L.R. 886, 893; it is clear that the Committee involved in that case was not considered to be a Court.

As has been pointed out already, the English case-law, which is relevant to the question of finding out what is a "Court", should be applied, as regards the power to issue, *inter alia*, orders of certiorari and prohibition under Article 155.4 of the Constitution, subject to the overriding consideration of the existence of the mutually exclusive jurisdictions under Articles 146 and 155.4 of our Constitution, the nature of which has been expounded in the *Ramadan, Vassiliou* and *Economides* cases, *supra*; and, therefore, when orders of certiorari and prohibition are sought in Cyprus, in respect of proceedings before a tribunal, which is not a Court, such orders cannot be granted by this Court in view of the availability of a remedy by virtue of the exclusive jurisdiction under Article 146 of the Constitution, which renders Article 155.4 inapplicable in this connection.

It was argued by counsel for the applicant that the fact that the Chairman of the Medical Disciplinary Board is a judicial officer renders it an organ outside the ambit of Article 146 of the Constitution. As, was, however, rightly pointed out in *United Engineering Workers Union, supra* (at pp. 378, 379) by Lord Guest and Lord Devlin—who dissented from the majority of the Privy Council on other points but not on this point—"... judicial power can be entrusted to someone who is not

a judicial officer and the person so entrusted is then generally spoken of as acting quasi-judicially. So, also, administrative power can be given to a Judge. The character of the office depends on the character of the chief function".

So, in my opinion, the fact that the Chairman of the Medical Disciplinary Board is a Judge is not of a decisive nature as regards the question of the existence of jurisdiction in the present instance under Article 146 of the Constitution.

I have anxiously considered one other aspect of this case, namely the fact that by means of section 18 of Law 16/67 the original section 16(1) of the Medical Registration Law, Cap. 250—which now by section 10 of the Medical Registration (Amendment No. 2) Law, 1961 (Law 53/61) has been renumbered as section 13(1)—may, apparently, have been allowed to continue being in force; under such section 13(1) any medical practitioner whose name is to be erased from the Register, or who is to be suspended from practising for a specified period, as a result of a decision in disciplinary proceedings, may appeal to the Supreme Court.

Even assuming that the remedy by way of appeal to the Supreme Court, under section 13(1), above, is still available as not being inconsistent with Article 146 of the Constitution, the relief sought in this case by the applicant, which essentially relates to administrative acts or decisions by means of which the case of the applicant was brought before the Medical Disciplinary Board, does not come at all within the ambit of the said section 13(1).

Moreover, the availability of the special and very restricted in scope aforementioned section 13(1)—(assuming that such remedy still validly exists by way of a quasi-criminal appeal)—would not be a sufficient, in my opinion, reason for treating the Medical Disciplinary Board as a Court, in relation to the decisions of which a prerogative order under Art. 155.4 of the Constitution would lie, instead of being, as in essence it is, an administrative tribunal, the decisions of which are subject to the exclusive jurisdiction under Article 146 of the Constitution.

I would, at this stage, venture to express the opinion that section 13(1) of Cap. 250 has to be read modified under Article 188.4 so as to substitute therein in the place of an appeal,

within ten days, a recourse, under Article 146, above, within seventy-five days, exactly as it was done in *Pelides* v. *The Republic*, 3 R.S.C.C. 13, 19, in relation to sections 12 and 18 of the Streets and Buildings Regulation Law, Cap. 96.

In the light of all the foregoing I find that the Medical Disciplinary Board is not a Court in the sense of the meaning of a "Court" either in Cyprus or in England. It is an administrative tribunal which has, to a certain extent, to act quasi-judicially and though, if it was in England, prerogative orders might lie in respect of its proceedings or decisions, by way of judicial supervision, such orders cannot be, likewise, granted here, in view of the fact that the said Board is an administrative organ the acts or decisions of which come within the jurisdiction under Article 146 of the Constitution and in view, too, of the already referred to carlier on in this judgment mutual exclusivity of the jurisdictions under Article 146 and 155.4.

I have, therefore, to dismiss this application for lack of jurisdiction under the said Article 155.4.

I would like to conclude this judgment with the observation, which I have made in the *Vassiliou* case, *supra* (at p. 54) and I have repeated in the *Economides* case, *supra* (at p. 187), that:

> "Also, I would like to point out that my conclusion that the disciplinary proceedings concerned are matters coming within the ambit of Article 146.1 and, therefore, not within the ambit of Article 155.4 of the Constitution, is based on the material at present before me; so, I should not, ex abundanti cautela, exclude the possibility that when the said proceedings are completed and, therefore, more material in relation to their nature is available before the Court, it might be open to the applicant to put forward again the contention that their essential nature is such that they do not come within the ambit of Article 146.1, but within that of Article 155.4: I must make it clear, however, that I make this observation without committing myself, in any way, in this respect".

As regards costs I am not prepared to make any order as to costs due to the novelty of the issues involved in the present case.

Application dismissed. No order as to costs.