

1981 December 1

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

COSTAS SHIAKALLIS,

Applicant.

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE MINISTER OF INTERIOR,

Respondent.

(Case No. 13/80).

Administrative law—Misconception of fact—Principles applicable.

*Disciplinary offences—Disciplinary conviction—Recourse against—
Court, as a rule, will not interfere with the subjective evaluation
of the relevant facts as made by the appropriate organ.*

*Disciplinary offences—Disciplinary punishment—Severity of—Cannot
be tested and decided upon in a recourse under Article 146 of
the Constitution.* 5

*Administrative law—Disciplinary offences—Disciplinary conviction
—Court as a rule, will not interfere with subjective evaluation
of the relevant facts as made by the appropriate organ—Disci- 10
plinary punishment—Severity of—Cannot be tested and decided
upon in a recourse under Article 146 of the Constitution.*

The applicant, a member of the Police Force was tried desci-
plinarily on five counts*, *inter alia*, of the disciplinary offences 15
of unlawful arrest, of unlawfully manning a road block and
of ill-treatment which were committed during the period of
the coup d' etat of July 15, 1974.

He was found guilty on all these counts and was sentenced
to a total fine of £180. The Divisional Police Commander
in the exercise of his revisional jurisdiction, under regulation 20

* Particulars of these counts appear at pp. 443-446 *post*.

18(4) of the Police (Disciplinary) Regulations 1958–1977, after giving to the applicant the opportunity to put forward any grounds of defence, considered that the sentences imposed, in the light of the seriousness of the offences, were insufficient and increased them to a total of £300.—fine.

The Assistant Chief of Police (Administration), exercising the powers vested in him under regulation 20(3)(c) of the above Regulations, appealed against the sentences imposed on the applicant, to the Chief of Police. The appeal was heard by the Deputy Chief of Police, duly authorized for that purpose by the Chief of Police; and the Deputy Chief of Police, acting under regulation 21, found that the disciplinary sentences imposed were insufficient and changed them to reduction to the salary scale of the first appointed.

In his decision the Deputy Chief of Police referred to the coup d' etat and the disaster that brought to Cyprus and said that "the fact is that if there did not exist in Cyprus followers and collaborators of EOKA B, of the Athens Junta and the leadership of the coup d' etat, the coup d' etat would not take place".

The applicant challenged the above decision by means of this recourse and contended:

- (a) That the subject decision was misconceived, the misconception consisting of the fact that facts were taken into consideration and descriptions were given to the applicant which were not born out either from the particulars of the various counts to which he was found guilty or from the judgment of the Disciplinary Court.
- (b) That if the Court found that their did not exist misconception of fact, the sentence imposed was excessive.

Held, (1) that for the existence of a misconception of fact there is required an objective non-existence of the actual circumstances and requisites upon which the act is based, which is ascertained in the absence of the element of the subjective test (see *Georghiades v. The Republic* (1972) 3 C.L.R. 594 at p. 694); that in the present case the particulars of the several offences and in particular those for counts 4 and 5, refer clearly to the applicant's participation in and contribution to the success

of the coup d' etat; that the facts also emanating from the evidence heard at the trial of the applicant clearly reveal such a participation and that the other offences were committed in relation to the furtherance of the aims of the coup d' etat; that there did not exist, therefore, objectively examining the matter, a non-existence of the actual circumstances and prerequisites upon which the subject decision was based, so that the ground of misconception of fact could exist; that there were not taken any facts into consideration by the Deputy Chief of Police that ought not to have been taken into consideration; that the description of the conduct of the applicant to be found in the subject decision was born out by the facts of the case, on the basis of which the conviction of the applicant was duly warranted; accordingly contention (a) should fail.

(2) That in a recourse against a disciplinary conviction this Court, as a rule, will not interfere with the subjective evaluation of the relevant facts as made by the appropriate organ (see *Enotiades v. The Republic* (1971) 3 C.L.R. p. 409, at p. 415); that the severity, as such, of a disciplinarily punishment cannot be tested and decided upon by means of a recourse under Article 146 of the Constitution; accordingly contention (b) should, also, fail.

Application dismissed.

Cases referred to:

Georghiades v. The Republic (1972) 3 C.L.R. 594 at p. 694;
Enotiades v. The Republic (1971) 3 C.L.R. 409 at p. 415;
Platritis v. The Republic (1969) 3 C.L.R. 366 at pp. 375, 376;
Republic v. Mozoras (1970) 3 C.L.R. 210 at p. 221;
Christofides v. CYTA (1979) 3 C.L.R. 99 at p. 125.

Recourse.

Recourse against the disciplinary sentence imposed on the applicant by the Deputy Chief of Police whereby he was reduced to the salary scale of the first appointed.

R. Schizas, for the applicant.

R. Gavrielides, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

A. LOIZOU J. read the following judgment. By the present

recourse the applicant seeks a declaration that the disciplinary sentence imposed on him by the Deputy Chief of Police whereby he was reduced to the salary scale of the first appointed, is null and void and of no effect whatsoever. The relevant facts are as follows:

The applicant joined the Cyprus Police Force on the 27th February, 1964. A report in writing was made to the Minister of Justice against him to the effect that he had committed disciplinary offences as defined in section 2 of the Certain Disciplinary Offences (Conduct of Investigation and Adjudication) Law, 1977 (Law No. 3 of 1977). The Council of Ministers by virtue of the provisions of section 4 of the Certain Disciplinary Offences (Conduct of Investigation and Adjudication) Laws, 1977-1978 (Suspension of Proceedings) Law, 1978 (Law No. 57 of 1978), remitted the case to the Chief of Police for further investigation and trial under the provisions of the relevant laws and regulations. The Chief of Police transmitted the case to the Divisional Police Commander, Nicosia, who by virtue of the powers vested in him under regulation 14 of the Police (Disciplinary) Regulations 1958-1977 (hereinafter to be referred to as the Regulations), appointed Chief Inspector Stelios Christodoulou, as presiding officer for the trial of the case. In the light of the evidence available, the applicant was charged with five counts as follows:

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"Count 1

Statement of Disciplinary Offence

Disciplinary offence as defined by Section 2 of Law 3/77, para. 19 of the First Schedule and Regulations 7 & 18 of the Police (Disciplinary) Regulations 1958-1977.

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Particulars of Disciplinary Offence

Between the 15th July, 1974, and 27th July, 1974, whilst the accused was a member of the Police Force he committed the following unlawful acts:

- 35
- (a) Between the 15th July, 1974, and 27th July, 1974, in various places in Nicosia District, namely, Paphos Square, Kaimakli, Exo Metochi, Kythrea and Neon Chorion Kythrea, was seen armed.
 - (b) On the 17th July, 1974, and 19th July, 1974, unlawfully

aided and abetted to the unlawful arrest of Polycarpus Fantis, of Kaimakli, Andreas Philippides of Neon Chorion Kythreas, Andreas Christodoulou of Exo Metochi, Nicos Gaourkotis of Neon Chorion Kythreas and Kyriacos Hadji Panayi of Neon Chorion Kythreas. 5

- (c) Between the 17th July, 1974 and 27th July, 1974, at Kaimakli, Neon Chorion Kythreas and Kythrea Police Station, unlawfully interrogated Polycarpus Fantis of Kaimakli, Andreas Philippides of Neon Chorion Kythreas and P.C. 3229 Theodotos Christou. 10

Count 2

Statement of Disciplinary Offence

Unlawful exercise of authority contrary to paras. 8(a), (b) and (c) and 19 of the First Schedule of Regulations 7 and 18 of the Police (Disciplinary) Regulations 1958/1977. 15

Particulars of Disciplinary Offence

The accused between the 17.7.1974 and 19.7.1974 whilst he was a member of the Police Force exercised unlawful authority, namely, he committed the following unlawful acts: 20

- (a) On the 17.7.1974 and 19.7.1974, unlawfully arrested Polycarpus Fantis, of Kaimakli, Andreas Philippides, of Neon Chorion Kythreas and Andreas Christodoulou of Exo Metochi, without a warrant of arrest.
- (b) Between 17.7.1974 and 27.7.1974, at Kaimakli, Neon Chorion and Kythrea Police Station, unlawfully interrogated Polycarpus Fantis, of Kaimakli, Andreas Philippides of Neon Chorion and P.C. 3229 Theodotos Christou. 25
- (c) On the 15th July, 1974, with other armed soldiers unlawfully manned a road block by the "BATA" Factory at Kaimakli. 30
- (d) On the 16.7.1974 at Kythrea threatened Theocharis Charalambous of Kythrea with the following words: "Your death my life". 35
- (e) On the 17.7.1974 at Kythrea he ill-treated and threa-

tened Andreas Kyriacou of Kythrea that he would kill him and bury him.

- (f) On the 19.7.1974 he ill-treated and threatened Andreas Christodoulou, of Exo Metochi.

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Count 3

Statement of Disciplinary Offence

Improper behaviour contrary to para. 1 of the First Schedule of Regulations 7 and 18 of the Police (Disciplinary) Regulations 1958-1977.

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Particulars of Disciplinary Offence

- (a) The accused on the 16th July, 1974, at Kythrea, whilst he was a member of the Police Force insulted the late Archbishop Makarios with the words "tsouros".
- (b) On the 17th July, 1974, the accused tried to tear the photograph of the late Archbishop Makarios at the house of Andreas Philippides, of Neon Chorion Kythreas.

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Count 4

Statement of Disciplinary Offence

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Disciplinary offence as defined in Section 2 of Law 3/77 and Regulation 7 & 18 of the Police (Disciplinary) Regulations 1958-1977.

Particulars of Disciplinary Offence

The accused between the 15.7.1974 and 27.7.1974, whilst he was a member of the Police Force with other armed persons acted in concert for the success of the coup d'etat, that is, he took part in battles, arrests and interrogations of law-abiding citizens.

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Count 5

Statement of Disciplinary Offence

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Encouragement or participation in seditions or mutiny, contrary to Sections 26(a), (b) and 27, of the Police Law, Cap. 285, as amended by Law 43/72, para. 19 of the First Schedule and Regulations 7 and 18 of the Police (Disciplinary) Regulations 1958-1977.

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Particulars of Disciplinary Offence

The accused between the 15th July, 1974 and 27th July, 1974, whilst a member of the Police Force with other armed persons acted in concert for the success of the coup d'etat, that is, he took part in battles, arrests and interrogations of law-abiding citizens". 5

The applicant who was represented by counsel pleaded not guilty to all of them and the case was heard in accordance with the procedure set out in regulation 14 of the Regulations, having been given all rights of defence provided by regulations 12 and 13 thereof. 10

At the conclusion of the hearing and the addresses made, the appellant was found guilty on all counts in the reasoned judgment delivered. The appellant was sentenced then as follows:- 15

Count 1	C£80.-	fine	
" 2	C£20.-	"	
" 3	C£10.-	"	
" 4	C£50.-	"	
" 5	C£20.-	"	20

The Divisional Police Commander in the exercise of his revisional jurisdiction under regulation 18(4) of the Regulations and after having given to the applicant the opportunity to put forward any grounds of defence, considered that the sentences imposed in the light of the seriousness of the offences were insufficient and increased them as follows:- 25

Count 1	- from	C£80.-	to	C£100.-	fine	
" 2	- "	20.-	"	40.-	"	
" 3	- "	10.-	"	50.-	"	
" 4	- "	50.-	"	70.-	"	30
" 5	- "	20.-	"	40.-	"	

The Assistant Chief of Police (Administration) exercising the powers vested in him under regulation 20(3)(c) of the Regulations, appealed against the sentences imposed on the applicant, to the Chief of Police. The appeal was heard by the Deputy Chief of Police, duly authorized for that purpose by the Chief of Police. The Deputy Chief of Police acting under regulation 21, found that the disciplinary sentences imposed were insuffi- 35

cient and changed them to reduction to the salary scale of the first appointed (the decision of the Deputy Chief of Police is contained in *exhibit 1* attached to the application).

In the said decision the Deputy Chief of Police referred to the
 5 coup d'etat and the disaster that brought to Cyprus and
 condemned those that in some way or other participated in it
 and made it possible for those who planned it to prosecute their
 treacherous aims. In particular he said that "the fact is that
 10 if there did not exist in Cyprus followers and collaborators
 of EOKA B, of the Athens junta and the leadership of the coup
 d'etat, the coup d'etat would not take place".

It is the case for the applicant that the recourse should succeed
 on the following grounds:

- 15 (a) The subject decision is misconceived, the misconception
 consisting of the fact that facts were taken into consid-
 eration and descriptions were given to the applicant
 which were not born out either from the particulars
 of the various counts to which he was found guilty
 or from the judgment of the Disciplinary Court.
- 20 (b). If the Court found that there did not exist miscon-
 ception of fact, the sentence imposed was excessive
 for the following reasons:
 - (i) the passage of six years from the date of the com-
 mission of the offences.
 - 25 (ii) the conduct of the applicant before and after
 the commission of the offences.
 - (iii) the clean criminal record of the applicant.
 - (iv) the non-prosecution of the organizers and main
 culprits of the coup d'etat.
 - 30 (v) everything that was mentioned in mitigation of
 sentence at the trial.

With regard to the ground of misconception of fact it was
 said in the case of *Lefkos Georghiades v. The Republic* (1972)
 3 C.L.R., p. 594, at p. 694, by reference to what is stated in
 35 the "*Conclusions of the Caselaw of the Greek Council of State*
 1929-1959", p. 268, that "for the existence of a misconception

of fact there is required an objective non-existence of the actual circumstances and requisites upon which the act is based, which is ascertained in the absence of the element of the subjective test. There does not exist a misconception of fact when the administration determines items which in substance are different and conflicting; whose determination may in principle lead to the conclusion arrived at by the administration. The substance of such determination is not controlled in the annulment trial".

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In the present case the particulars of the several offences and in particular those for counts 4 and 5, refer clearly to the applicant's participation in the contribution to the success of the coup d'etat. The facts also emanating from the evidence heard at the trial of the applicant clearly reveal such a participation and that the other offences were committed in relation to the furtherance of the aims of the coup d'etat. There did not exist, therefore, objectively examining the matter, a non-existence of the actual circumstances and prerequisites upon which the subject decision was based, so that the ground of misconception of fact could exist. Nor were there any facts taken into consideration by the Deputy Chief of Police that ought not to have been taken into consideration. The description of the conduct of the applicant to be found in the subject decision was born out by the facts of the case, on the basis of which the conviction of the applicant was duly warranted.

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In a recourse against a disciplinary conviction this Court, as a rule, will not interfere with the subjective evaluation of the relevant facts as made by the appropriate organ (see *Enotiades v. The Republic* (1971) 3 C.L.R. p. 409, at p. 415).

I turn now to the ground that the disciplinary punishment imposed on the appellant was excessive. In that respect counsel for the applicant has referred to a number of mitigating factors to which reference has already been made in this judgment. The answer to the above submission is to be found in a number of judgments of this Court. In the case of *Platritis v. The Republic* (1969) 3 C.L.R. p. 366, at pp. 375, 376, Hadjiana-stassiou, J., had this to say:

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"..... There can be no doubt, that Article 146 was specifically intended to create a separate system of administrative

justice which has been entrusted to that Court, and that the Court can only adjudicate in cases relating to matters, where consequent upon its decision, the Court may order the Respondent to take some executive or administrative action. That this is not so in this case is obvious, because the Court cannot interfere with the severity or not of the sentence of the Presiding Officer imposed upon the Applicant, once the Council of Ministers decided to dismiss the appeal, thus confirming the punishment”.

10 In the case of *Republic v. Mozoras* (1970) 3 C.L.R. 210, at p. 221, Triantafyllides, J., had this to say:

“..... The short answer to this is that failing any legislative provisions entitling this Court, in the exercise of its competence under Article 146, to decide on the substance of certain aspects of disciplinary matters (and it would be in the interests of justice if such provisions came to be enacted here, as in Greece) the severity, as such of a disciplinary sanction cannot be tested, and decided upon, by means of a recourse under Article 146 (see Kyriacopoulos on Greek Administrative Law, 4th ed., Vol. III, p. 305, p. 308)”.

This passage was also adopted by me in the case of *Christofides v. CYTA* (1979) 3 C.L.R. p. 99, at p. 125.

For all the above reasons this ground also fails.

25 In the result this recourse is dismissed, but in the circumstances I make no order as to costs.

Application dismissed. No order as to costs.