1982 March 26

[PIKIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CHARALAMBOS PAPACLEOVOULOU,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTER OF DEFENCE,

Respondent.

(*Case No.* 396/79).

Natural Justice—Rules of—Right to be heard—Find expression in Article 12.5 *of the Constitution—Minimum rights enumerated therein apply to criminal as well as disciplinary proceedings—But provisions of said Article applicable to the determination of the issue of guilt and innocence by the fact finding body—Right of appeal or review of first instance decision not safeguarded by Articles* 12 *or* 30 *of the Constitution nor their provisions become automatically applicable where such a right is conferred by statute—Disciplinary conviction and punishment by Disciplinary Board set up under regulation* 13(1)(*b*) *of the National Guard Disciplinary Regulations—Every reasonable opportunity given to applicant to be heard in the cause—Review of decision by Minister in exercise of his powers under regulation* 23(4) *of the above Regulations which do not give applicant a right of hearing unless the Minister is minded to impose a severer punishment—Minister not altering decision to the detriment of applicant—Under no duty to hear him before taking his decision.*

Administrative review—Need not take any particular form.

Disciplinary offences—Army officers—Sentence—Determination of—Perfectly legitimate to have regard to the dangers posed to

society from particular types of conduct and to the Coup d'etat of July, 1974.

The applicant, a captain of the National Guard, was found guilty by a disciplinary board, set up under regulation 13(1)(b) of the National Guard Disciplinary Regulations, on two counts for disciplinary offences which imposed him the sentence of dismissal. The decision of the Board was affirmed by the Commander of the National Guard, appointed by the Minister of the Interior under regulation 21(3) of the above Regulations to act as Affirmatory Authority. Following the affirmation by the Commander, the applicant moved, through his advocate, by two letters, respondent Minister of Interior and Defence to review the decision in exercise of the powers vested in him under regulation 23(4)(5) and (6) of the above Regulations. In these letters reference was made to the complaints against the decision of the Disciplinary Board and the circumstances justifying the extension of leniency to the applicant. The respondent Minister after examining these letters decided to confirm the conviction and sentence without affording the applicant any further opportunity to be heard in the matter of such confirmation.

Hence this recourse.

Counsel for the applicant contended:

(a) That the Minister acted in breach of the rules of natural justice by not affording the applicant an oral hearing or in the alternative a mere adequate opportunity to be heard.

(b) That in the discharge of his duties the Minister took into account extraneous and irrelevant matters in that in his decision he made reference to the Coup d'etat and the abnormal circumstances prevailing in Cyprus as relevant to the delineation of the context within which sentence had to be measured.

Held, that the rules of natural justice find in Article 12 explicit expression in the Constitution of Cyprus; that the minimum

rights of the accused enumerated in Article 12.5* apply to criminal as well as disciplinary proceedings; that the provisions of Article 12.5 are applicable to the determination of the issue of guilt and innocence by the fact finding body—in this case the Disciplinary Board; that, perusing the file of the case, it appears that every reasonable opportunity was given to applicant to be heard in the cause; that neither Article 12 nor Article 30 safeguard a right of appeal or review of the first instance decision of a criminal Court or Disciplinary Committee nor do their provisions become automatically applicable where such a right is conferred by statute; that where a right of appeal or review is created by statute the exercise of the right is exclusively regulated by the provisions of the law giving rise to it; that in the instant case the right to review emanates exclusively from the provisions of regulation 23(4) of the Disciplinary Regulations of the National Guard and its exercise regulated by the proviso to reg. 23(6), which provides that the Minister in exercising his statutory powers of review is under no obligation to afford the complainant an opportunity to be heard unless minded to impose a severer punishment whereupon such opportunity must be given; that since in this case the Minister did not alter the decision to the detriment of the applicant he was under no duty to hear the applicant before making his determination; accordingly contention (a) should fail.

Held, further, that where the Minister is under a duty to hear the applicant, the discharge of this duty need not take any particular form, for instance, that of an oral hearing; that so long as the opportunity is effective in the sense that it affords the

* Article 12.5 of the Constitution provides as follows:
"12.5 Every person charged with an offence has the following minimum rights:-

(a) to be informed promptly and in a language which he understands and in detail of the nature and grounds of the charge preferred against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through a lawyer of his own choosing or, if he has no sufficient means to pay for legal assistance, to be given free legal assistance when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court".

applicant an adequate opportunity to place before the Minister the representations he wishes to make, no valid criticism can be levied; that administrative review need not be unnecessarily judicialized in the sense of appeal or other proceedings (see *Bushell* v. *Secretary of State* [1980] 2 All E.R. 608 (H.L.) as to the inherent differences between judicial and administrative proceedings).

(2) That the exercise of judicial and administrative powers is not made in a vacuum but in the context of the realities of the society in which they perform; that particularly, in determining sentence it is perfectly legitimate both for a court of law and a disciplinary body to have regard to the dangers posed to society from particular types of conduct; that certainly, the need for discipline in the Army has become far greater after the tragic events of 1974 and the participation of a section of the Army in staging and perpetrating the treacherous coup d'etat; that in referring to this background the Minister was doing no more than defining the context within which sentence had to be measured; that he did not imply that the applicant participated in any of these acts; that the security of the state is at all times of paramount importance for the well being of the country and that discipline in the Army and regard for the law are among the first prerequisites for the discharge of its mission; accordingly contention (b) should, also, fail.

Application dismissed.

Cases referred to:

Haros v. *Republic*, 4 R.S.C.C. 39;

Morsis v. *Republic*, 4 R.S.C.C. 133;

Menelaou v. *Republic* (1980) 3 C.L.R. 467;

Petrou v. *Republic* (1980) 3 C.L.R. 203;

Lambrou v. *Republic* (1972) 3 C.L.R. 379 at p. 386;

Republic v. *Demetriades* (1977) 3 C.L.R. 213;

Re Commission for Racial Equality [1980] 3 All E.R. 265;

Bushell v. *Secretary of State* [1980] 2 All E.R. 608 (H.L.).

Recourse.

Recourse against the decision of the respondent affirming

applicant's dismissal from the National Guard by a disciplinary board.

A. Eftychiou, for the applicant.

Cl. Antoniades, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

PIKIS J. read the following judgment. The applicant, a captain of the National Guard, challenges the decision of the Minister of Defence dated 11.10.1979 affirming his dismissal by a disciplinary board set up under regulation 13(1)(b) of the National Guard Disciplinary Regulations made on 4.5.1979 subsequently affirmed by the Commander of the National Guard on 21.5.1979.

On 1st February, 1979, he was charged on two counts for acts connected or associated with the abduction of Achilleas Kyprianou betraying derogation of duty. The applicant was accused of holding a meeting under surreptitious circumstances with a certain Vassos Pavlides, alias Yiatros, a person wanted by the police, about a week prior to the abduction of Achilleas Kyprianou, a fact he carefully hid from his superiors and the Police. The second count related again to withholding information from the authorities regarding his meeting with three persons, namely Andreas Kostouris, Andreas Phylahtou and Andreas Rodotheou, suspected of complicity in the aforementioned kidnapping.

On 7th February, 1979, a disciplinary board was set up under the relevant provisions of the Rules regulating discipline in the National Guard for the purpose of trying the charges against the accused. The case proceeded expeditiously, as one may gather from the file, to a hearing. After hearing a number of witnesses for the prosecution and the accused in his defence, the board found the accused guilty as charged and thereafter imposed by majority the sentence of dismissal. A copy of the decision is contained in the file of the case explanatory of the reasons for the conviction of the applicant. They found that apart from refraining to report to the authorities his meeting with a wanted person, the applicant deliberately misled the authorities about the identity of the persons who handed over

to him a tape by the kidnappers of Achilleas Kyprianou for delivery to his father, the President of the Republic.

The decision of the board was affirmed on 21st May, 1979, by General Ioannis Komninos, Commander of the National Guard, appointed by the Minister of the Interior under Regulation 21(3) of the aforementioned rules to act as affirmatory authority (appointment made on 14th May, 1979).

Following the affirmation of conviction and sentence by the Commander of the National Guard, the applicant moved, through his advocate, by two letters addressed on the 4th and 5th June, 1979, the Minister of Interior and Defence to review the decision in exercise of the powers vested in him under reg. 23 (4), (5) and (6) of the Regulations earlier cited. In his letters reference is made to his complaints against the decision of the disciplinary board and the circumstances justifying the extension of leniency to the applicant. A short while later, on 26th June, 1979, the Minister confirmed the conviction and the Punishment imposed. His decision is embodied in a record in the file of the case before the Court.

For reasons not disclosed and not probed into by the applicant, only the result of the decision was communicated to the applicant by letter dated 11th October, 1979, addressed to the applicant by the Director of the Ministry of Defence written on behalf of the Minister. No explanation was given for the delay to acquaint the applicant of the fate of his application for review. However, no complaint was made about it.

The present recourse is primarily, though not exclusively, directed against the decision of the Minister of the Interior and Defence confirming the decision of the disciplinary board. The Court is asked to declare the decision of the Minister confirming that of the disciplinary board as null. The validity of the decision is impugned on seven legal grounds, some of which overlap. The grounds upon which the application is founded, as they emerge from the application, may be summed up as follows:-

(a) First and foremost that the Minister acted in breach of the rules of natural justice by not affording the applicant an oral hearing or in the alternative a more

adequate opportunity to be heard. It is common ground that the Minister, after examining the letters addressed by the applicant, took his decision without affording the applicant any further opportunity to be heard in the matter of the confirmation of the decision.

(b) The decision is not duly, adequately or properly reasoned. Counsel for the applicant invited the Court to hold that the decision is vulnerable on account of the fact that the Minister allegedly, in exercising his powers, took into account extraneous facts irrelevant to the case. Criticism was made in particular of the reference made by the Minister in his decision to the coup d' etat and the abnormal circumstances prevailing in Cyprus as relevant to the delineation of the context within which sentence had to be measured.

Lastly the contention is made that the Minister lacked power to issue the decision he did and in the alternative he is charged with abusing the powers vested in him by Law. This ground was not articulated either in the application or in the address before the Court nor was any evidence adduced paving the substratum for the advancement of such contention. Regulations 23 (4), (5) and (6) confer express power on the Minister to review the decision. These powers are not subject to any statutory limitation, nor has the applicant brought to the notice of the Court any acts indicating transgression by the Minister of the powers conferred by Law. This part of the application need concern us no further in the absence of factual and legal reasons for inferring abuse of power.

In ground No. 7 of the recourse the allegation is made that the disciplinary board acted in breach of the rules pertaining to discipline in the National Guard and that consequently it ought not to have been confirmed by the Minister. However, no reference was made to the rules allegedly infringed at any stage of the proceedings and like other contentions made in the application they hang in a vacuum.

The only ground effectively raised in the address is that ascribing to the Minister violation of the rules of natural justice

by not affording the applicant a proper opportunity to be heard in the matter of the confirmation of the decision of the disciplinary board. On any evaluation of the recourse on its face value, it is shrouded in ambiguity. The only two grounds that merit consideration are those relating to breach of the rules of natural justice and the contention that in the discharge of his duties the Minister took into account extraneous and irrelevant matters.

The Right to be Heard:

The rules of natural justice, that is, the inalienable minimum rights of man to justice, require in any civilized system of law that an adequate opportunity be given to the person concerned to defend himself in proceedings that may result in his punishment. Sustaining this principle is synonymous to upholding justice itself.

In *Nicolaos D. Haros* v. *The Republic (through the Minister of the Interior)*, 4 R.S.C.C. 39, the Supreme Constitutional Court decided that the rules of natural justice find in Art. 12 explicit expression in the Constitution of Cyprus and held that the minimum rights of the accused enumerated in Art. 12.5 apply to criminal as well as disciplinary proceedings. The same legal proposition was adopted in *Stelios K. Morsis* v. *The Republic (through the Public Service Commission)*, 4 R.S.C.C. 133. This approach was not uniformly adhered to by the Supreme Court in the exercice of its revisional jurisdiction at first instance. Hadjianastassiou and Malachtos, JJ., in the cases of *Menelaou* v. *Republic* (1980) 3 C.L.R. 467, and *Petrou* v. *Republic* (1980) 3 C.L.R. 203, respectively, inclined to the view that the principle laid down in the case of *Haros* (supra) is valid both on authority and as a matter of proper application of fundamental constitutional provisions. The applicability of the principle was doubted by Triantafyllides, P., in *Ninos Lambrou* v. *Republic* (1972) 3 C.L.R. 379, 386, on the basis of the interpretation of Article 6(3) of the European Convention on Human Rights, the provision upon which Art. 30 of the Constitution was modelled. The Commission of Human Rights of the Council of Europe decided that the application of the provisions of Art. 6(3) of the Convention is limited to criminal and does not extend to disciplinary

proceedings. The observations of Triantafyllides, P., were obiter in that they were not strictly necessary for the decision. Therefore, they are of limited impact. On the other hand the decision of the Supreme Court in *Republic* v. *Demetrios Demetriades*, (1977) 3 C.L.R. 213, on the application of precedent in Cyprus leaves no room for departure from the decision in *Haros* inasmuch as decisions of the Supreme Constitutional Court are binding on a Judge of the Supreme Court in the exercice of the revisional jurisdiction of the Court at first instance in the same way as judgments of the Full Bench of the Supreme Court are binding. When we say binding we refer especially to that part of the judgment that forms part of the ratio decidendi. Consequently authority requires that the provisions of Article 12.5 be applied to the extent compatible with disciplinary proceedings in the determination of disciplinary cases. In defining the defence rights of the person charged it is worth bearing in mind the observations of the Divisional Court in England in *Re Commission for Racial Equality*, [1980] 3 All E.R. 265, that there are degrees of a judicial hearing and that the holding of a hearing in the area of administrative Law does not necessarily imply adherence to every rule of the judicial system applicable to criminal cases. Not only authority but fundamental notions of justice also militate for adherence to the provisions of Art. 12.5 inasmuch as the commitment to fundamental conceptions of justice must be pervasive and lasting.

The provisions of Art. 12.5 are applicable to the determination of the issue of guilt and innocence by the fact finding body—in this case the Disciplinary Board. Perusing the file of the case it appears that every reasonable opportunity was given to applicant to be heard in the cause. A perusal of the record reveals that the proceedings were conducted very much along the lines of the trial in a criminal case.

Neither Article 12 nor Article 30 safeguard a right of appeal or review of the first instance decision of a criminal Court or Disciplinary Committee nor do their provisions become automatically applicable where such a right is conferred by statute. Where a right of appeal or review is created by statute the exercise of the right is exclusively regulated by the provisions of the law giving rise to it. In the instant case the right to review emanates exclusively from the provisions of regulation 23(4)

of the Disciplinary Rules of the National Guard and its exercise regulated by the proviso to Reg. 23(6). It expressly provides that the Minister in exercising his statutory powers of review is under no obligation to afford the complainant an opportunity to be heard unless minded to impose a severer punishment whereupon such opportunity must be given. It this case the Minister did not alter the decision to the detriment of the applicant; consequently he was under no duty to hear the applicant before making his determination. On the other hand, it must be noted to eliminate confusion that where the Minister is under duty to hear the applicant, the discharge of this duty need not take any particular form, for instance, that of an oral hearing. And, so long as the opportunity is effective in the sense that it affords the applicant an adequate opportunity to place before the Minister the representations he wishes to make, no valid criticism can be levied. Administrative review need not be unnecessarily judicialized in the sense of appeal or other proceedings. (Relevant on this point are observations made in the case of *Bushell* v. *Secretary of State*, [1980] 2 All E.R. 608 (H.L.) as to the inherent differences between judicial and administrative proceedings).

In my judgment the Minister did not fail in his duty by not inviting the applicant to make, if he chose, further representations to those contained in his two letters precipitating the review. On the other hand, as a matter of substance the Minister did have before him, in the letters, the representations he wished to make as one may gather on comparison of the complaints set out in the letters and the arguments raised before the Court. The complaint is not that the affirmation by the Minister of the sentence is erroneous. And rightly so for the powers of the Court to interfere with the choice of sentence by the disciplinary authority are very marginal.

It is settled in administrative law that a revisional Court has no authority to interfere with the punishment inflicted unless the organ charged with disciplinary powers evidently transgresses the outer limits of its discretion. (See *Petrou supra*—Conclusions from the Case Law of Greek Council of State, 1929–1959 p. 269, Kyriakopoullos—"The Law Regulating the Rights of Public Employees, p. 289). The powers of the Supreme Court in this regard have no similarity to those vested in the

Supreme Court in the exercice of its appellate jurisdiction from decisions of the District Court where there is power to interfere where the sentence is either wrong in principle or manifestly excessive or inadequate. The administration is regarded in administrative law as the principal arbiter of the measure of discipline within its rank. And it is not the province of the Court to make an evaluation of this measure.

What remains to decide is whether the Minister in exercising his powers took into consideration, as alleged, irrelevant matters. The suggestion here is not that the Minister took into account facts other than those set out in the file but that he evaluated the decision, particularly the punishment imposed, from a perspective that he ought not to, that in evaluating the punishment imposed he paid heed to the recent tragic history of the country especially the coup d'etat.

The exercice of judicial and administrative powers is not made in a vacuum but in the context of the realities of the society in which they perform. Particularly, in determining sentence it is perfectly legitimate both for a court of law and a disciplinary body to have regard to the dangers posed to society from particular types of conduct. Certainly, the need for discipline in the Army has become far greater after the tragic events of 1974 and the participation of a section of the Army in staging and perpetrating the treacherous coup d'etat. In referring to this background the Minister was doing no more than defining the context within which sentence had to be measured. He did not imply that the applicant participated in any of these acts. Concluding, one may remind that the security of the state is at all times of paramount importance for the well being of the country. Discipline in the Army and regard for the law are among the first prerequisites for the discharge of its mission.

None of the grounds advanced justify the intervention of the Court. The recourse is consequently dismissed. There will be no order as to costs.

Application dismissed. No order as to costs.