1983 April 28

[TRIANTAFYLLIDES, P.]

IN THE MATTER OF AN APPLICATION BY PHAEDON ECONOMIDES FOR LEAVE TO APPLY FOR ORDERS OF PROHIBITION AND CERTIORARI.

(*Application No.* 10/83).

Prohibition—Remand order—Application for leave to apply for an order of prohibition preventing a District judge from dealing with any further application of the police for a remand order—Remand order in question subject matter of a criminal appeal—Nothing left to be done by the District Judge in question in relation to the remand order—Therefore there is nothing left to prohibit in so far as he is concerned—Application dismissed—Leave cannot be granted in relation to a possible new application for a further remand order because the process for a further remand order has not yet been set at all in motion.

Prohibition—Earliest time for applying for.

On April 21, 1983 a Judge of the District Court (Eliades, D.J.) of Larnaca made an order remanding the applicant in custody. As against this order the applicant filed a criminal appeal and he also filed an application seeking leave to apply for an order of prohibition preventing the said Judge from dealing with any further application of the police, under section 24 of the Criminal Procedure Law, Cap. 155, for an order remanding in custody the applicant in relation to police investigations in respect of offences of importation and possession of narcotics which were allegedly committed on 5th March, 1983.

Before the issuing of the above order Counsel for applicant argued before the above Judge, by way of preliminary objection that he should not deal with the application but the Judge dismissed the objection.

On the application for leave to apply for an order of prohibition:

Held, that as the judicial process in respect of the order of remand of the 21st April, 1983, has been totally completed

before the District Judge concerned and it is already the subject matter of a criminal appeal there does not exist now a proceeding in respect of which leave may be granted to apply for an order of prohibition; that since there is nothing left to be done by the District Judge in question in relation to the above order there is nothing left to prohibit in so far as he is concerned; accordingly the application for leave to apply for an order of prohibition must fail.

On the question whether leave to apply for an order of prohibition could be granted in relation to a possible new application for an order for the further remand in custody of the applicant: That before leave can be granted to apply for an order of prohibition the process in which "steps have been or are about to be taken" must be somehow already in motion; as the process of a new application for a further remand in custody of the applicant, after the expiry of the currently in force remand order, which was made on the 21st April, 1983, has not yet been set at all, in any way, in motion, leave to apply for an order of prohibition cannot be granted in relation to a possible new application for an order of remand.

Application dismissed.

Cases referred to:

Ex Parte Papadopoullos (1968) 1 C.L.R. 496;

Ex Parte Maroulleti (1970) 1 C.L.R. 75;

In re Panaretou (1972) 1 C.L.R. 165;

Zenios v. Disciplinary Board (1978) 1 C.L.R. 382;

In re Azinas (1980) 1 C.L.R. 466;

In re Malikides (1980) 1 C.L.R. 472;

Rex v. Minister of Health, Ex Parte Davis [1929] 1 K.B. 619;

Rex v. Minister of Health, Ex Parte Villiers [1936] 2 K.B. 29;

Reg. v. Kent Police Authority, Ex Parte Godden [1971] 2 Q.B.622.

Application.

Application for leave to apply for orders of prohibition and certiorari preventing District Judge T. Eliades, of the District

Court of Larnaca, from dealing with any further application of the Police, under section 24 of the Criminal Procedure Law, Cap. 155, for an order remanding in custody the applicant in relation to police investigations in respect of offences of importation and possession of narcotics.

G. Cacoyiannis, for the applicant.

A.M. Angelides, Senior Counsel of the Republic, for the Republic.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment. The present application was filed on the 23rd April 1983 and was heard by me on the 26th April 1983.

I thought fit to direct that notice of this application should be given to the Attorney-General and so when I heard counsel for the applicant arguing in support of it I had, also, an opportunity to hear the views of counsel who appeared for the Republic.

The hearing of this application on 26th April 1983 was, at the request of counsel for the applicant, limited, for the time being, to that part of the application by means of which there is being sought leave to apply for an order of prohibttion; and, as presented and explained by counsel for the applicant, it appears to be an application seeking leave to apply for an order of prohibttion preventing District Judge T. Eliades, of the District Court of Larnaca, from dealing with any further application of the police, under section 24 of the Criminal Procedure Law, Cap. 155, for an order remanding in custody the applicant in relation to police investigations in respect of offences of importation and possession of narcotics which were allegedly committed on 5th March 1983.

Counsel for the applicant has contended that, if the aforementioned District Judge deals with any further application for remand in custody of the applicant, justice will not manifestly and, undoubtedly, be seen to be done, as the applicant, to say the least, will think that there exists a likelihood of bias on the part of the District Judge in question because of factors appearing in the affidavit filed in support of the present application, which was sworn by counsel for the applicant on

behalf of the applicant who was, at the time, ill in hospital and could not swear himself such affidavit. It is useful to quote in full in this judgment paragraphs 2 to 7 of the said affidavit:

"2. On 20.4.1983 the application of the Larnaca Police for the remand of the Applicant in custody for a period of eight days came to be determined before H.H. Mr. Takis Eliades D.J. in the District Court of Larnaca. Along with the Applicant was another suspect, a Mr. Pantelis Georghiou of Nicosia who was suspect No. 2 in the proceedings, the Applicant being suspect No. 1. The offences investigated by the Police in respect of which the Remand Order was sought to be made were the illegal importation and possession of narcotics, namely heroin, on 5.3.1983.

3. On two previous occasions namely on 20.3.1983 (a Sunday) and on 28.3.1983 the same Judge had dealt with similar applications concerning the Applicant respecting the same offences which had occurred on 5.3.1983. Both the said applications were hotly contested by or on behalf of the Applicant and the Police Investigating Officer was closely cross-examined as to the sufficiency of the material which he had before him justifying "reasonable suspicion" of the Applicant. On the first of the two occasions the Court granted the eight days remand as requested by the Police and on the second of the said occasions the Court made a five days Remand Order. At the expiration of the second of the said two Remand Orders, namely after the Applicant had been in custody for thirteen days, he was released from custody and was expressly told by the Police that as regards the offences relating to heroin nothing at all incriminating had emerged against him and he was considered absolutely cleared. This raised in the mind of the Applicant reasonable doubts as to the propriety of the two Remand Orders that had been made depriving him of his liberty for thirteen days. The applicant felt greatly aggrieved because he had remained in custody for a full period of thirteen days without justification as well as by the fact that his name and reputation had consequently been greatly damaged especially having regard to the prominence that the press gave to his arrest and detention.

4. Besides the two applications for remand in custody concerning the Applicant, the same Learned Judge had dealt with successive applications by the Police for the remand in custody of a number of other persons connected with the same case (all of who are still in custody) in respect of some of whom there may well have been sufficient or ample material to justify their remand. The applicant felt that the Judge may well have been influenced by the seriousness of the case and by evidence which he had heard in other applications concerning other suspects in dealing with his own application. He therefore had a reasonable doubt or suspicion regarding the impartiality and competence of the Judge to deal with his own case.

5. On the Applicant's instructions I personally argued before the District Judge by way of preliminary objection that he should not deal with this application but should send the case to another Judge of the District Court of Larnaca to do so advancing before him full reasons and quoting inter alia the case of *Vrakas and another*—v—*The Republic* (1973) 2 C.L.R. 139.

6. The Learned Judge saw fit to deliver his ruling on my preliminary objection dismissing my objection and declaring himself to be competent to deal with the application thereby deciding on his own impartiality and/or lack of bias and becoming a judge in his own cause. This added to the reasonable doubts in the mind of the Applicant as to the likelihood of justice being done in his case.

7. Immediately upon the pronouncement of the ruling by the Learned Judge I applied on behalf of the Applicant for an adjournment of the proceedings to enable me to file in the Supreme Court applications for Prohibition and Certiorari. My application was refused by the Learned Judge on the grounds which he advanced and immediately thereupon he embarked on the application of the Police hearing evidence and arguments on the merits of the application. He delivered his judgment on the application on 21.4.1983 finding the application of the Police fully justified and ordering the Applicant along with the other suspects to remain in custody for eight days".

At the present stage of these proceedings I have to decide whether the applicant has made out a prima facie case sufficient to justify the granting to him of leave to apply for an order of prohibition under Article 155.4 of the Constitution (see, inter alia, in this respect, *Ex parte Papadopoullos*, (1968) 1 C.L.R. 496, *Ex parte Maroulleti*, (1970) 1 C.L.R. 75, *In Re Panaretou*, (1972) 1 C.L.R. 165, *Zenios* v. *Disciplinary Board*, (1978) 1 C.L.R. 382, *In Re Azinas*, (1980) 1 C.L.R. 466 and *In Re Malikides*, (1980) 1 C.L.R. 472).

In this connection I have to examine whether there actually exists now a proceeding in respect of which leave may be granted to apply for an order of prohibition; and the order for the remand in custody of the applicant which was made on 21st April 1983 cannot be treated as being such a proceeding because the judicial process in respect of that order has been totally completed before the District Judge concerned and it is already the subject matter of a criminal appeal (No. 4405) which was heard by an appeal bench of our Supreme Court; and it is to be noted, too, that the order of prohibition is not being sought for the purpose of preventing the judicial enforcement of the aforementioned order of 21st April 1983.

In Halsbury's Laws of England, 4th ed., vol. 1, p. 143, para. 137, there are stated the following:

> "137. *Objection on face of proceedings.* Where the objection to the jurisdiction of an inferior court appears on the face of the proceedings, prohibition lies at any time, even after judgment or sentence in spite of the laches or acquiescence of the applicant; this rule applies, even if the application is merely to avoid payment of the costs of the applicant's own vexatious suit; but if nothing is left to prohibit, a different remedy, such as certiorari to quash, must be sought".

As has already been stated earlier on in this judgment there is nothing left to be done by the District Judge in question in relation to the order of remand made by him on 21st April 1983 and so there is nothing left to prohibit in so far as he is concerned. Consequently, the only remedy that might be available to the applicant could, conceivably, be an order of certiorari quashing the said order of remand. It is correct that leave to apply for such an order is being sought by means

of the present application, too, but in this respect no argument has been advanced, for the time being, by counsel for the applicant; and, in my opinion, he has quite rightly refrained from doing so since the validity of the order of remand of 21st April 1983 is already sub judice in criminal appeal No. 4405.

I have had to examine next whether leave to apply for an order of prohibition could be granted in relation to a possible new application for an order for the further remand in custody of the applicant which might be made by the police, assuming that such an application will be taken before the same District Judge.

It is useful to refer, in this connection, to Halsbury's Laws of England, 4th ed., vol. 1, p. 142, para. 136, which reads as follows:

> "136. *Earliest time for applying for prohibition.* Prohibition may be applied for as soon as the complete absence of jurisdiction is apparent on the record of the proceedings of the inferior court, without the question of jurisdiction being raised in that court.
>
> Even though the jurisdictional defect is not patent, an applicant will not be required first to take objection before the tribunal whose proceedings he seeks to impugn when the question is one of law, not dependent on disputed issues of fact, or when he is contending that the tribunal is improperly constituted because of the likelihood of bias.
>
> In any event it appears that prohibition may issue once steps have been or are about to be taken involving a usurpation of jurisdiction".

In my opinion, the situation in the present case is completely outside the ambit of what is envisaged by what is stated in paragraph 136, above. As I understand the text of such paragraph, a process in which "steps have been or are about to be taken" must be somehow already in motion before leave can be granted to apply for an order of prohibition. I think that the true position can be usefully illustrated by reference to the following cases:

In *Rex* v. *Minister of Health Ex Parte Davis*, [1929] 1 K.B. 619, prohibition was granted in respect of an improvement

scheme which had been presented to the Minister of Health with a petition for its confirmation. That case was first heard by the Divisional Court and then the decision of the Divisional Court was upheld on appeal (and the report of the judgment on appeal is to be found in [1929] 1 K.B. 634). It is pertinent to quote the following passage from the judgment of Lord Hewart C.J. in the Divisional Court (at pp. 627–628):

> "Here, to apply that kind of canon to the present case, this matter had reached its last stage but one; the last stage, if it were to be reached, would be the stage in which the order would have assumed all the authority of an Act of Parliament. If cheek there is to be, it must be imposed now. We are told that this power, which in my opinion does not exist, does exist in the Minister; we are told that subject to a certain modification he has already in other cases exercised it. We ought to assume, therefore, that in this case, if nothing is done, he may exercise it again".

In *Rex* v. *Minister of Health, Ex Parte Villiers*, [1936] 2 K.B. 29, prohibition was granted after the applicant had addressed a protest to the Minister of Health against a proposed appropriation and exchange of land for housing purposes and had been informed that the Minister intended to hold a public inquiry under the relevant provisions of the Housing Act 1925. Lord Hewart C.J. stated the following (at p. 42):

> "His first submission was that this case went beyond previous cases, where it has been held that prohibition would lie to a Minister or Government Department. The Court, however, is of opinion that this case comes exactly within the judgment of the Court of Appeal in *Rex* v. *Electricity Commissioners* (1), and is indistinguishable in principle from that case. The Minister is proposing to hold an inquiry and to determine questions relating to the rights of subjects. If then, as Atkin L.J. (as he then was) pointed out, these proceedings establish that the Minister is exceeding his jurisdiction by entertaining matters which would result in his final decision being liable to be quashed on certiorari, as it would be if the Housing

(1) [1924] 1 K.B. 171.

Act, 1925, has no application to this case, prohibition will lie".

In *Reg.* v. *Kent Police Authority, Ex Parte Godden*, [1971] 2 Q.B. 662, prohibition was granted to prevent a medical practitioner from determining whether the applicant was permanently disabled in a manner justifying his compulsory retirement, because the said medical practitioner had already given a report earlier that he had formed the opinion that the applicant was suffering from mental disorder of a paranoid type. Prohibition was applied for in that case after the applicant was notified by the authorities concerned that he was required to submit himself to a medical examination by the aforementioned practitioner in conformity with the relevant provisions of the Police Pensions Regulations 1971. Lord Denning M.R. stated the following (at p. 670):

> That brings me to the first question: was it proper for the Kent police authorities to refer for decision this question to Dr. Crosbie Brown? I must say I think it was not. Dr. Crosbie Brown was disqualified from acting. He had already expressed an opinion adverse to Chief Inspector Godden. As early as July 23, 1970, Dr. Crosbie Brown had said that the chief inspector was suffering from a mental disorder. Dr. Crosbie Brown acted on that opinion by putting him on sick leave. He has put his opinion on affidavit. He has committed himself to a view in advance of the inquiry. I think it would be impossible for Dr. Crosbie Brown - who is just a general medical practitioner and not a consultant - to bring a completely impartial mind to bear upon the matter. In any event, to the person affected by it, Chief Inspector Godden, it must inevitably appear that Dr. Crosbie Brown cannot bring an impartial judgment to bear upon the matter. If he was to decide the matter justice would not be seen to be done. In view of the additional material before us (which was not before the Divisional Court) I hold that Dr. Crosbie Brown is disqualified. For that reason in my opinion the first request for prohibition should go 'to prohibit Dr. Crosbie Brown from determining whether Chief Inspector Godden was permanently disabled within the police pensions regulations for the time being in force.'

If the police authority determine further to consider the matter, they should refer it for decision to somebody else. I would suggest that it would be better to have someone quite outside this case altogether - not even any of the names which have been mentioned, such as Dr. Pollitt or Dr. Hierons - but some duly qualified medical practitioner who has had no part in the case hitherto."

Also, Salmon L.J. said (at p. 672):

"Now, if Dr. Crosbie Brown is to conduct the inquiry and reach a decision under regulation 70, he would be put in an impossible position: and I have no doubt that he will be extremely glad to be relieved of it. As long ago as July 23, 1970, after reading certain reports that were put before him, he formed the opinion, according to his own memorandum, that Chief Inspector Godden was suffering from mental disorder of a paranoid type. That was before he ever saw the chief inspector. Having seen him, it is fair to point out that he says very plainly that he was unable to obtain any information from the chief inspector or any corroboration from examining him to support the opinion which he had previously formed. Nevertheless, he still held that opinion, as he was perfectly entitled to do; and indeed he swore an affidavit in these proceedings stating in terms that he had formed that opinion. I do not think it would be fair to Dr. Crosbie Brown to ask him to conduct what is in effect a quasi-judicial inquiry to decide the very question about which he had formed a firm view nearly a year ago. Moreover, justice would not be seen to be done; because the chief inspector would no doubt say: 'Well, this man has already made up his mind. Moreover, he made it up without seeing me. It would be unfair that he should now be asked to decide the question afresh and quite impartially-a question which is vital to me - in circumstances such as these.' I therefore entirely agree with Lord Denning M.R. Perhaps at the risk of repetition, I do not say this as indicating any criticism of Dr. Crosbie Brown. I agree that a writ of prohibition should go so that he will be relieved of what I am sure would be the most invidious task of having to exercise the duties imposed by regulation 70(2).

The Kent Police Authority have power of selecting the medical practitioner who shall carry out the inquiry if they

decide to refer this question for decision to a medical practitioner. I feel confident, however, that on reflection, they will agree, as I entirely agree, with what has fallen from Lord Denning M.R., that, having regard to all that has gone before, it would be far better not to appoint either of the distinguished consultants who have been selected by the police authority heretofore. It would be far better if they were to appoint some entirely independent medical practitioner–not that I am suggesting that the others are not independent; but they should appoint some entirely new medical practitioner who will be able to come to this question with an entirely fresh mind."

Lastly, Karminski L.J. said (at p. 673):-

"Dr. Crosbie Brown has been put, through no fault of his own, in a difficult and delicate position. About a year ago he inquired into the position so far as Chief Inspector Godden's health was concerned, and the opinion he formed was adverse as to the inspector's health. He is now holding, or has been asked to hold, another inquiry a year later, and an inquiry which, as Lord Denning M.R. and Salmon L.J. have pointed out, requires the exercise of at any rate judicial functions. In other words, he has to inquire and to reach a decision. In those circumstances it would be almost impossible for Dr. Crosbie Brown to be wholly impartial. I do not use those words in an unkind or critical sense. He formed a view a year ago, and it would require perhaps super-human qualities if he were able to expunge altogether from his mind what he heard last time and the reasons for which he came to the conclusion that he reached. In fact, other matters have since emerged and it is in my view quite essential that the inquiry should be held by another duly qualified medical practitioner."

In all the above three cases to which reference has just been made a process of some inquiry was already officially in motion when prohibition was sought for, whereas in the present instance the process of a new application for a further remand in custody of the applicant, after the expiry of the currently in force remand order which was made on 21st April 1983, has not yet been set at all, in any way, in motion.

I would, also, observe that the *Godden* case, supra, has to be regarded as being distinguishable from the present case in that in the *Godden* case the medical practitioner concerned had already pronounced, in a manner more or less binding on him, about the mental state of the applicant, whereas in the present instance, even assuming that another order of remand is to be applied for and is to be taken before the same District Judge as the one who has made the previous remand order of 21st April 1983, such District Judge will in no way be bound by his decision that on the material which was placed on the earlier occasion before him a remand order was justified, and will not even be entitled to take that into consideration, but he would have to reach an entirely new decision solely on the material to be placed before him in support of the new application for a further remand order.

For all the foregoing reasons I have to hold that a prima facie case, sufficient to entitle the applicant to leave to apply for an order of prohibition, has not been made out to my satisfaction and as a result this application has to be refused in so far as it relates to leave to apply for an order of prohibition, in the context in which such leave has been sought.

This application will remain pending in so far as it relates to leave to apply for an order of certiorari and will be fixed for hearing if and when counsel for the applicant applies within one month from today that it should be heard in this respect too; otherwise it will be treated as having been abandoned in so far its certiorari aspect is concerned and will be dismissed accordingly.

Order accordingly.