

1986 August 28

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 155(4) OF THE
CONSTITUTION AND S. 9 OF THE COURTS OF JUSTICE
(MISCELLANEOUS PROVISIONS) LAW, 1964,

AND

IN THE MATTER OF AN APPLICATION BY ROGHIROS
GEORGHIOU FOR AN ORDER OF CERTIORARI,

AND

IN THE MATTER AND/OR ORDER OF 27.3.1986 OF
THE DISTRICT COURT OF NICOSIA MADE BY
H. H. JUDGE HJICONSTANTINO IN APPLICATION
No. 15/86 UNDER THE GUARDIANSHIP OF INFANTS
AND PRODIGALS LAW CAP. 277.

(Civil Application No. 46/86).

*Civil Procedure—Proceedings fixed for “mention”—Meaning of
term “mention”.*

*The Guardianship of Infants and Prodigals Law, Cap. 277—
Sub-section (2), Section 7—Duty of trial Court thereunder.*

- 5 *Natural Justice—Opportunity of being heard—Trial Court
granting an application in respondent's absence and on a
day, when such application was fixed for mention and not
for hearing—Respondent deprived of opportunity of being
heard—In any event trial Court had a duty under s.7(2)*
10 *of the Guardianship of Infants and Prodigals Law, Cap.
277 to adjourn the proceeding and direct notification of
date of hearing to respondent father, so that his wishes
be known.*

- 15 *Prerogative Orders—Certiorari—Natural Justice—Violation of
the rules of—Ground for granting the order.*

Phivi Michael, the mother of two infant children, ap-
plied to the D.C. Nicosia by summons for an order re-
moving Roghiros Georghiou as guardian of the two infants,

an order appointing her as their guardian and an order giving her the custody of the said infants.

On the 27.3.86, when the application was fixed for mention, the Court granted the application. The relevant record reads:

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“For applicant: Mr. Koutras

Respondent absent, no appearance.

No Opposition filed.

Court: Having read the affidavit I grant the application without costs”.

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As a result the respondent in the said proceedings, having obtained the relevant leave filed the present application for an order of certiorari, quashing the said order. In the affidavit in support of the application it is stated that Miss Kekkou, a practising advocate, appeared before the Court for the respondent at 10.45 a.m., when she was informed that the application had already been granted.

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Held, granting the application: (1) Though the term “mention” is not one provided by the Rules of Court, nevertheless it denotes in practice that the proceedings are fixed either for directions or for exploring the possibility of a settlement, but, in any case, not for hearing. In this case the trial Judge proceeded as if the application had been fixed for hearing and not for “mention” and, without even hearing counsel for applicant, granted the application. As a result the applicant in this case (respondent in the proceedings before the trial Judge) had been deprived of the opportunity of being heard and, thus, the rules of natural justice had been violated.

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(2) In any event the trial Judge had a duty under section 7(2) of Cap. 277 to adjourn the case and give directions for the notification of the date of the hearing to the respondent father, so that his wishes on the matter be known.

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(3) It is well settled that an order of certiorari may be made on the ground that there has been a violation of the rules of natural justice.

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*Order of certiorari granted.
No order as to costs.*

Cases referred to:

Tourapis v. Pelides (1967) 1 C.L.R. 5;

In Re Nina Panaretou (1972) 1 C.L.R. 165.

Application.

5 Application for an order of certiorari to remove into
the Supreme Court of Cyprus and quash the decision and
order of a Judge of the District Court of Nicosia in the
exercise of Civil Jurisdiction in Appl. No. 15/86 under
10 the Guardianship of Infants and Prodigals Law, Cap. 277,
whereby the applicant was removed as a guardian of his
infant children and their care and custody was granted to
their mother who was appointed as their guardian.

Ph. Clerides, for the applicant.

D. Koutras, for the respondent.

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Cur. adv. vult.

SAVVIDES J. read the following judgment. This is an
application for leave to apply for an order of certiorari
for the purpose of quashing the decision and order of a
Judge of the District Court of Nicosia, in the exercise of
20 civil jurisdiction, in Application No. 15/86 under the
Guardianship of Infants and Prodigals Law, Cap. 277,
whereby the applicant was removed as a guardian of his
infant children Yiangos Georghiou and Electra Georghiou,
and their care and control was granted to their mother Phivi
25 Michael, who was appointed as guardian of the said in-
fants.

On the 20th May, 1986, leave was granted to the ap-
plicant to move this Court for an order of certiorari and,
in pursuance of such leave, applicant filed the present ap-
30 plication.

The facts of the case are briefly as follows:

Phivi Michael, of Nicosia, the mother of two infant
children, Eleni and Yiangos Georghiou, applied to the
District Court of Nicosia by summons, praying for, inter
35 alia:

(a) An order of the Honourable Court removing Royiros Georghiou as guardian of the infants Electra Georghiou and Yiangos Georghiou.

(b) An order of the Honourable Court appointing the applicant as the guardian of her infant children Yiangos and Electra Georghiou and as the guardian of their property.

(c) An order of the Honourable Court giving the applicant custody and care of her infant children Electra and Yiangos Georghiou.

As it appears from the record of the proceedings, copy of which was filed with this application, Miss Kekkou, a practising advocate, appeared in the Court on behalf of the respondent Royiros Georghiou—applicant in the present proceedings—and stated that the application of Phivi Michael was opposed and as a result the application was adjourned to 27.3.1986 for mention with directions that in the meantime opposition to be filed. On 27.3.1986 the day on which the case was fixed for mention, the case on that date was handled by a different Judge, namely H. H. Hadjiconstantinou, Senior District Judge, the Court granted the application in the absence of the respondent or his counsel. The record of the Court reads as follows:

“For applicant: Mr. Koutras.

Respondent absent, no appearance.

No opposition filed.

Court: Having read the affidavit I grant the application without costs.

(Sgd) *A. Hadjiconstantinou,*
S.D.J.”

According to the affidavit in support of the application, Miss Kekkou appeared before the Court at 10.45 a.m. and she was informed that the application had already been granted.

The grounds upon which leave is sought are, briefly, that the Court wrongly and in excess of power proceeded to the issue of the order of guardianship applied for and

that wrongly and in violation of the principle of the rules of natural justice to hear the other party and also in violation of the provisions of the Constitution and the Civil Procedure Rules, the Court proceeded to the making of the order. Also, that the Honourable Judge Mr. Hadjiconstantinou acted in abuse of powers.

At the hearing of this application counsel on behalf of the respondent stated that in the circumstances of the case he had no objection if the present application was granted and the order of the trial Court removing the applicant from the guardianship of his two children and appointing the respondent as sole guardian of the infants be quashed and the applicant be afforded the opportunity to be heard before the District Court.

Counsel for applicant submitted that this is a proper case for an order of certiorari to be made quashing the decision of the trial Court as the applicant by not having been afforded the opportunity to be heard has been deprived of his constitutional rights under Articles 12.5 and 30.2 and 3 of the Constitution. The trial Court, counsel submitted in the present case, has violated the rules of natural justice which by itself is a ground for quashing the decision by certiorari.

It is a common ground in these proceedings that on the day when the sub judice order was made the application of the respondent for the removal of the present applicant from the guardianship of his children had not been fixed for hearing. According to the record the application had been fixed on that day for "mention" and not for hearing. Though the term "mention" is not one provided by the Rules of Court, nevertheless, it has been the practice that when such term is being used, it denotes that the proceedings are fixed either for directions or for exploring the possibility for a settlement, but, in any case, not for hearing.

The trial Judge, in the present case, though aware of the fact that the application was fixed for *mention* and not for *hearing* and without any motion for judgment by default on behalf of counsel for applicant (respondent in the present proceedings) proceeded to treat the application

as if having been fixed for hearing and without even hearing any argument on the part of counsel for applicant in the application before him, granted the application by simply recording that "the application is granted."

Leaving aside for a moment the fact that the sub judge decision was taken on a day when such application had not been fixed for hearing and thus the respondent, applicant in these proceedings, had been deprived of the opportunity of being heard, the Court had a duty under the provisions of sub-section (2) of section 7 of The Guardianship of Infants and Prodigals Law, Cap. 277, to adjourn the case and give directions for the notification of the hearing of the application to the respondent father, so that his wishes on the matter be known.

Section 7(2) of Cap. 277 provides as follows:

"In exercising the powers conferred by this section in regard to infants, the Court shall have regard primarily to the welfare of the infant but shall, where the infant has a parent or parents, take into consideration the wishes of such parent or both of them."

It is well settled that an order of certiorari may be made on the ground that there has been a breach of the rules of natural justice such as, for instance, in the case of a party who has not been given a full and fair opportunity to be heard.

In Halsbury's Laws of England, Third Edition, Vol. II, page 145, para. 272 under sub-paragraph (2), we read:

"(2) Breach of the rules of natural justice: a judicial decision reached by an inferior tribunal in violation of these rules, e.g. where party is not given a full and fair opportunity of being heard, may be quashed on certiorari."

In *Tourapis v. Pelides et.c.* (1967) 1 C.L.R. 5 at p. 6, Josephides, J. had this to say in this respect:-

"It is well settled that the prerogative order of certiorari is made, inter alia, for breach of the rules

of natural justice by an inferior tribunal or a person exercising quasi-judicial powers, who has the duty cast on him of hearing both sides.”

5 (See, also in *Re Nina Panaretou* (1972) 1 C.L.R. 165 at p. 166).

In the circumstances of the present case I am satisfied that the applicant has shown a good cause for an order of certiorari to be granted.

10 Before concluding, I wish to express the appreciation of the Court for the attitude of counsel for respondent in not contesting this application, in the circumstances of the present case.

15 In the result, the application succeeds and an order of certiorari is granted, quashing the order of the District Court of Nicosia dated 27.3.1986 in Civil Application 15/86 under the Guardianship of Infants and Prodigals Law, Cap. 277.

There will be no order for costs.

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Application granted.
No order as to costs.