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March 8

COMMISSIONER OF LIMASSOL v. VASSOS PAPADOPOULOS AND OTHERS.

[HALLINAN C.J. AND ZANNETIDES J.]

COMMISSIONER OF LIMASSOL,

Appellant,

v.

VASSOS PAPADOPOULOS AND OTHERS,

Respondents.

(Civil Appeal No. 4210).

Emergency Powers (Collective Punishment) Regulations 1955—*Provisions of Regulation* 5—*Inquiry by Commissioner—Functions of Commissioner—Conduct of inquiry—Regulations intra vires the Emergency Powers Orders in Council,* 1939 *and* 1952.

Certiorari—Inquiry by Commissioner under Regulation 5—*Ministerial or Judicial act.*

Practice—Ministerial acts—Failure to comply with statutory provisions—Action for declaration.

The District Commissioner of Limassol made an order imposing a collective fine of £35,000 on the Greek Cypriot inhabitants of Limassol under Regulation 3 of the Emergency Powers (Collective Punishment) Regulations, 1955.* Upon an application for *certiorari* to quash the order it was submitted on behalf of the applicants (*i*) that the aforesaid Regulations were *ultra vires* the Emergency Powers Orders in Council, 1939 and 1952; and (*ii*) that the order of the Commissioner was bad because before making his order under Regulation 3 of the aforesaid Regulations he had failed to comply with the provisions of Regulation 5 as to the holding of an inquiry. On behalf of the Commissioner it was argued that an order made by him under the Regulations was final and not appealable and that, therefore, *certiorari* did not lie. Zekia J. made an order quashing the Commissioner's order.

On appeal it was further submitted by the Commissioner that the acts which the Commissioner was required to do when making an order under the Regulations of 1955 were ministerial and not judicial acts and that, therefore, *certiorari* could not issue to control them.

Held: (1) The Emergency Powers (Collective Punishment) Regulations, 1955, were not *ultra vires* the Emergency Powers Orders in Council, 1939 and 1952.

(2) The provisions of Regulation 13 of the Emergency Powers (Collective Punishment) Regulations 1955, that an order made by the Commissioner under Regulation 3 shall be final and no appeal shall lie, did not preclude the Supreme Court from quashing an order upon an application for *certiorari*.

* These Regulations were revoked on December 19, 1956.

(3) (*Per Hallinan C.J.*) : (*a*) It is beyond question good law that *certiorari* does not issue to control ministerial acts, and in the present case the Commissioner when making an order under Regulation 3 was acting ministerially and not judicially.

(*b*) Where a power is given to an official to do a ministerial act and he fails to comply with the statutory provisions which are conditions precedent to the exercise of such power then his order may not be challenged by *certiorari* but by an action for a declaration.

(*c*) Consequently, the application for *certiorari* in this case was misconceived and the prerogative order of *certiorari* could not issue to control it.

(4) (*Per Hallinan C.J.*): (*a*) The trial Judge misconceived the nature of the enquiry. The Commissioner had a duty to enquire into the facts and circumstances giving rise to the order. The confidential reports and information were part of his enquiry into the facts and circumstances, but there was nothing in the Regulations which prescribed that the enquiry should be a public one. The very nature of the emergency which gave rise to the Regulations might well make it necessary for the Commissioner's enquiries to be confidential.

(*b*) The phrase " subject matter of the enquiry " in Regulation 5 (2) did not mean the same thing as " the facts and circumstances giving rise to the order "; and the Commissioner was not, therefore, bound to disclose to the inhabitants the facts and circumstances giving rise to the imposition of the fine, but only to make a brief statement of the subject matter of the enquiry.

(*c*) What the Court was asked to say was not whether the procedure of the Commissioner was contrary to natural justice but whether he did what was required of him by the Regulations ; and the measures taken by the Commissioner to notify the inhabitants were sufficient to comply with the Regulations.

Consequently the order to bring up and quash the Commissioner's order should be set aside.

(5) (*Per Zannetides J.*) : The Commissioner was bound to act judicially if he were to comply with what Regulation 5 prescribed. His order under Regulation 3 was not a ministerial act but a judicial or quasi—judicial act, and *certiorari* could, therefore, issue to control it.

(6) (*Per Zannetides J.*) : (*a*) The words " subject matter of the enquiry " in Regulation 5 (2) meant the facts and circumstances giving rise to the making of the order ;

(*b*) The enquiry under Regulation 5 need not be a public enquiry or an enquiry at which all the inhabitants would have the right to be present.

(c) The Commissioner ought to give to the inhabitants sufficient facts and circumstances of the outrages committed and sufficient facts and circumstances showing that they were collectively liable. He failed to do so and he, therefore, failed to comply with the provisions of Regulation 5.

Consequently, the Commissioner's order was bad and it ought to be quashed

As the Court stood evenly divided the decision of Zekia J. (1956) 21 *C.L.R.* 193 *must stand*

[**Editor's Note** : The Judicial Committee of the Privy Council, after admitting further affidavit evidence, allowed the appeal of the Commissioner of Limassol (appellant) from the judgment of the Supreme Court of Cyprus in its appellate jurisdiction. The judgment of the Judicial Committee delivered on the 17th March, 1958, will be reported in the next volume of the Cyprus Law Reports] .

Cases referred to :

(1) *R.* v. *Halliday* (1917) A.C., 260.

(2) *Liversidge* v. *Anderson* (1942) A.C., 206.

(3) *Errington* v. *Minister of Health* (1935) 1 K.B., 249.

(4) *Robinson* v. *Minister of Town and Country Planning* (1947) K.B. 702, C.A.; (1947) 1 All E.R. 851.

(5) *Franklin and others* v. *Minister of Town and Country Planning* (1948) A.C. 87, H.L.; (1947) 2 All E.R.. 289 H.L.

(6) *Patterson* v. *District Commissioner of Accra and another* (1948) A.C. 341.

(7) *Local Government Board* v. *Arlidge* (1915) A.C. 120.

(8) *Franklin* v. *Minister of Town and Country Planning* (1947) 1 All E.R. 612, C.A.

(9) *Ezekias Papaioannou and others* v. *Superintendent of Prisons* (1956) 21 C.L.R. 134.

Appeal.

Appeal from a decision of Zekia J., dated the 15th December, 1956, quashing upon an application for *certiorari* (Application No. 16/1956), an order made by the Commissioner of Limassol on the 4th July, 1956, that a fine of £35,000 be levied collectively on the assessable Greek-Cypriot inhabitants of the area of the municipality of Limassol under the provisions of Regulation 3 of the Emergency Powers (Collective Punishment) Regulations, 1955, to (No. 1) 1955.

The facts appear in the judgment of Hallinan C.J.

Sir James Henry, Q.C., Attorney-General, with *R. R. Denktash*, Crown Counsel, for the appellant.

Sir Panayiotis Cacoyannis, *J. Potamitis* and *Chrysses Demetriades* for the respondents.

Cur. adv. vult.

Mar. 8, 1957. The following judgments were read:

HALLINAN C.J.: This is an appeal from the decision of Mr. Justice Zekia quashing, upon an application for *certiorari*, an order made by the Commissioner of Limassol on the 4th July, 1956, that a fine of £35,000 be levied collectively on the assessable Greek Cypriot inhabitants of Limassol.

The Commissioner made the order under the Emergency Powers (Collective Punishment) Regulations, 1955. These Regulations were made by the Governor under the Emergency Powers Orders in Council, 1939 and 1952. Three issues were considered upon the hearing of the application for *certiorari*. The first two were submitted by the applicants and the third by the respondent. The first issue was whether the Regulations of 1955 were *ultra vires* the Emergency Powers Orders in Council, 1939 and 1952. The second issue was whether the order of the Commissioner was bad because before making his order under Regulation 3 of the Regulations of 1955 he had failed to comply with the provisions of Regulation 5 as to the holding of an enquiry. And the third issue which was argued for the respondent was that under Regulation 13 any order made under the Regulations is final and not appealable and, therefore, a *certiorari* does not lie.

The learned trial Judge held that the provisions of Regulation 13 did not preclude the Supreme Court from controlling the order of the Commissioner by *certiorari*; and as regards the first and second issues he held that, although the Regulations of 1955 were not *ultra vires* the Emergency Powers Orders in Council, the Commissioner had not held an enquiry in the nature of the one contemplated by Regulation (5) (1) and that, since this enquiry was a condition precedent to the making of this order, an order of *certiorari* must issue to quash the Commissioner's order.

It is convenient to deal quite shortly with the first and third issues and then to consider at some length the much more difficult issue as to whether the Commissioner failed to hold the enquiry under Regulation 5 (1). In my view the decision of the learned Judge that Regulation 13 is not a bar to proceedings for *certiorari* is correct. The Regulation bars the right of appeal but does not preclude the Supreme Court from reviewing and controlling the order of the Commissioner by *certiorari* if it was established

that he was acting judicially. I also consider that the learned judge was correct in holding that the Regulations of 1955 were not *ultra vires* the Emergency Powers Orders in Council. Section 6 (1) of the Order of the Emergency Powers Order in Council, 1939, provides : " The Governor may make such regulations as appear to him necessary and expedient for securing public safety, the defence of the country, the maintenance of public order and the suppression of mutiny, rebellion and riot and for maintaining supplies and services essential for the life of the community ". Sub-paragraph 2 provides that, without prejudice to the generality of the powers conferred by the preceding sub-section, certain powers are expressly conferred on the Governor to make regulations including in paragraph 6 powers to provide for the apprehension, trial and punishment of persons offending against the Regulations. It was submitted by Counsel for the applicants that no Regulations under the Orders in Council can be made by virtue of sub-section 6 (1) which are inconsistent with the powers conferred under section 6 (2) and that it is contrary to sub-section 2 (*g*) that the inhabitants of Limassol should be punished without trial. I am unable to accept this submission. There is nothing in the paragraph which makes it necessaey that the regulation must provide for trial as well as punishment for, if this was so, logically no person could be punished unless he was apprehended first as well as tried. The argument ultimately rests not on the provisions of paragraph (*g*) but on the fundamental rights of the British subjects under the Magna Carta and the British Constitutional Law. This matter was considered in *R.* v. *Halliday*, 1917 Appeal Cases, 260, where the power to make a regulation for the detention of persons without a charge or trial under the Defence of the Realm Consolidation Act, 1914, was challenged as *ultra vires*. It was held in the House of Lords that the regulations were not *ultra vires* and that Parliament had the undoubted right to alter even the most fundamental laws of the constitution and had done so for the safety of the State. Under Regulation 7 of the Emergency Powers (Collective Punishment) Regulations, 1955, the proceeds of any fine must, under the Regulations, be paid to any person who suffered injury or loss or damage to his property unlawfully in the area ; and Regulation 4 provides that after the payment of any such compensation the balance of the fine so levied shall be applied to such purposes in the district as the Governor may direct. The imposition of such a fine and the way in which they are to be applied is a far less drastic interference with constitutional rights than the deprivation of the personal liberty under a detention order.

Before considering the second issue as to whether the Commissioner complied with the provisions of Regulation 5, I shall discuss a very important matter argued on this

appeal which apparently was not argued before the learned judge.

The Attorney-General submitted for the appellant that the acts which the Commissioner is required to do when making an Order under the Regulations of 1955 are ministerial and not judicial acts and, therefore, *certiorari* cannot lie to control them. It is beyond question good law that *certiorari* does not issue to control ministerial acts and, in my view, the Commissioner when making an order under Regulation 3 was acting ministerially. The Regulations of 1955 are made to meet a grave threat to law and order occasioned by organized terrorism in Cyprus; and the circumstances giving rise to the making of the regulations are the same as those which require the making of the principal regulations, namely, the Emergency Powers (Public Safety and Order) Regulations, 1955. Under Regulation 6 of these principal regulations if the Governor has reasonable cause to believe certain facts concerning a person, he may issue an order for that person to be detained. It has been already held by the Supreme Court that, following the decision in the House of Lords in *Liversidge* v. *Anderson* (1942) A.C. 206, such detention orders made by the Governor are ministerial acts. Taking Regulation 3 of the Emergency Powers (Collective Punishment) Regulations, 1955, by itself, apart from the provisions of Regulation 5, I am clearly of opinion that an order made under this regulation is purely ministerial. I also consider that where a power is given to an official to do a ministerial act and he fails to comply with the statutory provisions which are conditions precedent to the exercise of such power, then this order may not be challenged by *certiorari* but by an action for a declaration. I note in 11 Halsbury, 3rd edition, at p. 54, para. 111, it is stated: "It is possible to bring before the Court by means of an action for a declaration the question whether any administrative or executive action or decision taken or given in purported pursuance of a power conferred by statute . . . was *ultra vires*." If the enquiry prescribed by Regulation 5 had been a *lis* between two parties, then the Commissioner might have to act judicially in considering the report of the enquiry before making his order. This is the type of case illustrated in *Errington* v. *The Minister of Health* (1935) 1 K.B., 249, referred to in 11 Halsbury, p. 56, para 114, note (c). But the present case is of the type of cases referred to in the following note (d). In this latter type of case there is no *lis* between a local authority and an objector but the minister himself is the proposer; to cite from Halsbury's note: "The minister or other official who makes a decision in exercise of his statutory duty cannot be himself considered as 'quasi-litigant' *vis-a-vis* objectors." Since the Commissioner when making an order under Regulation 3 had not to consider judicially the report of the enquiry

under Regulation 5 his order remained ministerial in character.

The learned judge cites a passage from the judgment of Lord Greene in *Robinson* v. *The Minister of Town and Country Planning* (1947), K.B. 702, at p. 716 and 717 : I was at first puzzled by the fact that in Robinson's case the making of the order was held to be a ministerial act and yet in the citation from Lord Greene's judgment underlined by the learned Judge it was suggested that the Court could nevertheless control the minister if he had not complied with the statute in exercising his powers. On reading this passage I assumed, as I think the learned Judge must have done, that the application in Robinson's case and in the case of *Franklin and others* v. *The Minister of Town and Country Planning* (1947) 2 All E.R. 289 was for *certiorari*. However, it is clear from Lord Greene's judgment that the application was under section 16 of the Town and Country Planning Act, 1944. This section provides that any person aggrieved by an order made under the Act, that any requirement of the Act or that any regulation made under it has not been complied with, may make an application to the High Court ; and the Court, if satisfied that this is so, may quash the order. This section 16 was incorporated by reference into the New Towns Act, 1946, and again the application in Franklin's case was under that section. Upon an application under this section, even though the act was ministerial, the order could be quashed if some statutory provision under the Acts of 1944 or 1946 had not been complied with. But where the application is for *certiorari*, as I have already stated, this prerogative order cannot issue to control a ministerial act. The learned judge's failure to appreciate this distinction is all the more readily understood since the question of whether the Commissioner's order was a ministerial or judicial act does not appear to have been argued before him ; nor indeed was it one of the grounds of appeal, but we consider that it is an issue which should be argued and we are prepared to allow the grounds of appeal to be amended as we have allowed this matter to be argued upon hearing of the appeal.

For the reasons I have stated, in my view, the application for *certiorari* in this case was misconceived as the order of the Commissioner under Regulation 3 was a ministerial act and the prerogative order of *certiorari* cannot issue to control it.

Although my conclusion that the order was a ministerial act disposes of the appeal, I am unable to agree with the learned judge that the Commissioner failed to comply with the provisions of Regulation 5 (1) as to his holding an enquiry, and would allow the appeal also on this ground.

Regulation 3 provides *inter alia* that if an offence is committed within a certain area and the Commissioner has reason to believe that all or any of the inhabitants of the area are in some way responsible for the commission of such offences (and the ways in which they may be responsible are enumerated) the Commissioner with the approval of the Governor may *inter alia* order that a collective fine be levied on the inhabitants of the area. Regulation 5, which is the regulation most in question on the present issue, is as follows :—

" 5 (1). No order shall be made under Regulation 3 of these Regulations unless an enquiry into the facts and circumstances giving rise to such order has been held by the Commissioner.

(2) In holding enquiries under these Regulations the Commissioner shall satisfy himself that the inhabitants of the said area are given adequate opportunity of understanding the subject-matter of the enquiry and making representations thereon, and, subject thereto, such enquiry shall be conducted in such manner as the Commissioner thinks fit.

(3) A written report of any enquiry shall be submitted to the Governor as soon as possible after the completion thereof, and shall contain a certificate that the requirements of this regulation have been complied with."

The applicants' ground for submitting that there was non-compliance with the provisions of Regulation 5 (1) is contained in paragraph 8 of the affidavit of Mr. Papadopoulos of Limassol dated 20th November, 1956 :

" The defendant failed to hold such an enquiry into the facts and circumstances giving rise to the above Order as could reasonably satisfy the Commissioner that the inhabitants of the area of the Municipality of Limassol were given adequate opportunity of understanding the subject-matter of such enquiry and making representations thereon. In fact the Commissioner summoned a meeting at the office of the Commissioner of Limassol to which only the Greek Members of the Council of the Municipality of Limassol and the Greek Mukhtars and Azas of the Limassol town were invited to attend. Such meeting was held and attended by me, 5 Greek Municipal Councillors and the Greek Mukhtars and Azas of the town of Limassol to whom the Commissioner spoke about certain murders and other offences committed in Limassol and added that he was determined to impose a collective fine unless cause was shown to the contrary. Then all those present were asked by the Commissioner to show cause why a collective fine should not be levied on the assessable inhabitants of the area of the Municipality of Limassol and the reply was that the imposition of a collective

fine would be unjustified, unwarranted and anachronistic. None of the above persons represented or claimed to represent the Greek-Cypriot assessable inhabitants of the area of the Municipality of Limassol in the above matter nor have they undertaken or accepted to communicate anything conveyed to them at the above meeting to the assessable inhabitants of Limassol nor have they done so.

Furthermore, according to information received from Haralambos Hadji Arabis of Limassol, one of the said Mukhtars, the great majority of the said Greek Mukhtars (including the said Haralambos Hadji Arabis) and Azas of the Town of Limassol had resigned their office as such and ceased to exercise their powers and duties under the Village Authorities Law long before the said meeting."

What took place prior to the Commissioner's meeting with the Mukhtars and Azas is narrated in paragraphs 3 and 4 of the Commissioner's affidavit of the 4th December, 1956 :

"In my official capacity I followed six murders, ten attempted murders and a great number of bomb outrages, causing two other deaths and damage to property, which took place in the Limassol town during the six or seven months prior to July, 1956, and came to know, through confidential reports and information, that a great many of the Greek inhabitants living and working within the municipal limits of Limassol were in a position to identify the persons committing these outrages, but were wilfully abstaining from doing so and that a great number of the remaining Greek inhabitants were either actively or passively encouraging others to abstain from giving useful information to the Authorities. I was convinced that with the full co-operation of the Greek inhabitants of the town such outrages would not have taken place or remain undetected.

4. After due consideration of the situation, I invited in writing the 6 Greek Municipal Councillors (including the Deputy Mayor) and 9 Greek Mukhtars and 27 Azas of the various quarters of the town of Limassol to attend a meeting in my office on the 11th of June, 1956, at 4 p.m., informing them that the enquiry would be under Regulation 5 of the Emergency Powers (Collective Punishment) Regulations, 1955. I should point out that these were the Greek authorities appointed and elected of the town of Limassol and there were no other persons qualified to represent its Greek inhabitants. In reply to the last sentence of paragraph 8 of Dr. Papadopoulos' affidavit I say that the resignation of the persons therein mentioned has never been accepted."

The Commissioner here refers to section 6 of the Village Authorities Law (Cap. 256) which provides that Mukhtars and Azas may resign their office with the consent in writing of the Governor. The opportunity given by the Commissioner to the inhabitants to understand the subject-matter of the enquiry and make representations thereon is described by the Commissioner in paragraphs 5 to 8 of his affidavit as follows :

" 5. Publicity was given to the fact that such an enquiry was to be carried out on the 11th of June, 1956, through the local representatives of the Greek press.

6. On the 11th of June at the time and place appointed the above-mentioned Councillors, Mukhtars and Azas appeared. All local representatives of the Greek press were also there.

7. I informed the meeting that I was holding this public inquiry with a view to deciding whether I should recommend to His Excellency the Governor the levying of a fine on the Greek inhabitants of the town in respect of a long list of outrages which had occurred within the town since January 1st, 1956. I invited them to show cause why a fine should not be imposed. After discussion I came to the conclusion that no cause was shown and I accordingly told them that I was not satisfied with their representations and asked them to inform their co-inhabitants as widely as possible of what had transpired at the meeting and suggested that if there was any person or group of persons wishing to make further representations they could do so through the elected Municipal Councillors.

8. The enquiry was fully reported in all Greek papers and the invitation for further representations was given full publicity. There is now produced and shown to me marked " A " the translation of an extract from the Greek paper ETHNOS dated the 12th June, 1956."

The Commissioner, however, also gives particulars of numerous representations which he received from groups of people representing localities, quarters and associations.

The decision and reasons of the learned Judge on this question of compliance or non-compliance with the provisions of the regulations are contained in the following passage of the judgment :

" Regulation 5 (1) read in conjunction with Regulation 5 (2) in my view leaves no room for doubt that the enquiry to be held under paragraph 1 of Regulation 5 is intended to be a public one or at any rate an enquiry

in which the affected assessable inhabitants of the particular area would have a right to be present and follow it and take part if they wish to do so at some time or other in the proceedings. In my opinion Regulation 5 (1) is not susceptible of another interpretation.

If it is desired—and I have no hesitation that it is so—that persons called upon to pay a fine under these Regulations shall be given a fair chance to understand the reason why they are to pay such a fine in order that they may be able to make their representations, surely the facts and circumstances giving rise to the imposition of fine should be disclosed to them. No evidence need be given. The facts and circumstances should be related to one or more of the grounds specified in Regulation 3. It is not sufficient and it does not amount to a statement of facts and circumstances giving rise to an order to simply mention that a number of murders and outrages have been committed between such and such a date and to invite the inhabitants to show cause why a fine should not be imposed on them."

The first question that arises in considering Regulation 5 is whether this enquiry is a judicial act. Apart from the provisions requiring the Commissioner to give the inhabitants adequate opportunity of understanding the subject-matter of the enquiry and making representations I do not think he was discharging judicial functions. There is no *lis* between parties, and the enquiry requires a report but not a decision, for the decision is made under Regulation 3 which as I have stated is a ministerial act. In *Patterson* v. *District Commissioner of Accra and another* (1948) A.C. 341, a Peace Preservation Ordinance of the Gold Coast provided that the District Commissioner within whose district any portion of a proclaimed district is, shall, after inquiry, if necessary, assess the proportion in which such cost is to be paid by the said inhabitants according to his judgment of their respective means. This was held by the Privy Council to be a ministerial act even though Patterson had admittedly been deprived of part of his property without having had the opportunity of being heard. In the present case apart from the requirements of "adequate opportunity" already mentioned the Commissioner had merely to enquire into the facts and circumstances giving rise to the order and conduct an enquiry in such a manner as he thought fit. I would agree that when the Commissioner proceeds to give the inhabitants the adequate opportunity I have mentioned he is embarking on a judicial act, were it not for the phrase "The Commissioner shall satisfy himself". Unless this phrase is interpreted as applying a subjective test of compliance, it is difficult to see what meaning it can have in paragraph 2; if the test is subjective then the Court cannot go behind

the Commissioner's own statement that he has satisfied himself. However, I am prepared to assume that the phrase should be interpreted according to the objective test and that it is for the Court to say whether he had in fact reasonable grounds for being satisfied that the inhabitants had the "adequate opportunity" required in that paragraph.

As I understand the learned judge's judgment, the Commissioner failed in two ways to comply with Regulation 5: First, because the enquiry should have been a public one at which the assessable inhabitants had the right to be present and take part if they wished to do so; and, secondly, that he did not disclose to these inhabitants the facts and circumstances giving rise to the imposition of the fine.

As regards the first point I think the learned judge has misconceived the nature of the enquiry. The Commissioner had a duty to enquire into the facts and circumstances giving rise to the order. In my view the confidential reports and information, to which the Commissioner refers in paragraph 3 of his affidavit, is part of his enquiry into the facts and circumstances and these reports and information need not be given to him publicly before the inhabitants. There is nothing in the regulations which prescribes that the enquiry shall be public. The very nature of the emergency which gave rise to the regulations may well make it necessary for the Commissioner's enquiries to be confidential. The decision in the House of Lords in the *Local Government Board* v. *Arlidge* (1915) A.C. 120, is ample authority for the proposition that natural justice does not require an administrative officer when acting judicially to have the parties present before him. At page 138 Lord Shaw of Dunfermline said:

> "But that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation. And the assumption that the methods of natural justice are "ex necessitate" those of Courts of Justice is wholly unfounded."

As regards the second way in which the Commissioner is alleged not to have complied with Regulation 5, the learned Judge appears to have considered that the phrase "subject-matter of the enquiry" means the same thing as "the facts and circumstances giving rise to the order." With respect I do not think this somewhat vague phrase should be stretched so wide. In the Shorter Oxford English Dictionary under the word "subject" in its third meaning there appears the following: "That which forms or is chosen as the matter of thought, consideration or enquiry; at opic, theme". Commissioners and Judicial Officers might differ as to what the brief statement of the subject-matter of an enquiry should contain but I am

unable to hold that as a matter of law the Commissioner erred when he interpreted the phrase the " subject-matter of an enquiry " to mean that he was enquiring into a long list of outrages which had occurred within the town since the 1st of January, 1956, and that he proposed to hold the inhabitants of the town responsible and to levy a fine upon them under the Regulations of 1955, which had been published in the official *Gazette* and of whose provisions they presumably were aware.

In 25 Halsbury's Statutes, 2nd Edition, at p. 623, there is a note under section 104 of the Town and Country Planning Act, 1947, setting out the procedure of local enquiries. The inspector opens the local enquiry by making a brief statement as to the subject-matter of the enquiry. Where the minister is himself the promoter of the proposal, the inspector or the representative of the minister then makes a brief explanatory statement with reference to the draft order after which the objectors and other interested parties put their case. In 11 Halsbury, p. 65, paragraph 122, under the rubric " natural justice " at note (f), cases are cited where it was held that there was no obligation on the minister in considering objections to disclose to objectors the information obtained by him or material which came to his possession prior to the making of objections including information regarding the views of other Government departments. It must be remembered also that the Commissioner is complying with a specific statutory provision of a more restricted nature than the general consideration of natural justice. The learned judge's interpretation of the phrase " subject-matter " may, I think, have been induced by the judicial concept of natural justice which requires that a person acting judicially should give the parties a fair opportunity to correct the prejudicial statements made against them ; but here we are not asked to say whether the procedure of the Commissioner was contrary to natural justice but whether he did what was required of him by the regulations.

The learned judge not only considered that the facts and circumstances that have given rise to the order should have been disclosed but that these should have been related to one or more of the grounds specified in Regulation 3. Again I would respectfully say that I am unable to agree. The learned trial Judge appears to have assumed that the subject-matter of the enquiry should have been stated to the inhabitants almost with the particularity of a criminal charge. This is certainly not what the regulation requires and in fact, when stating the subject-matter of the enquiry to the inhabitants, the Commissioner need not in my view have made up his mind on which of the grounds specified in Regulation 3 his order would be based.

It is not entirely clear from the affidavit before the Court as to what precisely the Commissioner told the Mukhtars and Azas. The affidavit of Mr. Papadopoulos merely states that "The Commissioner spoke about certain murders and other offences committed in Limassol and added that he was determined to impose a collective fine unless cause was shown to the contrary". Neither the notice of motion or the facts stated in what respect the information given by the Commissioner fell short of what was required under Regulation 5 (2) and it is not surprising that the Commissioner should give nothing more than a summary of what he said to the meeting in paragraph 7 of his affidavit. In *Franklin* v. *The Minister of Town Planning* (1947), 1 All E.R. 612, which was an application to quash an order made by the minister on the ground of bias, Tucker, L.J., at 620 states: "When applications of this kind are made to the Court, the notice of motion and the affidavits in support thereof should state with precision and particularity the matters which are going to be relied on as indicating bias". Moreover I think that if the inhabitants considered that the statement of the subject-matter of the enquiry was insufficient to give them an opportunity of making representations they should have asked the Commissioner for further information, which in his discretion he might have given. In this connection, I cite a passage from the judgment of Lord Oaksey, L.J., in Franklin's case at p. 617:

> "Another point was raised before us. It was argued that the public inquiry which was held was not a proper public local inquiry within the meaning of para. 3 of Schedule I to the Act of 1946 because there had been at the inquiry no representative of the Minister of Town and Country Planning and no witnesses had been called on his behalf and the case for the designation of Stevenage had not been put. It was argued that in all analogous cases it had been held that the case for both sides must be put forward before the inspector who held the public local inquiry. The point that the inquiry was not being properly held was not taken at the inquiry, as, in my opinion, it ought to have been taken if the point was going to be raised on appeal. All that was done was that it was suggested to the inspector at the inquiry that witnesses ought to be called in support of the draft order, but it was never suggested that, on the true construction of the New Towns Act, the inquiry was not being properly held".

It was also argued on behalf of the applicants for *certiorari* that the inhabitants of the area had not been properly notified of their right to make representations. As he based his finding that the Commissioner had not complied with Regulation 5 on other grounds, the learned judge did not consider it necessary to go into this question.

He was content merely to make the following comment: "I can only say that the Commissioner is entitled to a great latitude and unless in his methods he manifestly frustrates the object of the section under review his action cannot be challenged".

In my view the measures taken by the Commissioner as disclosed by his affidavit to notify the inhabitants were sufficient to comply with the regulation and the Greek Cypriot Mukhtars and Azas who attended the meeting were, in my view, if not under a legal duty, at least had a civic duty to communicate and make public to the inhabitants the information given to them by the Commissioner. They failed to do their duty as citizens when they obstructed him in his endeavours to comply with the provisions of Regulation 5.

For the reasons stated in this judgment I consider that this appeal should be allowed, that the cross-appeal should be dismissed and that the order to bring up and quash the Commissioner's order should be set aside.

However, as my learned brother in his judgment, which he will now deliver, is of opinion that both the appeal and the cross-appeal should be dismissed, this Court stands evenly divided, and the decision appealed against must stand. There will be no order as to costs.

ZANNETIDES J.: The points which fall for consideration and decision in these two appeals—the appeal and the cross-appeal—are the following three: Two in the appeal and one in the cross-appeal. The two in the appeal are: First, whether the order made by the District Commissioner of Limassol is final and it cannot be brought up by *certiorari* in the Supreme Court and questioned in view of Regulation 13 of the Emergency Powers (Collective Punishment) Regulations, 1955, which I will call hereafter "Regulations". Secondly, whether the District Commissioner in making that order complied with the requirements of the Regulations and particularly of Regulation 5 and, if he did not, what would be the effect of the non-compliance. The point raised in the cross-appeal is whether the whole of the "Regulations" made by the Governor are *ultra vires* the Governor having regard to the powers given to him by the Emergency Powers (Orders in Council), 1939 and 1956, under which the said Regulations were made. A fourth point, although not taken before Zekia, J. and not contained in the Notice of Appeal, was put forward and argued before us by the Attorney-General on behalf of the appellant, namely, whether the District Commissioner in acting under the Regulations and making the order was performing a quasi-judicial act or a ministerial act.

For the sake of convenience I will take the four points in the following order: First the point in the cross-appeal, *i.e.* whether the whole of the Regulations are *ultra vires*

the Governor. The answer to this point is given by the construction to be put and the scope of section 6 of the Emergency Powers (Order in Council), 1939 and 1956. Section 6 runs as follows :

"(1) The Governor may make such Regulations as appear to him to be necessary or expedient for securing the public safety, the defence of the territory, the maintenance of public order and the suppression of mutiny, rebellion and riot, and for maintaining supplies and services essential to the life of the community.

(2) Without prejudice to the generality of the powers conferred by the preceding sub-section, the Regulations may, so far as it appears to the Governor to be necessary or expedient for any of the purposes mentioned in that sub-section :—

(*a*) make provision for the detention of persons

. . . . . .

(*b*) provide for the apprehension, trial and punishment of persons offending against the Regulations :

Provided that nothing in this section shall authorize the making of provision for the trial of persons by Military Courts".

In my view sub-section 1 is comprehensive enough as to include the making of the Regulations under consideration within the powers given to the Governor by that sub-section. The only limitation to the powers of the Governor is the limitation by the proviso to the section, namely, that he is not authorised to make provision for the trial of persons by Military Courts. The argument put forward by the respondents that the powers given in sub-section 1 are governed and limited by paragraph (*g*) of sub-section 2 cannot stand : that paragraph, in my opinion, has nothing to do with and cannot help to construe nor does it limit the powers given in sub-section 1 : in my view the decision of the learned trial judge that the Regulations were not *ultra vires* the Governor is correct and the cross-appeal fails.

The second point is whether the order of the District Commissioner is final and cannot be brought up by *certiorari* into the Supreme Court and questioned in view of Regulation 13. On this point too I am of the opinion that the learned trial Judge came to the right conclusion that *certiorari* was not taken away by Regulation 13. It is correct that the right of appeal is taken away by Regulation 13, but the common law right of *certiorari* is never taken away except by express negative words and the appeal, therefore, fails on that point too.

The third point is as to whether the Commissioner in acting under the Regulations and making the order complied with the Regulations and particularly with Regulations 3 and 5. Regulation 3 of the Regulations runs as follows :—

> " If an offence has been committed or loss of, or damage to, property has occurred within any area of the Colony (hereinafter referred to as " the said area ") and the Commissioner has reason to believe that the inhabitants of the said area have . . . . . "

(and then it goes on to enumerate 7 acts or omissions by the inhabitants and proceeds as follows) :—

> " . . . . it shall be lawful for the Commissioner, with the approval of the Governor, to take all or any of the following actions :—
>
> (i) to order that a fine be levied collectively on the assessable inhabitants of the said area, or any part thereof ;
>
> (ii) . . . . . .
>
> (iii) . . . . . .
>
> (iv) . . . . . "

I need no mention the other actions because we are concerned only in this case with the levying of a collective fine. Regulation 5 is as follows :—

> " (1) No order shall be made under Regulation 3 of these Regulations unless an enquiry into the facts and circumstances giving rise to such order has been held by the Commissioner.
>
> (2) In holding enquiries under these Regulations the Commissioner shall satisfy himself that the inhabitants of the said area are given adequate opportunity of understanding the subject-matter of the enquiry and making representations thereon, and, subject thereto, such enquiry shall be conducted in such manner as the Commissioner thinks fit."

The provision of these two Regulations must be read together. Regulation 3 gives power to the District Commissioner and enumerates the cases in which he can take a certain action and make an order and Regulation 5 prescribes what he is bound to do before he takes that action. To my mind the proper approach to the question is to try and give to these two Regulations their proper construction and after doing that to try to apply them to the facts of the present case. For the District Commissioner to start taking action there must be first the commission of an offence as defined in Regulation 2 or damage to property within his area. Then he must have reasons to believe that the inhabitants of the area have committed any of the acts or omissions enumerated in

Regulation 3, but he must under Regulation 5 hold an enquiry into the facts and circumstances giving rise to the making of the order. In holding this enquiry he must make sure than the inhabitants of the area are given adequate opportunity of understanding the subject-matter of the enquiry and making representations thereon and subject to this condition the manner of the enquiry is left to his discretion. It is obvious that the enquiry is not at an end until after the consideration by the Commissioner of possible representations. What are the facts and circumstances giving rise to the making of the order for which the Commissioner is bound under Regulation 5 (1) to hold an enquiry ? To my mind they are : First, the fact of the commission of an offence as defined by Regulation 2 or damage to property and also the facts from which the Commissioner will infer and on the strength of which he will have reasons to believe that the inhabitants of the area are guilty of one or more of the acts or omissions enumerated in section 3. Going now to Regulation 5 (2), what do the words " subject-matter of the enquiry " mean ? To my mind the words " subject-matter of the enquiry " mean the facts and circumstances giving rise to the making of the order. In other words the facts and circumstances of the commission of an offence or damage to property and the facts and circumstances fixing the inhabitants, in the belief of the Commissioner, with a collective liability ; until the inhabitants are furnished with that information I fail to see how they will be able to make representations on the subject-matter of an enquiry as they are entitled to do by Regulation 5 (2). As to the manner in which the enquiry is to be held, that is left by Regulation 5 (2) to the discretion of the Commissioner with one condition, that in holding the enquiry he shall be satisfied that the inhabitants are given adequate opportunity of understanding the subject-matter of the enquiry and making representations thereon. It is clear that the holding of the enquiry is a condition that must precede the making of the order.

Having thus endeavoured to construe the relevant regulation I must now see what the District Commissioner did in the present case. I take the material from his own affidavit (paragraphs 3 to 7) and from the affidavit of Mr. Vassos Papadopoulos, one of the respondents, at paragraph 8.

In paragraph 3 of his affidavit the Commissioner states :—

> " In my official capacity I followed six murders, ten attempted murders and a great number of bomb outrages, causing two other deaths and damage to property, which took place in the Limassol town during the six or seven months prior to July 1956 and came

to know, through confidential reports and information, that a great many of the Greek inhabitants living and working within the municipal limits of Limassol were in a position to identify the persons committing these outrages, but were wilfully abstaining from doing so and that a great number of the remaining Greek inhabitants were either actively or passively encouraging others to abstain from giving useful information to the Authorities. I was convinced that with the full co-operation of the Greek inhabitants of the town such outrages would not have taken place or remain undetected".

In paragraph 4 he says that he invited in writing the Greek local and municipal authorities in the town to attend a meeting at his office on the 11th June, 1956, at 4 p.m., informing them that there was to be held an enquiry under Regulation 5 of the Regulations. In paragraph 6 he states that they all appeared at the appointed day and time and in paragraph 7 he goes on to give a description of what had taken place at that meeting. This paragraph runs as follows:

> "I informed the meeting that I was holding this public inquiry with a view to deciding whether I should recommend to His Excellency the Governor the levying of a fine on the Greek inhabitants of the town in respect of a long list of outrages which had occurred within the town since January the 1st, 1956. I invited them to show cause why a fine should not be imposed. After discussion I came to the conclusion that no cause was shown and I accordingly told them that I was not satisfied with their representations and asked them to inform their co-inhabitants as widely as possible of what had transpired at the meeting and suggested that if there was any person or group of persons wishing to make further representations they could do so through the elected Municipal Councillors".

It is clear from this paragraph that what the Commissioner did was to inform them that he was holding a public enquiry with a view to deciding whether to levy a fine on the Greek inhabitants of Limassol collectively in respect of a long list of outrages which had occurred and he invited them to show cause why a fine should not be imposed. And he goes on to say that after discussions he came to the conclusion that no cause was shown. It is not stated by the Commissioner what the discussions were about but it may be reasonably inferred from paragraph 8 of Mr. Papadopoulos' affidavit that the discussion was not about the subject-matter of the enquiry but on the disclaimer by them of any representative capacity of the Greek inhabitants and in fact they were unco-operative. They did not even undertake to convey to the Greek

inhabitants what the Commissioner had told them at this meeting as it is stated in paragraph 8 of his affidavit.

With regard to the subject-matter of the enquiry Mr. Papadopoulos states that " . . . the Commissioner spoke about certain murders and other offences committed in Limassol and added that he was determined to impose a collective fine unless cause was shown to the contrary . . . ". It is clear from paragraph 7 of the Commissioner's affidavit and paragraph 8 of Mr. Papadopoulos' affidavit that nothing was said about the facts and circumstances of the outrages and the facts and circumstances of the acts or omissions of the inhabitants making them collectively liable. The Commissioner states in his paragraph 9 of his affidavit that after the enquiry he received some representations from various people but there is nothing to show whether they were representations regarding the subject-matter of the enquiry or whether they were complaints of a general character, regarding the propriety and justice of the Order. The Commissioner eventually submitted his report with the statutory certificate and with the Governor's approval issued his order dated the 4th July, 1956, in which he ordered that a fine of £35,000 be levied collectively on the Greek assessable inhabitants of Limassol. In this order he is fixing the inhabitants with a collective liability for having failed to take reasonable steps to prevent the commission of offence and as having failed to render all the assistance in their power to discover the offenders, bringing them within paragraphs (*c*) and (*d*) of Regulation 3. These are the facts.

Having stated the facts, it is appropriate now to see whether the Regulations and particularly Regulation 5 as construed applies to the facts of the case. As to the manner of the enquiry I would not go so far as the trial Judge did to say that it should be a public enquiry or an enquiry at which all the inhabitants would have the right to be present and follow it. The enquiry is to be conducted in the manner the Commissioner thinks fit. I would not also say that the knowledge he obtained through confidential reports and information as he states in paragraph 3 of his affidavit is not part of the enquiry ; that would be the beginning of the enquiry. At a later stage the District Commissioner, as he was perfectly entitled to do, called a meeting of the local and municipal representatives of the Greek inhabitants at his office which he called a public enquiry. It was not unreasonable for him to think that the Greek inhabitants were not inadequately represented. But where the Commissioner went wrong to my mind is that he failed at that meeting to enquire into the facts and circumstances of the case and thus give to those gathered there and consequently to the inhabitants adequate opportunity of understanding the subject-matter of the

enquiry and making representations thereon. It is true that in his affidavit, paragraph 12, he states that he did so. Had he been stating about the state of his own mind I may grant that this statement of paragraph 12 might be conclusive evidence as to the facts in the absence of *mala fides*, but here the Commissioner is stating about the state of mind of other people and the position is not analogous to the position of the Governor when making a detention order under Regulation 6 of the Emergency Powers (Public Safety and Order) Regulations, 1955, in which as it was decided by this Court, in Civil Appeals No. 4173—4176* that when the good faith of the Governor was admitted a statement by him that he brought his mind to bear on the circumstances of the case and that in his opinion a detention order should be made was the end to the whole thing and the facts and circumstances that made him act could not be enquired into.

As I said in dealing with the construction of Regulation 5 (2) I take the words " subject-matter of the enquiry " to mean the facts and circumstances giving rise to the making of the order as provided in Regulation 5 (1). Here the Commissioner did not tell them anything about it. What he told them is contained in paragraph 7 of his affidavit and paragraph 8 of Mr. Papadopoulos' affidavit. This is far from giving them adequate opportunity of understanding the subject-matter of the enquiry. I do not propose for a moment to hold that he was bound to give them all details and disclose to them confidential information and its source but I think that he ought to give them sufficient facts and circumstances of the outrages committed and sufficient facts and circumstances showing that they were collectively liable. They would then, and then only, be able to make representations on the enquiry. This the Commissioner did not do and I am of the opinion that he did not comply with Regulation 5 ; and, though I am deeply sorry that my opinion will have to differ from the opinion of My Lord the Chief Justice on this point, I am of the opinion that the order of the Commissioner was bad and the appeal must fail also on this point.

I will finally deal with the point raised by the Attorney-General before this Court for the first time, that is, whether the District Commissioner in acting under Regulations 3 and 5 of the Regulations and making the order was performing a quasi-judicial or a ministerial act, it being conceded that if it was a ministerial act *certiorari* did not lie. The proper approach of the question is, in my opinion, to consider the circumstances of the case and the construction of Regulations 3 and 5, assisted by the principle

* See *Ezekias Papaioannou and others* v. *Superintendent of Prisons* (1956) 21 C.L.R. 134.

enunciated in numerous English cases that *if a person has legal authority to determine questions affecting the rights of the subject and has a duty to act judicially his determination will be a judicial act.*

In our case the District Commissioner had legal authority under Regulation 3 to determine whether to levy a fine collectively on the inhabitants, in other words, to impose a penalty on them thus affecting not only their property but also their character.

Before making the order for the fine he was duty-bound by Regulation 5 to hold an inquiry into the facts and circumstances giving rise to the making of the order and, in holding the inquiry, give adequate opportunity to the inhabitants of understanding the subject-matter of the inquiry and making representations. He would then, and then only, make the order. The inquiry is a condition precedent to the order and throughout the process the District Commissioner, in my opinion, was bound to act judicially if he were to comply with what Regulation 5 prescribes. His order under Regulation 3, which was to come after the requirements of Regulation 5 had been complied with, cannot be regarded as a ministerial act done as a matter of policy but it is a judicial act. The cases of *Robinson and others* v. *Minister of Town and Country Planning* (1947) 1 All E.R. 851, and *Franklin and others* v. *Minister of Town and Country Planning* (1948) A.C. 87, cannot help us in our case.

The Court of Appeal in the former and the House of Lords in the latter decided that the order of the Minister was a ministerial act made as a matter of policy but the wording of the relevant sections of the Town and Planning Act, 1944, and the New Towns Act, 1946 was completely different from that or our Regulations 3 and 5. The inquiry to be held under those statutes was not into the facts and circumstances giving rise to the making of the order by the Minister; the order was drafted beforehand as a matter of general policy and the inquiry was into possible objections.

The case nearer to our case is the case of *Patterson* v. *the District Commissioner of Accra* (1948) A.C. 341, P.C. But in this case also the circumstances of the case and the wording of section 9 of the Peace Preservation Ordinance, which they were dealing with, were completely different and the decision of the Privy Council that the assessment by the District Commissioner was a ministerial act was mainly based on the wording of section 9.

Considering the circumstances of the present case and the wording of Regulations 3 and 5, I have come to the conclusion that I will have to differ on this point too from

the opinion of my Lord the Chief Justice and hold, as I have stated above, that the order made by the District Commissioner is a judicial or quasi-judicial act.

For all the reasons stated above both the appeal and the cross-appeal must, in my opinion, fail and must be dismissed.

As the Court stands evenly divided the decision of the lower Court must stand.