[TRIANTAFYLLIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

LEFCOS GEORGHIADES,

Applicant,

and

THE REPUBLIC OF CYPRUS, THROUGH
THE PUBLIC SERVICE COMMISSION,

Respondent.

(*Case No.* 179/69).

Constitutional Law—Public officer punished for disciplinary offences committed prior to the coming into operation of the Public Service Law 1967 (*Law No.* 33 *of* 1967)*—Allegation that such officer has been charged with, and punished for, offences (disciplinary) under said Law—Even assuming allegation to be correct, such disciplinary punishment still does not contravene the provisions of paragraph* 1 *of Article* 12 *of the Constitution safeguarding the principle nullum delictum (or crimen) sine lege—Disciplinary offences by public officers are outside the ambit of such paragraph the provisions of which clearly do not apply to such offences—Cf. European Convention of Human Rights of* 1950 *Article* 7(1) *(which Convention is in force in Cyprus by virtue of the European Convention of Human Rights (Ratification) Law* 1962 (*Law No.* 39 *of* 1962) *and Article* 169.3 *of our Constitution)—Cf. English and French texts of said Article* 7(1) *of the Convention.*

Disciplinary offences by public officers—Outside the ambit of Article 12.1 *of the Constitution as well as of Article* 7(1) *of the European Convention of Human Rights* 1950*—See, also,* supra.

Public Officers—Officer employed in the public service on contract—Still he is a "public officer" in the sense of the Public Service Law, 1967 (*Law No.* 33 *of* 1967)*—Sections* 2 *and* 32 *of the said Law.*

Public Service Law, 1967 (*Law No.* 33 *of* 1967)*—Disciplinary offences—Investigating officer appointed under the proviso to regulation* 1 *in Part I of the Second Schedule to the Law—Whether he has to be an officer of higher rank than the officer*

under investigation—Investigation not completed within the thirty days provided for in regulation 2 in Part I of the Second Schedule to the said Law—Still valid—Provisions of said regulation 2 being in the way of directive—See, also, herebelow.

Investigating Officer—Appointed under said regulation 1 (supra)—*Rules of natural justice not contravened merely because he as Counsel of the Republic had previously given legal advice in relation to one of the matters into which he later investigated.*

Statutes—Construction of—Proviso—Meaning and effect—Canon of construction to the effect that a statute should be construed as a whole applicable also to provisos.

Proviso—Effect of—Construction of—See hereabove under Statutes.

Words and Phrases—"Αδίκημα" *and "offence" in Article* 12.1 *of the Constitution—"Infraction" in the French text of Article* 7(1) *of the European Convention of Human Rights of* 1950—"Δημόσιος Υπάλληλος" (*Public officer*) *in sections* 2 *and* 32 *of the Public Service Law,* 1967 (*Law No.* 33 *of* 1967)—"Λειτουργὸς" *in regulation* 1 *in Part I of the Second Schedule to the Public Service Law,* 1967 (*Law No.* 33 *of* 1967).

In this recourse under Article 146 of the Constitution the Applicant complains against his demotion, by decision of the Respondent Public Service Commission dated April 30, 1969 to "Counsellor A" from the rank of "Ambassador" in the service of the Ministry of Foreign Affairs. It was argued on behalf of the Applicant that, *inter alia,* as he was, in effect charged with, and found guilty of disciplinary offences provided for under the Public Service Law, 1967 (Law No. 33 of 1967) and as the relevant events took place prior to the coming into force of the said Law, the *sub judice* decision should be annulled as being contrary to paragraph 1 of Article 12 of the Constitution. The said paragraph 1 of Article 12 provides:

> " No person shall be held guilty of any offence on account of any act or omission which did not constitute an offence under the law at the time when it was committed.....".

Various other points have been taken by counsel for the Applicant in relation to the appointment by the Council of Ministers, of Mr. P. Paschalis a counsel in the Legal Department of the Republic, as an Investigating Officer, under the Proviso to regulation 1 in Part I of the Second Schedule of the said

Public Service Law, 1967 (Law No. 33 of 1967). This proviso reads as follows:

> " Provided that if in any case the appropriate authority considers that it would not be possible, practicable or advisable to nominate an investigating officer from its Ministry or Office, it shall refer the matter to the Council of Ministers which shall nominate a suitable officer to conduct the investigation."

Overruling the submissions made on behalf of the Applicant the Court:

Held, I. As regards the submission to the effect that the decision complained of is contrary to Article 12.1 *of the Constitution.*

(1)(a) In this connection, counsel for the Applicant has drawn attention to paragraph (1) of Article 7 of the European Convention of Human Rights, 1950 (which Convention is now in force in Cyprus by virtue of the European Convention of Human Rights (Ratification) Law, 1962 (Law No. 39 of 1962) and Article 169.3 of our Constitution)—which paragraph makes similar provision as paragraph 1 of Article 12 of our Constitution (*supra*); but therein, unlike in our constitutional provision in question the term "offence" is qualified by the term "criminal"; therefore, counsel went on, it should be inferred that it was not intended that the application of our said constitutional provision should be limited to criminal offences only.

(b) It is quite correct that in the English official text of Article 7(1) of the European Convention (*supra*) the term "offence" is qualified by the term "criminal"; but, on the other hand, in the French official text of the same Article no such qualification is to be found; there the French word "infraction" is used, which means, substantially, a "breach of a law or regulation", and such word is not qualified by anything equivalent to the term criminal in the English text. So it may well be that the drafters of our Constitution, assuming they were influenced by Article 7(1) of the European Convention, adopted the style of the French text of the Convention.

(c) In my opinion no safe conclusion can be drawn about the exact effect of Article 12.1 of our Constitution from a comparison of the English and French texts of Article 7(1)

of the European Convention with the English text of our said Article 12.1, which text is not, after all, its official text.

(d) On the other hand, an examination of the official Greek text of Article 12.1 of the Constitution shows that there has been used therein the term "ἀδίκημα" and that it is this term which has been translated—correctly so—into "offence" in English.

(2) Now, the same term "ἀδίκημα" is to be found in the corresponding provision of the Greek Constitution of 1927 (Article 8); and it was held by the Greek Council of State (see *inter alia* its decisions Nos. 278/1932, 645/1935) that such provision did not apply to disciplinary offences by public officers (see also Conclusions from the Jurisprudence of the Greek Council of State 1929–1959 p. 366).

(3)(a) In the light of the foregoing I cannot accept that the first part of paragraph 1 of Article 12 of the Constitution (*supra*)—with which only we are concerned at this stage—can, or should be construed so as to render applicable to disciplinary matters concerning public officers the principles of *nullum delictum* (or *nullum crimen*) *sine lege*.

(b) Thus, even on the assumption that the Applicant has been charged with, or found guilty of, disciplinary offences contrary to the aforesaid Public Service Law, 1967 (Law No. 33 of 1967) (*supra*)—and I am leaving this issue entirely open for the time being—I cannot find that Article 12.1 of our Constitution has been contravened.

Held, II. Regarding the submissions in relation to the appointment and action of Mr. P. Paschalis as Investigating Officer under the proviso to regulation 1 *in Part I of the Second Schedule to the said Public Service Law,* 1967 (*Law No.* 33 *of* 1967):–

(1)(a) Mr. P. Paschalis, who retired from his post as counsel in the Legal Department has been re-employed on contract in the same capacity. It has been submitted that in the circumstances he could not be appointed as an Investigating Officer because he was no longer a "public officer" as defined in section 2 of the said Public Service Law, 1967. In my view when one reads together the relevant definitions in section 2 of the Law and the provisions of section 32 of the same Law, it appears quite clearly that Mr. Paschalis is a "public officer" in the sense of such Law, even though he is serving on contract.

(b) Moreover, the term used in the aforementioned regulation 1 is "λειτουργὸς" ("official") which is wider than the notion of "δημόσιος ὑπάλληλος" ("public officer"); so, even if Mr. Paschalis were not to be found to be a "public officer" in the strict sense under the said Law No. 33 of 1967 he is, at any rate, an "official" ("λειτουργὸς") and as such he could be appointed as an Investigating Officer.

(2) I find no merit in the submission that because the investigation was not completed within the thirty days provided for in regulation 2 in Part I of the Second Schedule to the said Law No. 33 of 1967 (*supra*) the whole disciplinary process against the Applicant should be annulled as having not complied with the said regulation 2. In my opinion this regulation, which specifies a period of thirty days for the completion of the investigation is not a provision which entails invalidity in case of noncompliance with it, but it is in the nature of a directive only (see, also, Conclusions from the *Jurisprudence of the Greek Council of State* 1929–1959 p. 105); any other interpretation of regulation 2 would lead to absurd results.

(3)(a) It was submitted further that Mr. Paschalis was invalidly appointed as Investigating Officer in view of the fact that he was not an officer of a higher rank than the Applicant. It is correct that under the relevant regulation (the aforesaid regulation 1 *supra*) the Investigating Officer should be a senior officer of a higher rank than the officer whose conduct is being investigated, in case both such officers belong to the same Ministry or Office. But in the present case he was appointed under the proviso to the said regulation (see the proviso *supra*).

(b) In construing a proviso it must be borne in mind that it prima facie exempts out of the previous enacting part of a statute something which but for the proviso would have been within the enacting part (see, *inter alia*, *Mullins* v. *The Treasurer of the County of Surrey* [1880] 5 Q.B.D. 170 at p. 173 per Lush, J.; *Duncan* v. *Dixon* [1890] 44 Ch. D. 211 at p. 215 per Kekewich, J.; *Local Government Board* v. *South Stoneham Union* [1909] A.C. 57 at pp. 62–63 per Lord Macnaghten; *Corporation of the City of Toronto* v. *Attorney-General for Canada* [1946] A.C. 32 at p. 37 per Lord Macmillan); furthermore it is a basic canon of construction of statutes applicable in case of provisos too, that a statute must so far as possible be construed as a whole in such a way as to give effect to all its

parts (see, *inter alia*, *Jennings* v. *Kelly* [1940] A.C. 206 at pp. 220 and 229 per Lord Wright).

(c) Applying these principles to the construction of regulation 1 and its said proviso; bearing in mind that the proviso speaks only of a "suitable" (κατάλληλον) officer; and not losing sight of the fact that the need for the investigation to be carried out by an officer of a higher rank can only be of any real importance in cases in which there exists between the Investigating Officer and the officer under investigation a hierarchical or other service relationship, I have reached the conclusion that even assuming that Mr. Paschalis is of a lower or an equal rank as compared to the Applicant there existed no legal impediment to the appointment of Mr. Paschalis as an Investigating Officer in this case. (Cf. the decision of the Greek Council of State No. 2046/1956).

(d) Moreover it is, in my view not possible to hold that Mr. Paschalis is actually, of a lower or of an equal rank as compared to the Applicant because there is really no significant relationship whatsoever between the post of the former and that of the latter. On the other hand the criterion of salary is not, in my view, an infallible and decisive test.

(4) Bearing in mind the circumstances of this case I cannot see how the rules of natural justice can be said to have been in any way contravened through Mr. Paschalis having been appointed, and acted as an Investigating Officer because he had earlier given legal advice as counsel of the Republic in relation to one of the matters into which he later was called upon to investigate.

Order in terms.

Cases referred to:

Mullins v. *The Treasurer of the County of Surrey* [1880] 5 Q.B.D. 170 at p. 173 per Lush, J.;

Duncan v. *Dixon* [1890] 44 Ch. D. 211 at p. 215 per Kekewich, J.;

Local Government Board v. *South Stoneham Union* [1909] A.C. 57, at pp. 62–63 per Lord Macnaghten;

Corporation of the City of Toronto v. *Attorney-General for Canada* [1946] A.C. 32 at p. 37 per Lord Macmillan;

Jennings v. *Kelly* [1940] A.C. 206 at pp. 220 and 229;

Decisions of the Greek Council of State Nos.: 278/1932, 645/1935, 2046/1956.

Recourse.

Recourse against the decision of the Respondent Public Service Commission taken as a result of disciplinary proceedings against the Applicant whereby he was demoted to "Counsellor, A/Consul-General, A" from the rank of "Ambassador".

L. Clerides with *C. Indianos*, for the Applicant.

L. Loucaides, Senior Counsel of the Republic, for the Respondent.

Cur. adv. vult.

The following decision on preliminary issues was delivered by:

TRIANTAFYLLIDES, J.: In this case the Applicant complains against his demotion, by decision of the Respondent Public Service Commission, to "Counsellor, A/Consul-General, A" from the rank of "Ambassador", in the service of the Ministry of Foreign Affairs.

The Decision of the Commission, which was taken as a result of disciplinary proceedings against the Applicant, is dated the 30th April, 1969 (*exhibit AD*) and was communicated to the Applicant by letter dated the 5th May, 1969 (*Exhibit AE*).

When the hearing of the recourse commenced, on the 14th July, 1969, counsel for the parties were heard on certain preliminary issues and, then, the further hearing was postponed until I would decide whether the determination of any one of such issues, at this stage, could result in the final determination of the recourse as a whole.

From what is stated hereinafter it is apparent that I have reached the conclusion that this is not the position and that the hearing of the recourse should proceed further in the ordinary course; I have, however, decided to dispose of those issues which could be conveniently, and properly, be determined at this stage of the proceedings:

Counsel for the Applicant has submitted that as the Applicant was, in effect, charged with, and found guilty of, disciplinary offences provided for under the Public Service Law, 1967, (Law 33/67) and as the relevant events took place prior to the coming into force of Law 33/67, the *sub judice* decision should be annulled as being contrary to paragraph (1) of Article 12 of the Constitution.

Such paragraph reads as follows:–

> "No person shall be held guilty of any offence on account of any act or omission which did not constitute an offence under the law at the time when it was committed; and no person shall have a heavier punishment imposed on him for an offence other than that expressly provided for it by law at the time when it was committed."

It has been argued by counsel for Applicant that this provision applies to disciplinary offences, too, and not only to criminal offences; and, in this connection, he has drawn attention to the fact that paragraph (1) of Article 7 of the European Convention of Human Rights, of 1950—(which Convention is now in force in relation to Cyprus by virtue of the European Convention of Human Rights (Ratification) Law, 1962, (Law 39/62) and of Article 169.3 of our Constitution)—makes similar provision as paragraph (1) of Article 12 of our Constitution, but therein, unlike in our constitutional provision in question, the term "offence" is qualified by the term "criminal", and, that, therefore, it should be inferred that it was not intended that the application of our said provision should be limited to criminal offences only.

It is quite correct that in the English official text of Article 7(1) of the Convention concerned the term "offence" is qualified by the term "criminal"; but, on the other hand, in the French official text of the same Article no such qualification is to be found; there the French word "infraction" is used, which means, substantially, a "breach of a law or regulation", and such word is not qualified by anything equivalent to the term "criminal" in the English text.

So, assuming that the drafters of our Constitution were influenced by Article 7(1) of the Convention when deciding to insert in the Constitution a provision such as Article 12.1, it may well be that they adopted the style of the French text of the Convention and that, they, therefore, considered it a surplusage to qualify the term "offence" by the term "criminal".

In my opinion no safe conclusion can be drawn, about the exact effect of Article 12.1 of the Constitution, from a comparison of the English and French texts of Article 7(1) of the Convention with the English text of our said Article 12.1, which text is not, after all, its official text.

On the other hand, an examination of the official Greek text of Article 12.1 shows that there has been used therein the term "άδίκημα", and that it is this term which has been translated—correctly so—into "offence" in English.

The same term, "άδίκημα", is to be found in the corresponding provision of the 1927 Greek Constitution (Article 8); and it was held by the Greek Council of State (see, *inter alia*, its decisions 278(32) and 645(35)) that such provision did not apply to disciplinary offences by public officers. In this respect the Council of State took the view that the principle of nullum delictum sine lege (which is given effect to by the first part of paragraph (1) of our Article 12) cannot, because of the nature of the status of a public officer, be applied to disciplinary matters regarding public officers (see the Conclusions from the Jurisprudence of the Greek Council of State 1929–1959, p. 366).

In the light of the foregoing I cannot accept that the first part of paragraph (1) of Article 12 of the Constitution—with which, only, we are concerned at this stage—can, or should, be construed so as to render applicable to disciplinary matters concerning public officers the principle of nullum delictum sine lege (or, nullum crimen sine lege).

Thus, even on the assumption that the Applicant has been charged with, or found guilty of, disciplinary offences contrary to Law 33/67—and I am leaving this issue entirely open for the time being—I cannot find that Article 12.1 has been contravened.

The next aspect of this case with which I will now deal consists of a series of points taken by counsel for the Applicant in relation to the appointment, by the Council of Ministers, of Mr. P. Paschalis, as an Investigating Officer, under the proviso to regulation 1 in Part I of the Second Schedule to Law 33/67.

It has, first, been submitted that Mr. Paschalis—who retired from his post as counsel in the Legal Department and has

been re-employed, in the same capacity, on contract—could not be appointed as an Investigating Officer because he is not a "public officer", as defined in section 2 of Law 33/67.

In my view, when one reads together the relevant definitions in section 2 of Law 33/67 and the provisions of section 32 of the same Law, it appears quite clearly that Mr. Paschalis is a "public officer", in the sense of such Law, even though he is serving on contract.

Moreover, it is to be noted that the term used in the aforementioned regulation 1 is "λειτουργὸς" (official), which is wider than the notion of "δημόσιος ὑπάλληλος" (public officer); so, even if Mr. Paschalis were not to be found to be a public officer, in the strict sense, under Law 33/67, he is, at any rate, an official, and as such he could be appointed as an Investigating Officer.

Counsel for the Applicant has complained that Mr. Paschalis received, from the Council of Ministers, more than one appointment—in fact three appointments—as Investigating Officer regarding one and the same matter, namely the conduct concerned of the Applicant.

In the light of the circumstances in which the original appointment of Mr. Paschalis as Investigating Officer had to be renewed twice—as for reasons beyond his control he did not manage, earlier, to even embark upon the investigation within the thirty days' period provided for by means of regulation 2 in Part I of the Second Schedule to Law 33/67 (see the relevant records of the Council of Ministers, *exhibit A1*, and paragraph 2 of the Opposition)—I can find nothing in the course adopted, by the Council of Ministers, in this matter, which is either contrary to law or in abuse or excess of powers.

Nor do I find any merit in the submission that because the investigation was not completed within thirty days, the whole disciplinary process against the Applicant should be annulled as having not complied with the said regulation 2. In my opinion such regulation, which specifies a period of thirty days for the completion of the investigation, is not a provision which entails invalidity in case of non-compliance with it, but it is in the nature of a directive only (see, also, Conclusions from the Jurisprudence of the Greek Council of State 1929–1959, p. 105); any other interpretation of regulation 2

could lead to absurd results because there may, indeed, arise cases in which the investigation, in view of the extent thereof, cannot be completed within thirty days; or, in which the non-completion of the investigation is due to the fact that the officer whose conduct is being investigated requests, and is granted, an extention of time in order to be enabled to present his side of the matter to the Investigating Officer; and this is exactly what did happen in the present case (see paragraph 2 of the Opposition).

The next contention of Applicant's counsel, regarding the appointment of Mr. Paschalis, was that he was invalidly appointed as Investigating Officer in view of the fact that he was not an officer of a higher rank than the Applicant:

It is correct that under the relevant regulation (the aforesaid regulation 1) the Investigating Officer should be a senior officer of a higher rank than the officer whose conduct is being investigated, in case both such officers belong to the same Ministry or Office.

The question that has to be resolved is whether when the Investigating Officer is appointed under the proviso to regulation 1—as in this case—then he still has to be an officer of higher rank than the officer under investigation.

This proviso reads as follows:-

> "Provided that if in any case the appropriate authority considers that it would not be possible, practicable or advisable to nominate an investigating officer from its Ministry or Office, it shall refer the matter to the Council of Ministers which shall nominate a suitable officer to conduct the investigation".

In construing a proviso it must be borne in mind that it prima facie exempts out of the previous enacting part of a statute something which but for the proviso would have been within the enacting part (see, *inter alia*, the judgments of Lush, J. in *Mullins* v. *The Treasurer of the County of Surrey* [1880] 5 Q.B.D. 170, at p. 173, of Kekewich, J. in *Duncan* v. *Dixon* [1890] 44 Ch. D. 211, at p. 215, of Lord Macnaghten in *Local Government Board* v. *South Stoneham Union* [1909] A.C. 57, at pp. 62–63, and of Lord Macmillan in *Corporation of the City of Toronto* v. *Attorney-General for Canada* [1946] A.C. 32, at p. 37); furthermore, it is a basic canon of construction of

statutes applicable in cases of provisos, too, that a statute must, so far as possible, be construed as a whole in such a way as to give effect to all its parts (see, *inter alia*, the judgments of Lord Russell of Killowen and of Lord Wright in *Jennings* v. *Kelly* [1940] A.C. 206 at pp. 220 and 229).

Applying these principles to the construction of regulation 1 and its proviso; bearing in mind that the proviso speaks only of a "suitable" (κατάλληλον) officer; and not losing sight of the fact that the need for the investigation to be carried out by an officer of a higher rank can only be of any real importance in cases in which there exists between the Investigating Officer and the officer under investigation a hierarchical or other service relationship, I have reached the conclusion that even, assuming that Mr. Paschalis is of a lower, or of an equal, rank as compared to the Applicant, there existed no legal impediment to the appointment of Mr. Paschalis as an Investigating Officer in this case (and in this respect it might be of some interest to refer, by way of analogy, to decision 2046(56) of the Greek Council of State).

Moreover, it is, in my view, not possible to hold that Mr. Paschalis is, actually, of a lower, or of an equal, rank as compared to the Applicant, because, apart from the criterion of the comparison of their respective salaries, which is not, in itself, an infallible and decisive test, there is really no significant relationship whatsoever between the post of Mr. Paschalis and that of the Applicant.

The last point which has been raised against the appointment of Mr. Paschalis as an Investigating Officer was that he was disqualified, in any case, for such appointment because, earlier, on the 24th April, 1967, he gave, as Counsel of the Republic, legal advice (see *exhibit AF*) to the Ministry of Foreign Affairs regarding one of the matters which eventually was included among the disciplinary charges against the Applicant:

On that occasion Mr. Paschalis merely gave legal advice on the basis of a factual situation which was placed before him by the Ministry of Foreign Affairs and was assumed by him, for the purpose, to be correct; he was not deciding himself on the existence or not of such situation.

Later on, when acting as an Investigating Officer, regarding the same situation, Mr. Paschalis had to examine what were the exact facts and decide, then, which were their consequences

from the disciplinary point of view; his function this time was essentially different from what he had done in the past when simply giving legal advice.

But even when Mr. Paschalis was acting as an Investigating Officer he was not acting in a judicial or quasi-judicial capacity, because he was not called upon, or entitled, to decide the guilt or innocence of the Applicant from the disciplinary point of view; he was merely investigating into acts of the Applicant in order to prepare a report on the basis of which the Attorney-General would advise the appropriate authority whether the Applicant might be charged disciplinarily (see the relevant regulations in Part I of the Second Schedule to Law 33/67).

Bearing all the above in mind I cannot see how in the circumstances of this case the rules of natural justice can be said to have been in any way contravened through Mr. Paschalis having been appointed, and acted, as an Investigating Officer after he had given legal advice in relation to one of the matters into which he later investigated.

Lastly, in this Decision, I am going to deal with the allegation that there existed bias on the part of the Respondent against the Applicant:

This allegation has been based on the contents of certain correspondence exchanged between the Chairman of the Respondent and the Applicant, in his then capacity as Development Officer in the service of the Planning Commission (see *exhibit AG*).

I can find nothing therein to satisfy me that the Applicant has discharged the burden of establishing bias by the Respondent, or its Chairman or any of its members, against him.

As the remaining issues which have been raised in argument by counsel are connected with the merits of this case I have decided not to go into them and to leave them entirely open for determination at the proper stage.

Order in terms.