

1980 September 5

[TRIANTAFYLIDIS, P.]

IN THE MATTER OF AN APPLICATION BY MARIANNA
PAPADOPOULLOU, OF NICOSIA, FOR AN ORDER OF
CERTIORARI AND AN ORDER OF PROHIBITION,

and

IN THE MATTER OF AN ORDER OF EVICTION MADE
BY THE DISTRICT COURT OF NICOSIA ON MARCH 12,
1979, IN ACTION NO. 4401/78, BETWEEN KATINA PARPERI
AND MARIANNA PAPADOPOULLOU.

(Application No. 30/79).

*Certiorari—Practice—Sub judice order has to be lodged together
with the application for leave—Not lodged at that stage due
to an accidental oversight—Allowed, in the circumstances of this
case, to be produced at the commencement of the hearing of the
application for the order of certiorari.*

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At the very beginning of the hearing of this application counsel
for the applicant sought to produce a copy of the order of eviction
which the applicant sought to quash by an order of certiorari.
Counsel explained that the order had not been produced earlier
due to an accidental oversight. Counsel for the respondent
objected to the production at that stage of the copy of the said
order on the ground that it ought to have been placed before
the Court together with the application for leave to apply for
an order of certiorari.

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Held, that though the better course for the applicant was
to have produced a copy of the *sub judice* eviction order at
the stage of the application for leave to apply for an order of
certiorari, in the circumstances, and in the light of the procedure
and practice applicable to a matter of this nature, as well as
in the light of the exceptional course adopted in the case of
Rex v. Newington Licensing Justices [1948] 1 K.B. 681, the expla-
nation given by counsel for the applicant for not producing

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earlier a copy of the complained of order is treated as sufficient; and that, accordingly, he is allowed to produce it at this stage.

Application granted.

Cases referred to:

Rex v. Newington Licensing Justices [1948] 1 K.B. 681. 5

Application.

Application by applicant for leave to produce a copy of the order of eviction which he seeks to quash by an order of certiorari.

A. Eftychiou, for the applicant. 10

D. Demetriades, for the respondent.

Cur. adv. vult.

TRIANAFYLLIDES P. read the following interim decision. When the hearing of the present application commenced counsel for the applicant sought to produce a copy of the order of eviction which the applicant seeks to quash by an order of certiorari. The order is dated March 12, 1979, and it was drawn up on July 23, 1979. 15

Counsel for the respondent objected to the production at that stage of the copy of the said order on the ground that it ought to have been placed before the Court together with the application for leave to apply for an order of certiorari. 20

It is true that the better course for the applicant was to have produced a copy of the *sub judice* eviction order at the stage of the application for leave to apply for the prerogative order in question (see the Practice Note in (1948) W.N. 207); and this was not done even though the said eviction order was referred to in an affidavit sworn by the applicant on August 24, 1979, in support of the application for leave which was granted on that date. 25 30

In Halsbury's Laws of England, 4th ed., vol. 11, p. 816, para. 1555, the following are stated:

"1555. *Lodging of order etc. in case of certiorari.* In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant may not question the validity of any order, warrant, commitment, conviction, inquisition 35

5 or record, unless before the hearing of the motion or summons he has lodged a copy of it verified by affidavit in the Crown Office, or accounts for his failure to do so to the satisfaction of the Court or Judge hearing the motion or summons."

The above passage is based on rule 6(1) of Order 53 of the Rules of the Supreme Court in England (see *The Supreme Court Practice 1973*, vol. 1, p. 779) which has, in the meantime, been replaced by rule 9(2) of Order 53 of the Rules of the Supreme Court (see, *the Supreme Court Practice 1979*, vol. 1, p. 822).

15 In *Rex v. Newington Licensing Justices* [1948] 1 K.B. 681, the position was that at the time when leave to apply for certiorari was sought there was not lodged with the Court a copy of the order complained of because it had not yet been recorded in writing; the Court refused to give judgment until it was reduced into writing but consented to hear the arguments of the parties in the meantime.

Humphreys J. stated the following (at pp. 685-686):

20 "In the course of the argument in support of the application it appeared that the applicant in moving for leave had not complied with R.S.C. Or. 59, r. 8, Sub-r. 1 in that she had failed to lodge in the Crown Office a copy of the order complained of. The attention of the Court should have been drawn to that omission, and if it had been no leave would have been granted. It appeared that no order had, in fact, been made at the time. The justices had announced their intention to make such an order, but no order had been drawn up. Certiorari does not lie to quash an oral statement and these proceedings were, at that stage, wholly irregular. As, however, both parties were anxious to have a decision whether the mortgage in question was or was not a document which had to be produced under s. 25 of the Act, and particularly as one of the parties is a bench of justices, the Court decided, perhaps unwisely, to overlook the failure to observe r. 8 and accepted an undertaking by the parties jointly that there would be produced to the Court on further hearing a copy of the order which had since been made by the justices and which is to be taken to be the order which the justices notionally had made on December 1".

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Singleton J. said (at p. 690):

“On the first day of the hearing of this motion it was ascertained that there was no written order in existence, and I expressed the opinion that this Court had no power to hear the motion. That remains my view. R.S.C. Or. 59, r. 8, sub-r. 1 is clear in its terms. The applicant had not lodged a copy of the order in the Crown Office for the simple reason that there was no order. The rule presupposes an order in writing, and there was none. There was, in my view, therefore, nothing for this Court to hear. It appeared that the licensing justices had purported to make an oral order for the production of a mortgage of the applicants’ interest in the premises. It seemed to me that the parties really wished to get before this Court something in the nature of a consultative case. If that were so, a motion for certiorari was hardly the way to achieve it.”

Also, Birkett J. said (at pp. 693–694):

“Both the judgments have referred to the form in which this matter came before this Court, and I think that is not without importance. The proper administration of the licensing law throughout the country is clearly a matter of the highest importance. If decisions are to be of value or of use or of general validity when made by this Court, I think it is very important indeed that the issue before the Court should be most clearly defined, and that it should be presented in a proper form. Both the judgments have referred to the situation which arose on the first day of the hearing of this matter and to the fact, a surprising fact, that an application was made to quash an order which in fact had no existence. Considerable time was spent in debating that situation, and as a result it was agreed that an order should be produced to be dated as on the December 1, 1947. Ironically enough, now that that order is produced, it appears that there was no authority to make it. It is regrettable, I think, that if a decision was really required that a form of procedure should be adopted which apparently is quite inappropriate.”

In the present case the complained of eviction order was in existence before the application for leave to apply for an order

of certiorari was filed, as it was drawn up on July 23, 1979, after it had been made on March 12, 1979.

5 According to counsel for the applicant it was not produced earlier due to an accidental oversight but it was, as already stated, sought to produce it at the very beginning of the hearing of the present application for an order of certiorari; actually, before the hearing of the merits of such application had commenced.

10 In the circumstances, and in the light of the procedure and practice applicable to a matter of this nature, to which reference has already been made in this Decision, as well as in the light of the exceptional course adopted in the case of the *Newington Licensing Justices, supra*, I have decided to treat as sufficient the explanation given by counsel for the applicant for not producing earlier a copy of the complained of order and to allow him
15 to produce it at this stage.

The present application will now be fixed for hearing as regards its substantive merits.

Application granted.