1983 December 29

[HADJIANASTASSIOU, A. LOIZOU, SAVVIDES, STYLIANIDES, PIKIS, JJ.]

ANDREAS CHRISTODOULOU,

Appellant-Applicant.

v.

THE PRESIDENT AND MEMBERS OF THE DISCIPLINARY BOARD OF NATIONAL GUARD,

Respondents.

(Civil Appeal No. 6574).

Prohibition—Disciplinary offences—Disciplinary charges—Whether they can be fashioned on the provisions of criminal statutes—Disciplinary proceedings before the Disciplinary board set up under the National Guard Disciplinary Regulations 1964-1979 *—They are not of a criminal but of a disciplinary nature—As such they are of Administrative character, exclusively amenable to judicial review under Article* 146.1 *of the Constitution—No order of prohibition, under Article* 155.4, *lies.*

Criminal proceedings—Whether a particular proceeding qualifies as a criminal proceeding—Test applicable.

The appellant, an officer of the National Guard, was charged before the Disciplinary Board, set up under the National Guard Disciplinary Regulations 1964-1979, with a number of violations of the Military and Criminal Codes in connection with an incident associated with his duties involving the use of weapons for training purposes of members of the Force. The trial Judge refused to the appellant leave to apply for an order of prohibition, restraining the disciplinary board from taking cognizance of, or dealing with the charges, having held that the proceedings before the Board were of an administrative character and as such exclusively amenable to the revisional jurisdiction of the Supreme Court under Article 146 of the Constitution. Hence this appeal.

On the issue whether proceedings before the Disciplinary Board, admittedly an administrative body, are of a judicial character

on account of the fact that the charges are modelled or fashioned on the provisions of Codes establishing criminal liability

Held, that there is no objection in principle or practice to fashioning disciplinary charges on the provisions of criminal statutes so long as the object they are designed to serve is purely disciplinary associated with the sustainance of pre-ordained standards in the relevant branch of the Public Service and, in the case of the National Guard intended to sustain discipline in the Force, that if the matter is one, the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a Court claiming jurisdiction to do so, the matter is criminal, that applying this test to the facts of the case, the appellant is not at risk of conviction by a Court of law, nor is there any risk whatever of any conviction other than a disciplinary one, that, therefore, the proceedings raised before the Disciplinary Board are of a disciplinary nature solely connected with the maintenance of discipline in the National Guard and, as such, of an administrative character, exclusively amenable to judicial review under Article 146 1 of the Constitution, that such review is only possible in respect of executory acts, accordingly the appeal must fail

Appeal dismissed

Cases referred to

Engel and Others (Decision of the European Court, Series A Vol 22),

Ramadan v *Electricity Authority of Cyprus*, 1 R.S.C.C. 49,

In re Frangos (1981) 1 C.L.R. 691;

In re Kalathas (1982) 1 C.L.R. 835,

Frangos v. *Disciplinary Board* (1983) 1 C.L.R. 256,

R. v *Pharmaceutical Society* [1981] 2 All E.R. 805;

Haros v. *Republic*, 4 R.S.C.C 39,

Morsis v. *Republic*, 4 R.S.C.C. 133,

Menelaou v *Republic* (1980) 3 C.L.R. 467,

Petrou v. *Republic* (1980) 3 C.L.R 203,

Papacleovoulou v. *Republic* (1982) 3 C.L.R. 187;

Re Racal Communications [1980] 2 All E.R. 634;

Anismunic v. *Foreign Compensation* [1969] 1 All E.R. 208;

Amand v. *Secretary of State for Home Affairs* [1943] A.C. 147 at p. 156.

Appeal.

Appeal against the judgment of the President of the Supreme Court (Triantafyllidés, P.) given on the 11th June, 1983 (Civil Appl. No. 13/83)* whereby leave to apply for an order of prohibition preventing a Disciplinary Board, set up under the National Guard legislation, from dealing with disciplinary charges preferred against the applicant was refused.

K. Talarides, for the applicant.

D. Papadopoullou (*Mrs.*), for the Republic.

Cur. adv. vult.

HADJIANASTASSIOU, J.: The judgment of the Court will be given by Pikis, J.

PIKIS, J.: The appeal is directed against an order of the learned President of the Supreme Court, whereby leave was refused to the appellant, an officer of the National Guard, to apply for an order of prohibition, restraining a disciplinary board set up under the National Guard Disciplinary Regulations 1964-1979 from taking cognizance of, or dealing with charges preferred against the appellant by the Military Authorities. An order of prohibition was sought on the ground that the Disciplinary Board, an administrative body, would, in view of the nature of the charges, be required to deal with a judicial matter in usurpation of its powers. Under the Constitution, judicial power is exclusively entrusted to the judicial authorities of the State, that is, the Supreme Court, and Courts subordinate thereto (see Part *X* of the Constitution, and Law 33/64).

The gist of the submission advanced by learned counsel for appellant before the trial Court, as well as before us, was that adjudication by the Disciplinary Committee upon the charges raised against the appellant would, because of the nature of the charges, involve a pronouncement upon the criminal liability of the appellant under the Military and Criminal Codes. Consequently, the Disciplinary Board lacked jurisdiction to deal with the matter not being a Court of law in the ordained judicial hierarchy of the State. The Disciplinary Board was nothing other than a disciplinary tribunal solely competent

* Reported in (1983) 1 C.L.R. 537.

to pronounce on disciplinary offences committed by members of the Force, viz. the National Guard.

The Disciplinary Regulations of the National Guard, hereafter referred to as "The Regulations"—Reg. 3 in particular—define the disciplinary offences that may be committed by members of the Force. In accordance with its provisions, violation of any of the provisions of the Military Code or any law in force for the time being, and that includes the Criminal Code as well, constitutes a disciplinary offence punishable thereunder.

The appellant was charged before the Disciplinary Board with a number of violations of the Military and Criminal Codes, in connection with an incident associated with his duties involving the use of weapons for training purposes of members of the Force. Judging from the particulars of the charges preferred against the appellant before the Disciplinary Board, the case against him is that he defied military orders and exhibited culpable negligence in the discharge of his duties in breach of the provisions of the Military Code defining criminal liability of members of the Force and the Criminal Code establishing liability of members of the public at large. Central in the argument of learned counsel for the appellant, is the proposition that under the guise of disciplinary proceedings the military authorities seek to establish the criminal liability of the appellant to the detriment of constitutional order and in breach of his rights, safeguarded by Article 30.2, entitling the appellant, like every other person, to a determination in respect of "any criminal charge" by an "impartial and competent Court established by law". Supplementary to the above proposition, counsel submitted that the power vested in the Disciplinary Board under reg. 9, constituted yet another derogation from his constitutional rights safeguarded by Article 11.2 of the Constitution. Power to imprison vests exclusively in the judicial authorities of the State. Counsel abandoned this submission in his reply, apparently upon reflection that the impropriety of any sentence authorised by the Disciplinary Regulations does not alter the character of the proceedings but merely affects the competence of the Board to impose such sentence. It must be noted that this point was not taken up before the trial Court nor was it made a ground of appeal. Therefore, it is unnecessary to examine the juridical implications

of imprisonment under reg. 9 or its compatibility with Article 11.2 of the Constitution. Nor need we examine the exceptional position of the Army as an institution of the State and the extraordinary rules governing the discipline of its members. It may be noted in parenthesis that, in Greece it has been acknowledged that the discipline of members of the armed forces is subject to special rules in recognition of the special mission of the army and the sacrifice expected of its members—See, *Tsatsos' Studies of Administrative Law*, p. 793—*Conclusions from the Greek Council of State* 1929–59, pp. 413–414. On the other hand, the provisions of Article 11.2 of the Constitution, as well as those of Article 5(1) of the European Convention of Human Rights—ratified by Law 39/62—appear to be all embracing and bind equally all organs, bodies and authorities of the State. The *European Court* decided in the case of *Engel And Others*, Series A—Vol. 22, that military discipline does not fall outside the scope of Article 5(1) of the Convention.

Only one issue poses for determination, that is, whether proceedings before the Disciplinary Board, admittedly an administrative body, are of a judicial character on account of the fact that the charges are modelled or fashioned on the provisions of Codes establishing criminal liability. Counsel for the appellant made a valiant effort to persuade us that the content of the charges is such as to brand the proceedings as criminal, in a manner making it impermissible for an administrative body to pronounce on the liability of his client.

The learned trial Judge, after examination of the nature of the proceedings and review of the caselaw* shedding light on the characteristics of administrative and judicial proceedings, held the proceedings to be of an administrative character and as such exclusively amenable to the revisional jurisdiction of the Supreme Court under Article 146 of the Constitution.

Learned counsel for the Attorney-General invited the Court to sustain the judgment of the trial Court and dismiss the appeal resting on a misconception of the true character of the proceedings before the Disciplinary Board.

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* 1. *Ramadan* v. *Electricity Authority of Cyprus*, 1 R.S.C.C. 49;
2. *In Re Frangos* (1981) 1 C.L.R. 691, and on Appeal (1983) 1 C.L.R. 256;
3. *In Re Kalathas* (1982) 1 C.L.R. 835.

Mr. Talarides laid emphasis on the implications of the decision of the Full Bench in *Frangos* v. *Medical Disciplinary Board*, supra, establishing a substantive test for the identification of the nature of the proceedings and their classification as criminal or administrative. This is a correct appreciation of the decision of the Supreme Court in the above case and its true ratio.

Disciplinary are proceedings designed to promote discipline within a branch of public administration; whereas criminal, are those proceedings that aim to establish the liability of the subject under the general law. In the case of *Frangos* supra, detailed analysis is made of the attributes of judicial proceedings and the characteristics that distinguish them from administrative proceedings. We do not propose to repeat the above analysis but adopt it for the purposes of the present judgment.

Under both, the continental and common law, systems of justice, the maxim that a citizen ought not to be punished twice for the same act, has no application to disciplinary proceedings. Criminal and disciplinary proceedings may be pursued simultaneously or in succession in respect of the same conduct, in recognition of the fact that the two proceedings are designed to serve separate and distinct purposes—See, *Tsatsos' Studies of Administrative Law*, pp. 77–78—*Conclusions from the Greek Council of State* 1929–59, p. 405, and *R.* v. *Pharmaceutical Society* [1981] 2 All E.R. 805 (D.C.) I regard it as salutary that in Cyprus, judicial trend favours the application of the provisions of Article 12.5 safeguarding the rights of a person charged with an offence to disciplinary as well as criminal proceedings.—See, *Haros* v. *The Republic*, 4 R.S.C.C. 39; *Morsis* v. *The Republic*, 4 R.S.C.C. 133; *Menelaou* v. *The Republic*, (1980) 3 C.L.R. 467; *Petrou* v. *The Republic* (1980) 3 C.L.R. 203; *Papacleovoulou* v. *The Republic* (1982) 3 C.L.R. 187.

The same act may constitute both a criminal and a disciplinary offence—see, *Tsatsos' Studies of Administrative Law*, pp. 77–78 —*Conclusions from the Greek Council of State* 1929–59, pp. 29–59, p. 405. That this is so, is no obstacle to the institution of disciplinary proceedings, nor conviction upon a disciplinary charge similar in nature to an offence created by the Criminal Code or any other law for that matter, imports a conviction under the general law.

There is no rule of law, certainly we have traced none, prohibiting the fashioning of a disciplinary offence on the provisions of the Criminal Code or any other law for that matter. Such practice appears to be common, considering that conduct akin to conduct prohibited by the Criminal Code, should not ordinarily be tolerated by public servants. And it is not. All that reg. 3 accomplished in this case, is to define a number of disciplinary offences by reference to the provisions of the Military Code and other laws in force for the time being. A conviction by the Disciplinary Board is nothing other than a disciplinary punishment that must conform to the norms of administrative law pertaining to such convictions. That is, the punishment can at its worse dissolve the relationship between the servant and the State. Under no circumstances can it result in a punishment disproportionate to or greater than the benefits received by the servant. —See, *Tsatsos' Studies of Administrative Law*, p. 79.

In our judgment, there is no objection in principle or practice to fashioning disciplinary charges on the provisions of criminal statutes so long as the object they are designed to serve is purely disciplinary associated with the sustainance of preordained standards in the relevant branch of the Public Service and, in the case of the National Guard intended to sustain discipline in the Force.

The jurisdiction under Article 55.4 of the Constitution, derives from the original jurisdiction of the Queen's Bench Division of the High Court in England, to review decisions of inferior tribunals in contrast to the appellate jurisdiction of the Supreme Court in England that derives its origin exclusively from the Statute Law—*Re Racal Communications* [1980] 2 All E.R. 634 (HL). Since the decision in the *Anisminic**, the compass of judicial review by means of prerogative writs has been extended and extends to acts that may properly be classified as administrative. In *Frangos* v. *Medical Disciplinary Board*, supra, it was made clear that in virtue of the provisions of Article 146, review of administrative action is only possible under the provisions of Article 146 and the provisions of Article 55.4 must be construed and applied accordingly. We observed

* *Anisminic* v. *Foreign Compensation* [1969] 1 All E.R. 208.

that "the primary purpose of judicial review by means of prerogative writs is to ensure that inferior tribunals operate within the limits of their jurisdiction and exercise their powers within the limits set by law. The impress of finality attached to decisions of inferior tribunals is conditional on the observation of the law".

Instructive in determining whether a particular proceeding properly qualifies as a criminal proceeding, are the observations of Viscount Simon, L.C., in *Amand* v. *Secretary of State for Home Affairs* [1943] A.C. 147 at 156 "If the matter is one, the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a Court claiming jurisdiction to do so, the matter is criminal". Applying this test to the facts of the case, the appellant is not at risk of conviction by a Court of law, nor is there any risk whatever of any conviction other than a disciplinary one.

In our judgment, the proceedings raised before the Disciplinary Board are of a disciplinary nature solely connected with the maintenance of discipline in the National Guard and, as such, of an administrative character, exclusively amenable to judicial review under Article 146.1 of the Constitution. And review is only possible in respect of executory acts.

The appeal is dismissed.

Appeal dismissed.