1985 May 31

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

PANAYIOTIS ORPHANOU,

Applicant,

v.

THE REGISTRAR OF CO-OPERATIVE SOCIETIES,

Respondent.

(Case No. 314/84).

Natural Justice—Rules of—Should be strictly adhered to in disciplinary proceedings—"Equality of arms" inherently embodied in the right to be heard—What is entailed by the principle embodied in the maxim "audi alteram partem"—Disciplinary proceedings—Requirements of section 83 of the Public Service Law, 1967 (Law 33/67)—And rules of natural justice not complied with—In that the respondent did not obtain the notes of the proceedings before the Criminal Court and failed to afford to the applicant adequate opportunity to exercise the right of hearing to which he was entitled—Sub judice disciplinary punishment annulled.

Public Officers—Disciplinary offences—Provisions of section 83 of the Public Service Law, 1967 (Law 33/67) mandatory.

The applicant, an employee of the Audit and Supervision Fund which was established under rule 92 of the Co-operative Societies Rules made under s. 54(1) (b) of the Co-operative Societies Law, Cap. 114, as amended by Law No. 28/59 was on 8.4.81 found guilty by the District Court of Nicosia of aiding and abetting the stealing of money by agent, abuse of office by public servant and breach of trust, and was sentenced to 12 months' imprisonment. Appeal was taken against the conviction and

sentence; and the Supreme Court on 16.10.81 partly allowed the appeal and reduced the sentence to 7 months' imprisonment. On 18.2.84 the respondent informed the applicant by letter that in view of his conviction and sentence to imprisonment by the District Court of Nicosia for offences of dishonesty, he was of the view that the applicant was not a suitable person to hold the post of an employee of the Audit and Supervision Fund and that he intended to dismiss him. Though the applicant was not a civil servant, the respondent decided, before proceeding to the dismissal of the applicant from his post, to afford him the opportunity to be heard on the matter, and this was consonant to s.83* of the Public Service Law, No. 33/67, which he would apply mutatis mutandis in the case of this applicant. The applicant was invited within 8 days from receipt of that letter to submit either orally or in writing his objections and the reasons thereof against his intended dismissal.

In reply Counsel for the applicant expressed the wish that the proceedings should be oral; and that for the proceedings to be carried out the notes of the proceedings of the Court which had tried the case and those of the Supreme Court should be received by the respondent. He further requested that copy of such notes be made by the respondent available to the applicant as extensive references to passages from them in defence of the applicant would be made and that it was not possible for the applicant to defend himself and make the necessary representations without the notes of the proceedings of the Courts. The respondent sent a photo-copy of the judgment of the District Court; and though at the hearing before the respondent Counsel for the applicant applied again for a copy of the notes of the proceedings before the District Court those notes were never made available to him.

Upon a recourse against the decision of the respondent terminating the services of the applicant:

Held, that in disciplinary proceedings the rules of natural justice, including the audi alteram partem, should be strictly adhered to; that "equality of arms" is inherently

* Section 83 is quoted at p. 1038-1039 post.

embodied in the right to be heard; that the principle embodied in the maxim "audi alteram partem" entails the right to be informed of the charge, to be furnished with all documents reasonably necessary for the defence, to be legally represented and to be afforded adequate opportunity to place his representations before the Tribunal; that the respondent did not conform with the mandatory provisions of s.83 in that he did not obtain the notes of the proceedings and he did not give the applicant the opportunity of putting forward any representations which he wished to make; that the right to be heard is interwoven and inherently part of the right of defence; that this right cannot by circumcision be limited to the right of physical presence before the Authority and a person charged has to be afforded the arms reasonably necessary for his defence; that the respondent in reaching the sub judice decision did neither comply with the requirements of s. 83 of the Public Service Law nor conform substantially with the rules of natural justice and failed to afford to the applicant adequate opportunity to exercise the right of hearing to which he was entitled; and that, therefore, the sub judice decision must be annulled.

Sub judice decision annulled.

Cases referred to:

Orphanos v. *Commissioner of Co-Operative Societies* (1983) 3 C.L.R. 1369;

Orphanos v. *The Acting Commissioner and Registrar of Greek Co-Operative Societies* (1984) 3 C.L.R. 1323;

Pandelidou v. *Republic,* 4 R.S.C.C. 100 at p. 106;

Marcoullides v. *Republic,* 3 R.S.C.C. 30 at p. 35;

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

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

Iordanous v. *Republic* (1974) 3 C.L.R. 194 at pp. 201-202;

Russell v. *Duke of Norfolk and Others* [1949] 1 All E. R. 109 at p. 118;

Georghiades v. *Republic* (1970) 3 C.L.R. 380 at pp. 400-401;

Republic v. *Georghiades* (1972) 3 C.L.R. 594;

University of Ceylon v. *Fernando* [1960] 1 All E.R. 631 at p. 638;

Pataki and Dunshirn v. *Austria,* (Yearbook IV, p. 714 at p. 732 of the European Commission of Human Rights).

Recourse.

Recourse against the decision of the respondent to terminate applicant's services as an employee of the Audit and Supervision Fund of the Co-operative Societies.

E. Sfstathiou, for the applicant.

M. Photiou, for the respondent.

Cur. adv. vult.

STYLIANIDES J. read the following judgment. By this recourse the applicant challenges the decision of the respondent, Commissioner and Registrar of Greek Co-operative Societies, dated 4.4.84 to terminate his services as an employee of the Audit & Supervision Fund of Co-operative Societies.

The applicant was appointed as from 28.10.66 by the Registrar of Greek Co-operative Societies as an employee of the Audit & Supervision Fund which was established under rule 92 of the Co-operative Societies Rules made under s.54(1)(b) of the Co-operative Societies Law, Cap. 114, as amended by Law No. 28/59.

On 8.4.81 the applicant was found guilty by the District Court of Nicosia of aiding and abetting the stealing of money by agent, abuse of office by public servant and breach of trust, and was sentenced to 12 months' imprisonment. Appeal was taken against the conviction and sentence. The Supreme Court on 16.10.81 partly allowed the appeal and reduced the sentence to 7 months' imprisonment—(*Azinas & Another* v. *The Police,* (1981) 2 C.L.R. 9).

On the same day—16th October, 1981—the respondent terminated the services of the applicant and informed him accordingly by letter of even date.

The applicant challenged the validity of such decision by Recourse No. 505/81. Preliminary objection was raised by the respondent that his decision was not amenable to review under Article 146 of the Constitution as the matter was not within the domain of public Law. The Supreme Court on 27th July, 1983, taking into account the nature and character of the particular decision, decided that it fell within the domain of public Law and it could be challenged by recourse under Art. 146 of the Constitution—*(Orphanos* v. *Commissioner of Co-operative Societies,* (1983) 3 C.L.R. 1369).

The President of the Court on 21.1.84 annulled the decision of termination of appointment of the applicant of 16.10.81 as, notwithstanding the seriousness of the offences of which the applicant was convicted, it was imperative to afford to him an opportunity to be heard by the respondent before the latter would reach his decision as to whether or not to terminate the services of the applicant and, therefore, the sub judice decision of the respondent was reached without the applicant having been heard and had to be declared null and void and of no effect whatsoever—*(Orphanos* v. *The Acting Commissioner and Registrar of Greek Co-operative Societies,* (1984) 3 C.L.R. 1323). Thereupon the applicant resumed his duties.

On 18.2.84 the respondent informed the applicant by letter (exhibit No. 2) that in view of his conviction and sentence to imprisonment by the District Court of Nicosia for offences of dishonesty, he was of the view that the applicant was not a suitable person to hold the post of an employee of the Audit & Supervision Fund and that he intended to dismiss him. Though the applicant was not a civil servant, in view of the decision of the Supreme Court in Recourse No. 505/81, he decided, before proceeding to the dismissal of the applicant from his post, to afford him the opportunity to be heard on the matter, and this was consonant to s. 83 of the Civil Service Law, No. 33/67, which he would apply mutatis mutandis in the case of this applicant. The applicant was invited within 8 days from

receipt of that letter to submit either orally or in writing his objections and the reasons thereof against his intended dismissal.

On 25.2.84 counsel for the applicant sent the letter, exhibit No. 3, in which, after referring to the contents of exhibit No. 2, he expressed the wish that the proceedings should be oral as the matter was a very serious one; for the proceedings to be carried out the notes of the proceedings of the Court which had tried the case and those of the Supreme Court should be received by the respondent; he further requested that copy of such notes be made by the respondent available to the applicant as extensive references to passages from them in defence of the applicant would be made and that it was not possible for the applicant to defend himself and make the necessary representations without the notes of the proceedings of the Courts; it was stressed that opportunity of putting forward the representations he wished to make was not possible without recourse to such notes.

The respondent replied by letter dated 8.3.84 (exhibit No. 4) in which he stated that he had in his possession for a long time the notes of the proceedings ("πρακτικά") of the District Court of Nicosia relating to the conviction in Case No. 17841/80 and those of the Supreme Court, Criminal Appeals No. 4214-17. He called upon the applicant to attend the respondent's office either on the 21st or the 22nd March to put up orally the objections and reasons against his intended dismissal.

On 17th March counsel for the applicant by letter, exhibit No. 5, expressed the view that there was a misconception or misunderstanding of the matters raised in his letter of 25.2.84. He stated that it was absolutely necessary for the defence of the applicant and the proper carrying out of the disciplinary proceedings that the notes of the proceedings both of the trial Court and of the Court of Appeal should be obtained by the respondent and be made available by the respondent to the applicant. He expressed the view that the disciplinary proceedings could not have been lawfully carried out without such notes. He applied for an adjournment of the case for the notes of the proceedings to be made available by the respondent to the defence.

The respondent replied by letter dated 20.3.84 (exhibit No. 6) which I consider pertinent to quote seriatim:-

«Αναφέρομαι στην επιστολή σας ημερομ. 8.3.1984 τη σχετική με την υπόθεση του πελάτου σας κ. Παναγιώτη Ορφανού και επισυνάπτω φωτοαντίγραφο των Πρακτικών του Επαρχιακού Δικαστηρίου Λευκωσίας που αφορούν την καταδίκη του πελάτου σας αρ. Υποθέσεως 17841/80 ημερομ. 8.4.1981 τα οποία θα σας βοηθήσουν στο έργο σας.

2. Όσον αφορά τα Πρακτικά του Ανωτάτου Δικαστηρίου, Ποινικαί Εφέσεις 4214-17, που αφορούν την επικύρωση της καταδίκης του πελάτου σας υπό του Επαρχιακοῦ Δικαστηρίου Λευκωσίας, επαναλαμβάνω ότι η εν λόγω απόφαση του Ανωτάτου Δικαστηρίου είναι ήδη δημοσιευμένη (Ίδετε ΑΖΙΝΑΣ και άλλων ν. ΑΣΤΥΝΟΜΙΑΣ, (1981) 2 C.L.R. 9).

3. Περαιτέρω δέον να σημειωθή ότι επειδή εχειρίσθητε την υπόθεση του εν λόγω πελάτου σας εις το Εφετείο, εξυπακούεται ότι έχετε ή έπρεπε να έχετε τα πρακτικά της υποθέσεως, οπότε πιστεύω ότι είσθε γνώστης των γεγονότων και περιστατικών της υποθέσεως, τα οποία εν συνδυασμώ με τα πρακτικά που σας αποστέλλω πρέπει να σας παρέχουν τα αναγκαία στοιχεία δια τους σκοπούς της παρούσης διαδικασίας.

4. Όθεν θα αναμένω να εμφανισθείτε ενώπιον μου την 21ην ή 22αν τρέχοντος για το σκοπό που άναφέρεται στην επιστολή μου προς τον πελάτη σας ημερ. 8.3.1984, αντίγραφο της οποίας σας κοινοποιήθηκε».

("I refer to your letter dated 8.3.1984 in respect of the case of your client Mr. Panayiotis Orphanos and to attach photo-copies of the record of the District Court Nicosia which refer to the conviction of your Client, Case No. 17841/80 dated 8.4.1981 which will help you in your task.

2. As regards the record of the Supreme Court, Criminal Appeals 4214-17, which refer to the confirmation of the conviction of your client by the District Court of Nicosia, I repeat that the said judgment of the Supreme Court has already been published

(see *Azinas and Others* v. *Police* (1981) 2 C.L.R. 9).

3. Further it must be noted that because you appeared in the case of your client in the Supreme Court it is to be understood that you have or ought to have had the record of the case, and I believe that you have knowledge of the facts and circumstances of the case, which in combination with the record which I am sending you must give you the necessary elements for the purposes of this proceeding.

4. Therefore I will expect you to appear before me on the 21st and 22nd of this month for the purpose stated in my letter to your client dated 8.3.1984, copy of which has been sent to you").

It is common ground that the enclosed "photocopy of the proceedings of the District Court of Nicosia" was no more than photocopy of the judgment of the trial Court.

On 22.3.84 the applicant with his counsel appeared before the respondent. The notes of the proceedings of that day are part of exhibit No. 7. Counsel for the applicant referred to s. 83 of the Public Service Law, No. 33/67, which would be applied mutatis mutandis in the present case, and the decision of the Supreme Court in Recourse No. 505/81. He referred to the correspondence of the respondent and counsel on the matter of the notes of proceedings of the trial Court and the Supreme Court. He submitted that the respondent had before him the two judgments only and not the notes of the proceedings and that obviously, as it emerged from the correspondence, the respondent was confusing the reasoned judgments with the notes of the proceedings. He objected that the disciplinary proceedings were defective, and that, as the applicant was not given the notes, he could not defend himself. Without prejudice to the above, he made certain submissions. On page 3 we read:-

«Εάν υπήρχαν τα πρακτικά θα ηδυνάμεθα να σας τα δείξωμεν, αλλά και εσείς με την οιωνεί εξουσίαν που έχετε και την οποίαν εξασκείτε σήμερον θα είσθο εις θέσιν να κρίνετε, και δεν θα καταλήγατε εις το συμπέ-

ρασμα ότι θα πρέπει να παυθεί. Δεν θα ήθελα να είμαι άδικος και θα ήθελα να πω ότι η μελέτη αυτή των πρακτικών η οποία είναι περίπου 2,000 σελίδες πράγματι απαιτεί χρόνον. Έχω επίσης υπόψη ότι ηναλώθη σχετικά μεγάλος χρόνος μέχρι την έκδοσιν της αποφάσεως του Ανωτάτου Δικαστηρίου. Αλλά αυτός είναι ο Νόμος, αυτή την ρύθμισιν έδωσε ο νομοθέτης και δεν θα έπρεπε ο όγκος αυτών των πρακτικών να μας επιβάλει την λύσιν να μην τα δούμε καθόλου. Αντιθέτως θα έλεγε κάποιος ότι εν όψει της αποφάσεως του Ανωτάτου Δικαστηρίου, επιβάλλετο η αναδρομή και η μελέτη αυτών των πρακτικών δια να σχηματίσωμε την ορθήν εικόνα και να ενημερωθούμε επί των υπό του Νόμου και της Νομοθεσίας καθοριζομένων».

("If the record was available we would be able to show it to you, but you with the quasi powers you have and which you exercise today you would be in a position to judge and you wouldn't have come to the decision that he must be dismissed. I wouldn't like to be unfair and I would like to say that this study of the record which is about 2,000 pages really needs time. I am also of the view that quite a long time has been spent up to the delivery of the judgment of the Supreme Court. But this is the Law, this is the arrangement given by the legislature and that the volume of this record should not impose on us the solution of not seeing them at all. On the contrary it could be said that in view of the decision of the Supreme Court, the reference to and the study of the record was imperative in order to form the correct picture and to be informed of by the Law and Statute defined").

After conclusion of his address, which was mostly a plea of inability to exercise properly the right of defence due to the non-availability to the applicant of the notes of the proceedings and the difficulty of the respondent to exercise properly his power for the same reason, the decision was reserved. On 4.4.84 the sub judice decision was issued—exhibit No. 7—whereby the applicant was dismissed.

In the decision itself (page 2) it is stated:-

"Although the respondent is not a public servant, nevertheless I applied mutatis mutandis s. 83 of the Public Service Law, 1967-1981. ... I had the opportunity to go through the notes of the proceedings before the District Court ("Πρακτικά και απόφαση") as well as the judgment of the Supreme Court".

The respondent testified before me. He stated that he had in his possession the notes of the proceedings of the trial before the District Court. It is significant, however, that he did not remember whether he obtained possession of same before or after 21.1.84 when the judgment in Recourse No. 505/81 was issued; he could not remember whether he had them in his possession on or before 16.10.81 when he took the decision of dismissal which was annulled; he could not remember at all, even by proximity, when he came to possession of same. He admitted that though counsel for the applicant in his address at the disciplinary proceedings before him made a repeated plea for the notes of the Courts to be obtained by the respondent and be furnished to the applicant and he suggested that the respondent was confusing the texts of the two judgments of the Courts with the notes of the proceedings, he kept mute. He agreed that though in his letter of 20.3.84 it was stated that he was sending the notes of the proceedings, actually it was a copy of the judgment that was sent, his explanation for that being that his subordinate, Mr. Mavrommatis, who made the dispatch, probably erred.

Having regard to the correspondence exchanged between the parties, the silence of the respondent during the address of the applicant as well as his evidence in Court, I reached the conclusion that the respondent was labouring under a misconception that the reasoned judgment were the minutes of the notes of the proceedings, and whenever he refferred to "πρακτικά", he meant the reasoned judgment, and when he referred to "judgment", he meant the order for the conviction or sentence of the applicant.

It was strenuously argued by counsel for the applicant that the rules of natural justice were violated; the right to be heard was infringed and though the applicant was afforded the opportunity to be present, he was not given the notes of the proceedings; that the respondent did not

have before him at the material time the notes of the proceedings; the provisions of s. 83 of the Public Service Law, which were purportedly by analogy applied, were violated; and that the right of defence or audience was not satisfied by what happened due to acts or omissions of the respondent.

Counsel for the respondent, on the other hand, submitted that the opportunity was afforded to the applicant to attend, make the necessary representations and furthermore that as he was defended by the same counsel before the District Court more than three years earlier, he had or ought to have had the notes.

In *Pantelidou* v. *The Republic*, 4 R.S.C.C. 100, at p. 106, it was said:-

> "In the opinion of the Court, strict adherence to the principle concerned is most essential, in spite of the fact that such a course may occasionally result in causing some delay and that the reasons for dismissing a public officer may sometimes be, prima facie, so overwhelming as to render it improbable that anything will be forthcoming from him which would render his dismissal unnecessary".

In *Marcoullides* v. *The Republic*, 3 R.S.C.C. 30, at p. 35, it was said:-

> "The Commission has to comply with certain well-established principles of natural justice and the accepted procedure governing dismissal of public officers".

The matter of this applicant is not governed by statutory provisions as he is not a civil servant. The respondent is entitled, though not bound, to accept as correct the relevant facts as established to the satisfaction of the criminal Court concerned and so long as the applicant was heard by the Court thereon, he need not have been given another opportunity to be heard by the respondent on the same facts with regard to conviction. The dismissal, however, of the applicant was not and could not be an automatic consequence of his conviction. The applicant ought to have been heard in his defence on the issue of the disci-

plinary punishment to be imposed. The same set of facts, which have led to a criminal conviction, may be viewed in a different light when examined from the point of view of disciplinary control—(*Morsis* v. *The Republic*, 4 R.S.C.C. 133).

Though the European Commission of Human Rights has held in a series of cases that the notion of "criminal offence", as mentioned in Article 6.2 and 6.3 of the Convention, does not envisage disciplinary offences, and the right to a fair hearing, as guaranteed by Article 6.1, does not apply to disciplinary proceedings, in this country in *Haros* v. *The Republic*, 4 R.S.C.C. 39, the Supreme Constitutional Court held that the rules of natural justice, which under Article 12 of our Constitution were applicable to offences in general, should be adhered to in all cases of disciplinary control in the domain of public Law. It is well settled that in disciplinary proceedings the rules of natural justice, including the audi alteram partem, should be strictly adhered to.

In *Iordanous* v. *The Republic*, (1974) 3 C.L.R. 194, Triantafyllides, P., at pp. 201-202, had this to say:-

> "A series of cases, such as *Markoullides and The Republic*, 1 R.S.C.C. 30, 35, *Morsis and The Republic*, 4 R.S.C.C. 133, 138, *Fisentzides* v. *The Republic*, (1971) 3 C.L.R. 80, at p. 86, and *Kyprianou* v. *The Public Service Commission*, (1973) 3 C.L.R. 206, at p. 224, leave no room for doubt that this complaint of counsel for the applicant is a valid one, both as a matter of natural justice and, also, because, the failure to afford the applicant an opportunity to make, if he wished, a plea in mitigation of punishment deprived the Commission of the possibility of knowing his attitude, as a member of the public service, after he had been informed that he had been found guilty of the disciplinary offences concerned, such attitude was a material fact, to be weighed with all other relevant considerations; had it been known it might have made the Commission take a different decision as regards the punishment to be imposed on the applicant. ...

It can be judicially noticed that it is the invariable practice to allow an accused, who has been found guilty by a Court in a criminal case after a summary trial, to be heard in mitigation of sentence; and, in my view, the same applies mutatis mutandis to the corresponding situation in proceedings before the Commission.

For all the foregoing reasons this recourse succeeds in so far as it is aimed at the part of the sub judice decision of the respondent by means of which disciplinary punishment was imposed on the applicant and, consequently, such punishment is annulled".

In *Russell* v. *Duke of Norfolk and Others,* [1949] 1 All E.R. 109, at p. 118 Tucker, L. J., said:-

"There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth".

It is a general and fundamental principle of law, applicable in every country where the rule of law prevails, that the right of defence of a person charged includes the right to be heard. This is not a mere procedural formality but a basic right that ensures the right of a person charged to put before the appropriate organ his interpretation of the facts and explanations of the happening and make the necessary representations relating to his case. This right is exercised before the administrative organ decides the punishment to be imposed as the object and purpose is to afford to the citizen the opportunity to give such explanations of the happenings and make such representations to the Administration or quasi-judicial authority as to influence the decision in his favour or to a certain direction —*(Cases of the Greek Council of State,* 54, 507 (1944)).

In *Tsatsos—Recourse for Annulment,* 3rd Edition, p. 308, we read:-

"The right of hearing acquires an exceptional as-

pect in regulating the relations of the State with its employees of all grades. Whenever the State is about to take an unfavourable disciplinary or quasi-disciplinary step against a person to whom the act intended to be issued refers, he should be called upon, so as to put forward his views, by giving him adequate time. In other words, even if the Law does not make provision for the hearing of the interested party, the duty of the Administration to a prior hearing is embodied in the very meaning of the provisions, which afford to the Administration the ease to issue an unfavourable act. This right of the subject is one of the most deeply rooted in human sense of justice. The violation of this right has in the past been a feature of absolutism. Analogous is the right of every accused person not to be tried without his defence if he so desires".

This right includes the making known and available to the interested person of all material for the exercice of it. The person charged should have the opportunity of being heard in his own defence in a manner in which such right shall be a real one worth what it is meant to be—(*Georghiades* v. *The Republic*, (1970) 3 C.L.R. 380, at pp. 400-401). Reference may also be made to the case of *The Republic* v. *Lefkos Georghiades*, (1972) 3 C.L.R. 594, where the question of disciplinary proceedings and the necessity to comply therein with the rules of natural justice and the applicability of principles extend to same are extensively dealt with.

In *University of Ceylon* v. *Fernando*, [1960] 1 All E.R. 631, at p. 638 Lord Jenkins said:-

"What, then, are the requirements of natural justice in a case of this kind? First, I think that the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and, thirdly, of course, that the tribunal should act in good faith. I do not think that there really is anything more".

"Equality of arms", i.e. the procedural equality of the accused with the prosecutor, is, according to the European

Commission—(See *Pataki and Dunshirn* v. *Austria*, Yearbook IV, p. 714, at p. 732)—an inherent element of "fair hearing" enshrined in Article 6 of the European Convention. Equality of arms is inherently embodied in the right to be heard.

In *The Right of Defence Before the Administrative Authorities*, (1974) by Stassinopoulos, at pp. 220-221, we read:-

«Η ακρόασις, ως είπομεν, αποτελεί εν στοιχείον της ευρυτέρας εννοίας της υπερασπίσεως του διοικουμένου. Η ακρόασις καθ' εαυτήν, είναι εν minimum της υπερασπίσεως, το οποίαν πρέπει νὸ παρέχηται εις τον ενδιαφερόμενον—τούτο δε, ως ημείς φρονούμεν, κατά συνταγματικήν επιταγήν, υφισταμένην εις τας περισσοτέρας περιπτώσεις.

Πέραν όμως της ακροάσεως, δυνατόν να παρέχωνται εις τον ενδιαφερόμενον και συμπληρωτικά μέσα υπερασπίσεως, άλλοτε μεν υπό του νόμου, άλλοτε δε κατ' εφαρμογήν της αρχής της πλήρους υπερασπίσεως.

Η ανακοίνωσις των στοιχείων του φακέλλου—Εάν ο κληθείς εις ακρόασιν δεν αρκείται εις όσα η πρόσκλησις διαλαμβάνει, αλλ' επιθυμεί να λάβη γνώσιν των ουσιωδών στοιχείων του φακέλλου, η Διοίκησις δεν δύναται κατ' αρχήν, ν' απορρίψη αναιτιολογήτως το αίτημα, έστω και άν η τοιαύτη ανακοίνωσις δεν προβλέπεται υπό του νόμου, ως προβλέπεται π.χ. εις την πειθαρχικήν διαδικασίαν. Άλλως, το δικαίωμα της ακροάσεως θα περιήρχετο, εις πολλάς περιπτώσεις, εις ατονίαν. Δεν υποχρεούται όμως η Διοίκησις εις αυτεπάγγελτον προσφοράν, εάν τούτο δεν ζητηθή.

Πάντως, εάν αναγνωρισθή το δικαίωμα τούτο, δέον να τηρηθούν κατά την ικανοποίησιν του, κατ' αναλογίαν, όσα ισχύουν δια την πειθαρχικήν διαδικασίαν, ίνα μη, άλλως, το δικαίωμα τούτο, φαλκιδευθή ή καταστή αναιμικόν.

Η ανακοίνωσις έχει 'τυπικόν' χαρακτήρα.—Δεν εξετάζεται εάν ο ενδιαφερόμενος είχε τυχόν λάβει γνώσιν εξωδίκως και δι' άλλην αιτίαν τινών ή πολλών εκ

των στοιχείων. Η υποχρέωσις προς ανακοίνωσιν αυτών, εφ' όσον υφίσταται, θεωρείται κατά τινα τρόπον τυπική και δέον να τηρήθή, έστω και αν η Διοίκησις έχει την αντίληψιν ότι ο ενδιαφερόμενος τελεί ήδη, ιδιωτικώς ή και υπηρεσιακώς, εν γνώσει των στοιχείων τούτων. Εις απόφασιν του Γαλλικού Συμβουλίου της Επικρατείας της 11 Φεβρουαρίου 1972, γίνεται δεκτόν ότι ο απειλούμενος δια του μέτρου της λήξεως της (προφορικής) συμβάσεως υπηρεσιών ετέλει εν γνώσει απάντων των στοιχείων του φακέλλου του, τουλάχιστον απάντων των ουσιωδών (importantes), διότι είτε ο ίδιος είχε συντάξει ταύτα, είτε ο ίδιος ήτο ο παραλήπτης αυτών. Εν τούτοις, το γεγονός τούτο δέν απήλλασσεν, ως δέχεται η απόφασις, την Διοίκησιν από την υποχρέωσιν να 'ανακοινώση' εις αυτόν τα στοιχεία ταύτα, επί τη παραλείψει δε της ανακοινώσεως ταύτης, η προσβληθείσα πράξις εθεωρήθη άκυρος δια παράνομον διαδικασίαν, ήτοι δια προσβολήν του δικαιώματος της υπερασπίσεως».

("The hearing, as we said, constitutes an element of the wider meaning of the defence of the subject. The hearing in itself is a minimum of the defence, which must be given to the interested party—and this, as we think, by constitutional order, subject in most cases.

But more than the hearing, there might be given to the interested party supplementary means of defence, sometimes by the Law and sometimes by the application of the principle of full defence.

Communication of material in the file—

If the person called to a hearing is not content with what is included in the summons but wishes to take notice of material facts of the file, the administration cannot as a rule, refuse without reason the application even though such communication is not provided by Law, as is provided for example, in disciplinary procedure. Otherwise, the right of hearing would result in many cases, in debility. But the administration is not under an obligation of a voluntary offer, if that is not requested.

In any way, if this right is recognised, there must be observed, during its satisfaction by analogy, everything which is valid in the disciplinary procedure, so that, otherwise, this right will not be or become anemic.

The communication has formal character.

It is not examined whether the interested party might have had knowledge extrajudicially and for another reason of some or of many of the particulars. The obligation for their communication, so long as it exists, is considered in a way formal and must be observed, even though the Administration is of the view that the interested party has already, privately or officially, knowledge of these particulars. In a decision of the French Council of State of the 11th February, 1972, it is accepted that the person threatened by the measure of terminating (oral) the contract of service had knowledge of all the particulars of the file, at least of all the fundamental (importantes), because either he had written them or he was their receiver. In spite of that this fact did not absolve, as accepted by the decision, the Administration of its obligation to 'communicate' to him these particulars, on the omission of this communication, the attacked act was considered void for unlawful procedure, i.e. for offending the right of defence").

In this case the respondent decided, and made it known to the applicant, to apply mutatis mutandis s. 83 of the Civil Service Law. The material part are subsections (1) and (2) which read as follows:-

"(1) Where a public officer has been convicted of an offence involving dishonesty or moral turpitude and the conviction has either been upheld on appeal or no appeal has been made, the Commission shall as expeditiously as possible obtain a copy of the notes of the proceedings of the Court which tried the case and of the Court, if any, to which an appeal was made.

(2) The Commission shall, within such period as may be prescribed, and until such period is prescribed

within two weeks of he receipt of the copy of the notes of the proceedings as in sub-section (1), seek the views of the Attorney-General of the Republic on whether the offence is one involving dishonesty or moral turpitude. The Attorney-General of the Republic shall advise thereon as expeditiously as possible and, in the event of an advice in the affirmative, the Commission, without any further investigation and after giving the officer concerned an opportunity of putting forward any representations he wishes to make, shall impose such disciplinary punishment as may be justified in the circumstances".

The respondent did not conform with the mandatory provisions of s. 83 in that he did not obtain the notes of the proceedings and he did not give the applicant the opportunity of putting forward any representations which he wished to make.

He did not furnish the applicant, though repeatedly requested, with copies of the notes of the proceedings of the trial Court and of the Supreme Court. The fact that the applicant was an accused person some years earlier before the District Court does not, according to the principles expounded earlier on in this judgment, absolve the respondent from the obligation to furnish the applicant with copy of the notes. This is not a simple non-observance of procedural safeguards; it goes to the root of the right to defend and the right of audience. After all, as Frankfurter, J., said in *Mc. Nabb* v. *United States*, 318 U.S.: "The history of liberty has largely been the history of the observance of procedural safeguards".

The right to be heard is interwoven and inherently part of the right of defence. This right cannot by circumcision be limited to the right of physical presence before the Authority. A person charged has to be afforded the arms reasonably necessary for his defence.

In the present case the notes of the proceedings of the Courts who tried the criminal case were asked for by letters of counsel for the applicant. The need of same for the presentation of the case of the applicant was eloquently and

dramatically stated on 22.3.84 to the respondent at the discipinary proceedings.

The principle embodied in the maxim "audi alteram partem" entails the right to be informed of the charge, to be furnished with all documents reasonably necessary for the defence, to be legally represented and to be afforded adequate opportunity to place his representations before the tribunal. The decision maker has to act fairly, hear and consider the representations of the person charged and then proceed to reach his decision. The principles of natural justice are fundamental rules, the breach of which prevents justice from being seen to be done. It cannot be validly argued that the seriousness of the offences for which the applicant was convicted was such as nothing which could have been said on behalf of the applicant would have influenced the mind of the applicant in the mental process of reaching a decision as to the punishment to be imposed. There are, after all, degrees even of grave misconduct and explanations if not excuses for it. Had it been otherwise, the hearing could have been only a useless formality because the tribunal could not have choice of sanction.

The respondent in reaching the sub judice decision did neither comply with the requirements of s. 83 of the Civil Service Law nor conform substantially with the rules of natural justice and failed to afford to the applicant adequate opportunity to exercise the right of hearing to which he was entitled.

For the aforesaid reasons the sub judice decision is hereby declared null and void and of no effect whatsoever.

The question of costs caused me some concern. In view of the history of this case the respondent to pay £50.- towards applicant's costs.

Sub judice decision annulled.
Respondent to pay £50.- costs.