

1989 August 1

(BOYADJIDS J)

IN THE MATTER OF THE APPLICATION BY ROBERT SMITH FOR AN ORDER OF CERTIORARI,

AND

IN THE MATTER OF GUARDIANSHIP ORDER, UNDER APPL NO 141/85 OF THE DISTRICT COURT OF NICOSIA

AND

IN THE MATTER OF THE ORDER ISSUED IN THE AFORESAID APPLICATION BY THE DISTRICT COURT OF NICOSIA ON 27 86 BY VIRTUE OF WHICH CHRYSSE R SMITH, WIFE OF THE APPLICANT, WAS APPOINTED GUARDIAN OF ELAINA, THE MINOR DAUGHTER OF THE APPLICANT,

AND

IN THE MATTER OF ARTICLE 155 4 OF THE CONSTITUTION, ARTICLE 30 3 OF THE CONSTITUTION, OF LAW 14/60, S 19 AND 42 SUBSTITUTED BY LAW 98/86 OF THE ADMINISTRATION OF JUSTICE (MISCELLANEOUS PROVISIONS) LAW 33/64 AS AMENDED, OR ORDER 58 RR 1, 2, 3 OF THE CIVIL PROCEDURE RULES AND REGULATIONS 9 AND 10 OF THE GUARDIANSHIP OF INFANTS AND PRODIGALS REGULATIONS

(Civil Application No 190/88)

Prerogative Orders — Certioran — Delay in applying — A ground for refusing the remedy

Prerogative Orders — Certioran — Practice — Though no rules have been enacted, the Court tends to follow the practice and procedure in force in England in 1960

The applicant moved the Court to issue an order of Certioran, quashing the order whereby the guardianship and custody of applicant's infant daughter was given to her mother. The drawn up order was served on the applicant on 24 3 87, that is about 18 months before filing of the application for leave to apply for certioran. No explanation was put forward for such delay. The Court held that such delay is sufficient ground by itself for the dismissal of the application.

Application dismissed with costs against applicant

Cases referred to:

- Iacovidou v. Christophi* (1985) 1 C.L.R. 533;
In Re Aeroporos and Others (1988) 1 C.L.R. 302;
In Re Sykopetritis and Sons Ltd. (not yet reported).

5 Application.

Application for an order of certiorari to remove to the Supreme Court in order to quash the order of the District Court of Nicosia issued on 2 July, 1988 in Appl. No. 141/85 whereby the guardianship, care and custody of the minor Elaina was granted to the respondent mother.

E. Vrahimi (Mrs.), for the applicant.

E. Efsthathiou with D. Koutras, for the respondent.

Cur. adv. vult.

BOYADJIS J. read the following judgment. Pursuant to the leave of this Court granted to him on 22 October 1988, the applicant Robert Smith, husband of the respondent Chryssa R. Smith and father of the minor Elaina R. Smith, now moves the Court for an order of certiorari to quash the order of the District Court of Nicosia issued on 2 July 1988 in the Originating Application No. 141/85, whereby the guardianship, care and custody of the aforesaid minor were given to her mother, the present respondent.

The ground upon which the applicant relies in invoking the aforesaid relief is his allegation that he was deprived of his right to defend the proceedings against him in breach of the rules of natural justice because -

- (a) the application and affidavit served on him by post in England were written in Greek;
- (b) being of English origin and residing in England the only language which he knows is the English language;
- (c) though copy of the order allowing substituted service upon him of the aforesaid application and affidavit was drawn in English, it did not specify the relief sought so as to throw any light on the nature of the proceedings against him.

The respondent opposes the application on the merits and also on the ground of unjustified long delay by the applicant in filing his

application. In support of the plea of delay my attention has been drawn to Exh. 2 attached to the affidavit sworn by the applicant on 4 October 1988 in support of the present application. This exhibit is a certified true copy of the order of the Court dated 2 July 1986, drawn up in English, which was served on the applicant on 24 March 1987, i.e. more than eighteen months before the filing of this application. The Court observes in this respect that at no time has the applicant attempted to put forward any explanation whatsoever for this inordinate delay.

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The remedy of certiorari is discretionary. Unjustified delay in applying may justify the Court to refuse making the order: *Nina Iacovidou v. Manolis Chistophi* (1985) 1 C.L.R. 533.

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Under R.S.C. Ord. 53 r. 4 presently in force in England, an application for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, unless the period is extended by the Court upon good reason. Where the relief sought is an order of certiorari in respect of any judgment or order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding. Promptly, in the context of the Rule, means as soon as practicable or as soon as the circumstances of the case will allow: Annual Practice 1985, p. 766.

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On the date of our Independence, the Rule applicable in England was RSC Ord. 59, r.4(2) which provided that the application for an order of certiorari should be made not later than six months after the date of the judgment, order, conviction or proceeding sought to be removed.

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In Cyprus no Rules of Court have yet been enacted prescribing the period within which an application for certiorari may be made. The English Rules are not, strictly speaking, applicable in Cyprus. Yet, in the exercise of its jurisdiction under Article 155.4 of the Constitution, the Supreme Court is guided, to say the least, on procedural matters by the practice and rules of procedure which were in force in England in 1960. In *Re Charalambos Aeroporos and Others*, (1988) 1 C.L.R. 302 Mr. Justice Pikiis expressed the view that «the Supreme Court has consistently adhered to the rules applicable in England at the time of the introduction of the

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Constitution». On the other hand, in *Re G.P. Sykoptritis and Sons Ltd.**, Mr. Justice Stylianides expressed the view that, though the English Rules are not applicable in Cyprus in the absence of any corresponding rules enacted in Cyprus we follow a practice which is similar but not identical to the practice prevailing in England.

In the case under consideration, the delay is exceedingly long and totally unexplained. This is in itself a good ground for refusing the making of an order of certiorari, even if the application, examined on its merits, were found justified.

The application is, therefore, dismissed with costs against the applicant.

*Application dismissed
with costs.*

* Not reported yet.