

1965  
Nov. 23,  
1966  
June 8

[TRIANTAFYLLIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE  
CONSTITUTION

NTINOS CONSTANTINOU AS ADMINISTRATOR OF THE  
ESTATE OF THE DECEASED EKATERINI EMMANUEL,

*Applicant.*

*and*

THE REPUBLIC OF CYPRUS, THROUGH

1. THE MINISTER OF INTERIOR,

2. THE DIRECTOR OF PLANNING AND HOUSING,

*Respondent.*

(Case No. 120/62).

NTINOS  
CONSTANTINOU  
AS ADMINISTRATOR  
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OF THE DECEASED  
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*Streets and Buildings—Streets and Building Regulations—Relaxation of these Regulations in certain circumstances—Regulation 66—Refusal of respondent 2 to authorize relaxations under Regulation 66—Discretion—Reasonably open to him in the circumstances to decide as he did—Failure of applicant to discharge the onus cast on him to establish that the said respondent acted in excess or abuse of powers—Paramount consideration under Regulation 66 (supra) is the public interest—And unless a relaxation sought thereunder is in the public interest, no amount of personal circumstances of the owner concerned could suffice to justify such relaxation—See, also, under Constitutional Law herebelow.*

*Constitutional Law—Restrictions or limitations of the right of property—Article 23, paragraphs 2 and 3 of the Constitution—The refusal of the respondent 2 to authorize the relaxations applied for under Regulation 66 (supra) does not amount to the imposition of restrictions or limitations within the meaning of Article 23, paragraphs 2 and 3 of the Constitution.—Therefore the contention that such refusal amounts to imposition of such restrictions or limitations and is unconstitutional as being contrary to paragraphs 2 and 3 of Article 23 of the Constitution, cannot be upheld—Any restrictions or limitations that may be found to be imposed on the applicant's property, are due to the operation of the relevant provisions of the Streets and Buildings Regulations and not to the refusal of the respondent 2 to authorize a relaxation of the provisions concerned—And the Constitutionality of those*

provisions is not in issue in these proceedings—The constitutionality of the aforesaid provisions concerned of the Streets and Buildings Regulations could not, in any case, be challenged by attacking the refusal of respondent 2 to authorize deviation therefrom—It could only be challenged by attacking a refusal of the Appropriate Authority to issue a building permit to applicant based on the ground that his plans were in conflict with the provisions in question, alleged to be unconstitutional—See, also, herebelow.

*Constitutional Law—Restrictions or limitations of the right of property—Compensation due in certain circumstances—Article 23, paragraph 3, of the Constitution—It is well settled that an applicant is not entitled to have from this Court, in proceedings under Article 146 of the Constitution for annulment of administrative acts or decisions etc., such as the present proceedings, a declaration that he is entitled to compensation in respect of restrictions or limitations imposed on his property—Such relief is not within the ambit of Article 146, paragraph 4, of the Constitution (Ramadan and The Electricity Authority v R.S.C.C. 49, applied).*

*Constitutional Law—Discrimination—An instance of discrimination can only arise if different treatment is meted out in two cases which are similar in all material respects—Differentiations reasonably warranted by the inherent nature of things do not amount to discrimination under Articles 6 and 28 of the Constitution—(See Mikrommatis and The Republic 2 R.S.C.C. 125).*

*Abatement of the recourse—Due to the disappearance of its subject matter—But in the instant case the decision complained of, viz. the refusal of respondent 2 to authorize the relaxations sought (supra) did take effect and did produce results between March, 1962, and December, 1962—In that it prevented the Appropriate Authority concerned (i.e. the Municipality of Famagusta), from issuing to applicant the required building permit—Thus the said Authority ceased to exist as from December, 31, 1962, because of the ceasing to exist as from that date of the relevant Municipal legislation—Nevertheless, it cannot be held that, as a result, this recourse has been abated—Inasmuch as, before its disappearance, such subject matter did take effect to the detriment of the Applicant—(See Malliotis and the Municipality of Nicosia (1965) 3 C.L.R. 75 at p. 94).*

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Regulation 66 of the Streets and Buildings Regulations provide that in certain circumstances the Director of Planning and Housing may authorize the appropriate authority to dispense with any of the requirements of these regulations. (The full text of Regulation 66 is set out in the judgment of the Court).

Article 23, paragraphs 2 and 3 provide :

“ 2. No deprivation or restriction or limitation of any such right (note : the right of property) shall be made except as provided in this Article.

3. Restrictions or limitations which are absolutely necessary in the interest of the public safety or . . . . . or the town and country planning or . . . . . may be imposed by law on the exercise of such right. *Just compensation shall be promptly paid for any such restrictions or limitations which materially decrease the economic value of such property; such compensation to be determined in case of disagreement by a civil Court ”.*

The Director of Planning and Housing (respondent No. 2) refused to authorize the relaxations applied for under Regulation 66 of the Streets and Buildings Regulations (*supra*). Hence this recourse under Article 146 of the Constitution. The facts sufficiently appear in the judgment of the Court.

Cases referred to :

*Ramadan and the Electricity Authority*, 1 R.S.C.C. 49, followed ;

*Malliotis and the Municipality of Nicosia*, (1965) 3 C.L.R. 75, at p. 94 (followed);

*Mikromatis and the Republic* 2 R.S.C.C. 125, followed.

**Recourse.**

Recourse against the decision of the respondent concerning, (a) his refusal to authorize the Municipality of Famagusta, under regulation 66 of the Streets and Buildings Regulations, to relax certain provisions of such regulations in favour of applicant, in relation to a building to be erected at Famagusta, (b) the imposition of a condition that applicant does not build shops at the ground floor of the said building,

and recourse for a declaration that applicant is entitled to just compensation for restrictions and limitations imposed on his property as a result of the aforesaid decisions.

*Ph. Clerides*, for the Applicant.

*K. Talarides*, Counsel of The Republic, for the Respondent.

*Cur. adv. vult.*

The following Judgment was delivered by:—

TRIANTAFYLIDES, J.: The claims for relief of Applicant, in this recourse, fall, in effect, into three categories:

First, claims (A), (C) and (E) are all aimed at the decision of the Respondent Director of Planning and Housing—who comes under the Respondent Minister of Interior—refusing to authorize the Municipality of Famagusta, under regulation 66 of the Streets and Buildings Regulations, to relax certain provisions of such Regulations in favour of Applicant, in relation to a building to be erected at Famagusta; this decision of the Respondent Director is set out in the letter of such Director dated the 6th March, 1962 (*exhibit 13*).

Secondly, claim (B) complains against the imposition by the Respondent Director of a condition that Applicant does not build shops at the groundfloor of the aforesaid building.

Thirdly, claim (D) seeks a declaration that Applicant is entitled to just compensation for restrictions and limitations imposed on Applicant's property as a result of the administrative action complained of in this recourse.

It is convenient to dispose, at once, of claims (B) and (D).

It has become quite clear, on the material before the Court, that no condition, regarding not building shops at the ground-floor of the building to be erected, has ever been imposed by means of an executory act or decision of the Respondent Director; the question of the possibility of such a condition being imposed appears to have been raised in negotiations between the parties, when trying to reach an agreed solution of the question of relaxations under regulation 66, but the stage was never reached of the Director taking any such final decision which could be the subject-matter of a recourse. Claim (B), therefore, is premature and is dismissed accordingly.

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Regarding claim (D) it is well settled that an Applicant is not entitled to have from this Court, in proceedings under Article 146 of the Constitution, such as the present proceedings a declaration that he is entitled to compensation in respect of restrictions or limitations imposed on his property; such relief is not within the ambit of Article 146(4)—see, *inter alia*, *Ramadan and The Electricity Authority* (1 R.S.C.C. p. 49). Claim (D) fails, therefore, and is dismissed too.

The relevant facts—in a summary—are as follows:—

The Applicant is the administrator of the estate of his deceased mother Ekaterini Emmanuel. The said estate is the owner of a plot of land in Famagusta, on the cross-roads of Odysseos Street and Roosevelt Avenue (see plot 446 on the map *exhibit* 5). On such plot there stands now an old house.

The shape of the plot in question is triangular and its extent has been reduced, due to the effects of street-widening schemes, to approximately 2,400 square feet (see *exhibit* 7).

For some time in the past the demolition of the old house and the erection on the said property of a new building have been contemplated, and it appears that, in the opinion of Applicant and his advisers, proper development of the property in question can only be effected, as a paying proposition, if the Streets and Buildings Regulations were to be relaxed in certain respects, under regulation 66 of such Regulations which reads as follows:—

“66. Notwithstanding anything in these regulations contained, where the appropriate authority is the Municipal Corporation of Nicosia, Limassol, Famagusta, Larnaca, Paphos or Kyrenia, the Director of Planning and Housing may, at the request of the appropriate authority or of the person concerned, in any particular case where he, with the concurrence of the Director of Medical Services and the Director of Public Works, is satisfied that any relaxation of these regulations is in the public interest, authorize the appropriate authority to dispense with any of the requirements of these regulations or to apply them with such modifications not being more onerous, as he may deem fit having regard to the particular circumstances of each case”.

In relation to this regulation 66, which was made in 1955, an agreement was reached in 1959 between the Famagusta Municipality and the Respondent Director's predecessor (see *exhibits 8 and 9*) by virtue of which a "regulation 66 area", as it came to be known, was specified in Famagusta (as delineated in black on *exhibit 5*).

It was agreed that with regard to properties in the said "regulation 66 area" relaxations under regulation 66 would be granted in accordance with terms which were laid down in the aforesaid agreement and which terms were published for general information of all concerned.

The property of Applicant is outside the said "regulation 66 area".

Since 1959 there has been only one case where a relaxation under regulation 66 has been granted in respect of a property outside the "regulation 66 area"; that was in relation to the property of a certain Mr. Hadjiloannou (see plot 668 on *exhibit 5*).

Plans were prepared and submitted in 1961 for building on the property involved in this recourse; such plans necessitated relaxations of the Streets and Buildings Regulations, of the same nature as those granted to property-owners in the "regulation 66 area". These relaxations would enable a new building to be built, to a considerable extent, along the boundaries of plot 446—instead of 10 feet away therefrom as provided for under the Streets and Buildings Regulations—and also to cover, by means of the groundfloor and first-floor, 50% and 70% respectively of the area of plot 446—instead of 50% and 40% respectively as provided for under the said Regulations.

The Municipality of Famagusta recommended to the Respondent Director the granting of the relaxations sought, as above, by letter dated 23rd December, 1961 (*exhibit 10*).

On the 6th March, 1962 the Respondent Director replied stating that the relaxations in question could not be authorized (*exhibit 13*). He added, however, that he was still prepared to discuss the possibility of authorizing *some* relaxation of the relevant Regulations; no agreement was, however, reached in the end between the Director and Applicant's side and this recourse was filed on the 15th May, 1962.

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This Case has, first, been through Presentation before me—under the Supreme Constitutional Court Rules—in September, 1962. Then it was left pending for a considerable period of time, mainly on the application of Applicant's counsel, in view of the fact that since January, 1963 there followed a succession of authorities responsible for building control in Famagusta town, and Applicant was trying to secure, afresh each time a new authority took over, the desired relaxations of the Streets and Buildings Regulations.

At the commencement of the hearing of this Case counsel for Respondent raised the issue of whether or not this recourse has been abated, due to disappearance of its subject-matter, as a result of the ceasing to exist of the Municipal authority in Famagusta which was involved in the question of the relaxations sought by Applicant; such authority ceased to exist as from December, 1962, when the then relevant municipal legislation ceased to be in force.

I do not think that it is necessary for the purposes of this Judgment to decide the aforesaid issue; the sub judice refusal of the Respondent Director did take effect and did produce results, between March, 1962 and December, 1962, in that it prevented the Municipality of Famagusta, which was in existence during that time, from issuing to Applicant the required building permit, with the relaxations applied for; therefore, even if one were to hold that the subject-matter of this recourse disappeared as from after December, 1962, nevertheless it cannot be held that, as a result, this recourse has been abated, inasmuch as, before its disappearance, such subject-matter did take effect to the detriment of Applicant. (See *Malliotis and the Municipality of Nicosia*, (1965) 3 C.L.R. p. 75 at p. 94).

Counsel for Applicant at the hearing of this Case adopted the submissions he had made at the Presentation stage—which are to be found at pp. 4 and 5 of the Statement of Case prepared after such Presentation—and elaborated on them further.

His first submission is, thus, that the refusal of the Respondent Director to authorize the relaxations applied for amounts to the imposition of restrictions and limitations contrary to Article 23—paragraphs 2 and 3—of the Constitution.

In my view any restrictions or limitations that may be

found to be imposed on the property of Applicant, are due to the operation of the relevant provisions of the Streets and Buildings Regulations—the constitutionality of which is not, as such, in issue in these proceedings—and not to the refusal of the Respondent Director to authorize a relaxation of the provisions concerned. Under regulation 66 the Director does not decide at all on the imposition of any restrictions or limitations, but is only empowered to authorize a modicum of relief in proper cases; thus, the above submission of Applicant cannot lead to finding unconstitutional the sub judice decision of the Respondent Director.

Moreover, the constitutionality of the provisions concerned of the Streets and Buildings Regulations could not, in any case, be challenged through attacking the refusal of the Respondent Director to authorize deviation therefrom; it could, only, be challenged by attacking a refusal of the Famagusta Municipality, to issue a building permit to Applicant, based on the ground that his plans were in conflict with the provisions in question; and we are not faced with such a position, in the present Case, because the Applicant does not challenge at all any refusal, or other decision, of the Famagusta Municipality in this recourse.

The second submission of counsel for Applicant has been that the refusal of the Respondent Director to authorize the relaxations sought by Applicant is a decision taken in excess or abuse of powers.

In my view, on the contrary, a question of excess or abuse of powers of the Respondent Director might have arisen had he authorized the relaxations in question; and I say this for the following reason:

There is no doubt that relaxations are to be authorized under regulation 66 only to the extent to which they prove to be necessary in the public interest: it follows, therefore, that no greater a relaxation should be granted than what is warranted by the public interest in a particular case. In the present Case new plans (*exhibit 12*) have been prepared which provide for the building development of Applicant's property in a way requiring less extensive relaxations, of the relevant provisions of the Streets and Buildings Regulations, than under the original plans (*exhibit 4*); the Municipal Engineer of the Famagusta Municipality, Mr. Pavlos Pavlides, has given evidence for Applicant, at the Presentation, and

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has explained the reasons why he had recommended in the public interest, inter alia, the relaxations originally sought; but he has also admitted in evidence (see p. 23 of the Statement of Case) that the lesser relaxations involved by the new plans, *exhibit 12*, would be quite satisfactory from all points of view, on the basis of which he had recommended the relaxations originally sought by Applicant.

It follows that the more extensive relaxations requested on the basis of the plans originally submitted (*exhibit 4*) go beyond what is warranted in circumstances of the present Case, and, therefore, it cannot be said that it would be in the public interest to authorize the more extensive relaxations involved by the plans *exhibit 4*, when lesser relaxations, as involved by the new plans *exhibit 12*, could meet the situation. And in the present Case we are concerned only with the validity of the refusal of the Respondent Director to authorize the relaxations involved by the plans *exhibit 4*. It is true that during the hearing of this Case he stated that he was not prepared to authorize, either, the lesser relaxations involved by the new plans *exhibit 12*, but his said view is not sub judice in the present proceedings, as part of the subject-matter thereof. He may still be requested to authorize the lesser relaxations entailed by the new plans *exhibit 12*, and then, if he refuses to authorize them, a new recourse would have to be filed to test the validity of his refusal.

It has been, further, submitted by counsel for Applicant that in exercising his discretion under regulation 66 the Respondent Director has failed to consult, before reaching his decision, the director of Medical Services and the Director of Public Works, who are both mentioned by regulation 66. In my view the need to consult these two officers could only have arisen had the Respondent Director been inclined to authorize the relaxations applied for; as regulation 66 is framed he did not have to consult them when refusing the said relaxations.

It has been, also, submitted by counsel for Applicant that the Respondent Director has misinterpreted the object of regulation 66. In this respect I have been referred to, in particular, to certain parts of the evidence at the Presentation of the Respondent Director, Mr. Nicos Sakkides. I think that the evidence of the Respondent Director has to

be read as a whole and it is not proper to take any part thereof in isolation and build thereupon a case of misdirection by the Director. Though, indeed, it might be said that the Respondent Director takes a quite strict view of the need to uphold as much as possible the uniform application of the Streets and Buildings Regulations, and is not disposed to be generous with relaxations thereof, I am satisfied that his approach to the matter in question was well within the ambit of regulation 66; his evidence when read as a whole leaves no room for doubt on this point.

It has, next, been complained of by counsel for Applicant that the Respondent Director has failed to give due weight to the personal circumstances of the Applicant. I do not agree that he has failed to take into account such circumstances; also, I am of the view that the personal circumstances of Applicant could not have been the paramount consideration in the mind of the Respondent Director, because the paramount consideration under regulation 66 is the public interest, and unless a relaxation sought thereunder is in the public interest no amount of personal circumstances of the property-owner concerned could suffice to justify such relaxation.

On the whole of the material before me I have come to the conclusion that Applicant has not discharged the onus cast upon him, in a case of this nature, of establishing that the Respondent Director has acted in excess or abuse of powers. On the contrary I am satisfied that his sub judice decision was reasonably open to him in the circumstances and, thus, I am not prepared to annul it as taken in abuse or excess of his powers under regulation 66.

Counsel for Applicant has, also, complained that there has been discrimination against him inasmuch as relaxations of the relevant Regulations were authorized in the case of the aforesaid Mr. HadjiIoannou, in respect of his plot 668, which is also outside the "regulation 66 area". But an instance of discrimination can only arise if different treatment is meted out in two cases which are similar in all material respects; differentiations reasonably warranted by the inherent nature of things do not amount to discrimination (see *Mikrommatis and The Republic* 2 R.S.C.C. p. 125). On all the material before me I am satisfied that the cases of Mr. HadjiIoannou and of Applicant are not on such an

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equal footing as to give rise to the conclusion that Applicant has been discriminated against.

I have, lastly, considered whether the fact that the “regulation 66 area” had been established, has in any way prevented the Respondent Director from examining duly the case of Applicant by leading him along the line of thought that only cases within such area could have been considered with a view to any relaxation being authorized. I am satisfied, however, from the evidence of the Respondent Director, that the case of Applicant did receive examination on its merits, irrespective of its being outside the “regulation 66 area”; and this is also shown by *exhibit* 13, where the Respondent Director, in refusing the relaxations requested, nevertheless appears disposed to discuss the possibility of *some* relaxation being authorized, in view of the circumstances of Applicant’s case.

For all the reasons set out in this Judgment I find that this reccurse fails and should be dismissed.

In concluding this Judgment I would like to state that nothing which I said herein should be taken as finding justified, or unjustified, the attitude of the Respondent Director in not being prepared to approve even the relaxations involved by the new plans, *exhibit* 12. I leave this matter entirely open. It is up to Applicant to place these plans, or any other plans, before the Director who will have to consider, under regulation 66, the matter of any relaxations of the Streets and Buildings Regulations that may be involved, giving due weight to all relevant considerations; and it may usefully be borne in mind that the Respondent Director has, as already stated, envisaged himself, in *exhibit* 13, the possibility of *some* relaxation of the relevant Regulations being authorized in the circumstances of this particular Case.

Regarding costs I have decided to make no order as to costs because I think that this was a Case which the Applicant, as a citizen, was reasonably justified in bringing before this Court, even though he has failed to succeed in the end.

*Application dismissed.*

*No order as to costs.*