1972
May 27

LOULLA GEORGHIOU LIASIDOU

v.

THE MUNICIPALITY OF FAMAGUSTA

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

LOULLA GEORGHIOU LIASIDOU,

Applicant,

and

THE MUNICIPALITY OF FAMAGUSTA,

Respondent.

(Case No. 385/71).

Administrative acts or decisions—Confirmatory act—Act merely confirmatory of a previous executory one cannot be made the subject of a recourse—Refusal of application for a building permit to erect third storey—On the ground that the permit applied for was by law precluded—Renewal of application by submission of plans different than the original ones—No new inquiry taking place as there were no new facts—Second refusal held to be a mere confirmatory act of the previous act or decision, and not a new executory decision—Because by such second refusal the administration was insisting on its view that under the Law no permit for a third storey could be granted, reiterating, thus, its previous executory decision—And because both refusals were based on the same reasoning as neither the factual nor the legal position had changed—Nor can the second decision be considered as an omission to perform what the administration is alleged to have been legally bound to perform—Inasmuch as the express repetition of a previous refusal clearly declared constitutes a confirmatory act—Therefore, the present recourse in so far as it tends to challenge the previous refusal is out of time—And as regards the second one such recourse is not maintainable—Article 146.1 of the Constitution—Article 146.3 of the Constitution.

Executory act or decision—Confirmatory act or decision—What is a merely confirmatory act as distinct from an executory one—New facts—New inquiry etc.—See supra.

Confirmatory act or decision—Cannot be made the subject of a recourse under Article 146 of the Constitution—What is a confirmatory act.

"Omission"—Article 146.1 of the Constitution—Express refusal to do something cannot be said to be an "omission" within Article 146.1.

Recourse under Article 146 of the Constitution—Acts or decisions which alone can be made the subject of such recourse—Executory acts or decisions as distinct from merely confirmatory acts—"Omission"—Time within which the recourse has to be filed—See supra, passim.

The respondents refused the applicant's application for a building permit to erect a third storey, on the ground that the permit applied for was by law precluded. This decision of the respondents dated June 5, 1970, was duly communicated to the applicant by letter dated June 26, 1970. On September 8, 1970, the applicant submitted a new application with new plans for a permit to erect two storeys on the same building site which was granted on October 19, 1970. On the same date she (the applicant) submitted a new application with new plans to add a third storey thereto. The respondents examined this application and refused to grant the permit for the said third storey for exactly the same reasons for which they refused her previous application as aforesaid. This last decision of the respondents was communicated to the applicant on February 3, 1971. In July 1971, the applicant submitted a new application with new plans for a building permit for the addition of a third floor (and staircase) on the said same property. This application was refused by the respondents by their decision which was duly communicated to the applicant by their letter dated September 10, 1971: it reads:

> "I have the honour to refer to your application dated 31st July, 1971, by which you apply for a building permit for the addition of a third floor..... In reply I wish to refer you to a previous, on a

completely similar application, decision of the Municipal Council (the respondents) as communicated to you by my letter dated 3rd February, 1971" *(supra)*.

It is against this decision contained in the said letter of September 10, 1971, that the present recourse was filed.

The sole issue in this case is whether the *sub judice* decision is an executory administrative act—within the meaning of Article 146.1 of the Constitution—so as to form the valid subject of a recourse, or, it is a mere confirmatory act of a previous decision of the respondents with the result that by itself such confirmatory act cannot be made the subject of a recourse, such recourse being admittedly out of time in so far as it may concern the previous executory decision.

Held, *after reviewing the full facts and circumstances of the case :*

(1) It will be observed, therefore, from the exposition of the background to the present proceedings that all along the respondents were refusing to grant a building permit for the erection of a third storey. At no time there ever was a question that the *refusal to grant the permit applied for* was based on any other ground; or, on the ground that the plans submitted did not satisfy the requirements of the law and that they might call for adaptation or variation. The *sole approach of the respondents to all applications of the applicant was that under the existing law no third storey could be erected on the applicant's property.*

(2) On the facts of the present case there has not been and to my mind there ought not to be a new enquiry, because there were basically no new facts. By the *sub judice* decision the respondents were insisting on their view that under the law no permit for a third floor could be granted, reiterating thereby their previous executory decision. Both decisions were based on the same reasoning as neither the factual nor the legal position had changed in the meantime. The second decision is therefore of a confirmatory nature.

(3) And of course, such second decision cannot be considered as an 'omission' to perform what the administration is alleged to have been bound to perform, in as much as the express repetition of a previous refusal, clearly declared, constitutes a confirmatory act (cf. *Decision of the Greek Council of State* No. 1796/1958; the relevant passage with translation in English is set out *post* in the Judgment).

(4) For all the above reasons the *sub judice* decision is found to be a confirmatory act which cannot be the subject of a recourse under Article 146 of the Constitution. Therefore, the present recourse is considered to be out of time as it was filed long after the lapse of the 75 days period provided by Article 146.3 of the Constitution from the date of the last executory act or decision of the respondents

Recourse dismissed. Applicant to pay £25 against respondents' costs.

Cases referred to:

Varnava v. *The Republic* (1968) 3 C.L.R. 566, at p. 574

Decision of the Greek Council of State: No. 1796/1958

Recourse.

Recourse against the decision of the respondent refusing the grant of a building permit to applicant.

J. Kaniklides, for the applicant.

N. Zomenis, for the respondent.

Cur adv. vult.

The following decision was delivered by:-

A. LOIZOU, J.: By this recourse the applicant complains against the refusal of the Municipality of

Famagusta—the appropriate authority under the Streets and Buildings Regulation Law, Cap. 96—to grant her a building permit for the erection of a third storey on plot 342, sheet/plan 33/21 i.i. block 'C', Stavros quarter, Famagusta, communicated to her by their letter dated 10th September, 1971.

It was thought proper, and with the consent of the parties it was directed, that the issue that the recourse has been filed out of time be heard and determined as a preliminary one in the case.

The decision of this point depends on the determination whether the *sub judice* decision is an executory administrative act—within the meaning of Article 146 of the Constitution—so as to form the valid subject of a recourse, or, it is a mere confirmatory act of a previous decision of the respondent with the result that it cannot be by itself the proper subject of a recourse.

Before going into the history of events leading to the *sub judice* decision, it will be useful if I quote verbatim the communication of the 10th September, 1971, *exhibit* 1; it reads:

> "I have the honour to refer to your application dated 31st July, 1971, by which you apply for a building permit for the addition of a third floor and staircase to the verandah of your property, plot 342, sheet/plan 33/21, i.i., block 'C' Stavros.
>
> In reply I wish to refer you to a previous, on a completley similar application, decision of the Municipal Council as communicated to you by my letter dated 3rd February, 1971."

The building site of the applicant is, in effect, half a building site and together with plot 341, — owned by another person—which is the adjoining half, previously formed plot 294. It was sub-divided into two by an application and for the purpose of erecting two semi-detached houses. On the 13th January, 1970, the applicant submitted an application to the respondent, with plans attached, for permission to erect three storeys on her half-plot. The application and plans are *exhibit* 3 and

3A respectively. On the 27th March, 1970, the respondent after considering the application decided not to grant a permit for the erection of a third storey. Their decision was communicated to the applicant by letter dated 10th April, 1970, (*exhibit* 4). The material part of this communication is as follows:

> "...It was not approved because your property is the one half of a building site divided on the basis of a plan for semi-detached houses and the erection of the proposed building does not tally with the notion of the half semi-detached house which should govern your property. If you correct your plans in such a way as to omit the floor for offices, the Municipal Council will gladly grant you a permit for the erection of residences in the first and second floor."

In answer thereto the applicant sent to the respondents a letter dated 16th April, 1970, (*exhibit* 5). She complained therein for the refusal to grant her a building permit and requested re-examination of the matter. On the 5th June, 1970, the respondents re-examined the case, (*exhibit* 6). Their decision was communicated to the applicant by letter dated 26th June, 1970, (*exhibit* 7). It specifically said that the Council decided to insist on its original decision as communicated to her by its letter of the 10th April, 1970 (*exhibit* 4) and for the reasons stated therein, and she was informed that the appropriate authority "would be glad to issue the permit applied for if the plans were corrected in such a manner that: (1) The proposed buildings would constitute flats in the sense of the half semi-detached houses which govern the building site, and (2) the proposed storeys, with the existing building, would not on the whole exceed the three, that is, the whole building would consist of ground floor, first and second floor."

The applicant replied by letter dated 3rd August, 1970, through her advocate, (*exhibit* 8) to which the Mayor replied by letter dated 18th August, 1970, (*exhibit* 9), again informing her that "a permit will be granted if the proposed new storeys do not exceed the

two, that is the whole building should consist of ground, first and second floors".

On the 8th September, 1970, the applicant submitted new plans and applied for a permit to erect two storeys which was granted to her on the 19th October, 1970.

On the same date she submitted a new application for a permit to add a third storey thereto, (*exhibit* 10), the plans attached thereto are *exhibit* 10A, which are the same as *exhibit* 3A. The respondents examined this application and refused to grant a permit for exactly the same reasons for which they refused the previous application. Their decision was communicated to the applicant by their letter dated 3rd February, 1971, *exhibit* 2. This decision was to the effect that "The Municipal Council saw no reason to deviate from its decision that as a general rule it would not allow the building of more storeys than three, including the ground floor, on half plots of land on which semi-detached houses were allowed to be built". This was the decision which was the subject matter of recourse No. 38/71, *exhibit* 13, ultimately withdrawn on 29th January, 1972.

On the 21st July, 1971, and whilst recourse No. 38/71 was still pending before this Court, the applicant submitted a new application for the addition of a third and fourth storeys as described in *exhibit* 6, the fourth storey being the staircase which also appeared in *exhibit* 10; the third storey would consist of two bedrooms, sitting room, dining room, hall, kitchen, bathroom, verandah and staircase as described in paragraph 6 of *exhibit* 11. The description in this paragraph corresponds with the description in paragraph 6 of the application of the 19th October, 1970, (*exhibit* 10), except that a corridor and W.C. mentioned in *exhibit* 10 is not included in *exhibit* 11. The relevant plans attached to *exhibit* 11 were produced and marked *exhibit* 11A. They are similar, but not identical, to the previous plans *exhibit* 10A. The differences which have been marked thereon by the Municipal Engineer are these :

The new plans cover an area of 300 sq. ft. less than

the plans *exhibit* 10A. Whereas the plans in *exhibit* 10A provide for a large bedroom in the new plan *exhibit* 11A that bedroom was divided into two parts, the one part being turned into a kitchen and the remaining left unbuilt as a verandah. The sitting-dining room has been made smaller and part of it turned into a verandah which is connected now with the originally provided verandah in *Exhibit* 10A. The kitchen in the original plan is now turned into a bedroom; the bathroom and W.C. which were separated by a partition are now made into one room by omitting the partition. The conveniences, other than the bath-tab have been re-arranged. As a consequence of omitting the partition the use of this bathroom is secured by one door instead of two. In the original plan the hall was divided into hall and corridor with a partition which is now omitted.

The letter dated 10th September, 1971, (*exhibit* 1) hereinabove referred to is the communication of the decision of the respondents to this application.

It will be observed, therefore, from the aforesaid exposition of the background to the present proceedings that all along the respondent Corporation was refusing to grant a building permit for the erection of a third storey. At no time was there ever a question that the refusal to grant the permit applied for was based on any other ground; or, on the ground that the plans submitted did not satisfy the requirements of the law and that they might call for adaptation or variation. The sole approach of the respondents to all applications of the applicants was that under the existing law no third storey could be erected on the applicant's property. With this finding of fact I turn now to the legal aspect of the case.

It has been the contention of counsel for the applicant that the aforesaid differences appearing in the new plans constituted new facts which were the subject of a new enquiry and, therefore, a decision thereon was a new executory decision that could be the proper subject of a recourse. Alternatively, it was argued that had there been no new enquiry, that amounted to an omission which could be the subject of a recourse. On the other

hand, counsel for the respondent argued that there was no new enquiry, in as much as it was all along the building permit for a third storey that was refused, and not a question of refusal to grant a permit because of the character or type of the plans relating to the proposed erection of a third storey. It was his contention that there were no new facts as to justify a new enquiry. In this respect he relied on a passage from Stassinopoulos "Law of Administrative Disputes" cited with approval by Hadjianastassiou, J., in the case of *Varnava* v. *The Republic* (1968) 3 C.L.R. 566, at p. 574. It reads :

> «Πότε ὑπάρχει νέα ἔρευνα, εἶναι ζήτημα πραγματικόν. Θεωρεῖται ὅμως γενικῶς νέα ἔρευνα ἡ λῆψις ὑπ' ὄψιν νέων οὐσιωδῶν νομικῶν ἢ πραγματικῶν στοιχείων, κρίνεται δὲ αὐστηρῶς τὸ χρησιμοποιηθὲν νέον ὑλικόν, διότι δὲν πρέπει ὁ ἀπολέσας τὴν προθεσμίαν διὰ τὴν προσβολὴν μιᾶς ἐκτελεστῆς πράξεως, νὰ δύναται νὰ καταστρατηγῇ τὴν προθεσμίαν ταύτην διὰ τῆς δημιουργίας νέας πράξεως, ἡ ὁποία ἐξεδόθη κατ' ἐπίφασιν μὲν κατόπιν νέας ἐρεύνης, κατ' οὐσίαν ὅμως ἐπὶ τῇ βάσει τῶν αὐτῶν στοιχείων.
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> . . . . . .
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> Νέα ἔρευνα ὑπάρχει ἰδίως ἐάν, πρὸ τῆς ἐκδόσεως τῆς νεωτέρας πράξεως, λαμβάνῃ χώραν ἐξέτασις στοιχείων κρίσεως νεωστὶ προκυπτόντων ἢ προϋπαρχόντων μὲν ἀλλὰ τέως ἀγνώστων, ἅτινα νῦν λαμβάνονται προσθέτως διὰ πρώτην φορὰν ὑπ' ὄψιν. Ὁμοίως, νέαν ἔρευναν συνιστᾷ ἡ διενέργεια αὐτοψίας ἢ ἡ συλλογὴ συμπληρωματικῶν ἐπὶ τῆς ὑποθέσεως πληροφοριῶν».

The English translation prepared by the Registry of this Court is as follows :

> "When does a new enquiry exist, is a question of fact : In general, it is considered to be a new enquiry the taking into consideration of new substantive legal or real material, and the new material is meticulously considered, for he who has been out of time in attacking an executory act, should not circumvent such a time limit by the creation

of a new act, which it was issued nominally after a new enquiry but in substance on the basis of the same material.

Especially there does exist a new enquiry where, before the issue of the subsequent act, there takes place consideration of newly produced material or pre-existing but unknown, which are now taken into consideration in addition, but for the first time. Similarly, it constitutes a new enquiry the carrying out of a local inspection or the collection of additional information in the matter under consideration."

On the facts of the present case there has not been and to my mind there ought not to be a new enquiry, because there were basically no new facts. The aforesaid passage applies forcefully to the facts of the present case. By the *sub judice* decision the administration was insisting on its view that under the law no permit for a third floor could be granted, reiterating thereby its previous executory decision. Both decisions were based on the same reasoning as neither the factual nor the legal position had changed in the meantime. The second decision, therefore, is of a confirmatory nature. It cannot be considered as an omission to perform what the administration is alleged to have been legally bound to perform, in as much as the express repetition of a previous refusal, clearly declared, constitutes a confirmatory act, subject to what has been hereinabove stated regarding the absence of new material facts or change in the legal position. A similar approach was made by the Greek Council of State in Decision 1796/58 where it dealt with almost similar facts to those of the present case, as it appears from the passage quoted below :

«Καὶ ναὶ μὲν ἡ πρώτη ἄρνησις ἀναφέρεται εἰς αἴτησιν τῆς αἰτούσης πρὸς ἔκδοσιν ἀδείας περιτοιχίσεως, ἡ δὲ δευτέρα εἰς ἄδειαν ἀνεγέρσεως οἰκοδομῆς διὰ τὸ ἐν λόγῳ οἰκόπεδον, ἀλλ' οὐδόλως παρέπεται, ὅτι ἐκ μόνου τοῦ λόγου τούτου αἴρεται ὁ κατὰ τὰ ἀνωτέρω βεβαιωτικὸς χαρακτὴρ τῆς προσβαλλομένης πράξεως, δοθέντος ὅτι ἀμφότεραι αἱ ἀρνήσεις αὗται

ἐρείδονται ἐπὶ τῆς ἀντιλήψεως τῆς Διοικήσεως ὅτι κωλύεται νόμῳ ἡ χορήγησις τῶν αἰτηθεισῶν ἀδειῶν πρὸς ἐκτέλεσιν οἰκοδομικῶν ἢ οἱωνδήποτε ἄλλων συναφῶν ἐργασιῶν ἐπὶ οἰκοπέδου, ὅπερ κατέστη κοινόχρηστος χῶρος. Κατ' ἀκολουθίαν ἡ ὑπὸ κρίσιν αἴτησις ἀκυρώσεως, κατατεθεῖσα τὴν 13 Νοεμβρίου, 1957, τυγχάνει τύποις ἀπαράδεκτος, τὸ μὲν ὡς στρεφομένη κατὰ διοικητικῆς πράξεως μὴ ἐκτελεστῆς, τὸ δὲ ὡς ἐκπρόθεσμος, ἐὰν ἤθελε ἑρμηνευθῆ, ὅτι στρέφεται καὶ κατὰ τῆς ἀρχικῆς ἀπὸ 19.12.1955 ἀρνήσεως, ἧς ἔκτοτε εἶχε λάβῃ γνῶσιν ἡ αἰτοῦσα».

Translation of the above in English is as follows :

"True the first refusal refers to an application by the applicant for the issue of a permit for a surrounding wall, and the second to a permit for the erection of a building on the said building site, but in no way it follows from this reason alone that the—in accordance with the above—confirmatory character of the *sub judice* decision is lifted, given that both such refusals are based on the view of the administration that the grant of the permits applied for, which concern the erection of buildings or other similar works on a building site which has been rendered a common use place, is by law precluded. It follows, therefore, that the application for annulment, under consideration, filed on the 13th November, 1957, is in form unacceptable as being on the one hand directed against a non-executory administrative act and on the other hand it is out of time, if it were to be interpreted as being also directed against the original refusal of the 19th December, 1955, which has since then come to the knowledge of the applicant."

I adopt fully the reasoning of the aforesaid decision of the Greek Council of State.

For all the above reasons the *sub judice* decision is found to be a confirmatory act which cannot be the subject of a recourse under Article 146 of the Constitution. Therefore, the present recourse is considered

to be out of time as it was filed long after the lapse of the 75 days period provided by Article 146.3 of the Constitution, from the date of the last executory act of the respondents.

Applicants to pay £15 against respondent's costs.

Application dismissed; order for costs as above.