1982 September 7

[LORIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

IOANNIS CHRISTOPHI IOANNOU,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTRY OF INTERIOR, THROUGH THE DISTRICT OFFICER NICOSIA,

Respondents.

(*Case No.* 409/81).

Administrative Law—Administrative acts or decisions—Confirmatory act—Is not of an executory nature and cannot be made the subject of a recourse—When administration confirms a previous executory act after a new inquiry the resulting new act is itself executory too, and therefore justiciable—A new inquiry takes place when the administration takes into consideration new substantive legal or real material—No new material taken into consideration by administration in reaching sub judice decision—Therefore no new inquiry has taken place—And decision reached a confirmatory one of previous executory decision—Which cannot be made the subject of a recourse.

Constitutional Law—Equality—Discrimination—Article 28 of the Constitution—Fact that administration did not apply the law on another occasion does not create a right of annulment because of its application in this case.

Administrative Law—Administrative acts or decisions—Legality—Governed by the legislation in force at the time when they are made.

Abuse or excess of powers—Burden of establishing—Rests upon the person propounding same.

Vested rights—Grant of Building permit to applicant which was valid

for one year—Rights that vest in him not rights ad infinitum but for one year.

On October 9, 1974 the applicant obtained a building permit from the District Officer Nicosia with a view to erecting a pigsty. The permit covered the proposed building of 14 sties plus a store and like all permits it was, by virtue of section 5 of the Streets and Buildings Regulation Law, Cap. 96, valid for one year from the date of the issue thereof, unless renewed consonant to the provisions of the proviso* to the same section.

The applicant, owing to financial difficulties, was unable to construct all the sties during the period of the validity of his said permit; instead he managed to build in time only 9 out of the 14 enclosures and started operating his pigsty at some time in 1975, using only those sties he had been able to complete. On 15.11.1979 he submitted a written application to the District Officer Nicosia seeking a renewal of his said permit in order to be enabled to construct the remaining enclosures.

The District Officer Nicosia by a letter dated 24.1.1980 (attached to the opposition and marked appendix "B") refused thereby the renewal of the said permit on the ground that the aforesaid pigsty of the applicant was situated within the zone for which a prohibition for the construction of any structures to be used as pigsties was already in existence, the relevant notification having been promulgated in Supplement No. 3 of the Official Gazette No. 1515 of 27.4.1979.

No recourse was filed against the decision of the District Officer dated 24.1.1980.

On 20.7.1981 Counsel acting on behalf of the applicant addressed to the District Officer a letter by virtue of which the District Officer was substantially asked to reconsider his decision of 24.1.1980. The District Officer turned down the application by letter dated 7.10.1981 and hence this recourse.

* The proviso to section 5 of the Streets and Buildings Regulation Law, Cap. 96 reads as follows:

"Provided that, if the work or other matter is not completed within that period, the permit shall be renewable at any subsequent time if not conflicting with any Regulations in force at the time of such renewal upon payment of the fee prescribed for the original permit or of two pounds whichever is the less. The permit so renewed shall be valid for one year from the date of renewal".

Counsel for the applicant mainly contended:

(a) That the sub judice decision affects vested rights of the applicant.

(b) That the respondents discriminated against applicant because they granted a covering permit to a company in respect of a far greater number of sties.

(c) That the respondents acted in abuse or excess of powers and their decision was taken under misconception of facts and was contrary to law.

The respondents in their opposition raised the preliminary objection that the act or decision challenged was merely informatory and or confirmatory of a previous act or decision and as such is not justiciable.

Held, (*I*) *on the preliminary objection:*

That a confirmatory decision of the administration is not of an executory nature and therefore it cannot be made the subject-matter of a recourse; that when the administration confirms a previous executory act after a new inquiry then the resulting new act or decision is itself executory too, and therefore justiciable; that when does a new inquiry exist, is a question of fact; that in general, it is considered to be a new inquiry the taking into consideration of new substantive legal or real material; that since no new substantive legal or real material was placed by applicant by his letter of 20.7.1981 before the respondents for consideration no new inquiry has been carried out; accordingly the decision of 7.10.1981 is confirmatory of the previous executory decision of 24.1.1980 and as such it cannot be made the subject of a recourse.

Held, (*II*), *on the merits of the recourse assuming that the sub judice decision is an executory one:*

(1) The applicant obtained a building permit on 9.10.1974, which according to section 5 of the Streets and Buildings Regulation Law, Cap. 96 was valid for one year; consequently the rights that vested in the applicant by virtue of the said permit, were not rights vested in him ad infinitum but simply for one year during which all the buildings enumerated in the permit ought to have been completed; accordingly contention (a) should fail.

(2) That the fact that the administration did not apply the Law on another occasion, no annulment is created due to its application in this case; that, moreover, the unlawful act of the administration in the past towards other persons does not create obligation to the administration to repeat likewise the contravention; and that, therefore, the sub judice decision does not infringe the notions of equality, envisaged by Article 28 of the Constitution and does not constitute discrimination; accordingly contention (b) should fail.

(3) That it is a cardinal principle of Administrative Law that the legality of administrative acts is governed by the legislation in force at the time when they are made; that the burden of establishing abuse or excess of powers rests upon the person propounding same; that in refusing renewal of the permit on 24.1.1980 the respondent was neither acting contrary to law or under a misconception of facts, nor was he acting in abuse or excess of his powers; accordingly contention (c) should fail.

Held, further, that the respondent would have been perfectly justified in refusing renewal of the permit even if the change in the relevant legislation was effected after the submission of the application for renewal (15.11.1979) but prior to his decision on 24.1.1980 (see *Lordou and Others* v. *Republic* (1968) 3 C.L.R. 427).

Application dismissed.

Cases referred to:

Kolokassides v. *The Republic* (1965) 3 C.L.R. 549 and on appeal (1965) 3 C.L.R. 542;

Ktenas and Another (No. 1) v. *The Republic* (1966) 3 C.L.R. 64, and on appeal (1966) 3 C.L.R. 820;

Papaleontiou v. *The Republic* (1966) 3 C.L.R. 557;

Varnava v. *The Republic* (1968) 3 C.L.R. 566 at p. 575;

Ioannou v. *The Grain Commission* (1968) 3 C.L.R. 612;

Megalemou v. *The Republic* (1968) 3 C.L.R. 581;

Kelpis v. *The Republic* (1970) 3 C.L.R. 196;

HjiKyriacos & Sons Ltd. v. *The Republic* (1971) 3 C.L.R. 286;

Police Association and Others v. *The Republic* (1972) 3 C.L.R. 1;

Liassidou v. *The Municipality of Famagusta* (1972) 3 C.L.R. 278;

Salamis Holdings Ltd. v. *The Municipality of Famagusta* (1974) 3 C.L.R. 344;

Lordos Apartotels Ltd. v. *The Republic* (1974) 3 C.L.R. 471;

Ioannou v. *The Commander of Police* (1974) 3 C.L.R. 504;

Limassol Chemical Products Company Ltd. v. *The Republic* (1978) 3 C.L.R. 52;

Dr. G.N. Marangos Ltd. v. *The Municipality of Famagusta* (1979) 3 C.L.R. 73;

Lordou and Others v. *The Republic* (1968) 3 C.L.R. 427 at p. 433;

Nissis v. *The Republic* (1967) 3 C.L.R. 671.

Recourse.

Recourse against the refusal of the respondents to renew applicant's building permit No. 074726 for the erection of a pigsty on his land situate at Shia village

V. HadjiGeorghiou, for the applicant.

A. Vladimirou, for the respondents.

Cur. adv. vult.

LORIS J. read the following judgment. The applicant in the present case, applied to and obtained from the appropriate authority - the District Officer of Nicosia - a building permit under No. 074726 dated 9.10.74 with a view to erecting a pigsty on his land situate at Shia village, of Nicosia District, covered by plot 173 of the Government Survey Sheet/Plan XXXIX/32.

The aforesaid permit covered the proposed building of 14 sties plus a store and like all permits regulated by the provisions of s. 5 of the Streets and Buildings Law Cap. 96, was valid for one year from the date of the issue thereof, unless renewed consonant to the provisions of the relevant proviso of the same section which reads as follows:

> "Provided that, if the work or other matter is not completed within that period, the permit shall be renewable at any subsequent time if not conflicting with any Regulations in force at the time of such renewal, upon payment of the fee prescribed for the original permit or of two pounds whichever is the less. The permit so renewed shall be valid for one year from the date of renewal."

It seems that the applicant, owing to financial difficulties,

was unable to construct all the sties during the period of the validity of his said permit; instead he managed to build in time only 9 out of the 14 enclosures and started operating his pigsty at some time in 1975, using only those sties he had been able to complete.

On 15.11.79 the applicant submitted a written application to the District Officer Nicosia (photo-copy of same is attached to the opposition and marked appendix "A") seeking a renewal of his said permit in order to be enabled to construct the remaining enclosures.

The District Officer Nicosia, addressed to the applicant a letter dated 24.1.80 (attached to the opposition and marked appendix "B") refusing thereby the renewal of the said permit on the ground that the aforesaid pigsty of the applicant was situated within the zone for which a prohibition for the construction of any structures to be used as pigsties was already in existence, the relevant notification having been promulgated in Supplement No. 3 (Κ.Δ.Π. 74/79) of the Official Gazette No. 1515 of 27.4.79.

The last paragraph of the said letter of the District Officer Nicosia went on to add that the aforesaid pigsty of the applicant is situate "very near to the inhabited area and any extention thereof will create additional nuisance to the inhabitants."

On 20.7.81 counsel acting on behalf of the applicant addressed to the District Officer Nicosia letter exh. 1 by virtue of which the District Officer was substantially asked to reconsider his decision of 24.1.80 (vide Appendix "B").

The applicant by means of the present recourse challenges the validity of the decision of the respondent dated 7.10.81 (exh. 2) on five grounds of Law which appear in the recourse and may, very briefly, be stated as follows:

(1) Decision of respondents was taken under misconception of facts and was contrary to Law.

(2) Abuse or excess of power by respondents.

(3) Sub judice decision affects vested rights of applicant.

(4) Discrimination against applicant.

(5) Sub judice decision obscure, uncertain and not properly reasoned.

The respondents in their opposition raised the preliminary objection that the act or decision challenged was merely informatory and or confirmatory of a previous act or decision and as such is not justiciable.

Subject to the above objection the respondents maintain that their said decision was taken according to law and the Constitution and they deny any sort of discrimination against the applicant.

The parties did not apply to the Court that the preliminary issue raised by the opposition be determined in the first instance, so in deciding on the merits of the recourse I shall pronounce to-day on this issue as well. Before doing so, I consider it pertinent at this stage to deal as briefly as possible with the legal aspect on this point.

It is a well settled principle of Administrative Law that a confirmatory decision of the administration is not of an executory nature and therefore it cannot be made the subject-matter of a recourse. According to *Stassinopoulos* on the *Law of Administrative Disputes,* 4th ed. at p. 175 a confirmatory act is one which repeats the contents of a previous executory act and signifies the adherence of the administration to a course already adopted; but when the administration confirms a previous executory act after a new enquiry then the resulting new act or decision is itself executory too, and therefore justiciable.

These principles have been adopted by our Supreme Court in a great number of cases such as:

Kolokassides v. *The Republic* (1965) 3 C.L.R. 549 and on appeal (1965) 3 C.L.R. 542.

Ktenas and another (No.1) v. *The Republic* (1966) 3 C.L.R. 64 and on appeal (1966) 3 C.L.R. 820.

Papaleontiou v. *The Republic* (1966) 3 C.L.R. 557.

Varnava v. *The Republic* (1968) 3 C.L.R. 566.

Ioannou v. *The Grain Commission* (1968) 3 C.L.R. 612.

Megalemou v. *The Republic* (1968) 3 C.L.R. 581.

Kelpis v. *The Republic* (1970) 3 C.L.R. 196.

HjiKyriakos & Sons Ltd. v. *The Republic* (1971) 3 C.L.R. 286.
Police Association & others v. *The Republic* (1972) 3 C.L.R. 1.
Liasidou v. *The Municipality of Famagusta* (1972) 3 C.L.R. 278.
Salamis Holdings Ltd. v. *The Municipality of Famagusta* (1974) 3 C.L.R. 344.
Lordos Apartotels Ltd. v. *The Republic* (1974) 3 C.L.R. 471.
Ioannou v. *The Commander of Police* (1974) 3 C.L.R. 504.
Limassol Chemical Products Company Ltd. v. *The Republic* (1978) 3 C.L.R. 52.
Dr. G.N. Marangos Ltd. v. *The Municipality of Famagusta* (1979) 3 C.L.R. 73.

As to the question when does a new enquiry exist *Stassinopoulos* on the *Law of Administrative Disputes* states the following at p. 176:

"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.

Νέα ἔρευνα ὑπάρχει ἰδίως ἐὰν, 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 συνιστᾶ ἡ διενέργεια αὐτοψίας ἢ ἡ συλλογὴ συμπληρωματικῶν ἐπὶ τῆς ὑποθέσεως πληροφοριῶν".

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

"When does a new inquiry exist, is a question of fact: In general, it is considered to be a new inquiry 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 inquiry, but in substance on the basis of the same material.

Especially there does exist a new inquiry 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 inquiry the carrying out of a local inspection or the collection of additional information in the matter under consideration".

In the present recourse it is abundantly clear that the administration gave its decision on 24.1.80 (vide letter of Appendix "B"). It must be borne in mind that the said decision was never challenged.

The question which now falls for determination is whether a new enquiry was carried out by the respondents in the light of exh. 1 before they have given their reply in exh. 2.

As already stated: When does an enquiry exist is a question of fact. I have considered exhs. 1 and 2 in the light of the written addresses of counsel of both sides and I have observed the following:

(a) No new substantive legal or real material was placed by exh. 1 before the respondents for consideration.

(i) In spite of the fact that the application dated 20.7.81 (exh. 1) speaks of "a permit for extention of the pigsty" in para. 3 thereof, the fact remains that the said application was an application for the renewal of the permit of 1974 with a view to enabling the applicant to construct the remaining five enclosures which he was unable to construct within the period of the validity of the original permit; this is abundantly clear from the combined effect of paras 2 and 3 of exh. 1. This fact was al-

ready known to the respondents from Appendix "B", and the employment of nice but vague words in exh. 1 in connection with the intended future operations of the pigsty cannot be by any stress of imagination considered as "new substantive legal or real material."

(ii) Reference to Mylo Ltd. in exh. 1 cannot be considered "as a new substantive material"; first of all such a material was not new anyway; it is clear from exh. Z that the respondents had the opportunity of examining everything connected with the pigsty of the said company more than a year prior to the time when exh. 1 was addressed to them. As to the question of the alleged discrimination I shall have the opportunity of dealing with such an allegation later on in my present judgment.

(b) It is clear from the wording of exh. 2 that the respondents did not carry out a new enquiry before addressing exh. 2 to counsel acting for the applicant. Learned counsel appearing for the applicant in his written address speaks of a duty of the respondents to carry out a new enquiry as a result of his aforesaid letter. In this respect I must stress that the respondents were under no duty to carry out such a new enquiry. On this point I am in full agreement with my brother Judge Hadjianastassiou, J. who stated the following in the case of *Varnava v. The Republic* (1968) 3 C.L.R. 566 at p. 575.

"The question therefore is: Is there an Omission on the part of the Respondent to re-examine the case of the applicant?

In my view, in the absence of legislation regulating such matter there can be no question of an omission on the part of the Respondents because the administration had no duty to discharge; and because it was decided long ago that the applicant was not entitled to a gratuity benefit..."

In the present case the respondents have decided as early as

24.1.80 - and they have then communicated their said decision to the applicant - that the latter was not entitled to a renewal of his permit. The said administrative decision was not challenged. The present recourse was filed on 2.11.81 and challenges a decision of the respondents dated 7.10.81 which is purely confirmatory of their decision of 24.1.80.

I find myself unable to agree with counsel appearing for the applicant who has submitted in his written address, inter alia, that Article 146 of our Constitution is wide enough to cover both executory decisions of the administration as well as confirmatory ones. It is more than clear from the authorities cited above that confirmatory decisions of the administration are not justiciable subject to the exception of course when the administration confirms a previous act or decision after a new enquiry, which is not the present case.

I shall now proceed to examine the grounds advanced by the applicant in support of the present recourse assuming for a moment that the administrative decision in question was of an executory nature and could be the subject of a recourse.

As already stated the applicant challenges by this recourse the validity of the aforementioned decision on five grounds; these grounds boil down to two main points notably,

(a) prejudicial affection of vested rights of applicant,

(b) discrimination against applicant.

Let us consider first the issue of vested rights: The applicant applied to the District Officer of Nicosia and obtained a building permit under No. 074726 dated 9.10.74; this building permit covered the proposed building of 14 sties plus a store and was valid, according to the provisions of s. 5 of the Streets and Buildings Law, Cap. 96, for one year.

Consequently the rights that vested in the applicant by virtue of the said permit, were not rights vested in him ad infinitum but simply for one year during which all the buildings enumerated in the permit ought to have been completed.

The applicant, for one reason or another did not erect all the structures during the year and he chose to apply for the renewal

of his said permit some 4 years after its expiration. It is true that the proviso to s. 5 of Cap. 96 provides for the renewal of the permit (if the work is not completed within a year) at any subsequent time, but at the same time specifically emphasizes that the permit shall be renewable "... if not conflicting with any Regulations in force at the time of such renewal". And it must be borne in mind that the applicant applied for renewal of his permit as late as 15.11.79 whilst the relevant prohibition was already in existence having been published in the Official Gazette on 27.4.1979.

In the case of *Andriani Lordou and others v. The Republic* (1968) 3 C.L.R. 427 at p. 433 it was laid down that,

> "it is a cardinal principle of administrative Law that the legality of administrative acts is governed by the legislation in force at the time when they are made. (See Conclusions from the Jurisprudence of the Greek Council of State 1929 - 1959 p. 160; see also inter alia, Decision 1477/56 of the Greek Council of State).
>
> The above principle applies, even to cases in which there has been a change in the relevant legislation between the submission of an application for a permit and administrative action thereon..."

I do not feel that I should embark any further on this issue; suffice it to say that from the above it is clear that the respondent refusing renewal of the permit on 24.1.80 (vide letter "B") was neither acting contrary to Law nor was he acting in abuse or excess of his power. According to the case of *Andriani Lordou* (supra) the respondent would have been perfectly justified in refusing renewal of the permit even if the change in the relevant legislation was effected after the submission of the application for renewal (15.11.79) but prior to his decision on 24.1.80.

The next complaint of the applicant is "discrimination". He alleges that inspite of the fact that he was refused renewal of his permit on 24.1.80 for the erection of the remaining five sties which he had failed to construct within the original period of his permit, a certain company under the name of "MYLO LTD" was subsequently to that time given a covering permit for a far greater number of sties constructed on their property which is situated in the same area covered by the same prohibition published on 27.4.79.

The applicant maintains that such a treatment by the administration constitutes discrimination against him and violates the principles of equality envisaged by the provisions of Article 28 of our Constitution.

It must be noted in the first instance that:

(i) the company under the name 'MYLO LTD' is not a party to the present proceedings;

(ii) the facts of the present recourse differ substantially from the facts alleged in respect of the said company.

In the present recourse the sub judice decision of the respondent is refusal to renew a building permit for intended erection of 5 more sties on the land of the applicant, whilst the facts before me in connection with "MYLO LTD" refer to an application by the said company for relaxation of the Rules with a view to obtaining a covering permit for sties already erected by the former owner of the land without permit, something unknown to the present owners, the purchasers namely "MYLO LTD".

Exh. Z is an application by the Ministry of Interior to the Ministerial Council for (a) the relaxation of the Rules connected with the restrictions imposed at Shia village on 27.4.79, (b) the authorization of the District Officer of Nicosia to issue a covering permit.

It is not known whether the Ministerial Council has approved the relaxation suggested; nor is it known whether the District Officer of Nicosia as the proper authority has ultimately issued such a permit, although the address of the learned counsel appearing for the respondent (first para. at p. 5) points to that end. Be that as it may I have decided to treat as a fact that the proper authority has granted a permit to "MYLO LTD" after the relaxation of the relevant rules by the Ministerial Council. The question which falls for determination is this: Does this decision of the administration constitute discrimination against the applicant? Does this decision infringe the notions of equality of treatment envisaged by the provisions of Article 28 of our Constitution?

The short answer to that is to be found in the Conclusions from the Jurisprudence of the Greek Council of State 1929 - 1959 at p. 158.

" Ἐκ τοῦ ὅτι ἡ Διοίκησις δὲν ἐφήρμοσε τὸν νόμον εἰς ἄλλην περίπτωσιν, δὲν δημιουργεῖται ἀκυρότης ἐκ τῆς ἐφαρμογῆς του ἐπὶ τῆς κρινομένης ὑποθέσεως: 761 (36), οὔτε ἡ ἐν τῷ παρελθόντι ἢ ἔναντι ἑτέρων προσώπων; 1253(48), 755, 756(49), 892(51) γενομένη μὴ νόμιμος ἐνέργεια τῆς Διοικήσεως δημιουργεῖ καὶ ὑποχρέωσιν αὐτῆς ὅπως ἐπαναλάβη ὁμοιομόρφως τὴν παράβασιν: 353, 1187(53), 1118, 1121(54)".

English Translation:

"Due to the fact that the Administration did not apply the Law on another occasion, no annulment is created due to its application in the sub judice case; nor does the unlawful act of the Administration in the past or towards other persons, create obligation to it to repeat likewise the contravention."

Having dealt with the substantive grounds of the present recourse I intend to deal very briefly with the remaining.

As regards ground 1 there is no evidence whatsoever that the respondent acted under a misconception of facts or contrary to the Law. Nor was any evidence adduced to suggest, even slightly, that the respondent acted in abuse or excess of power and we must not lose sight of the fact that the burden of establishing abuse or excess of power rests upon the person propounding same (*Nissis v. The Republic* (1967) 3 C.L.R. 671).

As it emerges from the facts of this case the main decision of the respondent is that of 24.1.80 (Appendix "B"); this decision was never challenged by the applicant. The sub judice decision in the present recourse (exh. 2) as I held already is a confirmatory decision of the respondent and therefore not justiciable. Both decisions are quite clear and certain and they have the same reasoning which is quite sufficient to bring to the knowledge of the applicant the reason for which the application was dismissed.

Although I must say that the main decision that of 24.1.80 was

more explicit, yet the sub judice decision, the confirmatory one, although drafted in a rather laconical language contains and repeats the main reason for which the application for renewal was refused.

For all the above reasons the present recourse fails and it is accordingly dismissed.

Having given to the matter my best consideration I have decided to make no order as to the costs of the present recourse.

Application dismissed. No order as to costs.