

1983 March 18

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

KYRIACOS HADJI TTOPHIS,

*Applicant,*

v.

THE IMPROVEMENT BOARD OF AY. NAPA, THROUGH  
THE CHAIRMAN, THE DISTRICT OFFICER OF  
FAMAGUSTA,

*Respondent,*

(Case No. 425/79).

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*Administrative Law—Administrative acts and decisions—Validity  
—Determined on the basis of legal status existing at the time  
of its issue—This rule subject to the exception that pre-existing  
legislation applicable when there has been an omission on the  
part of the administration to perform within a reasonable time  
what it was duty bound to do before the change of the law—  
Change of the law two months after the submission of applicant’s  
application for a building permit—Which was dealt with after  
enactment of new law and refused—Two months’ delay not such  
an omission as to amount to abuse or excess of power and not  
undue and unjustifiable so as the question of grant of the permit  
had to be governed by the pre-existing law.*

On December 15, 1972 the applicant applied for a building permit for the construction of a seaside tourist pavilion on a plot of land at Ayia Napa of which he was the owner. The District Officer dismissed the application on the ground that there was no right of way serving the said plot. On the 9th March, 1973 applicant having registered a right of way in respect of his plot renewed his application. On the 11th March, 1973 the Council of Ministers, in exercise of its powers under section 5(A)(I) of the Foreshore Protection Law, Cap. 59, prohibited every kind of building in an area on the coast of Ayia Napa which area included the property of the applicant.

The application of the applicant was dealt with subsequent to the decision of the Council of Ministers and it was refused mainly on the ground that applicant's plot was situated within the area of the foreshore where the construction of any building permit is prohibited.

Upon a recourse against such refusal it was contended that the sub judice act has been taken in excess and/or abuse of power and/or was ultra vires to the Streets and Buildings Regulation Law, Cap. 96 and the relevant Regulations as the application in question has not been examined in time and on the basis of the legislation in force at the time of its submission or immediately after and/or within a reasonable time.

*Held*, that the general principle that the validity of an administrative act is determined on the basis of the legal status existing at the time of its issue, is subject to the exception that the pre-existing legislation is applicable when there has been an omission on the part of the administration to perform within a reasonable time what it was duty bound to do before the change of the law; that on the totality of the circumstances and bearing in mind that as on the 11th May 1973 the plans of the applicant were not in compliance with the regulations in force and also bearing in mind that if there was a preliminary study of the plans and the defects in question were pointed out to the applicant and there was compliance with the regulations, yet the matter would call for further study and examination by various departments, in the circumstances and considering the volume of work that inevitably exists in Government departments, and existed at the time, a two months delay was not such an omission as to amount to abuse or excess of power; that as there has been no undue and unjustifiable delay on the part of the respondents in dealing with the applicant's application, the matter regarding the grant of the building permit applied for had to be governed by the legislation in force after the 11th May, 1973; accordingly the recourse must fail.

*Application dismissed.*

Cases referred to:

*Lordou v. Republic* (1968) 3 C.L.R. 427;

*Loiziana Hotels Ltd. v. Municipality of Famagusta* (1971) 3 C.L.R. 466 at p. 472.

**Recourse.**

Recourse against the refusal of the respondent to issue a building permit to applicant.

A. *Panayiotou*, for the applicant.

G. *Pittadjis*, for the respondent.

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*Cur. adv. vult.*

A. LOIZOU J. read the following judgment. By the present recourse the applicant seeks a declaration of the Court that the decision of the respondent Board dated 7th September 1979, by which it rejected his application dated 15th December 1972, for a building permit on plots of land Nos. 445 and 450, Sheet/Plan 42/22 at Ayia Napa, Famagusta, is null and void and of no legal effect whatsoever.

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By application dated 15th December, 1972, the applicant applied for a building permit for the construction of a seaside tourist pavilion on the aforesaid plots of land of which he is the owner. The District Office of Famagusta acknowledged receipt of same on the 10th January 1973 and gave him the reference number of his case as 2B6200 as per their letter, photocopy of which has been produced as exhibit 4(c).

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There was apparently no right of way serving the said properties as required by the Streets and Buildings Regulation Law, Cap. 96 and the application was dismissed on that ground without any further study by the government departments concerned.

On the 3rd March 1973, however, as it is shown from an unsigned copy of a bond (good for £725.-) exhibit 5, the applicant purchased, or so he claims, a right of way from a certain Christos Georghiou Yerimou, of Ayia Napa.

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The said bond reads as follows:

“On the 2nd March 1974, I the undersigned Kyriacos HadjiTtophi of Ayia Napa, hereby declare that I owe to pay to the order of Christos Georghiou of Ayia Napa, the aforesaid sum of £725.- being the value of the agreed price 1,450 sq. feet from his property under plot No. 16/7 sheet/plan 42/22, village of Ayia Napa, which he has ceded to me in order to use it as a right of passage to my nearby property under plot No. 446 and 450 sheet/plan 48/22 of

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Ayia Napa, the ceded right to be registered through the L.R.O.

5 After the lapse of the aforesaid period I am bound to pay interest at 9% per annum until full and final payment and in case of legal proceedings, to the payment of all Court and advocate's fees.

Famagusta the 3rd March, 1973".

10 I shall not enter at this stage into the dispute that has arisen between the owners of the servient property and the applicant as to whether such a right was ever sold by them or their predecessor to him. In fact affidavit evidence has been given and there is a civil case pending before the Civil Courts.

15 Before proceeding any further I consider it helpful to set out herein a letter dated 6th May 1974 addressed by the Town Planning Office to the District Officer Famagusta (exhibit 4(a) ), it reads:

*"File number 2B6200—Ayia Napa.*

*Plots number 445 and 450 s/p. XLII/22.E.2*

*Applicant: Kyriakos HadjiTtofi.*

20 The present application relates to the issue of a permit for the construction on the aforesaid plot of a tourist pavilion as shown on the submitted plans in pages 1-5 of this file.

25 2. The plot of the applicant is situate within zone A2 of A.A. 145/5.8.1972 and within the area where for the protection of the sea-shore the construction of any building is prohibited (A.A.98/11.5.1973).

30 3. The relevant application was first submitted to your office on the 15th December 1972 but it was dismissed without a study by the interested Government Departments as the plot of the applicant *was completely devoid of a passage to public road.* On the 9th March 1973 he acquired a registered right of passage of a width of 10' - 0", along the south boundary bordering to plot under number 16/5.

35 4. The object of A.A. 98/11.5.1973 which was published 63 days after the submission of the relevant right of passage

is that no building will be built in the area where the plot of the applicant lies so that in any way the sandy beach and the natural environment of the area will be protected. In accordance with paragraph 3 of the said Administrative Act its provisions are not applicable, only to buildings on which there was a building permit on the 11th May 1973. 5

5) In view of the above but also of the fact that:

- (a) The application submitted was contrary to the legal situation as on 9th March 1973, that is: 10
- (i) *The width of the access* to the building of the applicant 7' - 0" and 10' - 0" was in no way satisfactory (this should be at least 25' - 0") for the use of the building and the length of this access 1/3 of a mile. 15
- (ii) *The plot coverage percentage* was 21.11% instead of 20% as provided by the A.A. 145/72.
- (b) The time period of 63 days between the date of the submission of the right of passage and the publication of A.A. 98/11.5.1973 was not sufficient for the correction on the one hand of those in paragraph (a) mentioned illegalities and the completion of the study of this case by all interested government departments (KOT, Fire Service, Town Planning, Public Works, Health Department etc), on the other hand, I recommend that the application be dismissed". 20 25

On the 11th May, 1973, in the exercise of its powers under subsection 1 of section 5(A) of the Foreshore Protection Law, Cap. 59, as amended the Council of Ministers by Notification No. 98, published in Supplement No. 3(1), to the Official Gazette No. 1010 of even date, prohibited every kind of building on the coast of Ayia Napa, which area included the property of the applicant. 30

No reply to that application was received until after the invasion of 1974 when he was asked by the respondent, that as the file of his case had been lost in Famagusta in order to proceed with its determination, he should supply them afresh 35

with all details and copies of all documents which he did on the 16th July 1976. On the 5th August 1976, the respondents wrote to the applicant rejecting his application on the ground that his property was situated within the protected foreshore area specified in Notification 98, hereinabove mentioned.

As a result on the 14th September 1976, the applicant filed recourse No. 207/76, the file of which has been produced as exhibit 1. On the 7th April 1977, however, upon the respondent's undertaking to reconsider the case on the basis of the legal position and circumstances existing at the time of his application, provided the applicant could satisfy the authorities that his application has been submitted in 1972, withdrew his said recourse. The applicant then submitted all relevant material and by letter dated the 18th October, 1978, (Appendix B in Recourse No. 428/78, exhibit 2), the respondents informed applicant's counsel as follows:

"I acknowledge receipt of your letter dated 3rd October 1978 with regard to the case of your client Kyriacos Hadji-Ttophi of Ayia Napa, and I inform you,

(1) that the Improvement Board of the village at its meeting of the 21st September, 1978, decided not to grant a permit to Mr. HadjiTtophi in order to avoid a bad precedent.

(2) In view of this you may inform your client that he may seek from the Improvement Board of Ayia Napa compensation for the substantial damage which may have been caused to his ownership in accordance with Section 5(A)(3) of Law Cap. 59 as amended by Laws 29/61, 17/64, 8/72, and 52/75 and to point out if he claims that compensation in money or in State land of equal value.

(3) Note that all the above are submitted without obligation on behalf of the Council as any arrangements which may result must be approved by the Government".

As against the decision contained in this letter the applicant filed recourse No. 428/78, which, however was withdrawn upon

the making by counsel for the respondents of the following statement:

“*Mr. Pittadjis*: Having gone through the record of the file of the case and in particular the letter of the District Officer dated 18th October, 1978, I note that the respondents failed to give due reasoning for their refusal to grant to the applicant a building permit. If the applicant withdraws this recourse and applies afresh for the issue of a building permit, then the respondent board undertakes to re-examine his application”.

The respondents after re-examination of the case dismissed once more the application of the applicant and communicated to him their decision by letter dated 7th September 1979, copy of which is appended to the present recourse and which reads as follows:

“I wish to refer to your letter of the 21st June for re-examination of the application of your client Kyriacos HadjiTtophi for a building permit in plots 445 and 450 sheet/plan 42/22 at Ayia Napa and to inform you that the Improvement Board of Ayia Napa rejected once more your application for the grant of a permit for the following reasons:

(a) your properties are situated within the area of the foreshore where the construction of any building permit is not permitted by virtue of the Foreshore Protection Law, Cap. 59 Notification 98 of 11th May, 1973.

(b) although you had submitted originally application for a building permit on the said properties before the 11th May, 1973, when the aforesaid notification was published, yet, on the 11th May, 1973, when the Law changed your case was not as yet matured and/or ready for the issue of the relevant permit.

(c) the small delay which was caused in the examination of your first application was due to the following irregularities:

(i) originally there did not exist a right of passage;

- (ii) the plot ratio number as regards the plans submitted was 0.42:1 instead of 0.30:1 as specified by Notification 145/72;
- 5 (iii) the percentage which was to be covered by the plans on the building side was 21.11 per cent instead of 20 per cent as provided by Notification No. 145/72”.

Upon receipt of this communication the applicant filed the present recourse.

10 Before dealing with the legal issues raised in this recourse a brief reference may be made to the controversy that has arisen regarding certain factual aspects. Affidavit evidence has been filed and the affiants have been cross-examined at length. I do not intend to deal extensively with everything that has been said and alleged. In particular there has been evidence regard-  
15 ing the existence or not of the right of way, but whatever the real position is, and indeed there are many questions that can be posed, particularly when one notices that the bond regarding its purchase is dated the 3rd March 1973, and that the applicant according to his own version was informed for the first time  
20 that he had to register same on the 9th March 1973, and he did so on the same day, something improbable, bearing in mind Land's Office routine, yet, I feel that I should take it that there existed a registered right of passage as mentioned in the letter of the Town Planning Department, exhibit 4(a).

25 Evidence has also been adduced with regard to the technical aspect of the case aiming at contradicting the findings of the Town Planning Department regarding the compliance of the plans to existing regulations. I am not prepared to go beyond those findings which are contained in the letter of the Town  
30 Planning Department (exhibit 4(a)) and also that of the respondents, of the 7th September 1979, copy of which is appended to the present recourse and which letters have been set out in full earlier in this judgment.

35 On this factual basis I turn now to the legal aspect of the case. It has been the contention of the applicants that the sub judice act and/or decision has been taken in excess and/or abuse of power and/or is ultra vires to the Streets and Buildings Regu-



lation Law, Cap. 96 and the relevant regulations as the application in question has not been examined in time and on the basis of the legislation in force at the time of its submission or immediately after and/or within a reasonable time.

In respect of the aforesaid proposition I have been referred 5  
to the case of *Andriani Lordou v. The Republic* (1968) 3 C.L.R. p. 427 and the principles therein expounded by reference to the Case Law and the Greek Council of State which has been followed in the case of *Loiziana Hotels Ltd., v. The Municipality of Famagusta* (1971) 3 C.L.R. p. 466 where summing up the 10  
position I had this to say at p. 472:

“From the aforesaid exposition of the law, as it is established both here and in Greece, it appears that independently from the construction of the relevant legislation, the general principle that the validity of an administrative act is determined on the basis of the legal status existing at the time of its issue, is subject to the exception that the pre-existing legislation is applicable when there has been an omission on the part of the administration to perform within a reasonable time what it was duty bound to do before the change of the law.” 15 20

I abide by the aforesaid statement of the Law and guided by it I turn now to examine whether there has been an omission on the part of the respondents to perform within a reasonable time what they were duty bound to do, that is to issue the building permit applied for before the change of the Law. 25

On the facts of the present case as hereinabove set out it has to be examined whether 63 days' delay between the 9th of March 1973 when the applicant is recorded as having acquired a right of passage in respect of the subject property and the 11th May 1973, when the notification prohibiting the building in the area where the plot of the applicant lies, was unreasonable in the circumstances and was such as to amount to an omission which would have been put right by applying the law as it was when it should have been determined and not as the law happened to be at the time the decision was actually taken. 30 35

On the totality of the circumstances and bearing in mind that

as on the 11th May 1973 the plans of the applicant were not in compliance with the regulations in force and also bearing in mind that if there was a preliminary study of the plans and the defects in question were pointed out to the applicant and there  
5 was compliance with the regulations, yet the matter would call for further study and examination by various departments, I find that in the circumstances and considering the volume of work that inevitably exists in Government departments, and existed at the time, a two months delay was not such an omission  
10 as to amount to abuse or excess of power.

As pointed out by Triantafyllides, J., as he then was, in the *Lordos case* "It must be remembered in this respect that once an application for a building permit is made the grant thereof is not automatic even if all the necessary plans are ready and in  
15 compliance with the legislation in force at the time. The matter has still to be considered by the appropriate Authority, so that if need be proper conditions may be imposed by it under the relevant provisions of Cap. 96, such as section 9 thereof."

As there has been therefore no undue and unjustifiable delay  
20 on the part of the respondents in dealing with the applicant's application, I find that the matter regarding the grant of the building permit applied for had to be governed by the legislation in force after the 11th May 1973. This ground therefore fails.

The next ground has been that there has been discrimination  
25 inasmuch as other applications submitted at the same time, in the same area were approved and building permits issued. It has been disputed on the part of the respondents that the facts of those cases were identical to the present case and I have no material before me to make a comparison of those cases with the  
30 one in question so that the issue of unequal treatment or discrimination could be decided. On the contrary the disposal of those cases prior to the 11th May 1973 is somehow an indication that there was no ulterior motive in non examining the applicant's application before the 11th May 1973 when the Law was changed.  
35 This ground therefore should also fail.

The grounds of misconception of fact, lack of due reasoning and lack of due inquiry cannot stand either, as the subject

decision is duly reasoned, it has been arrived at after a proper inquiry and there is no misconception of fact.

For all the above reasons this recourse is dismissed but in the circumstances I make no order as to costs.

*Recourse dismissed. No order as to costs. 5*