

1981 October 30

[MALACHTOS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

MAROULLA STYLIANOU CHRISTODOULOU,
Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE DISTRICT OFFICER OF NICOSIA,
Respondents,

(Case No. 317/77).

*Constitutional law—Equality—Principle of—Entails equal or similar
treatment of all those found in the same situation—Article 28
of the Constitution—Building permits for erection of auxiliary
building and for erection of main building—Imposition of different
conditions on former permit does not contravene principle of* 5
*equality because holders of the two building permits not in the
same situation.*

*Building—Building permit—Auxiliary buildings—Main buildings—
Different considerations apply in relation to—No improper use
of discretionary powers, under regulation 64 of the Streets and* 10
*Buildings Regulations by regulating differently in the case of
auxiliary buildings, the question of the distance of these buildings
from the adjacent plot—Regulation 6(1) of the Regulations.*

In 1975 the applicant secured a building permit for the erection
of a new house on a plot of land of hers on which there stood 15
an old house. One of the conditions imposed by the respondent
District Officer was that the new house should be erected at
a distance of not less than 5 ft. from the boundaries of the adja-
cent plots including plot No. 375/1. In 1977 the owner of this
latter plot (No. 375/1) secured a building permit for the erection 20
of a shed as an auxiliary building to his existing house on the
said plot on the common wall that separated his property from
that of the applicant on condition that no windows should

be opened to the side of the property of the applicant. Hence this recourse.

Counsel for the applicant mainly contended:

- 5 (a) That the *sub judice* decision was contrary to regulation 6(3)* of the Streets and Buildings Regulations.
- (b) That the respondent exercised in a wrong way his discretionary powers under regulation 64** of the Streets and Buildings Regulations.
- 10 (c) That the *sub judice* decision amounted to unequal treatment of the applicant vis a vis the interested party, contrary to Article 28 of the constitution.

15 *Held*, that the principle of equality entails the equal or similar treatment of all those who are found to be in the same situation (see *Republic v. Arakian and Others* (1972) 3 C.L.R. 294 at p. 299); that in the present case, the applicant and the interested party were not in the same situation as the case of the applicant was for the erection of a main building for which the 10 ft. restriction provided by regulation 6(3) applies whereas in the case of the respondent that part of this regulation does not apply as it is concerned with an auxiliary building; that it is clear from the wording of the Building Regulations that in granting a building permit different considerations apply in the case of main and auxiliary buildings, (see proviso to Regulation 6(1) where it is stated that a percentage of not more than 10% in each case may be occupied by auxiliary buildings of a height not more than 12 ft. and at a distance of not less than 5 ft. from the main building); that, furthermore, this Court has not been satisfied from the arguments advanced by counsel for applicant

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* Regulation 6(3) runs as follows:

"No part of the main building or alteration or addition to any existing main building and no open verandah higher than 4 ft. from the ground level shall be less than 10 ft. from the boundary of the plot on which it stands or less than....."

** Regulation 64 runs as follows:

"Notwithstanding anything in these Regulations contained, where the appropriate authority is the District Officer of the District or a Board of which the District Officer is the Chairman, such Authority may dispense with all or any of the requirements of these Regulations or apply them with such modifications, not being more onerous, as to such authority may seem fit having regard to the particular circumstances of any case or the general conditions obtaining in the area".

that in the present case there was improper use of the discretionary power on behalf of the respondent authority or a misconception concerning the factual situation or the non taking into consideration of material factors; and that, therefore, neither the allegation of counsel for unequal treatment contrary to Article 28 of the Constitution nor his submission that in the case in hand the respondent District Officer exercised his discretion in a defective manner can stand; accordingly the recourse must fail. 5

Application dismissed. 10

Cases referred to:

Republic v. Arakian and Others (1972) 3 C.L.R. 294 at p. 299.

Recourse.

Recourse against the decision of the respondent whereby the interested party Nestoras Charalambous was granted a building permit for the erection of a shed as an auxiliary building to his existing house on the common wall that separates applicant's property from that of the interested party. 15

A. *Pandelides*, for the applicant.

R. *Gavrielides*, Senior Counsel of the Republic, for the respondent. 20

Cur. adv. vult.

MALACHTOS J. read the following judgment. In this recourse the applicant is the owner of a house situated at Yerakies village, Nicosia District, under Registration No. 5760 being Plot 372 of Sheet/Plan 37/9. 25

On 22nd November, 1975 the applicant secured a building permit under No. 74845 for the erection of a new house on her above mentioned plot on condition that the building should be erected at a distance of not less than 5ft. from the boundaries of plots 375/1, 375/2 and 374 which plots have common boundaries with her plot. This condition was imposed in view of the fact that in the architectural plans submitted it was proposed the opening of windows on the walls of the new buildings to be erected to the side of the said plots in order to secure adequate light and air. It should be noted here that the applicant was allowed to erect one of the walls of the new building on the boundary line of her property with another plot on condition 35

that on that wall no windows should be opened. The said building permit of the applicant was renewed on 1.8.1977.

On 27.1.1977 the respondent District Officer of Nicosia granted to the interested party, Nestoras Charalambous of Yerakies, who is the owner of plot 375/1, a building permit under No. 76977 for the erection of a shed as an auxiliary building to his existing house on his said plot, on the common wall that separates his property from that of the applicant on condition that no windows should be opened to the side of the property of the applicant.

The fact that the said permit was granted to the interested party was communicated to the applicant by a letter of the District Officer dated 19.9.1977, addressed to her advocate, who, feeling aggrieved that the shed of the interested party would interfere with her enjoyment of light and air, filed on 22.11.1977 the present recourse claiming:-

- (a) a decision and/or declaration of the Court that the decision of the respondent dated 28.1.1977, which was communicated to her advocate by letter dated 19.9.1977, by which a building permit No. 76977 was granted to Nestoras Charalambous to erect a shed on plot 375/1 of S/P 37/9 at Yerakies, is illegal and/or null and void and/or was granted in excess and/or abuse of power, and
- (b) a decision of the Court declaring the above decision (granting of the permit) void and of no legal effect.

The application is based as stated therein, on the following grounds of law:

1. On the provision of the Streets and Buildings Regulations (regulation 6) which provides that no part of the main building or addition to any existing building shall be less than 10ft. from any boundary of the plot on which it stands;
2. In the wrong way exercises of the discretionary power by virtue of regulation 64 of the above Regulations, by the respondent; and
3. On Article 28 of the Constitution.

The relevant part of regulation 6(3), with which we are concerned, as amended, provides that—

“No part of the main building or alteration or addition to any existing main building and no open verandah higher than 4 ft. from the ground level shall be less than 10 ft. from the boundary of the plot on which it stands or less than.....”

Also, regulation 64, as amended, reads as follows:

“Notwithstanding anything in these Regulations contained, where the appropriate authority is the District Officer of the District or a Board of which the District Officer is the Chairman, such Authority may dispense with all or any of the requirements of these Regulations or apply them with such modifications, not being more onerous, as to such authority may seem fit having regard to the particular circumstances of any case or the general conditions obtaining in the area.

Provided that the present Regulation does not apply for the areas covered by Regulation 66”.

Counsel for applicant in arguing his case, did not deny the fact that the respondent District Officer, in view of the facts and circumstances of the present case, had a discretion under the powers given to him by regulation 64, to dispense with the requirements of regulation 6(3) and/or to apply this regulation with modifications, taking into account the general conditions obtained in the area. His complaint is that the respondent exercised his discretionary power under regulation 64 in a defective manner because in the case of the applicant a condition was imposed that her building should be 5 ft. away from the boundary line, whereas in the case of the interested party he was allowed to build on the boundary line. He also submitted that as the bedroom windows of the house to be erected by the applicant would be facing the boundary line of the two plots, the erection of the rear wall of the shed by the interested party would interfere with the use and enjoyment of the new house of the applicant by obstructing the light and air.

Furthermore, counsel for applicant submitted that the defective manner in which the respondent exercised his discretion, amounts to unequal treatment of the applicant vis a vis the

interested party contrary to Article 28 of the Constitution, which provides that all persons are equal before the Law, the administration and justice and are entitled to equal protection thereof and treatment thereby.

- 5 In the case of the *Republic v. Nishan Arakian & Others* (1972) 3 C.L.R. 294 at page 299, it has been decided that the principle of equality entails the equal or similar treatment of all those who are found to be in the same situation.

10 In the present case, the applicant and the interested party were not in the same situation as the case of the applicant was for the erection of a main building for which the 10 ft. restriction provided by regulation 6(3) applies whereas in the case of the respondent that part of this regulation does not apply as we are concerned with an auxiliary building. It is clear from the
15 wording of the Building Regulation, that in granting a building permit different considerations apply in the case of main and auxiliary buildings. The first proviso to regulation 6(1) where it is stated that a percentage of not more than 10% in each
20 case may be occupied by auxiliary buildings of a height not more than 12 ft. and at a distance of not less than 5 ft. from the main building for the use connected to the main building affords an example. The above is also an answer to the allegation of counsel for applicant that the respondent District Officer exercised his discretionary power in a defective manner.

25 Furthermore, I must say that I have not been satisfied from the arguments advanced by counsel for applicant that in the present case there is improper use of the discretionary power on behalf of the respondent authority or a misconception concerning the factual situation or the non taking into consideration
30 of material factors.

For the reasons stated above neither the allegation of counsel for applicant for unequal treatment contrary to Article 28 of the Constitution, nor his submission that in the case in hand the respondent District Officer exercised his discretion in a
35 defective manner, can stand.

In the result, this recourse fails and is dismissed.

On the question of costs I make no order.

Application dismissed. No order as to costs.