1985 December 7

[DEMETRIADES, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

MEROPI GEORGHIOU AND ANOTHER,

Applicants,

v.

THE MUNICIPAL COMMITTEE OF LARNACA,

Respondents.

(Case No. 268/81).

Building permit—Application for—Should be examined on the basis of Building Regulations in force on the date when the application was lodged.

Interpretation of Statutes—Retrospective effect—Statute taking away rights already acquired cannot, unless its language otherwise plainly requires, be held to have a retrospective effect. 5

On the 14.8.1980 the applicants applied to the respondents for the issue to them of a building permit for the reconstruction of a two storied building standing on their 10 property at Scala, Phaneromeni Quarter, plot 177 and the addition to it of two more floors.

On the 16.8.1980 new Building Regulations came into force in the town of Larnaca, regulating the area of the building site to be covered by the construction, the number 15 of stories of each building to be erected on it as well as its height.

By letter dated 12.6.1981 the respondents informed the applicants that they could not issue to them the building permit applied for as the building intended to be constru- 20 cted by them was not in accordance with the said new building regulations of the 16th of August 1980.

As a result applicants filed the present recourse. It should be noted that the proposed building for which a permit had been applied for did not comply with the provisions of the said new regulations.

5 *Held, annulling the sub judice decision:*

(1) A statute that takes away rights already acquired cannot, unless its language as such plainly requires that construction, be held to have a retrospective effect. This tallies with the rule that in the event of annulment of an 10 administrative act the re-examination that follows by the administration must be made on the basis of the facts and the law existing at the time the decision annulled was taken.

(2) As it emanates from respondents' letter dated 12.6. 15 1981 the respondents failed, even as late as that date, to examine applicants' application and see whether it complied with the Building Regulations in force on the date their application was lodged.

Lordou v. *The Republic* (1968) 3 C.L.R. 427 and 20 *Loiziana Hotels Ltd.* v. *The Municipality of Famagusta* (1971) 3 C.L.R. 466 not followed.

Sub judice decision annulled.
No order as to costs.

Cases referred to:

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

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

Recourse.

Recourse against the refusal of the respondents to issue 30 to applicants a building permit for the reconstruction of their building at Phaneromeni quarter, Larnaca and for the addition to it of two more floors.

L. Papaphilippou, for the applicants.

G. Nicolaides, for the respondents.

35 *Cur. adv. vult.*

DEMETRIADES J. read the following judgment. The applicants are the registered owners of a building site of an extent of one evlek and 2,100 sq. feet, i.e. 5,700 sq. feet, situated at Skala, Phaneromeni quarter, plot 177, Sheet/Plan XL/64E.II, block H. On this building site there stands a two storied building. 5

On the 14th August, 1980, the applicants applied to the respondents who are the appropriate authority in the town of Larnaca, where their property is situated, for the issue to them of a building permit for the reconstruction of their said building and the addition to it of two more floors. 10

As it appears from a photocopy of their application, which is appended to the written reply of their counsel to the address of counsel for the respondents, the applicants intended to have the ground floor turned into shops and in addition to build two flats on each of the other three floors, each flat consisting of three bedrooms, hall, a sitting room, W.C., kitchen and corridor. In addition verandahs, a staircase and a lift shaft were to be built. The height of the intended building would be 46 feet. The total extent of the covered area of the building would be 11,360 sq. feet and the covered area of each floor was to be 50% of the total area of the building site. 15 20

On the 16th August, 1980, new Building Regulations came into force in the town of Larnaca, regulating the area of the building site to be covered by the construction, the number of the stories of each building to be erected on it, as well as its height. These regulations were published in the Official Gazette of the Republic (See No. 234, Third Supplement, Part I, dated 16th August, 1980) after a decision of the respondents, in the exercise of the powers vested in them by section 14(1) of the Streets and Buildings Regulation Law, Cap. 96, as amended by Laws 14/1959, 67/1963, 6/1964, 65/1964, 12/1969, 38/1969, 13/1974, 28/1974, 24/1978 and 25/1979. 25 30 35

Under this Notification Larnaca was divided into a number of areas for each of which different retrictions for building are provided.

It is an admitted fact that the property of the applicants is situated within the area that falls under item No. 6 of Notification No. 234 in which the height of the buildings cannot exceed 37 feet and the number of floors is limited to four. In this area the said Notification further provides that the total build area cannot exceed 50% of the extent of the building site.

The applicants received no reply to their application till the 12th June, 1981, when the respondents informed them by a letter that they could not issue to them the building permit applied for as the building intended to be constructed by them was not in accordance with the new Building Regulations. It is against this decision of the respondents that the applicants complain by their present recourse.

The applicants argued that -

1. The refusal of the respondents to issue to them a building permit is not justified because Notification No. 234 could not prejudice their rights in view of the fact that their application for a building permit was submitted prior to its publication.

2. The decision of the respondents offends Article 23.1 of the Constitution which safeguards the right of a person to acquire, own, possess, enjoy or dispose of any movable or immovable property in that it deprives them of their right to enjoy their property and imposes on them restrictions of their right to ownership.

3. The *sub judice decision was taken in circumstances* of misconception of the law and/or in abuse or in excess of power.

4. The respondents failed to carry out a due inquiry in that they failed to make a local enquiry to see the existing buildings, the general environment of the area and the actual locality of the proposed buildings. The applicants further argued on this point that another fact which was not considered by the respondents is that the plot on which the building was to be erected is a building site with buildings standing thereon; that the title of ownership does not contain any limi-

tation as to the height or extent of the buildings, and that had the respondents made a proper enquiry they might have found that the erection of the proposed building would beautify or embetter the area.

5. The respondents failed to examine the particular merits of the application of the applicants which failure flagrantly interfered with the right of ownership safeguarded by Article 23 of the Constitution.

The last argument of the applicants, which I shall quote verbatim is as follows:

"Notification No. 234, by its second proviso gives certain guidelines for the relaxation of the restrictions and discretions which are conflicting with the purpose of the notification which is given in the beginning of its text. In any event, the notification itself connects the environment with the protection of private life of the families. In other words the private life factor is one of the ingredients of the objectives of the notification. We might say that the family requirements of the owners is a factor which should be taken into account when dealing with applications for building permits.

These objectives are not served by the notification in question, but only the equation and monotony of the character of the buildings.

It is suggested that the notification in question was hasty and was not the result of a proper study".

The case for the respondents as put forward by them is in a nutshell that the applicants submitted their application two days before the publication of Notification 234, that is after the decision of the respondents had leaked to the public; that it cannot seriously be argued that the respondents had the opportunity or the possibility to examine the application within the period of two days that lapsed between its lodgment and the publication of the said Notification; that section 14(1) of the Streets and Buildings Regulation Law, Cap. 96, which empowers Municipal Corporations to define zones does not violate Article 23 of the

Constitution, nor is it ultra vires and that the respondents applied the provisions of Notification 234 correctly. Further, they argued that any delay in taking their decision or communicating same to the applicants has no bearing on 5 the present case and that they had no discretion, under the proviso to Notification 234, to relax its restrictions, except in cases in which the building site on which a building was proposed to be erected did not exceed 1,500 sq. feet, in view of the extent of the applicants' building 10 site which is 5,700 sq. feet.

The respondents further submitted that in taking their decision they were not entitled to examine special circumstances relating to the applicants.

The respondents finally argued that as Notification 234 15 had directly affected legitimate interests of the applicants and as they had failed to attack its provisions within the time limit provided by the Constitution, their recourse ought to be dismissed as filed out of time.

The answer of the applicants to this submission of the 20 respondents is that the respondents, by failing to decide their application within the period of 30 days, as it is provided by Article 29.1 of the Constitution, prevented them from directly attacking by recourse to this Court Notification 234. They further submitted that this delay by 25 the respondents was made on purpose so that the applicants be prevented from attacking Notification 234.

With regard to the first legal ground raised by the applicants, both counsel relied on the cases of *Lordou* v. *The Republic*, (1968) 3 C.L.R. 427 and *Loiziana Hotels* 30 *Ltd.* v. *The Municipality of Famagusta*, (1971) 3 C.L.R. 466.

In the *Lordou* case, supra, Triantafyllides J. (as he then was) had this to say (at p. 433) on a similar issue raised by the applicants in that case:

35 "It is 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; for example in case 398(39) the Greek Council of State decided that, though a doctor had applied on the 1st June, 1937, for a permit regarding the functioning of his clinic, a decision, prohibiting such functioning, which was taken—while his applicaton was still under consideration—on the 15th October, 1938, was valid, because it was based on legislation which was published on the 24th January, 1938, and was prohibiting the functioning of a clinic of that nature in the particular area; and it was stressed, by the Council of State, that the administration could not have acted contrary to such legislation and allow something to be done which was prohibited by legislator, relating to a matter of public order (δημοσίας τάξεως), in force at the time when the relevant administrative action was taken".

The learned Judge, after making reference to Decision 1235 (56) of the Greek Council of State, in which it was held that an application regarding a building permit had to be dealt with under the legislation in force at the time when it was made—and under which all the conditions relevant to the grant of the permit had been satisfied —and that such application was not to be governed by legislation which had come into effect in the meantime, after the making of the application, went on (at p. 434):

"A perusal of the aforementioned decision shows, at once, that the situation in that case is clearly distinquishable from the situation in the present case: There, before the coming into effect of the new legislation, there appears to had arisen a duty of the appropriate authority to issue the permit applied for, in view of the fact that the application therefor com-

plied fully with all relevant conditions. In the present case, the application of the Applicants was submitted on the 17th May, 1967, it was studied, within reasonable time, by the technical services of respondent 2; and on the date when the Notice in question was published the position was that the applicants were still required to supply some further collateral plans and effect a modification to those already submitted; it could not be said that by the 25th May, 1967, the matter had ripened to such an extent that the building applied for by the applicants could, and should, have been issued already.

In any event, in a subsequent case before the Greek Council of State, 1477 (56)—where it was held that an application for a building permit, submitted before new legislation had come into effect, was rightly dealt with under such new legislation which had in the meantime come into effect—case 1235 (56) was considered, and it was distinguished as having been decided on the basis of the correct interpretation and application of the specific enactment involved therein. Thus, case 1235 (56), supra, cannot be regarded as derogating from the cardinal principle of Administrative Law regarding legality of administrative acts—to which reference has been made earlier on in this decision; such case was merely determined on the basis that the legislation properly applicable to the matter in issue therein was the earlier one, and not the later one, which on a proper construction thereof was found not to be applicable".

In the *Loiziana* case, supra, Loizou J., in deciding a similar issue and after making reference to the *Lordou* case, supra, and decisions of the Greek Council of State, said the following (at pp. 472-473):

"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.

The unreasonable delay by the respondent in determining the application of the applicant and their subsequent application of the law as it was on the 15th March, 1971, amounts, to my mind, to a misdirection as to the law applicable and in fact to an excess and abuse of power. The law applicable is the law as it was before the 29th January, 1971, under which it is common ground the permit could be issued as a matter of course".

In my view, a statute that takes away rights already acquired cannot, unless its language as such plainly requires that construction, be held to have a retrospective effect. This view of mine, I feel, tallies with another principle of administrative law, namely that when a decision of an administrative organ is held by a Court of Law to be null and void, must be re-examined by that organ on the basis of the facts and the law existing at the time the decision annulled was taken.

As it appears from the contents of the letter dated the 12th June, 1981, containing the sub judice decision, the respondents rejected the application of the applicants on the ground that it did not comply with the Building Regulations in force on that date and in particular with Notification 234. It is, therefore, clear that the respondents failed, even as late as that date, to examine the application of the applicants and see whether the plans, specifications etc. submitted by them complied with the Building Regulations in force on the date their application was lodged. In view of this I find that the sub judice decision should be declared null and void and of no effect.

By this decision of mine it is obvious that I disagree with the judgments delivered by my learned colleagues in the

cases of *Lordou* and *Loizlana*, supra, as well as the Decisions of the Greek Council of State on which my brother Judges based their judgments.

Having reached this decision I find it unnecessary to deal
5 with the other issues raised in this recourse.

There will be no order as to costs.

Sub judice decision annulled.
No order as to costs.