1979 April 14

[A. Loizou, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

PANOS A. RAZIS AND ANOTHER,

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTRY OF INTERIOR.

Respondent.

(*Case No.* 345/78).

Administrative Law—Executory act—Legal opinion from the office of the Attorney-General—Not a decision in the sense of Article 146 which can be made the subject of a recourse thereunder—Re-examination of a case from its legal aspect, not based on new facts or on a change of the provisions regulating the concrete relationship—Does not constitute a new inquiry giving an executory character to the act issued thereafter.

Citizenship—Citizen of the Republic of Cyprus—"Ordinarily resident" in section 2(1) of Annex D to the Treaty of Establishment of the Republic of Cyprus—Meaning—Alien continuously living and working in Cyprus for a period of 10 years immediately before the date of the said Treaty—Marrying a Cypriot—Applying and obtaining a British naturalization certificate—"Ordinarily resident" in Cyprus within the meaning of the said section 2(1).

Infants—"Ordinary residence"—Infants cannot decide for themselves where to live—"Ordinarily resident" in their parents' matrimonial home.

The two applicants are twin brothers and were born in Limassol in 1957. Their father was born in Argostolion, Greece, in 1924 and came to Cyprus in 1950 for work at the Evrychou Gymnasium as a physical training school master. He was the holder of a Greek passport which was issued in Athens in 1950 and expired in 1953. In 1955 he was married to his present

wife, a Cypriot, who was born in Limassol in 1935. She was issued with a British Cypriot passport in 1958 and became a Cypriot citizen automatically on the 16th August, 1960, the day of the Establishment of the Republic of Cyprus, by virtue of section 2 of Annex D to the Treaty of Establishment.

Between the years 1950 and 1960, the applicants' father remained in Cyprus and worked as a school master at various secondary schools, on a temporary residence permit, for the purposes of employment, granted to him under the Aliens and Immigration Laws and Regulations in force at the time. On the 22nd January, 1960, he applied for a certificate of naturalization under the British Nationality Act, 1948, which was issued to him on the 8th June, 1960. In 1969 he applied, under section 5(1) of Annex D to the Treaty of Establishment to be granted citizenship of the Republic of Cyprus; and was asked to produce, and he did produce, a certificate of the chairman of the Committee of the Quarter he was residing, to the effect that he was a permanent resident of Cyprus at any time in the period of five years immediately before the 16th August, 1960, as required by section 5(1) of the said Annex D. Thereupon his application was approved and in September, 1969 the father was issued with a Cyprus passport.

On July 4, 1977 counsel for the applicants wrote to the respondent and asked that they might be declared as aliens. The respondent replied by letter dated July 15, 1977 that after consideration of the whole matter, it was ascertained that the applicants were citizens of the Republic of Cyprus. As against this reply, the two applicants filed on the 17. 8. 1977 Recourse No. 229/77 and prayed for a declaration that that decision of the respondent, by virtue of which they were considered as citizens of the Republic and as such liable to military service, was null and void. After repeated adjournments that recourse was withdrawn and dismissed on the 22nd April, 1978, upon a statement being made by both counsel that they had seen the Attorney-General of the Republic and he had agreed to a re-examination of the case.

On July 14, 1978, counsel of the Republic informed counsel for the applicants that "The Attorney-General of the Republic re-examined the legal aspect of the case and is of opinion that the decision which formed the subject-matter of the said recourse

was correctly taken because your clients fall within section 2 of Annex D to the Treaty of Establishment". On the 12th August, 1978, the applicants filed the present recourse and sought a declaration that the act and/or decision of the respondent dated 14. 7. 1978 by virtue of which they were considered as citizens of the Republic and as such liable to military service, was null and void and with no legal effect.

The answer to the issue whether the applicants were citizens of the Republic, which was the main issue in this recourse, depended on the construction of the words "ordinarily resident" in section 2(1)* of Annex D to the Treaty of Establishment. Before resolving this issue the Court dealt *ex proprio motu* with the question whether the act complained of was an executory administrative act that could be made the subject of a recourse.

Held, (*I*) *on the question whether the sub judice decision was an executory administrative act:*

(1) That the decision challenged by this recourse is nothing more than a legal opinion from the office of the Attorney-General which cannot be considered as a decision in the sense of Article 146 and, therefore, it could not be made the subject of a recourse: and that, accordingly, this recourse must fail (*Pitsillides* v. *Republic* (1973) 3 C.L.R. 15 *followed*).

(2) That, moreover, on the assumption that the decision subject-matter of the first recourse (No. 229/77) was an executory administrative decision, which was not, (see, *inter alia*, *Pieri* v. *Republic* (1978) 3 C.L.R. 356 and *Florides* v. *Republic* (1979) 3 C.L.R. 37) this recourse is also out of time, as generally speaking the re-examination of a case from its legal aspect only and so long as it is not based on new facts or on a change of the provisions regulating the concrete relationship, does not constitute a new inquiry giving an executory character to the act issued thereafter (see *Varnava* v. *Republic* (1968) 3 C.L.R. 566 at p. 576).

Held, (*II*) *on the question whether the applicants were citizens of the Republic*:

(1) That the question whether an individual is "ordinarily

* Quoted at p. 134 *post*.

resident" in this country or not, has to be decided by examining his pattern of life over a period of years; that the expression "ordinary residence" connotes residence in a place with some degree of continuity (see *Levene* v. *Commissioner of Inland Revenue* [1928] A.C. 217); that the words "ordinarily resident" should be given their natural meaning and a person whilst physically present in a place is "ordinarily resident" there (see *Hopkins* v. *Hopkins* [1951] P. 116); that giving the words "ordinarily resident" their natural meaning and effect that they connote residence in a place with some degree of continuity, this Court holds that on the facts of this case the father of the applicants was "ordinarily resident" in Cyprus within the meaning of section 2(1) of Annex D to the Treaty of Establishment.

(2) That the two applicants, who between their birth in 1957 to the date of the Treaty in 1960 were children of tender years and could not decide for themselves where to live, were "ordinarily resident" in their parents' matrimonial home; that they are, therefore, "ordinarily resident" in Cyprus within the meaning of section 2(1) of the said Annex D and they are citizens of the Republic of Cyprus and liable to military service; and that, accordingly, this recourse must be dismissed.

Application dismissed.

Cases referred to:

Pieris v. *Republic* (1978) 3 C.L.R. 356;

Vrahimi and Another v. *Republic*, 4 R.S.C.C. 121;

Colocassides v. *Republic* (1965) 3 C.L.R. 542;

Florides v. *Republic* (1979) 3 C.L.R. 37;

Pitsillides v. *Republic* (1973) 3 C.L.R. 15;

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

Varnava v. *Republic* (1968) 3 C.L.R. 566 at p. 576;

Levene v. *Commissioner of Inland Revenue* [1928] A.C. 217;

Fox v. *Stirk* [1970] 3 All E.R. 7;

Brokelmann v. *Barr* [1971] 3 All E.R. 29;

Macrae v. *Macrae* [1949] P. 403;

Hopkins v. *Hopkins* [1951] P. 116;

In re (G.E.) (An infant) [1965] Ch. 568.

Recourse.

Recourse against the decision of the respondent whereby applicants were considered as citizens of the Republic and as such liable to military service.

L.N. Clerides, for the applicants.

N. Charalambous, Counsel of the Republic, for the Respondent.

Cur. adv. vult.

A. LOIZOU J. gave the following judgment. By the present recourse the applicants seek a declaration of the Court that the act and/or decision of the respondent dated 14. 7. 1978 by virtue of which they were considered as citizens of the Republic and as such liable to military service, is null and void and with no legal effect.

The undisputed facts of the case are as follows: The two applicants are twin brothers and were born in Limassol on the 19th February, 1957. Their father was born at Argostolion, Greece, on the 30th November, 1924, and came to Cyprus on the 2nd October, 1950, for work at the Evrychou Gymnasium as a physical training school master. He was the holder of a Greek passport issued in Athens on the 8th September, 1950, which expired on the 23rd September, 1953. On the 18th September, 1955, he was married to his present wife, a Cypriot, born in Limassol on the 20th October, 1935. She was issued with a British Cypriot passport on the 10th September, 1958, and became a Cypriot citizen automatically on the 16th August, 1960, the day of the Establishment of the Republic of Cyprus, by virtue of section 2, of Annex D to the Treaty of Establishment.

Between the years 1950 and 1960, the applicants' father remained in Cyprus and worked as a school master at various secondary schools, on a temporary residence permit, for the purposes of employment, granted to him under the Aliens and Immigration Laws and Regulations in force at the time. On the 22nd January, 1960, the father of the applicants applied for a certificate of naturalization under the British Nationality Act 1948, which was issued to him under No. 1220 on the 8th June, 1960. The father of the applicants applied in 1969 under section 5(1) of Annex D to the Treaty of Establishment to be granted citizenship of the Republic of Cyprus. On the 10th

May, 1969, (red 123 of *exhibit* 1), the Migration Officer informed the District Officer of Limassol through whom the aforesaid application had been submitted that before its further consideration the said applicant had to produce to the said Department a certificate of the Chairman of the Committee of the Quarter as to whether he was a permanent resident of Cyprus at any time in the period of five years immediately before the 16th August, 1960, as required by section 5(1) of Annex D to the Treaty of Establishment. Such a certificate, dated the 19th May, 1969, was forwarded by the District Officer of Limassol (reds 124 and 125 of *exhibit* 1).

Thereupon the application of the father was approved and on the 12th September, 1969, he was issued with a Cyprus passport.

We have, therefore, here clear evidence supplied by the father of the two applicants and acted upon by the Authorities of the Republic that he was a permanent resident in the island of Cyprus, not only at any time during the period of five years preceding the date of Independence, but so resident for more than five years preceding that date. In fact, that was a qualification that had to be possessed by a citizen of the United Kingdom and Colonies in order to be entitled to the grant to him of citizenship of the Republic.

On the 4th July, 1977, counsel for the applicants, after explaining the circumstances of their case to the respondent, asked that they might be declared as aliens (red 137 of *exhibit* 1). The respondent replied by letter dated 15. 7. 1977 (red 138 of *exhibit* 1) that after consideration of the whole matter, it was ascertained that the applicants were citizens of the Republic of Cyprus. As against this reply, the two applicants filed on the 17. 8. 1977 Recourse No. 229/77 and prayed for a declaration that that decision of the respondent by virtue of which they were considered as citizens of the Republic and as such liable to conscription, was null and void. After repeated adjournments that recourse was withdrawn and dismissed on the 22nd April, 1978, upon a statement being made by both counsel that they had seen the Attorney-General of the Republic and he had agreed to a re-examination of the case.

On the 14th July, 1978, counsel of the Republic informed counsel for the applicants that "The Attorney-General of the

Republic re-examined the legal aspect of the case and is of opinion that the decision which formed the subject-matter of the said recourse was correctly taken because your clients fall within section 2 of Annex D to the Treaty of Establishment".

On the 12th August, 1978, the applicants filed the present recourse. The first question for determination which the Court may examine *ex proprio motu* is whether the act complained of is an executory administrative act. In the case of *Pieri* v. *The Republic* (1978) 3 C.L.R., p. 356, it was held that the certificate of the Migration officer as to what the legal situation was regarding the citizenship of that applicant and his liability for military service under the National Guard Laws 1964-1978, was not an executory act and could not be made the subject of a recourse under Article 146.1 of the Constitution and reference was made therein to the cases of *Vrahimi and Another* v. *The Republic*, 4 R.S.C.C. 121, and *Nicos Kolokassides* v. *The Republic*, (1965) 3 C.L.R., p. 542. and The Conclusions, from the Case-Law of the Council of State in Greece, 1925-1959, pp. 236 and 237.

A similar approach is to be found in the case of *Florides* v. *The Republic* (1979) 3 C.L.R., p. 37. Legal opinions are not executory acts except in the cases where by law an executory act is taken in agreement with an opinion when a negative opinion has the legal consequence that it restricts the competence of another organ and prevents the issuing of the executory act and from that point of view it is considered as executory act capable of being the subject of a recourse for annulment (see Stassinopoulos, The Law of Administrative Disputes, p. 173).

In Pitsillides v. *The Republic* (1973) 3 C.L.R. 15 I held that the legal advice of the Attorney-General in that case, on a question again relating to military service, was not a decision within the meaning of Article 146 of the Constitution and therefore it could not be the subject of a recourse. Likewise in the present case the decision challenged by the present recourse is nothing more than a legal opinion from the office of the Attorney-General which cannot be considered as a decision in the sense of Article 146 and therefore this recourse should fail on this ground.

Moreover on the assumption that the decision, subject matter of Recourse No. 229/77 was an executory administrative de-

cision, which in my opinion was not in the light of the authorities hereinabove set out, the present recourse is also out of time, as generally speaking the re-examination of a case from its legal aspect only and so long as it is not based on new facts or on a change of the provisions regulating the concrete relationship, does not constitute a new inquiry giving an executory character to the act issued thereafter. (See: Conclusions of the Greek Council of State 1929-1959, p. 241; *Megalemou* v. *The Republic* (1968) 3 C.L.R., p. 581; *Varnava* v. *The Republic* (1968) 3 C.L.R. p. 566, at p. 576).

Out of respect, however, to counsel for the very elaborate argument advanced on the substance of the recourse, I propose to answer the second question raised, namely, whether the *sub judice* decision is in law a valid one.

The answer to this issue depends on the construction of the words "ordinarily resident" to be found in section 2 of Annex D to the Treaty of Establishment which reads as follows:-

"1. Any citizen of the United Kingdom and Colonies who on the date of this Treaty possesses any of the qualifications specified in paragraph 2 of this section shall on that date become a citizen of the Republic of Cyprus if he was ordinarily resident in the Island of Cyprus at any time in the period of five years immediately before the date of this Treaty.

The qualifications referred to in paragraph 1 of this section are that the person concerned is -

(a) a person who became a British subject under the provisions of the Cyprus (Annexation) Orders in Council, 1914 to 1943;

(b) a person who was born in the Island of Cyprus on or after the 5th of November, 1914; or

(c) a person descended in the male line from such a person as is referred to in sub-paragraph (a) or (b) of this paragraph.

3. Any citizen of the United Kingdom and Colonies born between the date of this Treaty and the agreed date shall become a citizen of the Republic of Cyprus at the date

of his birth if his father becomes such a citizen under this section or would but for his death have done so".

The terms "residence" and "ordinary residence" are not defined in the Treaty and accordingly have their ordinary dictionary meaning. "Residence" describes the country where an individual lives and "ordinary residence" is generally speaking equivalent to habitual residence and is used in constradistinction to casual or occasional residence. These terms are used in Tax Acts and also are to be found in section 18(1)(b) of the Matrimonial Causes Act 1950, in relation to the qualification of residence and "ordinary residence" by a wife for a period of three years immediately preceding the commencement of proceedings for divorce for the purpose of giving to the Court jurisdiction in the matter. The question whether an individual is "ordinarily resident" in this country or not, has to be decided by examining his pattern of life over a period of years and in this respect as stated in *Pinson on Revenue Law*, 10th Edition, p. 166, "the concept of ordinary residence resembles domicile more than residence".

In the case of *Levene* v. *Commissioner of Inland Revenue* [1928] A.C. 217, the appellant, a British subject, who left England under medical advice with the intention of living abroad but returned for a period of about five months in each year for the next six years, was found by the Special Commissioners that he was resident and ordinarily resident in the United Kingdom during those years. Viscount Cave had this to say at pages 222–223:

> " My Lords, the word 'reside' is a familiar English word and is defined in the Oxford English Dictionary as meaning 'to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place'. No doubt this definition must for present purposes be taken subject to any modification which may result from the terms of the Income Tax Act and Schedules; but, subject to that observation, it may be accepted as an accurate indication of the meaning of the word 'reside'. In most cases there is no difficulty in determining where a man has his settled or usual abode, and if that is ascertained he is not the less resident there because from time to time he leaves it for the purpose of business or pleasure. Thus,

a master mariner who had his home at Glasgow where his wife and family lived, and to which he returned during the intervals between his sea voyages, was held to reside there, although he actually spent the greater part of the year at sea: *In re Young*, I Tax Cas. 57; *Rogers* v. *Inland Revenue*, 1 Tax Cas. 225. Similarly a person who has his home abroad and visits the United Kingdom from time to time for temporary purposes without setting up an establishment in this country is not considered to be resident here, although if he is the owner of foreign possessions or securities falling within Case IV. or V. of Sch. D, then if he has actually been in the United Kingdom for a period equal in the whole to six months in any year of assessment he may be charged with tax under r. 2 of the Miscellaneous Rules applicable to Sch. D. But a man may reside in more than one place. Just as a man may have two homes—one in London and the other in the country—so he may have a home abroad and a home in the United Kingdom, and in that case he is held to reside in both places and to be chargeable with tax in this country. Thus, in *Cooper* v. *Cadwalader* 5 Tax Cas. 225, an American resident in New York who had taken a house in Scotland which was at any time available for his occupation, was held to be resident there, although in fact he had only occupied the house for two months during the year; and to the same effect is the case of *Loewenstein* v. *de Salis*, 10 Tax Cas. 424".

He went on to say at page 225:

"The expression 'ordinary residence' is found in the Income Tax Act of 1806 and occurs again and again in the later Income Tax Acts, where it is contrasted with usual or occasional or temporary residence; and I think that it connotes residence in a place with some degree of continuity and apart from accidental or temporary absences. So understood the expression differs little in meaning from the word 'residence' as used in the Acts; and I find it difficult to imagine a case in which a man while not resident here is yet ordinarily resident here".

The first dictum of Viscount Cave hereinabove quoted was applied in *Fox* v. *Stirk* [1970] 3 All E.R. 7 and in *Brokelmann* v. *Barr* [1971] 3 All E.R. 29.

In *Macrae* v. *Macrae* [1949] P. 397 at p. 403 Somervell L.J. said:

> " Where there are indications that the place to which he moves is the place which he intends to made his home for at any rate an indefinite period, then as from that date in my opinion he is ordinarily resident at the place to which he has gone".

In *Hopkins* v. *Hopkins* [1951] P. 116, a wife whose husband was resident and domiciled in Canada presented a divorce petition and claimed that she had been "ordinarily resident" in England for a period of three years immediately preceding the institution of the proceedings, although during some six months of the relevant period she had been living with her husband in Canada and neither she nor her husband had at that time had a home in England. It was held applying the *Levene* and *Macrae* cases (*supra*) that although, on the evidence, she would have been entitled to a decree of dissolution if the Court had had jurisdiction, her petition must be dismissed, for, giving to the words their ordinary and natural meaning, she must be held to have been ordinarily resident in Canada while physically present in that country, and was therefore not "ordinarily resident" in England throughout the relevant period, and had, accordingly, not brought herself within the sub-section.

Pilcher, J. said at pp. 121-122:

> " My own view is, that on the facts of this case, and the words ordinarily resident being given their natural meaning, the wife was, whilst physically present in Canada, 'ordinarily resident' there. She was clearly resident there, and to find that she was also during the period of her stay 'ordinarily resident' there involves a conclusion that, on the facts of this particular case at least, the qualifying adverb 'ordinarily' adds nothing to the adjective 'resident'. Such a conclusion accords with the view taken by the highest tribunal in the country when called upon to construe identical and similar words in the Revenue Acts, and also accords with the view of the meaning of the words taken by Somervell, L.J., in *Macrae* v. *Macrae* [1949] P. 397. It follows that if the wife was ordinarily resident in Canada during her five months sojourn, then she was not 'ordinarily resident' in England during the three years preceding

the commencement of the proceedings, and that this Court has no jurisdiction to entertain her suit under the provisions of s. 1, sub-s. 1(a), of the Law Reform (Miscellaneous Provisions) Act, 1949".

Applying the meaning given to the words 'ordinarily resident' in the cases hereinabove set out and giving the words 'ordinarily resident' their natural meaning and effect that they connote residence in a place with some degree of continuity, I hold that on the facts of this case the father of the applicants was ordinarily resident in Cyprus within the meaning of section 2 of Annex D to the Treaty of Establishment. He had been living and was physically present with a considerable degree of continuity apart from accidental or temporary absences since 1950 up to the present time, though for our purposes up to 1960 would be enough. He was continuously employed in Cyprus, he married a Cypriot, he applied and he was granted a British naturalization certificate and the two applicants were born and have been living with him eversince their birth in 1957 in Cyprus.

This being so it need only be pointed out that the ordinary residence of the two applicants who between their birth in 1957 to the date of the Treaty in 1960 were children of tender years and who could not decide for themselves where to live, were ordinarily resident in their parents' matrimonial home (*Re: P. (G.E.) (An Infant)* [1965] Ch. 568, 585-586 (C.A.)). This answers also the argument advanced that the Court had to examine the residence of the two applicants and not that of their father in connection with the present case.

For all the above reasons I would also dismiss the present recourse on the merits, but in the circumstances I make no order as to costs.

Application dismissed. No order as to costs.