1979 November 24

[DEMETRIADES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

THRASSOS O' MAHONY,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH THE MINISTER OF INTERIOR,

Respondent.

(*Case No.* 298/79).

Citizenship—Citizenship of the Republic of Cypru—"Ordinarily resident" in section 2(1) *of Annex D to the Treaty of Establishment of the Republic of Cyprus—Meaning—Domicile irrelevant—Applicant born in Cyprus in* 1958 *and residing ever since with his father who was ordinarily resident in Cyprus from* 1958 *until the date of the said Treaty—Being a minor and unable to decide for himself where to live during the period between his birth and the date of the Treaty, was ordinarily resident in his parents' home in Cyprus—And since he was a citizen of the United Kingdom and Colonies and he, also, possessed qualification* (*b*) *of paragraph* 2 *of section* 2 *of the said Annex D, on the date of the treaty he became a citizen of the Republic and liable to serve in the National Guard.*

Administrative Law—Executory act—Revocation of administrative acts or decisions—Recourse against respondent's decision concerning citizenship and liability to serve in the National Guard—Statement by counsel of the Republic, who was defending the respondent on behalf of the Attorney-General of the Republic, that applicant is not a citizen of the Republic and not liable to serve in the National Guard—Subsequent decision by respondent that he continued to support the contrary view—Said statement a legal opinion different from the view held by respondent, the competent authority which has never revoked its decision—No interference with the constitutional rights of the Attorney-General of the Republic contrary to Article 113.1 *of the Constitution—Even assuming*

that said statement was expressing a decision reached by the respondent, he could have changed his mind and revoke such decision as it had been reached by wrongly interpreting the Law, section 2 of Annex D.

Administrative Law–Administrative acts or decisions–Reasoning.

The applicant was born on the 1st May, 1958 at Scala Cyprus. His father was born on the 22nd December, 1920 at Adhana, Turkey, and was an Italian national till the 25th January, 1955, when, on his application, he was issued with a certificate of naturalisation under the British Nationality Act, 1948. From 1955 to 1958 he has been ordinarily residing in Italy and the Republic of Ireland but from 1958 until the Proclamation of the Republic of Cyprus in 1960, he has been ordinarily residing in Cyprus together with the applicant.

On June 15, 1976, the applicant filed a recourse ("recourse No. 160/76") against the decision of the respondent to the effect that he was bound to continue to serve in the National Guard. When recourse No. 160/76 came for trial counsel for the respondent made the following statement: "We have now satisfied ourselves that the applicant is not a citizen of the Republic and therefore is not liable for service in the National Guard". As a result of this statement recourse No. 160/76 was withdrawn.

On August 23, 1979, the Acting Immigration Officer informed counsel for the applicant by letter (*exhibit* 3) that after careful consideration of the matter the Department of Immigration continued to support the view that the applicant and his brother were citizens of the Republic of Cyprus and, as a result, he was unable to proceed to issue a certificate to the effect that the applicant was not a citizen of the Republic. Hence this recourse.

Counsel for the applicant mainly contended:

(a) That before reaching the age of 16 an unmarried minor is utterly incapable of acquiring, by his own act, an independent domicile of choice and that even if a child acquires at birth, by operation of law, the domicile of his father, the applicant's father was never a citizen of the Republic at any crucial time, and hence the applicant could not have become such.

(b) That the statement of counsel in recourse No. 160/76 was an executory act since it affected the legal rights

of the applicant (the nature of his status and service with the National Guard) and that it could only be revoked by the person who originally made it, i.e. the Attorney-General or his representative, but not by any other organ of the Republic, like the Chief Immigration Officer who acted without competence in this connection and in breach of Article 113.1 of the Constitution.

(c) That the *sub judice* decision was null and void for lack of reasoning.

Counsel for the respondent in this case, who was the one who appeared in recourse No. 160/76, stated that having gone further into the whole legal question posed in this case, he changed his view and came to the conclusion that on the correct interpretation of section 2(2)(b)* of Annex D to the Treaty of Establishment, the applicant is and was always a citizen of the Republic.

Held, (1) that section 2(1) of Annex D to the Treaty of Establishment does not speak of "domicile" but of "ordinarily resident" and so domicile does not come into play; that applying the law governing the meaning of the expression "ordinarily resident" (see *Razis and Another* v. *Republic* (1979) 3 C.L.R. 127 and the case-law referred to therein) to the undisputed facts of this case this Court concludes that the applicant being a child of tender years and being unable to decide for himself where to live during the period between his birth and the date of the Treaty of Establishment, was ordinarily resident in his parents' home in Cyprus; that he, having continuously lived with his parents in their home, was ordinarily resident in Cyprus during the material time; that since, also, on the date of the said Treaty he was, having been born in a Colony, a citizen of the United Kingdom and Colonies by birth (see section 4 of the British Nationality Act, 1948) and, having been born after the 5th November, 1914, he possessed qualification (b) of paragraph 2 of section 2 of Annex D, on the date of the Treaty he automatically became a citizen of the Republic of Cyprus; and that, accordingly, he is liable to serve in the National Guard.

(2) That there was no interference with the constitutional rights of the Attorney-General contrary to Article 113.1 of the

* Quoted at p. 576 *post*.

Constitution since the competent Authority for the *sub judice* matter was the Minister of Interior, the respondent in recourse No. 160/76, who was defended by Mr. R. Gavrielides, counsel of the Republic, for the Attorney-General.

(3) That on the evidence, and in particular the contents of the letter *exhibit* 3, the respondent's counsel in recourse No. 160/76 was by his statement expressing a legal opinion which was different from the view held by the respondent as regards the nationality of the applicant; that, therefore, the respondent—the competent authority in this matter—has never revoked its decision as regards the nationality status of the applicant; and that, accordingly, contention (b) above must fail.

Held, further, that assuming that counsel for the respondent in recourse No. 160/76 was expressing by his statement a decision reached by the competent authority, the respondent, he could have changed his mind and revoke the said decision, as that decision had been reached by wrongly interpreting the provisions of section 2 of Annex D to the Treaty of Establishment (see Kyriacopoulos on Greek Administrative Law, 4th ed. Vol. B, p. 410).

(4) That though the contents of the letter *exhibit* 3 are not those one could have wished, still they sufficiently inform the applicant of the opinion of the respondent as regards his nationality status; and that, accordingly, the contention regarding absence of reasoning must, also, fail.

Application dismissed.

Cases referred to:

Razis and Another v. *The Republic* (1979) 3 C.L.R. 127;

Levene v. *Inland Revenue Commissioner* [1928] All E.R. Rep. 746 at p. 749;

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

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

Recourse.

Recourse against the refusal of the respondent to issue a certificate that the applicant is not a citizen of the Rupublic and hence he could travel freely abroad.

L. N. Clerides with *N. L. Clerides*, for the applicant.

R. Gavrielides, Counsel of the Republic, for the respondent.

Cur. adv. vult.

DEMETRIADES J. read the following judgment. By the present recourse, the applicant prays for, and I quote, "a declaration of the Honourable Court that the act and/or decision of the respondent not to issue a certificate that the applicant is not a citizen of the Republic of Cyprus, and hence he could travel freely abroad, communicated to the applicant on the 22nd day of August, 1979, should be declared null and void and of no effect whatsoever".

The undisputed facts of the case are: On the 15th June, 1976, the present applicant filed Case No. 160/76, by which he sought a declaration of the Court that the act and/or decision of the respondent communicated to the applicant's counsel by a letter dated 27th May, 1976, where the applicant was bound to continue to serve in the National Guard, was null and void and of no effect whatsoever. Case No. 160/76 came up for trial on the 22nd January, 1977 and counsel appearing for the Minister of Interior, that is the respondent in that case, made the following statement: "We have now satisfied ourselves that the applicant is not a citizen of the Republic and therefore is not liable for service in the National Guard". As a result of that statement, counsel for the applicant withdrew the case, which was then dismissed.

On the 21st May, 1979, counsel for the applicant wrote to the Minister of Interior a letter, (which is *exhibit* No. 2 before me) by which he referred the respondent to a letter of his dated 28th January, 1979, and in which he was complaining that he had, up to that date, received no reply. The letter of the 28th January, 1979, was not produced.

On the 23rd August, 1979, the Acting Immigration Officer replied to *exhibit* No. 2—this letter was produced and is *exhibit* No. 3—and informed counsel for the applicant that he had been directed, after careful consideration of the matter, to inform him that the Department of Immigration continued to support the view that the applicant and his brother are citizens of the Republic of Cyprus and, as a result, he was unable to proceed to issue a certificate to the effect that the applicant is not a citizen of the Republic of Cyprus.

According to the birth certificate of the applicant, which was produced and is *exhibit* No. 5 before me, he was born on the

1st May, 1958 at Scala Cyprus. His father was born on the 22nd December, 1920 in Adhana, Turkey and was an Italian national till the 25th January, 1955, when, on his application, he was issued with a certificate of naturalisation under the British Nationality Act 1948. In his able address, counsel for the applicant, stated that the father of the applicant was, from 1955 until 1958, ordinarily resident in Italy and the Republic of Ireland, but that as from 1958 to the Proclamation of the Republic in 1960, he was ordinarily resident in the island of Cyprus. Counsel further admitted that the applicant, who was born on the 1st May, 1958, and was in 1960 2 1/2 years old, was residing with his father in Cyprus.

When Cyprus was declared an Independent State in 1960, provision was made for determining the nationality of persons affected by the agreement reached for its independence. These provisions are embodied in Annex D to the Treaty of Establishment.

Section 2 of the Annex defines the persons who, by reason of their connection and residence in Cyprus, automatically became citizens of the Republic as from its establishment. This section reads:-

" 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.

2. 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; or

(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."

I feel that before deciding the present nationality status of the applicant, one must go back and find what was his nationality on the date of his birth, as Section 2 makes provision only for those residents that were on the date of the Treaty citizens of the United Kingdom and Colonies.

At the material time, the law that governed the nationality of a resident in Cyprus was the British Nationality Act, 1948, section 4 of which provides that "every person born within the United Kingdom and Colonies, after the commencement of the Act, shall be a citizen of the United Kingdom and Colonies by birth". It is, therefore, my view, having regard to the above section of the Act, that the applicant was, having been born in a Colony, on the date of the Treaty, a citizen of the United Kingdom and Colonies by birth. The applicant, therefore, automatically acquired the nationality of the Republic of Cyprus if he possessed, at the time, the qualifications specified in para. 2 of Section 2 of Annex D and he was ordinarily resident in the island at any time in the period of five years immediately before the date of the Treaty.

There is no doubt that the applicant was born after the 5th November, 1914, so he possesses qualification (b) of para. 2 of Section 2 of the Annex. He was, further, on the date of the Treaty a citizen of the United Kingdom and Colonies. According to his counsel, he was residing with his father in Cyprus from his birth to the date of the Treaty. He had, therefore, his residence in Cyprus for some time in the period of five years immediately before the date of the Treaty.

Mr. Clerides submitted that before reaching the age of 16 an unmarried minor is utterly incapable of acquiring, by his own act, an independent domicile of choice and that even if a child acquires at birth, by operation of law, the domicile of his father, the applicant's father was never a citizen of the Republic at any crucial time, and hence, the applicant could not have become such.

Section 2(1) of Annex D, however, does not speak of "domicile" but of "ordinarily resident" in the island of Cyprus at any time in the period of five years immediately before the date of this Treaty, so domicile does not come into play in this case. What is "ordinarily resident" is not defined in Annex D to the Treaty of Establishment but the meaning of the word

"resident" has been construed in a number of English cases, relating to income tax and voting rights and very recently in the case of *Razis and Another* v. *The Republic* (1979) 3 C.L.R. p. 127 in which A. Loizou J., held that the question whether an individual is ordinarily resident in this country or not is to be decided by examining his pattern of life over a period of years; that the expression "ordinarily resident" construes residence in a place with some degree of continuity and that the words "ordinarily resident" should be given their natural meaning and a person whilst physically present in a place is ordinarily resident there. In the *Razis* case, reference was made amongst other authorities to the cases of *Levene* v. *Inland Revenue Commissioner* [1928] All E.R. Rep. 746 at p. 749, *Fox* v. *Stirk* [1970] 3 All E.R. 7, and *Brokelmann* v. *Barr* [1971] 3 All E.R. 29.

I feel that I need not quote from the above cases the relevant the the meaning of the word "residence" passage. Ashworth J., in delivering the judgment in the *Brokelmann* case at p. 36g said: "In the judgment of this Court there has gradually been developed and established a rule of construction that prima facie at least residence involves some degree of permanence". And at p. 37d "There is nothing in the order itself to suggest that the meaning of 'resident' is different from that given to it in a number of decided cases, nor is there any compelling reason from the practical point of view why the word should not be construed in a way similar to that adopted in those cases."

I fully adopt the last quoted passage and I go further and say that if the draftsmen of Annex D to the Treaty of Establishment intended the words "ordinarily resident" to have a meaning different to that judicially accepted, they could do so by giving them in plain words the definition they intended them to have.

Applying the law, as I find it to be to the undisputed facts of this case, I have come to the conclusion that the applicant, being a child of tender years and being unable to decide for himself where to live during the period between his birth and the date of the Treaty, was ordinarily resident in his parents' home in Cyprus; that he, having continuously lived with his parents in their home, was ordinarily resident in Cyprus during the material time and that on the date of the Treaty automatically became a citizen of the Republic of Cyprus. He is, thus, liable to serve in the National Guard.

It was submitted by learned counsel for the applicant that

exhibit No. 1—that is the statement of counsel for the respondent in recourse No. 160/76—was an executory act since it affected the legal rights of the applicant (the nature of his status and service with the National Guard) and that it could only be revoked by the person who originally made it, i.e. the Attorney-General or his representative, but not by any other organ of the Republic, like the Chief Immigration Officer who acted without competence in this connection and in breach of Article 113.1 of the Constitution.

He further submitted that in any case the decision complained of is null and void for lack of reasoning, as there is absolutely no reasoning at all in *exhibit* No. 3, that is to say the letter of the Immigration Officer dated 3rd August, 1979.

In support of his argument as regards his first submission, counsel for the applicant relied on two extracts which appear at p. 237 and p. 200 of Porismata Nomologias tou Symvouliou tis Epikratias 1929-1959, which read:-

"Εἰς προσβολὴν δι' αἰτήσεως ἀκυρώσεως δὲν ὑπόκειται οἱαδήποτε πρᾶξις ἀπορρέουσα ἐκ διοικητικοῦ ὀργάνου, δρῶντος ὡς τοιούτου, ἀλλὰ μόνον αἱ ἐκτελεσταὶ πράξεις, τοὐτέστιν ἐκεῖναι δι' ὧν δηλοῦται βούλησις διοικητικοῦ ὀργάνου, ἀποσκοποῦσα εἰς τὴν παραγωγὴν ἐννόμου ἀποτελέσματος ἔναντι τῶν διοικουμένων καὶ συνεπαγομένη τὴν ἄμεσον ἐκτέλεσιν αὐτῆς διὰ τῆς διοικητικῆς ὁδοῦ. Τὸ κύριον στοιχεῖον τῆς ἐννοίας τῆς ἐκτελεστῆς πράξεως εἶναι ἡ ἄμεσος παραγωγὴ ἐννόμου ἀποτελέσματος, συνισταμένου εἰς τὴν δημιουργίαν, τροποποίησιν ἢ κατάλυσιν νομικῆς καταστάσεως, ἤτοι δικαιωμάτων καὶ ὑποχρεώσεων διοικητικοῦ χαρακτῆρος παρὰ τοῖς διοικουμένοις. Ἐκτελεσταὶ διοικητικαὶ πράξεις δύνανται νὰ ἀποτελοῦν οὐ μόνον αἱ ἐγγράφως διατυπούμεναι, ἀλλὰ καὶ αἱ προφορικαὶ πράξεις τῶν διοικητικῶν ἀρχῶν, ἐφ' ὅσον συντρέχουν οἱ ὅροι τοῦ νόμου. Ἐξ' ἄλλου ἐκτελεσταὶ εἶναι οὐ μόνον αἱ ἀτομικαὶ πράξεις ἀλλὰ καὶ αἱ γενικαὶ αἱ θέτουσαι κανόνας γενικοὺς, ὑποχρεωτικοὺς διὰ τοὺς διοικουμένους. Τὸ γεγονὸς ὅτι συνετελέσθη ἤδη ἡ ἐκτέλεσις τῆς διοικητικῆς πράξεως δὲν ἀποκλείει τὴν ἀκύρωσιν αὐτῆς ὑπὸ τοῦ Συμβουλίου Ἐπικρατείας: 209(30)."

"Κατὰ τὰς ἀναπτυχθείσας ἐν τῇ νομολογίᾳ τοῦ Σ. τ. Ε. ἀρχὰς, ἐφαρμοζομένας ὑπὸ τὰς ἀνωτέρω (ὑπὸ στοιχ. Ι)

προυποθέσεις, ἡ ἀνάκλησις τῶν νομίμων διοικητικῶν πράξεων εἶναι κατὰ κανόνα ἐπιτρεπτή, ἐφ' ὅσον διὰ τῆς ἀνακλήσεως δὲν θίγονται δημιουργηθέντα διὰ τῆς ἀνακαλουμένης πράξεως δικαιώματα πολιτῶν: 605 (30), 1340 (34), 281 (51), 706 (53) ἢ πραγματικαὶ καταστάσεις ἐπὶ μακρὸν διαρκέσασαι: 363 (34), 988 (35), 456 (43). Αἱ ἀρχαὶ αὗται ἐφαρμόζονται ὁμοίως καὶ ἐπὶ τῶν πράξεων, αἵτινες συγκροτοῦν σύνθετον διοικητικὴν ἐνέργειαν, ἰδίᾳ εἰς περίπτωσιν, καθ' ἣν ἡ ἀνάκλησις λαμβάνει χώραν πρὸ τῆς ἐκδόσεως τῆς τελειούσης τὴν σύνθετον διοικητικὴν ἐνέργειαν πράξεως: 7 (38), 768 (51)."

("It is not subject to a recourse for annulment any act emanating from an administrative organ, acting as such, but only executory acts, in other words those by means of which the will of the administrative organ is declared, aiming at producing a legal situation concerning the citizens and entailing its direct execution by administrative means. The main element of the notion of an executory act is the direct production of a legal situation consisting of the creation, amendment or abolition of a legal situation, in other words rights and obligations of an administrative character concerning the citizens. Not only written administrative acts can constitute executory acts but oral acts of administrative authorities as well, so long as the prerequisites laid down by the law exist. On the other hand executory acts are not only the personal acts but also general acts establishing general rules obligatory for the citizens. The fact that the execution of the administrative act has already taken place does not preclude its annulment by the Council of State: 209(30). "

" According to the principles enunciated by the Council of State, applied under the above (para. I) prerequisites, the revocation of lawful administrative acts is as a rule permissible, since by the revocation there are not affected rights of the citizens which have been created by the revoked act: 605(30), 1340(34), 281(51), 706(53) or real situations that have lasted for long: 363(34), 988(35), 456(43). These principles similarly apply also on acts constituting a composite administrative act especially in case where the revocation takes place before the issue of the act which completes the composite administrative act: 7(38), 768(51).").

It was conceded by learned counsel for the applicant that the competent authority for the *sub-judice* matter is the Minister of Interior who was the respondent in recourse No. 160/76 and who was defended by Mr. R. Gavrielides, counsel of the Republic for the Attorney-General. In view of this admission by counsel it is clear that there was no interference with the constitutional rights of the Attorney-General by any organ of the Republic.

Mr. Gavrielides, who appears also for the respondent in this recourse, in his address stated that having gone further into the whole legal question posed in this case, he changed his view, though not without hesitation, and came to the conclusion that on the correct interpretation of Section 2(2)(a) of Annex D to the Treaty of Establishment, the applicant is and was always a citizen of the Republic.

In deciding this submission, one should first examine the statement made in recourse No. 160/76 and find whether it was an executory act, as alleged by the applicant, or simply an expression of legal opinion, as suggested by the respondent.

An executory act is an administrative decision and is thus defined at p. 237 of Porismata Nomologias tou Symvouliou tis Epikratias:-

> "δι' ὧν δηλοῦται βούλησις διοικητικοῦ ὀργάνου, ἀποσκοποῦσα εἰς τὴν παραγωγὴν ἐννόμου ἀποτελέσματος ἔναντι τῶν διοικουμένων, καὶ συνεπαγομένη τὴν ἄμεσον ἐκτέλεσιν αὐτῆς διὰ τῆς διοικητικῆς ὁδοῦ. Τὸ κύριον στοιχεῖον τῆς ἐννοίας τῆς ἐκτελεστῆς πράξεως εἶναι ἡ ἄμεσος παραγωγὴ ἐννόμου ἀποτελέσματος, συνισταμένου εἰς τὴν δημιουργίαν, τροποποίησιν ἢ κατάλυσιν νομικῆς καταστάσεως, ἤτοι δικαιωμάτων καὶ ὑποχρεώσεων διοικητικοῦ χαρακτῆρος παρὰ τοῖς διοικουμένοις."
>
> (" by means of which the will of the administrative organ is declared, aiming at producing a legal situation concerning the citizens and entailing its direct execution by administrative means. The main element of the notion of an executory act is the direct production of a legal situation, consisting of the creation, amendment or abolition of a legal situation, in other words rights and obligations of an administrative character concerning the citizens.").

In my mind, the statement of counsel in recourse No. 160/76 should be taken to mean that the respondent, having examined the life history of the applicant and having in mind the provisions made in Annex D to the Treaty of Establishment, which determines the nationality of persons affected by the Treaty, came to the conclusion that the applicant was not a citizen of the Republic, and, therefore, not liable for service in the National Guard. One may assume that it was a statement made in Court orally of an administrative act taken by the competent authority after it considered all the facts pertaining to the applicant. This, however, does not appear to be the case. The evidence before me, and in particular the contents of the letter *exhibit* No. 3, lead me to the conclusion that the respondent's counsel in case No. 160/76 was by his statement expressing a legal opinion which was different from the view held by the respondent as regards the nationality of the applicant.

The respondent—the competent authority in this matter—has, therefore, never revoked its decision as regards the nationality status of the applicant, and for this reason this submission cannot stand.

Assuming, however, that counsel for the respondent in recourse No. 160/76 was expressing by his statement a decision reached by the competent authority, the respondent, he could have changed his mind and revoke the said decision, as that decision had been reached by wrongly interpreting the provisions of Section 2 of Annex D to the Treaty of Establishment.

This conclusion I have reached having in mind the following extract from Κυριακόπουλος Ἑλληνικὸν Διοικητικὸν Δίκαιον, Ἐκδ. 4η, Τόμος Β. σ. 410, which reads:-

> " Ἡ μεταβολὴ τῶν ἀντιλήψεων τῆς ἀρχῆς. Ὅταν καὶ ἄνευ μεταβολῆς τῶν πραγματικῶν συνθηκῶν, ἡ ἀρχὴ ἐκτιμᾷ ταύτας καὶ ἑρμηνεύῃ τὸν νόμον ἄλλως ἢ ὅταν ἐξέδιδε τὴν πρᾶξιν, δικαιοῦται νὰ προβῇ εἰς τροποποίησιν ἢ ἀνάκλησιν αὐτῆς."
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> (" The change of mind by the Authority. When and without alteration of the actual circumstances, the authority assesses same and interprets the law differently than when it was issuing the act, it is entitled to proceed with its amendment or revocation").

As regards now the other submission by counsel that there is absolutely no reasoning at all in *exhibit* No. 3, I feel that though the contents of this letter are not those one could have wished, still they sufficiently inform the applicant of the opinion of the Ministry of Interior as regards the status of the applicant.

For all the above reasons, the recourse is dismissed, by there will be no order as to costs.

Application dismissed. No order as to costs.