

1986 November 21

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

PHILIPPOS MICHAEL,

Applicant.

v.

THE REPUBLIC OF CYPRUS, THROUGH
1. THE MINISTER OF FINANCE,
2. THE DIRECTOR OF CUSTOMS AUTHORITY,

Respondents.

(Case No. 552/84).

Customs and Excise Duties—Motor vehicles, importation of by Cypriots—Exemption from import duty—The Customs and Excise Duties Laws 1978-1981, section 11(2)—Order 188/82 of the Council of Ministers—The three prerequisites of the relief—The second prerequisite, namely return and permanent establishment in the Republic—Meaning of “permanent establishment”—Indicates the quality rather than length of residence—An intention to reside and establish necessary—Its notion akin to domicile—The third prerequisite, namely importation within “reasonable time”—Period starts to run from return and permanent settlement—What is “reasonable time” a question of fact—Period of three years—Court not prepared to hold that it is “reasonable”.

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The applicant, a Cypriot, emigrated in 1949 in England where he married and acquired three children. As from 1974 he started visiting Cyprus regularly. He formed a family company with limited liability, which in effect started business in 1976, run by the attorney of the applicant and his wife. The applicant was regularly receiving a salary from the said company. Since 1975 he was declaring his annual income for income tax pur-

poses, claiming deduction for the expenses of the studies of his children abroad. On 2.1.81 he obtained an electoral booklet. Both he and his wife were for many years receiving foreign exchange facilities for private travel abroad.

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In 1978 he built a house at Latsia let to his aforesaid attorney. In 1979 he built another house in the same location. He stayed in Cyprus in 1979 for 253 days, in 1980 for 290 days and in 1981 for 158 days. The length of his wife's stays in Cyprus during those years was 274, 286 and 246 days respectively. The applicant had a residence telephone at the house in Latsia

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The applicant was at the material time the holder of a British Passport, the last one having been issued on 25.1.82. On 18.6.81 he transferred his two garages in London together with the freehold land on which they were standing in the name of his sons. As from 1976 he started remitting funds in Cyprus and in particular during the period 1980-1982 he remitted £47,865 sterling. As the applicant stated he brought to this country a total amount exceeding £200,000.

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On 6.7.82 the applicant applied for exemption of import duty for the importation of a motor car as a repatriated Cypriot, contending that he returned to Cyprus for permanent settlement in April, 1982. His application was turned down on the ground that it was not submitted within a reasonable time from his arrival in Cyprus for permanent settlement, which in the opinion of respondent 2 could not be later than February, 1979.

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Hence the present recourse. In accordance with Order 188/82 a Cypriot is entitled to such exemption as aforesaid, if the following requirements are satisfied: (a) Permanent settlement abroad for at least 10 continuous years, (b) Return and permanent establishment in the Republic, and (c) Importation of a motor vehicle within reasonable time from the date of arrival in the discretion of the Director.

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Held, dismissing the recourse: (1) "Permanent establishment" is not synonymous to residence. It indicates the

quality of residence rather than its length. The duration of residence is one of the factors to be taken into consideration. An element of intention to reside and establish is necessary. Evidence of intention is important when the period or periods of residence point to both directions. One cannot be permanently settled both in the Republic and in another country. The intention may be gathered from conduct or action consistent with such settlement. Though permanent settlement cannot be assimilated to domicile, it is akin to it. It carries with it the notion of a real or permanent home.

(2) An administrative Court cannot substitute its own discretion to that of the administration. In the light of the circumstances of this case it was reasonably open to the respondents to find that the applicant returned and had permanently settled in 1979.

(3) The element of "reasonable time" must be reckoned from one's return and permanent establishment in the Republic. What is reasonable time depends on the circumstances and is a question of fact. This Court is not prepared to hold that three years is a reasonable period of time.

Recourse dismissed.

No order as to costs.

Observations by the Court: In this case there are weighty reasons for the Minister of Finance to exercise his discretion under the proviso to the Order in favour of the applicant, who, having worked hard in a foreign Country for 30 years, returned in his country of origin and remitted through the years a considerable amount of foreign currency.

Cases referred to:

Re Gape Decd., Verey v. Gape [1952] 1 Ch. 743;

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

Matsas v. The Republic (1985) 3 C.L.R. 54;

Shakallis v. The Republic (1985) 3 C.L.R. 2570;

Papageorgiou v. The Republic (1984) 3 C.L.R. 1348;

Yiangou and Another v. The Republic (1976) 3 C.L.R. 101.

Recourse.

Recourse against the decision of the respondents where- 5
by applicant's request for exemption from import duty of
a motor vehicle, as a repatriated Cypriot, was rejected.

G. Papatheodorou, for the applicant.

M. Photiou, for the respondent.

Cur. adv. vult. 10

STYLIANIDES J. read the following judgment. The ap-
plicant by this recourse seeks the annulment of the deci-
sion of the Director of Customs dated 29.9.84 and com-
municated to the applicant on 8.10.84 whereby his re-
quest for exemption from import duty for a motor-vehicle 15
was rejected.

The applicant is a Cypriot. In 1949 he emigrated to
England where he married and acquired three children.
He worked regularly with British Leyland as a motor-
mechanic. In 1971 he purchased a garage in London; in 20
1973 he resigned from British Leyland. As from 1974
he started visiting Cyprus regularly. In 1974 he purchased
a building site at Latchia. He also formed the company
"Papamichael Spareparts Distributors Ltd.", the share-
holders of which were the applicant, his wife and their 25
children. This company in substance commenced business
sometime in 1976. The business of the company at the time
—sale of motor-car spareparts—was run by a certain An-
dreas Alexandrou, alias Georgi, attorney of the applicant
and his wife—(See power of attorney, exhibit No. 2). A 30
house was built at Latchia in 1978 which was let to the
said Georgi. Another house was erected and completed, as
ascertained by authorities, in 1979 and not in 1981, as
alleged by the applicant, at the same location.

The applicant stayed in Cyprus in 1979 for 253 days, 35
in 1980 for 290 days and in 1981 for 158 days. The length

of his wife's stays in Cyprus during those three years is 274, 286 and 246 days, respectively. This was verified from their passports. For the remaining periods of these last three years they were living in the United Kingdom.

5 The applicant was the holder of a U.K. passport, the last one No. 307856D having been issued by the Home Office on 25.1.82.

10 On 6.7.82 he applied for exemption from duty for the importation of a car under the provisions of the Order of the Council of Ministers made under Section 11(2) of the Customs & Excise Duties Law, 1978 (No. 18 of 1978-1981).

15 He stated in the said application that he returned for permanent settlement in Cyprus on 20.4.82; he was the holder of a British passport issued on 25.1.82; he was permanently resident in England from 1949-1982; he visited Cyprus either for holidays or for matters related to his settlement in Cyprus; that since 1975 he was continuously travelling from U.K. to Cyprus and back
20 for the aforesaid purposes.

25 During the inquiry which was carried out in respect of this application, it transpired that he stayed in Cyprus for the long periods aforementioned; that since 1975 the applicant was declaring his annual income on the prescribed forms for income tax in Cyprus and he was claiming deduction for the expenses of the studies of his children abroad. He was regularly receiving an amount of salary from the company he registered in 1974. Both he and
30 his wife were receiving for many years foreign exchange facilities for private travel abroad, as recorded in their passports. On 2.1.81 he obtained a voting booklet under the Registration of Electors and Register Law, 1980 (No. 40 of 1980) but he never exercised the right to vote. (A
35 necessary prerequisite for the right to vote and consequently to obtain this booklet is 6 months' ordinary residence). He was a subscriber of C.Y.T.A. and had a residence telephone at the house at Latchia.

His such application was rejected on the ground that for the last 10 years prior to the date of his return to Cyprus he was not permanently resident abroad.

He impugned the said decision by Recourse No. 149/83. In the course of the hearing of the said recourse the respondent undertook to re-examine applicant's request on production to him of further material. Thereupon that recourse was withdrawn and dismissed by the Court. 5

The applicant thereafter addressed to the respondent a letter dated 6.3.84. He attached thereto the document of transfer of two garages in London and the freehold land on which these garages are standing in the name of his sons Michael and Costas, which took place on 18.6.81, and a certificate from Barclays Bank Plc., Caledonian Road Branch, London, to the effect that the applicant was remitting regularly from U.K. to Cyprus funds as from 1976 and in particular during the period 1980 - 1982 he transferred £47,865.- sterling, and a certificate from a certified accountant to the effect that he transferred to Cyprus from 1970 - 1982 an amount of £78,949.-, part of which in notes when travelling to Cyprus and part in value of spare-parts purchased by him and paid in England. The applicant further in his letter stated that he brought to this country from U.K. a total amount exceeding £200,000.-, the fruits of his toils of decades in England. 10 15 20 25

After further inquiry respondent No. 2 on 21.9.84 took the sub judge decision on the ground that the application was not submitted within reasonable time from applicant's arrival in Cyprus for permanent settlement, which, in the opinion of the Director of Customs, could not be later than February, 1979. 30

The relevant Order of the Council of Ministers reads as follows:-

«Διάταγμα δυνάμει του άρθρου 11(2)

- 5 Το Υπουργικόν Συμβούλιον, ενασκούν τας εις αυτό χορηγουμένας εξουσίας δυνάμει του εδαφίου (2) του άρθρου 11 των περί Τελωνειακών Δασμών και Φόρων Καταναλώσεως Νόμων του 1978 έως 1981 (εν τοις εφεξής αναφερομένων ως 'ο Νόμος'), διατάττει ως ακολούθως:-

Κλάσις	Εδάφιο	Περιγραφή Απαλλαγής	Έκτασις Απαλλαγής
01	19	<p>Μηχανοκίνητα οχήματα των κλάσεων 87.02.11 και 87.02.19 εισαγόμενα υπό Κυπρίων οι οποίοι κατόπιν μονίμου εγκαταστάσεως εις το εξωτερικόν δια συνεχή περίοδον τουλάχιστον 10 ετών επανέρχονται και εγκαθίστανται μονίμως εν τη Δημοκρατία νοουμένου ότι η εισαγωγή γίνεται εντός ευλόγου χρονικού διαστήματος από της αφίξεως των κατά την κρίσιν του Διευθυντού:</p> <p>Νοείται περαιτέρω ότι ο Υπουργός Οικονομικών κέκτηται εξουσίαν όπως παραχωρή ατέλειαν εις Κυπρίους επαναπατρισθέντας προ της 1.1.1982 οι οποίοι δεν πληρούν τους ανωτέρω όρους».</p>	<p>Η απαλλαγή καλύπτει μόνον εν όχημα δι' εκάστην οικογένειαν.</p>

"Order pursuant to section 11(2)

The Council of Ministers, in the exercise of its powers pursuant to sub-section (2) of section 11 of the Customs and Excise Duties Laws 1978-1981 (hereinafter referred to as 'the Law') orders as follows:

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Item	Sub-head- ing	Description of Relief	Extent of Relief
01	19	<p>Motor Vehicles of categories 87.02.11 and 87.02.19 imported by Cypriots who having permanently settled abroad for a continuous period of at least 10 years, return and settle permanently in the Republic, provided that the importation is made within a reasonable time from their arrival at the discretion of the Director.</p> <p>Provided that the Minister of Finance shall have power to grant relief to Cypriots repatriated before 1.1.82, who do not satisfy the aforesaid prerequisites.</p>	The Relief covers only one vehicle for each family.

A Cypriot is entitled to exemption if the following requirements are satisfied:-

- (a) Permanent settlement abroad for at least 10 continuous years;
- (b) Return and permanent establishment in the Republic; and,
- (c) Importation within reasonable time from the date of arrival in the discretion of the Director.

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There is no dispute that the applicant satisfies fully the first requirement.

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There is no quarrel that the applicant returned and established permanently in the Republic. This prerequisite

consists of two elements: (i) Return to the Republic and (ii) permanent settlement in the Republic. A Cypriot who returns to the Republic after more than 10 years' permanent settlement abroad, without permanently settling in Cyprus, does not qualify. The time must be reckoned from the date of his return and permanent establishment in the Republic. In the sub judice decision the time is reckoned as from February, 1979.

The word "permanent" (Μόνιμος) is defined in «Νέο Ορθογραφικό Ερμηνευτικό Λεξικό—Δημητράκου» as «σταθερός, αμετάκλητος» (steady, unchangeable), and in the Greek Dictionary of the Modern Greek Language it is defined «ο σταθερός, αυτός που μένει πάντοτε στον ίδιο τόπο» (steady, he who stays always at the same place).

"Permanent establishment" is not synonymous to "residence". Residence alone is not sufficient. Permanent establishment indicates a quality of residence rather than its length. The duration of the residence, i.e. regular physical presence in a place, is only one of a number of relevant factors. An element of intention to reside and establish is required. Evidence of intention may be important where the period or periods of residence are such as to point to both directions. It is not possible for a person to be permanently settled in the Republic and in another country. The intention of permanently settling may be gathered from the conduct and action consistent with such settlement. Though permanent settlement cannot be assimilated to domicile, it is akin to it and pronouncements on domicile are very relevant and helpful.

In *re Gape Decd.*, *Verey v. Gape*, [1952] 1 Ch. 743, at 749, it was said:-

"As has been observed during the course of the argument, the intention permanently to reside in a particular country is one of the two essential characteristics of domicile. It has been emphasized as an essential condition or characteristic time and again in these Courts, and I find it impossible to suppose that the Judges, in referring to that characteristic, were doing other than stating something which was to the lawyer both definite and precise. If a synonym be required, I would say that the condition of taking up permanent residence in England was

another way of saying: making England your permanent home; that is to say, residing in England with the intention of continuing to reside there until you die. It is, in other words, another way of referring to the characteristic essential to domicile.”

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And, further down on the same page:-

“You cannot take up a permanent residence at any particular point of time, unless at the time you take up residence you intend that it should be permanent, that is, that you should go on living there for your natural days”.

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And at pages 751 - 2:-

“The expression ‘take up’ suggests volition and intention and even more so does the word ‘permanent’, for it postulates a decision to live in a place for the rest of one’s life, as opposed to living there temporarily or for a fixed period of time and no longer.”

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(See also Vol. 1 of Dicey & Morris “The Conflict of Laws”, (10th Ed.,) at pages 141-143; and *Brokelmann v. Barr*, [1971] 3 All E.R. 29).

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In *Matsas v. Republic*, (1985) 3 C.L.R. 54, A. Loizou, J., said at p. 61, referring to this same Order:-

“To my mind permanent settlement carries with it the notion of a real or permanent home and should be distinguished from the notion of ordinary residence”.

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In *Andreas Shakallis v. Republic*, (1985) 3 C.L.R. 2570, it was said:-

“Settle has the meaning of voluntary and intentional action to settle.”

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Counsel for the applicant submitted that the trips to and stays in Cyprus of the applicant before 20.4.82 were of temporary nature and could not be deemed as permanent settlement in the country. The company, in which the applicant was one of the four shareholders, was being run in substance and effect by the attorney, Mr. Alexandrou, who was a mechanic by occupation.

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The applicant testified before the Court to the effect that he was coming to Cyprus for long periods in order to look after his old ill parents and to promote in some way his Cyprus business, and only when he thought that
5 the business reached a certain stage, he decided to establish in Cyprus. Before doing so, he transferred the ownership of his London garages into the name of his sons and transferred a lot of money to his homeland.

An administrative Court cannot substitute its own discretion in the place of the discretion of the proper organ. Nor can the administrative Court act as an Appeal Court in the matter of the exercise of such discretion on the merits of the subject under examination. The Court can only exercise control over such discretion in order to ensure
10 that it has been exercised within the proper limits laid down by Law—(*Papageorghiou v. Republic*, (1984) 3 C.L.R. 1348).
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Having given due consideration to the matter, I am of the opinion that it was reasonably open for the respondent,
20 on the material before him, and in all the circumstances of this case, to reach the decision that the applicant returned and established permanently in Cyprus in 1979.

The other point that arises is whether the period from February, 1979 - 20th April, 1982, when the application
25 was submitted, was reasonable.

Where anything is limited to be done within a "reasonable time," the question what is a reasonable time must necessarily depend on the circumstances, and is therefore a question of fact—(*Halsbury's Laws of England*, 4th
30 Ed., Volume 45, page 552, paragraph 1147). (See, also, *Yiangou and Another v. Republic*, (1976) 3 C.L.R. 101).

In the present case the applicant permanently established in Cyprus in 1979. He has not, however, severed all his links with England but for long periods in each year—
35 1979, 1980 and 1981—he was residing in England where he lived and worked for over 30 years. Notwithstanding this, I am not prepared to hold that three years is a reasonable period of time.

For the aforesaid the applicant is not entitled to the relief prayed and the recourse fails.

Before concluding, however, I wish to place on record that, having regard to the object of the statute and the Order of the Council of Ministers, in this particular case there are weighty considerations for the Minister of Finance to exercise his power under the proviso to the Order in favour of this applicant who emigrated as a young person to a foreign land, he worked hard for over 30 years, he returned and re-established in his country of origin and brought through the years into Cyprus a considerable amount of foreign currency. 5 10

Case dismissed. Let there be no order as to costs.

Recourse dismissed.

No order as to costs. 15