

1987 March 21

[STYLIANIDES J ]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

IOANNIS P SALLOUMIS,

*Applicant,*

v

THE REPUBLIC OF CYPRUS, THROUGH  
THE MINISTRY OF FINANCE AND/OR  
THE DIRECTOR OF CUSTOMS AUTHORITY,

*Respondents*

(Case No 1052/85)

*Customs and Excise Duties—Motor vehicles, importation of by Cypriots—  
Exemption from import duty—Order 188/82 of the Council of Ministers—  
The notion of «permanent settlement abroad»—The discretion of the Director  
to examine and decide whether each one of the pre-requisites of the relief  
under Order 188/82 is satisfied—Judicial control of the discretion*

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*Executory act—Informatory/Advisory act—Rejection of application by a  
repatriated Cypriot for the duty free importation of a motor car, which the  
applicant had not imported, but intended to import—Lacks executory  
character*

The applicant was employed by a Cyprus firm in Saudi Arabia as costing  
manager for the period 24 5 74 until 4 7 85 In September, 1980 the  
applicant married in Cyprus, but until 26 7 83 his wife and family were staying  
in a rented house in Limassol On 26 7 83 applicant's wife and children  
moved, also, to Saudi Arabia The applicant and his family returned to Cyprus  
on 4 7 85 It must, also, be noted that during the period of his stay in Saudi  
Arabia the applicant remitted money in Cyprus for the purchase of a house,  
a building site and a flat-office in Limassol

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On 10 10 85 the applicant applied for the duty free importation of a motor  
car, which he intended to purchase His application was turned down on the  
ground that applicant's stay abroad was of a temporary nature Hence the  
present recourse

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Held, *dismissing the recourse* (1) It is for the Director of Customs to reach  
a decision on whether each of the pre-requisites for the relief under Order  
188/82 of the Council of Ministers is satisfied The submission that the  
Director has no discretion to determine the nature of an applicant's stay  
abroad is wholly untenable

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(2) An administrative Court cannot substitute its own discretion in the place

of that of the proper organ, but it can only exercise control over such discretion in order to ensure that it has been exercised within the proper limits laid down by law

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(3) In this case and bearing in mind the case-law on the notion of «permanent settlement», this Court is of the view that it was reasonably open to the respondent Director to find that applicant’s stay abroad was of a temporary nature

(4) In any event and in view of the fact that the applicant had not imported a motor car, the sub judge decision lacks executory character

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*Recourse dismissed*  
*No order as to costs*

*Cases referred to*

*Michael v The Republic* (1986) 3 C L R 2067

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

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*Brokelmann 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,

*Neocleous v The Republic* [1986] 3 C L R 1435,

*Leonidou v The Republic* [1986] 3 C L R 2022,

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*Ioannou v The Republic* [1986] 3 C L R 1263,

*Theodoulou v The Republic* [1987] 3 C L R 424,

*Yiangou v The Republic* [1987] 3 C L R 27,

**Recourse.**

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Recourse against the rejection of applicant’s request for exemption from import duty for a motor car as a repatriated Cypriot

*A.S Angelides*, for the applicant

*S Georghiadis*, Senior Counsel of the Republic, for the respondent

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*Cur adv. vult.*

STYLIANIDES J read the following judgment. By means of the present recourse the applicant seeks the annulment of the

decision of the respondent Director of the Department of Customs & Excise whereby his request for exemption from import duty for a motor-car was rejected.

The salient facts of the case over which there is no dispute are:-

The applicant from 24.5.74 until 4.7.85 was employed as Costing Manager in the service of J. & P. Limited, a Cyprus firm, in Saudi Arabia. In September, 1980, he married in Cyprus. His family since marriage until 26.7.83 was staying in a rented house in Limassol, when they moved also to Saudi Arabia. Two years later they returned home. The applicant continued his service with the same employer in Cyprus. 5 10

On 10.10.85 he submitted an application for exemption from import duty in respect of a motor-vehicle by virtue of Order 188/82. This application was rejected because «his stay abroad was of a temporary nature and did not constitute permanent settlement there». 15

During his stay in Saudi Arabia he remitted money to Cyprus for the purchase of a house, a building site and a flat-office in Limassol. He alleged that in 1985 he decided to return to his homeland for the better upbringing of his twin children who at the material time were two years old. 20

It was submitted by learned counsel for the applicant that the Director had no discretion under the relevant Order to decide whether the stay of the applicant abroad was permanent or temporary.

The Order on which the application is based was made by the Council of Ministers in virtue of its powers under Section 11 of the Customs Duties and Excise Law, 1978 (No. 18 of 1978) as amended. 25

Having regard to the provisions of Section 11, where reference is made to the Director and the Order of the Council of Ministers, no doubt is left that the organ vested with competence to examine and accept or reject the claim of the applicant is the Director of the Department of Customs & Excise. 30

Before the relief sought can be granted, the Director has to be satisfied that the following prerequisites are met by the applicant:- 35

- (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.

5 It is for the Director on the material placed before him to reach a decision on each of the aforesaid and then issue the administrative act contemplated either accepting or rejecting the application. The submission of counsel for the applicant that the Director has no discretion to determine the issue of the nature of the stay abroad of an applicant is wholly untenable.

10 Counsel for the applicant submitted that the applicant satisfied the requirement of permanent settlement abroad for a period of continuously 10 years as he worked in Saudi Arabia for 11 years.

The length of the period is not sufficient.

15 In *Philippos Michael v. The Republic*, Case No.552/84, judgment delivered on 21.11.86, not yet reported\*, in dealing with the term of «μόνιμος εγκατάσταση» («permanent establishment»), I said:-

20 «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

25 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

30 akin to it and pronouncements on domicile are very relevant and helpful.»

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

35 «As has been observed during the course of the argument, the intention permanently to reside in a particular country is

\* Reported in (1986) 3 C.L.R. 2067.

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».

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».

And at pages 751-752:-

«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».

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

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».

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».

(See, also *Phivos Neokleous v. The Republic*, Case No.465/85,

- decided on 24 5 86 by Tnantaflilides, P , unreported \* *Leonidha v The Republic*, Case No 422/85, judgment delivered on 28 11 86, not yet reported\*\*, *Charalambos Ioannou v The Republic*, Case No 415/85, judgment delivered on 9 7 86 by
- 5 Píkis, J , unreported,\*\*\* *Theodoulou v The Republic*, Case No 57/86, judgment delivered by Savvides, J , on 23 1 87)\*\*\*\*

- Learned counsel for the applicant stressed the fact that the applicant's wife, a dentist, who from 1975 was keeping a dental clinic in Limassol, 3 years after their marriage, in 1983, left
- 10 Limassol and moved to Saudi Arabia where she joined her husband

- It is well established that 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
- 15 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 that it has been exercised within the proper limits laid down by Law

- In the present case, bearing in mind the relevant case-law of the
- 20 Supreme Court on the notion of «permanent settlement abroad» and the material before the Director set out hereinabove, I am of the view that it was reasonably open to the respondent to find that applicant's stay abroad was of a temporary nature and did not constitute permanent settlement in Saudi Arabia The fact that
- 25 applicant's wife 3 years after the marriage joined him in Saudi Arabia, wherefrom periodically they visited Cyprus until the lapse of two years, when they finally returned to Cyprus, does not alter the temporary nature of his stay abroad

This recourse, therefore, fails

- 30 A decision of the Director with regard to the exemption from payment of import duty is only executory act when there is importation of the goods Order 188/82 becomes effective only on the importation of the goods - (See *Anna Yiangou v The Republic*, Revisional Appeal No 617, decided on 20 1 87, not yet

\* Reported in (1986) 3 C L R 1435

\*\* Reported in (1986) 3 C L R 2022

\*\*\* Reported in (1986) 3 C L R 1263

\*\*\*\*Reported in (1987) 3 C L R 424

reported)\*. The sub-judice decision only conveys the opinion of the Director about the applicant's rights under the said Order and is not an executory one and, therefore, not amenable to review under Article 146 of the Constitution.

For all the aforesaid reasons the recourse is hereby dismissed.

**5**

Let there be no order as to costs.

*Recourse dismissed.*

*No order as to costs.*

\* Reported in (1987) 3 C.L.R. 27.