

1988 August 29

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ANDREAS TTOFIS,

Applicant,

v.

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

Respondents.

(Case No. 113/87).

5 *Customs and Excise Duties—Motor vehicles, importation of by Cypriots—The Customs and Excise Duties Laws 1978-1981—Order 188/82 of the Council of Ministers—Permanent settlement abroad—Meaning—Review of authorities—Refugee admitted in U.K. as a tourist in September, 1974 and obtained permit for permanent settlement in March, 1976—In the circumstances, it should have been accepted that he settled permanently as from 1974—Prolonged visits to Cyprus on account of his father's illness—In the circumstances it did not amount to resettlement in Cyprus.*

10 In this case the Court annulled the decision whereby applicant's application for duty free importation of a motor vehicle submitted in 1986 was turned down on the ground that the applicant had not completed ten years' permanent settlement abroad. The Court found that in the circumstances the finding did not tally with the facts.

15 *Sub judice decision annulled.
No order as to costs.*

Cases referred to:

Sophocliides v. The Republic (1988) 3 C.L.R.1483;

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

Ioannou v. The Republic (1986) 3 C.L.R. 1263;

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

Theodoulou v. The Republic (1987) 3 C.L.R. 424;

Nicolis v. The Republic (1988) 3 C.L.R. 1264.

Recourse.

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Recourse against the decision of the respondents rejecting applicant's application for the exemption from import duty of a Mercedes Benz 300 motor vehicle as a repatriated Cypriot.

A.S. Angelides, for the applicant.

St. Theodoulou, for the respondents.

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Cur. adv. vult.

SAVVIDES J. read the following judgment. The applicant by this recourse prays for the following relief:

(1) A declaration of the Court that the decision of the respondents whereby they rejected applicant's application dated 28th May, 1986, for the exemption from import duty a Mercedes Benz 300 motor-vehicle is null and void.

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(2) A declaration of the Court that the omission and/or refusal of the respondents to accept applicant's claim for the importation of a duty-free car is null, void and of no legal effect.

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The legal grounds on which the recourse is based are: That the sub judice decision violates Article 28 of the Constitution; that it was taken without due inquiry; that it was taken under a misconception of fact and law; that it was taken in the wrong exercise of discretion; that it was taken in excess and/or abuse of powers; that it is not duly reasoned and/or the reasoning is in conflict with the facts of the case;

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The uncontested facts of the case as they appear in the applica-

tion, the opposition and the written address of counsel for both parties and the various appendices thereto are as follows:

5 The applicant was born in Ayios Andronikos village in the District of Famagusta on 2nd April, 1952, and he was residing there till August, 1974, when as a result of the Turkish invasion and occupation of his village by the Turkish forces he was forced to leave his village and in October, 1974, he was issued with a travel document by the Republic of Cyprus to go to England where he was originally admitted as a tourist. He remained in
10 England ever since.

In January, 1976, he got married to a British citizen and on 9th March, 1976, he was granted indefinite leave to remain in the U.K. with no restriction on his stay and full freedom to reside and take employment. He was visiting Cyprus on rare occasions
15 for short visits for holidays.

In September, 1985, he came to Cyprus due to serious illness of his father and stayed till the 23rd December, 1985, when he returned to England. On the 30th December, 1985, he had to come to Cyprus again as a result of an urgent call that his father had
20 been admitted to the Limassol Hospital suffering from kidney trouble. He stayed in Cyprus till the 16th February, 1986, to look after his sick father and he went back to England and finally came to Cyprus on the 16th April, 1986 with the intention of permanently settling here. The above facts appear also in a letter dated
25 25th June, 1987, sent to the respondent Director of the Department of Customs and Excise by counsel for the respondents acting on behalf of the Attorney-General. After setting out the facts, counsel concluded his letter by expressing the following opinion:

30 "Bearing in mind the above, I am of the opinion that the prolonged stay of the applicant in Cyprus during the material time cannot be considered as unjustified nor can it be deemed as being outside the limits of the expected behaviour of a child towards his father at the moment when the health of the latter was deteriorating."

According to the applicant he was working in England for the period 1975-1977 as a dress cutter, from 1977-1980 he had a dress factory which he sold as he got engaged in the construction business which brought him to Greece during the years 1981-1983. In 1984 he set up again a dress factory in England which he sold in 1985 to get involved once again in the construction business. 5

On the 28th May, 1986, he submitted an application to the Director of the Department of Customs & Excise requesting relief from import duty for a Mercedes Benz car which arrived in Cyprus on the 29th April, 1986 and was imported temporarily on the 29th April, 1986, by virtue of a temporary permit of the Customs Department. 10

The respondents by letter dated 11th December, 1986, rejected the application. The contents of such letter read as follows: 15

"I refer to the above subject and regret to inform you that it was not found possible to accede to your request because your permanent residence abroad was not of a period of at least ten years since you were settled on 9.3.1976, and it has been established that you returned for settlement on 3.9.1985." 20

In reaching his decision the respondents, as it appears from the opposition, relied on a certificate issued by the British High Commissioner, Nicosia, on the 7th July, 1986 which reads as follows:

"This letter refers to one ANDREAS TTOFI born on 2nd April 1952 at Ayios Andronicos, Cyprus. 25

Mr. TTOFI has produced cancelled Republic of Cyprus passport, number A192860 issued at London on 5.12.1975. This document, on page 7, contains a Home Office endorsement dated 9th March 1976. On this date Mr. TTOFI was granted indefinite leave to remain in the United Kingdom. There were then no restrictions on his stay and he had freedom to reside and take employment. 30

All the subsequent UK immigration endorsements, in both old and new passports, continue to record Mr. TTOFI's right of permanent residence in the United Kingdom.

5 This letter is prepared at the request of Mr. Andreas TTOFI."

10 The respondent, also, relied on the fact of the prolonged stay of the applicant in Cyprus as from 3rd September, 1985, till 23rd December, 1985, and his short trips abroad thereafter from which the respondent-Director reached the conclusion that the applicant returned to settle in Cyprus permanently on 3rd September, 1985, and not on the 16th April, 1986, as alleged by him.

15 The applicant's claim for a duty free car was based on an Order of the Council of Ministers, which was issued under the provisions of s.11(2) of the Customs and Excise Laws 1978-1981, and published in the official Gazette of the Republic, Third Supplement of 11th June, 1982, under Notification 188, which provides under item 01, Sub-heading 19, that motor-vehicles of tariff headings 87.02.11 and 87.02.19 imported by Cypriots who, after permanent settlement abroad for a continuous period of at least
20 ten years, return to take up permanent residence in Cyprus, are exempted from import duty subject to certain conditions set out therein.

25 The question of exemption from import duty in respect of cars imported by Cypriots who after permanent settlement abroad return to take up permanent residence in Cyprus and the extent of such exemption has now been regularized by new provisions introduced by the Customs & Excise (Amendment) (No. 3) Law of 1987 (Law No. 309/87) which amended s.11 of the previous law by virtue of which the above Order was issued. In view of the
30 fact, however, that the present case has to be decided on the legal situation which existed on the date when the sub judice decision was taken, I find it unnecessary to make any detailed reference to the new provisions introduced by Law 309/87 in this respect.

The sole question which poses for consideration in the present

case is whether when the applicant returned to take up permanent residence in Cyprus, he satisfied the condition of permanent settlement abroad for a continuous period of at least ten years as provided by Notification 188.

The question of permanent settlement has been considered by me in the recent case of *Jennifer Anne Sophocliides v. The Republic of Cyprus* (1988) 3 C.L.R. 1483. In that case I reviewed the principles emanating from *Matsas v. The Republic* (1985) 3 C.L.R. 54, *Ioannou v. The Republic* (1986) 3 C.L.R. 1263 and *Michael v. The Republic* (1986) 3 C.L.R. 2067. 5 10

In *Michael v. The Republic* (*supra*), Styliandies, J., after an extensive analysis on the matter, said the following at p. 2075:

" '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." 15 20 25

The question of permanent settlement abroad has also been considered by me in the case of *Theodoulos Theodoulou v. The Republic of Cyprus* (1987) 3 C.L.R. 424. (See also *Georghios Nicolis v. 1. The Director of the Department of Customs and Excise, and 2. The Republic of Cyprus* (1988) 3 C.L.R. 1264. 30

From the material before me the following facts are established:

The applicant who, as a result of the Turkish invasion and the

5 occupation of his village by the Turkish invading forces, was forced to move to the free area controlled by the Government of the Republic, left for England in 1974 by virtue of a travel document issued to him, after he had secured a visa as a temporary
10 visitor, and with the object of securing a job in England. He stayed in England ever since and he took up employment there as a dress cutter and then operating his own dress factory or engaging himself in other business, and he was only casually coming to Cyprus for short holiday visits. According to his statement to the
15 respondent contained in his letter, when he left Cyprus for England, he did so with the intention of staying there permanently irrespective of the fact that the visa which was given to him on the travel document issued on the 11th September, 1974, mentioned that he was going to England as a visitor.

15 The contention of the applicant that he went to England in search of work after he became a refugee, is a reasonable explanation and one could not expect that a person in the position of the applicant remained in England as a visitor and a holiday maker
20 from September, 1974 till 9th March, 1976 when he was granted indefinite leave to remain in the United Kingdom. The applicant came to Cyprus in September, 1985, for a visit which had rather to be prolonged due to serious illness of his father, a fact which is not denied by the respondent and is supported by medical reports,
25 and stayed till December, 1985. He re-visited Cyprus on the 30th December, 1985, and stayed till February, 1986, again due to health reasons of his father, and he finally returned to Cyprus on the 16th April, 1986, with the intention, as alleged by him, of permanently settling in Cyprus.

30 The respondent considered that the applicant settled permanently in England as from the 9th March, 1976, when the British Home Office endorsement that he was granted indefinite leave to remain in the United Kingdom was made on his passport and that he returned to Cyprus to settle permanently on the 3rd September,
35 1985, and not on the 16th April, 1986, due to the prolonged periods of stay of the applicant in Cyprus between the 3rd September, 1985 and the 16th April, 1986.

On the material before me I consider the explanation of the applicant as to his intention to discontinue his permanent settlement abroad and settle in Cyprus permanently as a reasonable one and supported by evidence explaining the reason for his prolonged stays in Cyprus during the period between September, 1985, and February, 1986. In view of such finding, even assuming that the applicant had made up his mind to settle permanently in England on the day when the endorsement of his passport dated 9th March, 1976, is recorded, the period as from 9th March, 1976, to the 16th April, 1986, when as I found above he returned to Cyprus for the purpose of permanently settling, satisfies the prerequisite period set out in the relevant Order. But even if I would have accepted the contention of the respondent that the applicant returned to Cyprus for permanent settlement in September, 1985, again I cannot find that the period that the applicant started working in England as alleged by him, that is, from 1974 till 9th March, 1976 when he was granted indefinite leave to remain in the United Kingdom should be completely ignored and excluded from the calculation of the relevant time.

In the circumstances of the present case, as explained above, and in the light of all material before me, I find that the conditions set out for the entitlement to a duty free car are satisfied and, therefore, the sub judice decision has to be set aside.

In the result, the present recourse succeeds and the sub judice decision is hereby annulled but, in the circumstances of the case, I make no order for costs.

*Sub judice decision annulled.
No order as to costs.*