

(1988)

1988 September 8

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CHRISTODOULOS A. MICHALAS,

Applicant,

v.

THE REPUBLIC OF CYPRUS, THROUGH

(1) THE MINISTER OF FINANCE,

(2) THE DIRECTOR OF CUSTOMS DEPARTMENT,

Respondents.

(Case No. 188/87).

Customs and Excise Duties—Motor vehicles, duty free importation of by Cypriots—Order 188/82 of the Council of Ministers—The three prerequisites of the relief.

Executory act—Confirmatory act—New inquiry—Substantive new material taken into consideration—The new act is executory—The earlier act merges into the second, thereby losing its executory character. 5

Executory act—Customs and Excise Duties—Motor vehicles, duty free importation of by Cypriots—Order 188/82 of the Council of Ministers—Dismissal of application for importation of a car—In fact, no importation ever took place—The decision is not of an executory nature. 10

The facts of this case sufficiently appear in the Judgment of the Court.

Recourse dismissed.

No order as to costs.

Cases referred to:

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

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Kyprianides v. The Republic (1982) 3 C.L.R. 611;

Spyrou v. The Republic, (1983) 3 C.L.R. 354;

Yiangou v. The Republic (1987) 3 C.L.R. 27.

Recourse.

5 Recourse against the refusal of the respondents to exempt applicant from import duty for a motor car as a repatriated Cypriot.

A. *Eftychiou*, for the applicant.

D. *Papadopoulou (Mrs.)*, for the respondents.

Cur. adv. vult.

10 STYLIANIDES J. read the following judgment. The applicant challenges the validity of the refusal of the respondent Director of Customs to exempt him from import duty for a motor car.

15 The applicant is a Cypriot born in Avgorou village in the Famagusta district. In 1960 he emigrated to England. After long settlement in that country he returned to his native land. On March 4th, 1986, he submitted to the Director of the Department of Customs and Excise an application, by duly completing a prescribed form, for relief from import duty of a motor car.

20 The relief was sought in virtue of the provisions of Order 188/82 made by the Council of Ministers under section 11(2) of the Customs and Excise Duties Law, 1978, (Law No. 18/78). Under the said Order a Cypriot is entitled to exemption if the following requirements are satisfied:

25 (a) Permanent settlement abroad for at least ten 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.

The prerequisite (b) consists of two elements:

1. Return to the Republic, and

2. Permanent settlement in the Republic.

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Both the settlement abroad and the establishment in the Republic import the same quality, that is the element of intention to settle and establish permanently. Evidence of intention may be important. It is not possible for a person to be permanently settled in the Republic and in another country at the same time. The intention of permanently settling may be gathered from the conduct and action consistent with such settlement. (See *Philippos Michael v. The Republic* (1986) 3 C.L.R. 2067.)

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The time for (c) must be reckoned from the date of his return and permanent establishment in the Republic.

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The Respondent rejected the application for a duty free car on two grounds:

(a) That applicant's permanent settlement abroad was not continuous as he was residing in Cyprus from 7th November, 1979 to 11th October, 1980; and

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(b) The importation could not take place within a reasonable time from the date of his return for settlement which was established to be the 22nd July, 1984.

This decision was communicated to the applicant on 10th September, 1986.

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On 18th September, 1986, he submitted a petition for re-examination and produced supplementary material including medical reports and documents from the English Social Insurance.

The applicant alleged that his stay from April 1979 to October 1980 in Cyprus was dictated by health reasons, as he underwent a heart operation in England and on the advice of his doctors he came to Cyprus temporarily for rest.

5 The Administration re-examined the case in the light of the new material produced. It was established that the applicant built up a house in Cyprus which was completed in 1984. As from 22nd July, 1984, he returned with his wife to Cyprus and resided in their newly built house. He travelled to England four times and
10 his wife twice between 22nd July, 1984 and 22nd February, 1986. He was paying social insurance in England as a self-employed person until and inclusive the year 1985-86.

On 3rd January, 1987, the Respondent 2 decided to reject the request for exemption from import duty and his decision was
15 communicated to the applicant by letter dated 9th January, 1987, which reads:

"With reference to your letter dated 18th September, 1986, you are informed that we have re-examined your case but it was not made possible to change my original decision as com-
20 municated to you by my letter dated 10th September, 1986."

Hence this recourse.

Counsel for the Respondents contended that the sub judice decision cannot be made subject of a recourse as it is simply a confirmatory act. In the course of the hearing, however, she, having
25 regard to the material adduced by the applicant which was before the Authority after 18th September, 1986, conceded that a new inquiry was carried out and that there was a new act. (See *Kyprianides v. Republic* (1982) 3 C.L.R. 611 and *Spyrou v. Republic* (1983) 3 C.L.R. 354).

30 The letter dated 9th January, 1987, contains a confirmation of the earlier one but it was made after a new inquiry to the matter. When new substantive factual elements are taken into considera-

tion in arriving at a sub judice decision the second decision is not a confirmatory act but a new executory act. The executory act ceases to be operative and merges into the second act.

It was argued that the applicant's permanent establishment in Cyprus commenced in February, 1986 and not July, 1984. On the basis of the material in the file it was reasonably open to the Respondent to conclude that the applicant returned and permanently established in the Republic in 1984 and not 1986. 5

Objection was taken by counsel for the Respondent that no car was imported and therefore the act complained of is not of an executory nature. Indeed no car has ever been imported by the applicant. 10

In *Anna Yiangou v. The Republic* (1987) 3 C.L.R. 27, Full Bench, the appellant who had returned to Cyprus in April 1981, applied to the Respondent to inform her whether in case she imports on a future date a motor car she would qualify for exemption of import duty under Order 188/82. As the answer was in the negative, she challenged it by means of a recourse which was dismissed. Upon appeal the Full Bench raised ex proprio motu the issue whether the sub judice decision is of an executory nature and held that—the crucial issue in Order 188/82 being "the importation takes place within a reasonable time from arrival" the sub judice decision was in the nature of a confirmatory or advisory act. It was also said that Order 188/82 should be read and interpreted subject to the definition of the word "import" in section 2 of the Law, i.e., bringing of goods into the Republic from abroad by sea or air. 15
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There is no indication that any car was imported and no particulars of a vehicle temporarily or to be shortly imported were given. In the course of the hearing learned counsel for the applicant applied for adjournment to communicate with his client with regard to the actual importation of a car. The adjournment was granted. No affidavit as to facts, as directed, was filed and counsel stated in Court that he has nothing to say. So it must be taken 30

that no car has ever been imported by the applicant. As no car was imported the prerequisite (c) above, that is, "importation of a car within reasonable time" was not satisfied.

5 Furthermore, in view of the non-importation of the car, the sub judice decision is not amenable to the jurisdiction of this Court.

10 For all the aforesaid reasons this recourse fails and it is hereby dismissed, but, in the circumstances, there will be no order as to costs.

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*Recourse dismissed.
No order as to costs.*