1986 June 11

[LORIS, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

ANGELA SOLOMONIDES,

*Applicant,*

*v.*

THE REPUBLIC OF CYPRUS, THROUGH
THE DIRECTOR OF THE DEPARTMENT
OF CUSTOMS AND EXCISE,

*Respondent.*

*(Case No. 511/84).*

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*Administrative Act—Executory—Confirmatory—Decision taken subsequently to an executory administrative decision in the same matter is not confirmatory, if it is the result of new inquiry—What constitutes a new inquiry—Principles governing the issue of whether there has been such inquiry or not.*

*The Customs and Excise Duties Law 18/78—Fourth Schedule to the said law, item 01 sub-heading 19—Order 188/82, of the Council of Ministers—Duty-free importation of a motor vehicle—Meaning of "settled" in the said Order—It means a voluntary and intentional action to settle—Such capacity cannot be attributed to a minor—A minor ordinarily resides in his parents matrimonial home.*

*Words and Phrases: "Settled" in Order 188/82 of the Council of Ministers.*

The applicant was born in London on 27.1.56 of Greek Cypriot parents, who were prior to her birth and still are, permanently settled in the U.K. She was a British subject ever since her birth up to 10.1.83 when she was granted Cyprus citizenship. At some time in 1962 she was sent

by her parents to live with her grandmother in Cyprus allegedly "in order to begin her elementary school career and make her permanent home here". On 15.1.1964 she returned to London allegedly forced by the events of 1963. In 1982 she came to Cyprus with her Greek Cypriot husband "with the intention of making her permanent home in Cyprus".

On 22.11.83 the applicant applied for the duty-free importation of her vehicle as a repatriated Cypriot, relying on sub-heading 19 of item 01 of the 4th Schedule to Law 18/78 and the relevant order of the Council of Ministers 188/82*.

On 18.1.84 the applicant submitted a further application praying that the relief claimed by her first application "be transferred" so that she would be enabled to import duty-free a brand new car she was intending to buy.

The respondent rejected both applications on the ground that the applicant did not qualify as a "repatriated" Cypriot. This decision was communicated to the applicant by letter dated 17.5.84. The respondent did not impugn the said decision by a recourse, but instead she applied by letter dated 20.6.84 for the re-examination of her case. This application was also turned down. The decision was communicated to the applicant by letter dated 11.9.84.

Hence the present recourse challenging the validity of the decision communicated by the letter dated 11.9.84. Counsel for the respondent raised the preliminary objection that the sub judice decision is of a confirmatory nature and, therefore, not justiciable under Article 146 of the Constitution.

*Held,* sustaining the preliminary objection: (1) An administrative decision, taken subsequently to an executory administrative decision, in the same matter, is not confirmatory, if it is the result of new inquiry involving the evaluation of new factors. Whether or not a new inquiry has taken place depends on what this Court finds out to

* The material for this case part of the said Order is quoted at pp. 1029-1030 post.

be the true situation. Re-examination of a matter from its legal aspect only does not amount to a new inquiry. Re-examination of facts which have already been taken into account in reaching the previous decision or the taking into account of an isolated element put forward by the applicant, which is not found material enough to lead to the revocation of the previous executory decision, does not render the new decision an executory one.

(2) The question in issue in this case is not the re-examination of the matter, but whether the letter of 20.6.84 introduced new facts for re-examination. The answer is in the negative. The reference in such letter to applicant's sister is an isolated element not material enough to lead to the revocation of the previous decision. Nor do the legalistic arguments in the said letter render the new decision of an executory nature. Furthermore the fact that before taking the new decision the respondent sought the advice of the Attorney-General does not alter the nature of the sub judice decision.

*Held further,* dismissing the recourse on its merits; that assuming that the sub judice decision is of an executory nature, the applicant did not satisfy the requirement of Order 188/82 of "having permanently settled abroad for a continuous period of 10 years". The word "settle" has the meaning of voluntary and intentional action and such capacity cannot be attributed to a child which is considered as ordinarily resident in his parents matrimonial home. The applicant's stay in Cyprus between 1962 and 15.1.64 did not render her a Citizen of the Republic nor did her return on 15.1.64 to the U.K. could render her "a Cypriot having permanently settled abroad" as she was a minor at the time and she could not decide where to settle.

*Recourse dismissed.*
*No order as to costs.*

Cases referred to:

*Pieris* v. *The Republic* (1983) 3 C.L.R. 1054;

*Asaad* v. *The Republic* (1984) 3 C.L.R. 1529;

*Goulielmos* v *The Educational Service Committee* (1983) 3 C L R 883.

*Komodromos and others* v *Registrar of Trade Unions* (1983) 3 C L R 495

*Kelpis* v *The Republic* (1970) 3 C L R 196

*Photiades and Co* v *The Republic* 1964 C L R 102

*Croxford* v *Universal Insurance Co* [1936] 2 K B 253

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

*Re P (G E) (An Infant)* [1965] Ch 568

**Recourse**

Recourse against the refusal of the respondents to allow applicant to import duty-free her motor vehicle as a repatriated Cypriot when she came to Cyprus with her Greek Cypriot husband with the intention of residing in Cyprus permanently

*Ph Valiantis* with *H Solomonides* for L Papaphilippou, for the applicant

*M Photiou*, for the respondent

*Cur. adv. vult*

LORIS J read the following judgment. The applicant, a British subject at all material times, born of Greek-Cypriot parents in London on the 27th day of January 1956, was sent by her said parents at some time in 1962 to Cyprus near her grandmother at Yialoussa village, allegedly "in order to begin her elementary school career and make her permanent home here, the applicant's parents and rest of the family would follow suit in due course"

As stated in the application "unfortunately the intentions of the applicant's parents never materialised due to the 1963 intercommunal troubles."

The applicant actually did attend a Greek Elementary School at Yialoussa village until the 15th day of January, 1964 when she returned to London allegedly forced by the events of 1963.

She stayed near her parents in U.K. where she received her education and worked as a Chartered Accountant; she was married to a Greek Cypriot Lawyer and in September 1982 she came to Cyprus with her Greek Cypriot husband "with the intention of making her permanent home in Cyprus" as stated in paragraph 8 of the recourse.

On 5.1.83 applicant applied to the respondent Director of Customs and obtained a temporary importation permit of her motor vehicle, a BMW 316, under Engl'sh Registration No. QYH 602 W (now Registered in Cyprus under No. QC 878); the aforesaid temporary importation was valid up to 4.4.1983 (vide Appendix A attached to the opposition) and was renewed on the same basis five more times.

The applicant who was granted Cyprus citizenship on 10.1.83 applied on 22.11.83 (vide Appendix 'C' attached to the opposition) to the respondent for the duty-free importation of her said vehicle as a repatriated Cypriot, relying on the provisions of sub heading 19 of Item 01 of the Fourth Schedule to the Customs and Excise Duties Law, 1978 (Law No. 18 of 1978) as amended by the relevant Order of the Council of Ministers published in the Official Gazette of the Republic of 11.6.82 under Not. 188/82 (vide CG. 1783 of 11.6.82 Suppl. No. 3 Not. 188 at p. 885.)

The material part of No. 188/82 reads as follows:

«Μηχανοκίνητα οχήματα των κλάσεων 87.02.11 και 87.02.19 εισαγόμενα υπό Κυπρίων οι οποίοι κατοπιν μονίμου εγκαταστάσεως εις το εξωτερικόν δια συνεχή περίοδον τουλάχιστον 10 ετών επανέρχονται και εγκαθίστανται μονίμως εν τη Δημοκρατία νοουμένου ότι η εισαγωγή γίνεται εντός εύλογου χρονικού διαστήματος από της αφίξεως των κατά την κρίσιν του Διευθυντού·

Νοείται περαιτέρω

Η άπαλλαγή καλύπτει μόνον ένα όχημα δι' έκάστην οικογένειαν.»

(English Translation)

"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:

Provided further

The relief covers only one vehicle for each family".

On 18.1.84 applicant submitted a further application to the respondent praying that the relief already claimed by her (as per her application of 22.11.83 referred to above) for the importation of her said vehicle duty-free, "be transferred" so that she would be enabled to import duty-free, a brand new car she was intending to buy. (vide Appendix "C" attached to the opposition).

The respondent after examining both applications aforesaid, decided that both should be rejected as applicant did not qualify as a "repatriated" Cypriot; respondent's said decision was communicated to the applicant by letter dated 17.5.84 (vide Appendix "D" attached to the opposition).

The applicant did not attack the said decision of the respondent by a recourse; instead she addressed to the respondent a letter dated 20.6.84 applying for re-examination of her case (vide Appendix "A" attached to the recourse).

Respondent turned down the latter application and informed applicant accordingly by letter of 11.9.84 addressed to her (vide Appendix "E" attached to the opposition.)

Applicant instituted present proceedings on 25.9.84

praying for a declaratory judgment annulling the decision of the respondent "contained in his letter dated 11.9.84".

The respondent Director in his opposition raises the preliminary objection that the present recourse is not justiciable being out of time as the letter of 11.9.84 does not contain a decision of an executory nature, but simply of a confirmatory nature, indicating his adherence to his previous decision on the matter contained in his letter dated 17.5.84, which the applicant failed to attack by a recourse. The respondent maintains that the letter of the applicant dated 20.6.84 did not contain any new facts but it was simply a repetition of facts already placed before the respondent prior to his original decision of 17.5.84.

As the preliminary objection goes to the root of the jurisdiction under Article 146, I shall examine it first.

It is well settled that confirmatory acts are not justiciable *(Pieris* v. *The Republic* (1983) 3 C.L.R. 1054).

In the recent case of *Asaad* v. *The Republic* (1984) 3 C.L.R. 1529 the learned President of this Court stated inter alia the following in this connection (at pp. 1531-1532):

> "That a confirmatory act cannot be made the subject-matter of a recourse is well settled (see inter alia, *Goulielmos* v. *The Educational Service Committee* (1983) 3 C.L.R. 883, 895, *Demos Farm Ltd.* v. *The Republic* (1983) 3 C.L.R. 1172, 1178 and *Odysseos* v. *The Republic* (1984) 3 C.L.R. 463, 470).
>
> An administrative decision, which is taken subsequently to an executory administrative decision in the same matter, is not confirmatory if it is the result of new enquiry not merely regarding the legal aspect of the matter but of a new enquiry involving the evaluation of new factors; and whether or not a new inquiry has taken place, as aforesaid, does not depend on what was stated in this respect by a party to an administrative recourse, such as the present one, but what this Court, as an administrative Court, finds out to be the true situation (see in this respect,

Tsatsos on the Recourse for Annulment before the Council of State—3rd ed. p. 136, and, also, the Decision of the Council of State in Greece in case 459/1958).

It is furthermore, useful to note that in case 1833/1965 the Council of State in Greece held that a new decision reached after re-examination of the facts which have already been taken into account in reaching a previous executory decision is merely confirmatory of such previous decision, and not an executory one; and it was, also, held by the Council of State in Greece in case 538/1969 that the taking into account in the course of such re-examination, of an isolated element put forward by the applicant which is not found to be material enough to lead to the revocation of the previously taken executory decision does not render the subsequent decision of the administration an executory one."

In the case of *Kelpis* v. *The Republic* (1970) 3 C.L.R. 196 it was laid down (at p. 203) that "...the re-examination from the legal aspect only of a matter, in relation to which an executory decision has already been reached *does not amount to a new inquiry resulting in a new executory decision*, but results only in a confirmatory act; and this is so even in cases in which, in relation to the legal aspect, there has been sought by the administration legal advice or the matter has been referred for the purpose to an appropriate organ, such as the State Legal Council in Greece (see the decisions of the Greek Council of State in cases 345/35, 5/37, 229/38, 34/54, 479/55, 1013/66 and 752/80...)"

Reverting now to the case under consideration:

As stated earlier on in the present judgment the applicant submitted to the respondent 2 applications (dated 22.11.83 and 18.1.84) which were examined by the respondent whose decision was communicated to the applicant by letter dated 17.5.84 (Appendix "D" attached to the opposition).

The applicant did not attack the aforesaid decision which was no doubt of an executory nature, by a recourse; instead she addressed to the respondent a letter dated 20.6.84 (Appendix "A" attached to the recourse) The respondent re-examined the case in the light of the contents of the said letter, this is clearly stated in the letter of the respondent addressed to the applicant on 11.9 1984 But the issue in this case is not the re-examination. The issue is Did the aforesaid letter introduce new facts for re-examination?

Having gone carefully through the material before me which was also laid before the respondent, I hold the view that the answer to this question must be in the negative It is apparent from the material in the administrative file, which is ex "Z" before me, and in particular blue 18, that all the facts stated in the aforesaid letter were already before the respondent when the latter reached at his decision of 17.5 84. All the substantial facts were before the respondent prior to his taking the original executory decision; and if an isolated element which was not material enough to lead to the revocation of the original decision, such as reference in the letter of 20.6 84 to applicant's sister, would not render the second decision of the respondent communicated to the applicant by letter dated 11 9.84, a decision of an executory nature (Vide *Asaad's* case supra) Nor would the legalistic argument in the letter of 20 6 84 render the second decision of an executory nature

Furthermore the seeking of the opinion of the Attorney-General on the matter by the respondent on 5 7 84 (that is subsequently to his original decision of 17 5 84 and prior to his last decision of 11 9 84) would not alter the nature of the decision of 11 9 1984 (vide in this connection *Kelpis'* case - (supra) )

The decision of the respondent dated 11 9 84 was of a confirmatory nature indicating his adherence to his original decision of 17 5 84 and therefore the decision of 11.9.84 which is being impugned by means of the present recourse is not justiciable

The preliminary objection is therefore sustained and the present recourse fails accordingly.

Although I am satisfied that the sub judice decision is of a confirmatory nature and therefore non-justiciable I shall proceed to examine briefly the merits of the recourse assuming that the sub judice decision is of an executory nature.

The duties of an administrative authority in the making of an administrative act have thus been summed up by Triantafyllides J., as he then was, in *Photiades & Co.* v. *The Republic*, 1964 C.L.R. 102 at pp. 112-113:

> "the study and, if necessary, interpretation of the relevant legal provisions; ascertainment of the correct facts; application of the law to the facts; and decision on the course of action. (Vide "the Law of Administrative Acts" by Stassinopoulos - (1951) p. 249)."

So the primary duty of the respondent in this case was to study and if necessary, interpet the relevant legal provisions of Order 188/82 set out above; their wording is clear, unequivocal and they leave no margin for the slightest ambiguity. In the circumstances as Scott L.J. said in *Croxford* v. *Universal Insurance Co.* [1936] 2 K. B. 253 at p. 281 "Where the words of an Act of Parliament are clear, there is no room for applying any of the principles of interpretation, which are merely presumptions in cases of ambiguity in the Statute." (Vide in this connection *Komodromos & others* v. *Registrar of Trade Unions* (1983) 3 C.L.R. 495 at p. 507).

In the case under consideration Order under No. 188/82 covers only motor vehicles of the categories therein mentioned,

"Imported by Cypriots who:

(i) having permanently settled abroad for a continuous period of at least 10 years,

(ii) return and settle permanently in the Republic..."

The applicant was born in London on 27.1.56 of Greek Cypriot parents who were prior to her birth and still are, permanently settled in the U.K. She was a British Subject ever since her birth up to 10.1.1983 when she was granted Cyprus Citizenship.

Applicant's stay in Cyprus during the period between 1962 and the 15.1.1964 (when she was staying near her grandmother attending school at Yialoussa village) could not operate in the circumstances to render her a citizen of the Republic; nor did her return on 15.1.1964, to the U.K. near her parents could render her "a Cypriot having permanently settled abroad" within the meaning of the Order as she was a minor at the time and she could not decide for herself where to settle (vide: *Razis and Another* v. *The Republic* (1979) 3 C.L.R. 127 at p. 138—Re: P. (G.E.) (An Infant) [1965] Ch. 568, 585 - 586 (C.A.) ).

The word "settle" has the meaning of voluntary and intentional action to settle and such capacity cannot be attributed to a child which is considered as ordinarily resident in his parents matrimonial house (See: *Dicey and Morris—The Conflict of Laws* 10th ed. Vol. I p. 144).

As the parents of the applicant were prior to her birth, during her infancy and still are permanently settled in the U.K., the applicant, a minor at the material time, was considered as ordinarily resident in her parents matrimonial house in U.K.

For all the above reasons the present recourse would have been doomed to fail on the merits as well independently of my earlier finding that the sub judice decision is non justiciable as being of a confirmatory nature.

In the result present recourse fails and is accordingly dismissed; let there be no order as to its costs.

*Recourse dismissed.*
*No order as to costs.*