1986 December 23

[A. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

CHARALAMBOS HADJIGEORGHIOU,

Applicant,

v.

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

Respondents.

(Case No. 965/85).

Customs and Excise Duties—Motor vehicles, imporation of by Cypriots—Exemption from import duty—The Customs and Excise Duties Laws, 1978-1981—Sub-heading 19 of item 0.1 of the Fourth Schedule—The three prerequisites for the relief thereunder—"Permanent settlement abroad"—These words should be given their natural meaning.

Administrative Law—Misconception of fact—A material misconception of fact or even the probability of its existence leads to annulment of the administrative act.

The applicant is a displaced person from Komi-Kebir in the Famagusta District. On 4.12.74 he emigrated and settled in England. He returned to Cyprus in May, 1985, that is after the expiration of ten continuous years of settlement abroad.

The applicant stayed in Cyprus during the period 25.7.83 until the 17.6.84. The applicant contended that this prolonged stay did not interrupt the continuity of his settlement abroad, because it was rendered necessary by an unforeseen heart disease in respect of which he had to be treated at the Larnaca Hospital and elsewhere.

Following his return to Cyprus the applicant submitted

an application for the duty free importation of a motor car pursuant to section 19 of Class 0.1 of the Fourth Schedule of the Customs and Excise Duties Laws, 1978-1981. The said application was turned down on the ground that his permanent settlement abroad was not continuous since he was residing in Cyprus from 4.5.83 to 17.6.84.

As it is clear from the address of counsel for the respondents one of the reasons for taking the sub judice decision is that the applicant "went to the hospital as an outpatient on 12.1.84, that is eight months after his arrival in Cyprus and that until his departure to England on 17.6.84 he made a total of four visits". It was also alleged that the applicant was never advised that it was not safe for him to travel.

The Court found that both legs of the above statement are not born out by the evidence adduced.

Held, annulling the sub judice decision: (1) For exemption to be granted under the provision hereinabove referred to the following requirements must be satisfied: (a) Permanent settlement abroad for at least ten years. (b) Return and permanent establishment in the Republic. (c) Importation within reasonable time from the date of arrival in the discretion of the Director.

(2) The words "permanent settlement abroad" are common words and there is no context requiring that they should be given other than their natural meaning in accordance with their accepted use.

(3) The main ground for deciding that applicant's settlement abroad was interrupted was that applicant's stay in Cyprus for the said period 25.7.83 - 17.6.84 was not dictated by medical reasons. The respondents laboured in this respect under a material misconception of the factual situation.

(4) It is well settled that a material misconception of fact or even the probability of its existence justifies the annulment of an administrative act.

Sub judice decision annulled.
No order as to costs.

Cases referred to:

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

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

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

Christodoulou v. *CY.T.A.* (1978) 3 C.L.R. 61;

Mallouros v. *Electricity Authority of Cyprus* (1974) 3 C.L.R. 220;

Ioannides v. *The Republic* (1972) 3 C.L.R. 318.

Recourse.

Recourse against the decision of the respondent whereby applicant's application for the exemption from import duty in respect of a motor vehicle, as a repatriated Cypriot, was rejected.

N. Zomenis, for the applicant.

S. Georghiades, Senior Counsel of the Republic, for the respondent.

Cur. adv. vult.

A. Loizou J. read the following judgment. The applicant in this recourse prays for:-

(a) A declaration of the Court that the decision of the respondent Director of Customs communicated to him by means of a letter dated 25th September 1985, whereby there was rejected his application dated 5th June 1985, for exemption from import duty in respect of motor-vehicles is unfounded, both in Law and in fact as reached under a misconception of fact and that it is null and void and of no effect whatsoever.

(b) A declaration of the Court that whatever has been omitted ought to be performed.

The applicant is a displaced person from Komi-Kebir in the Famagusta district. After the Turkish invasion of Cyprus he went to England on 4th December, 1974 where he settled and resided permanently for a continuous period of

more than ten years, that is until 7th May, 1985. During that period he visited Cyprus for short periods for holidays and for visiting his relatives on four occasions, that is thirty-three days in March, April, 1977, eighteen days in September 1978, thirty-eight days in May, June, 1983 and on the 25th July 1983 until the 17th June 1984. This last prolonged stay was rendered necessary because though his intention was to stay for a while and return to England he was compelled to stay for ten and a half months due to an unforeseen heart disease in respect of which he had to be treated at the Larnaca Hospital and elsewhere. As soon as his health improved and he could travel safely he returned to England where he was residing permanently. He finally returned to Cyprus on 17th May, 1985, for permanent settlement.

Following his return he did on the 5th June 1985, submit to the respondent Director of Customs an application (exhibit 1) for exemption from import duty in respect of a motor-vehicle pursuant to Section 19 of Class 0.1 of the Fourth Schedule of the Customs and Excise Duties Laws 1978 - 1981 (Law No. 80 of 1978 as amended). The Director of Customs rejected his application by his letter dated 25th September 1985, (exhibit 2) in which it was stated that it was not found possible to accede to his request because his permanent settlement abroad was not continuous since he was residing in Cyprus from the 4th May, 1983, to the 17th June, 1984.

The grounds of Law on which the recourse was based may be summarised as follows:

(a) That the applicant was discriminated against;

(b) That the sub judice decision was arbitrarily taken and under a misconception of the true facts.

(c) That there was lack of sufficient inquiry into the facts.

The facts set out in the opposition are these:

The applicant settled abroad with his family in 1974. During the period between the 4th May 1983, until 17th June 1984, he was in Cyprus with the exception of a period

of fourty-three days from 12th June 1983, until 25th July 1983, when he was abroad. He also went again abroad on the 17th June 1984, to return again on 15th May, 1985. From a further investigation of the case it was found out that his wife had been in Cyprus since the 10th January 1982, and was residing at a Government house at Kamares refugee estate. Also his son returned to Cyprus on 27th January 1983 and his daughter remained in England where she has settled permanently.

Learned counsel for the applicant in his written address submitted that the applicant returned for permanent settlement in Cyprus on 17th May, 1985, following a continuous settlement abroad for more than ten years because the period from 25th July, 1983, to 17th June 1984 during which he was obliged to remain in Cyprus due to a heart disease and due to medical treatment cannot be considered as interruption and cannot in Law and in fact amount to an interruption of his permanent settlement abroad for purposes of exemption by virtue of Section 19 of Class 0.1 of the Fourth Schedule to the Customs and Excise Duties Laws, 1978 - 1981. On the other hand, learned counsel for the respondent Director submitted, (a) that the competent Authority in taking the sub judice decision relied on its finding that the applicant returned to Cyprus for permanent settlement on 4th May, 1983, and therefore he had not completed at least ten years permanent settlement abroad as demanded by the Administrative Regulatory Act 188/82. (b) That this finding that the applicant returned to Cyprus for permanent settlement is reinforced also by the fact that his wife as well has been in Cyprus with effect from 10th January 1982, and the house has been allocated to her at Kamares refugee estate with effect from 13th December 1982, in order to reside therein with her husband. (c) That since the applicant returned to Cyprus on 4th May 1983, he did stay here until 19th June 1984, when he returned to England for temporary stay at his daughter's house and not at his own house as beforehand until 17th May, 1985.

For this reason his stay in England during the period of time at his daughter's house was not considered as a continuation of his own permanent stay but as a temporary one,

but more so that a government house had already been allocated to him in order to reside therein with his wife.

The applicant's allegation that from 4th May, 1983, until 17th June 1984, he was obliged to stay in Cyprus has been investigated into by the competent Authority which arrived at the conclusion that such allegation does not appear to be supported by the applicant's card at the hospital or by the medical certificate of Mr. Pilides. In none of the documents produced by the applicant is there anything to the effect that he was advised not to travel. From his medical card it appears that he went to the hospital as an out-patient on 12th January 1984, that is eight months after his arrival to Cyprus and until his departure to England on 17th June, 1984, he paid four visits to the hospital. Regarding the allegations in the address of learned counsel for the respondent about the actual date of the applicant's visit to the Larnaca Hospital, the documentary evidence before the Court and as appearing in the reply filed on his behalf, another picture appears, namely that his first visit was on 9th August 1983 and his last on 14th June 1986. Moreover there is a medical certificate, exhibit 8, which certifies that from the medical card kept it is shown that the applicant was suffering from a heart illness and during the period that the reasons for his stay are inquired into he was under treatment and medical observation. In addition to the above there was documentary evidence that almost during the whole period of his stay here in Cyprus he was working. When confronted with the above facts, learned counsel for the respondents said: "in his last written address my colleague indicates one or two points in respect of which he alleges that the competent Authority erred as to the facts and I will place these facts before the competent Authority in order to find out what its reply will be. But even if there is an error as to the facts or on these issues I submit that they are errors as to details which do not affect the substance. The substance of the case is whether it was open to the respondents to arrive at the conclusion that the period of the applicants stay from 4th May 1983, until 17th June, 1984, that is a period of thirteen months was such a stay which amounted to the interruption of his permanent settlement in Cyprus and it was open to the respondent to arrive at the conclusion it did, in view of

the fact that a Government house had been allocated to his family and because of his long stay in Cyprus. Now for exemption to be granted under the said Section 19, the following requirements must be satisfied: (a) Permanent settlement abroad for at least ten years. (b) Return and permanent establishment in the Republic. (c) Importation within reasonable time from the date of arrival in the discretion of the director per Stylianides J., in *Michael and The Republic*, Recourse No. 552/84, dated 21st November, 1986, still unreported*. There is no dispute that the applicant satisfies requirements (b) and (c).

Regarding requirement (a)—permanent settlement—I had the occasion to deal with the meaning of this term in *Matsas* v. *The Republic* (1985) 3 C.L.R. 54 at pp. 58 to 62. Also I dealt with it in *Shakallis* v. *The Republic* (1985) 3 C.L.R. 2570 where I referred to the *Matsas* case, with approval. The gist is that the words "permanent settlement abroad" are common words and there is no context requiring that it should be given other than their natural meaning in accordance with their accepted use.

The relevant file of the administration has not been produced before the Court, but it is clear from the address of learned counsel for the respondents that one of the reasons on which the respondents relied in taking the sub judice decision is that the applicant "went to the hospital as an outpatient on 12th January 1984, that is eight months after his arrival in Cyprus and that until his departure to England on 17th June 1984, he made a total of four visits. Further it was alleged by respondent's counsel that the applicant was never advised that it was not safe for him to travel. As already indicated, both legs of the above statement are not born out by the evidence before me and regarding the question of advice to travel to England, is to the effect that during the period under inquiry he was under treatment and medical observation.

It appears that the main ground upon which the res-

* Reported in (1986) 3 C L R 2067

pondents decided that the applicant's permanent settlement abroad was interrupted, was that his stay in Cyprus for the period aforesaid was not dictated by medical reasons. It also appears from all the above that in taking the sub judice decision the respondents did not have before them all the facts pertaining to the medical reasons.

Therefore in view of the above I am driven to the conclusion that in taking the sub judice decision, the respondents laboured under a material misconception of the factual situation in the case. What is the effect of such a misconception has been repeatedly stated in our Case Law. It has been held that material misconception of fact or even the probability of its existence justifies the annulment of an administrative act (*Christodoulou* v. *CY.T.A.* (1978) 3 C.L.R. 61; *Mallouros* v. *Electricity Authority of Cyprus* (1974) 3 C.L.R. 220).

It was further held that taking a decision under misconception of fact constitutes a contravention of the well settled principle of Administrative Law and the resulting act or decision has to be annulled as being contrary to law in excess and abuse of power. See *Ioannides* v. *The Republic* (1972) 3 C.L.R. 318.

Having concluded that the sub judice decision was taken under a material misconception of the factual position the sub judice decision has to be annulled as being contrary to Law and in excess and abuse of power.

For all the above reasons the recourse succeeds but in the circumstances there will be no order as to costs.

Sub judice decision annulled.
No order as to costs.