



**COURT OF MAGISTRATES (GOZO)
SUPERIOR JURISDICTION
GENERAL SECTION**

**MAGISTRATE DOCTOR BRIGITTE SULTANA
LL.D., LL.M (CARDIFF) ADV. TRIB. ECCL. MELIT.**

Today, Friday, 25th of November 2022

Sworn Application number: 26/2019 BS

**Anthony Peter Swallow (I.D. 31805A) in his own name and on
behalf of his husband Michael Pierre Auguste Gustave
Vanwelkenhuyzen (Belgian I.D. 083007 1861 84)**

-vs-

Commissioner of Inland Revenue¹

The Court;

A. Preliminary:

Having seen the Sworn Application filed by Anthony Peter Swallow in his own name and on behalf of his husband Michael Pierre Auguste Gustave Vanwelkenhuyzen;²

- 1. That, as a married couple by contract in the deeds of Notary Maria Grima of the sixth (6) of December two thousand (2000),**

¹ Correction authorised via a decree dated the 15th of May, 2019.

² Fol 1 to 4, with documenst at fol 5 ta 13.

as married spouses, they acquired in undivided quotas among themselves the tenement number 17, Triq ta' Doti, Kerċem;

2. That this acquisition was affected by virtue of the permit issued by the respondent under the Acquisition of Immovable Property by Non-Residents Act, 1974, Cap. 246, with reference AIP 135/2000;
3. That condition number 1 of this permit reads as follows: "that the property is solely used as a residence by applicant/s and his/her/their family/ies and for no other purpose";
4. That today Anthony Swallow is a permanent resident of Malta and has transferred his residence in Malta regularly and in exercise of the right granted to him as a citizen of the European Union under Article 3 of the Treaty on European Union, as well as Article 20 (2) (a) of the Treaty on the Functioning of the European Union. As such he is paying his income tax and other tax obligations in Malta and is subject to the laws of this country;
5. That the applicants believe that as a corollary to this recurrent couple they should enjoy the same rights as citizens and other residents of Malta, including the right to use their capital in that way. which seems to them to be more responsive to their needs;
6. In particular, they should also enjoy the right of movement of capital and the right of establishment and the provision of services, guaranteed to all citizens of the European Union by Articles 26(2), 49 and 57 of the Treaty on the Functioning of the European Union;
7. That in the opinion of the applicants, these rights are being violated by the absolute prohibition that they use their house of residence as a source of auxiliary income by making certain rooms from that house available for rent. to persons who are willing to pay compensation so that they can stay in those rooms;

8. That this prohibition is also discriminatory against the applicant: in fact persons who are in a situation comparable to their own but who have acquired their residential property after Malta joined the European Union are enjoying the right to use that house as a means of subsidiary and auxiliary income - the difference between the respective situations of the applicants and these persons lies solely in the fact that the acquisition by part of these persons took place after Malta's membership of the European Union;
9. That in the opinion of the applicants, it cannot be argued that such discrimination can in any way be justified by any imperative public interest reasons since as stated above, persons who have acquired real estate in Malta after the accession of Malta to the European Union enjoys that possibility without any obstacle or restriction while this possibility is absolutely excluded to the applicants;
10. That the applicants requested permission from the respondent Department to have this ban imposed on them lifted, but that request was rejected;
11. That in the light of the above facts, the applicants wish to challenge this prohibition and request that it be annulled and revoked.

Accordingly they requested this Court to:

1. Declare that, for all of the above reasons and those that will arise in the course of the proceedings, condition number 1 of the permit issued by the respondent under the Immovable Property (Acquisition by Non-Residents) Act, Cap. 246, with reference AIP 135/2000 which reads: "that the property is solely used as a residence by applicant/s and his/her/their family/ies and for no other purpose" goes against the right of movement capital and the right of establishment and the provision of services, guaranteed to all citizens of the European Union by Articles 26 (2), 49 and 57 of the Treaty on the Functioning of the European Union, and is also discriminatory against the applicant, especially in view of the

fact that today, Anthony Peter Swallow is a person permanently resident in Malta and is paying his income tax and other tax obligations in Malta and is subject to the laws of this country;

2. Consequently annul and revoke that condition and declare instead that the applicants are entitled to manage their capital in such a way as they deem best suited to their needs, including the ability to use the home referred to as a means of subsidiary and auxiliary revenue.

With costs, including those of the official letter of the 9th November 2018, Official Letter No. 625/2018, against the respondent, and with the injunction for the submission to which the respondent is as of now summoned.

Subject to any further action, including action for damages due to the plaintiffs against you.

Having seen the Sworn Reply filed by the defendant³ in which he declared that:

1. That in the first place and in line with the preliminary ruling, the action in response is irritual and null and void which has been brought against a non-existent entity, i.e. 'Director General, Capital Transfer Duty Branch', whereas according to Article 3(5) of the Tax Commissioner Act (Cap. 517 of the Laws of Malta), the Commissioner must have the legal and judicial representation of the Government in documents, all judicial acts and actions relating to the collection of tax and any other matter in which the Tax departments have an interest, and the Act on the Acquisition of Real Estate by Non-Residents is listed with the "tax acts" in accordance with Chapter 2 of Chapter 517;

³ Fol 21 to 27.

2. That, in substance, the applicant's claims are founded in fact and in law and must be rejected for the following reasons set out below without prejudice to each other;
3. That the facts are the following:
 - a. That on 17 November 2000, permission was granted under reference number AIP 135/2000 under the Act on the Acquisition of Real Estate by Non-Residents (Cap. 246 of the Laws of Malta) in respect of the applicant, a copy of which is annexed as part of 'Doc. A' of the application for defence;
 - b. That, on 31 October 2018, the officer responsible for issuing the permits in accordance with Chapter 246 replied in the negative to the applicants' request that they be granted a licence to rent the property acquired under the permission, a copy of which reply is annexed hereto and marked as 'Dok KT1';
 - c. That on 14 November 2018, the exponent was notified by official letter number 625/2018, to which letter – contrary to the applicants' claim that they had never received any form of reply – the exponent replied by official letter number 701/2018, which was notified on 7 January 2019, true a copy of which is attached herein and marked as 'Dok KT2';
4. That both during the procedure for issuing permit number AIP 135/2000 and subsequently, the exponent has always complied with the parameters of Chapter 246 of the Laws of Malta;
5. That there is no violation of rights and/or discrimination on the part of the respondent vis-à-vis the claimant, provided that any permit issued under Chapter 246 of the Laws of Malta in the case of a dwelling is issued on the same condition that the immovable property is used only as residence by the applicant and his family and for no other reason, and this condition

applies equally to Maltese nationals who are not resident in Malta for whom the said permit has been issued;

6. That it is clear from the application in response and from the documents annexed to it that none of the applicants actually resided in Malta on 6 December 2000, i.e. when they acquired the property in question;
7. That according to paragraph (b) of article 3(1) of Chapter 246 of the Laws of Malta “a citizen of Malta and a national of a Member State who is not in each of the two cases a resident of Malta **may not, without the need to obtain permission under this Act, acquire real estate for secondary residence purposes by an inter vivos act in Malta**” (emphasis added by the respondent). That according to Article 2 of the same Act, ‘non-resident’ means and includes:
 - (a) an individual who is not a national of Malta or of another Member State; or
 - (b) a national of Malta or of another Member State, even, in either case if he holds a valid residence permit, **who has not resided in Malta for a continuous minimum period of five years at any time prior to the date of acquisition.**’ (emphasis added by the respondent).
8. That, therefore, contrary to the applicant’s claim, the applicant’s situation would not have been treated differently according to the law if the property had been purchased after Malta’s membership of the European Union, as long as **the applicants had not been resident in Malta for a continuous minimum period of five years prior to the date of acquisition;**
9. That, therefore, even in such a wholly hypothetical situation, and even if the applicants wished to acquire the property in question following Malta’s membership of the European Union, the applicants could not in any event have acquired real estate in Malta for secondary residence purposes without

the need for a permit issued under Chapter 246 of the Laws of Malta (hereinafter referred to as “AIP permit”);

10. That the fact that a person in respect of whom a permit has been issued under Chapter 246 subsequent to the acquisition of the permit becomes a resident of Malta, or otherwise decides to take up residence in the property as his main residence, certainly does not mean that the AIP permit or any condition imposed by it must be revoked, and this applies without any discrimination to both Maltese citizens and nationals of other countries members of the European Union who have not resided in Malta for a continuous minimum period of five years prior to the date of acquisition of the property;
11. Furthermore, without prejudice to the foregoing argument, the condition cannot be waived in so far as it forms part of a public contract;
12. That, contrary to the applicant’s claims, the requirement of an AIP permit as well as any restriction on the use of immovable property deriving from such a permit is sanctioned by an appropriate derogation negotiated by the Maltese Government prior to accession to the European Union, and contained in **Protocol No 6 on the acquisition of secondary residences in Malta, set out in the Act concerning the conditions of accession of the Republic of Malta to the European Union**, which provides as follows:

‘Noting the very limited number of residences in Malta and the very limited land that can be used for construction purposes, and which can only cover the basic needs created by the demographic development of the residents present, Malta may on a non-discriminatory basis maintain the rules on the acquisition and possession of immovable property for secondary residence purposes by nationals of a Member State who have not been legally resident in Malta for at least five years, as laid down in the Act on the Acquisition of Real Estate by Non-Resident Persons (Chapter 246).’

'Malta shall apply authorisation procedures for the acquisition of real estate for secondary residence purposes in Malta based on published, objective, stable and transparent criteria. These criteria shall be applied in a non-discriminatory manner and shall not differentiate between Maltese nationals and those of other Member States. Malta shall ensure that in no case shall a national of a Member State be treated more restrictively than a third-country national...'; (emphasis added by the respondent)

13. It should also be noted that in 2013, the European Commission had informally requested the Maltese Government to explain the implementation of the provisions of Chapter 246 in relation to property acquired by nationals of European countries following Malta's accession to the European Union and the Maltese Government had replied to the European Commission by letter dated 18 October 2013 (here annexed and marked as "Dok KT3") in the following manner:

"...This law was first enacted in 1974 and Malta retained its status quo post-accession in terms of the said derogation for the acquisition of a secondary residence. The position is the same for all EU Member State individuals, including Maltese nationals, who do not satisfy the five year continuous residence parameter. ... **once the property has been acquired by such EU nationals (including therefore Maltese nationals) for secondary residence purposes the acquisition is subject to the personal use condition which condition cannot be waived as it attaches to the property for as long as the applicant is the owner.** All AIP permits issued to EU Member State nationals have this personal use condition, whether acquired by Maltese nationals or otherwise, and this condition cannot be lifted. **The fact that such person has subsequently resided in Malta continuously for over five years does not in any way nullify this condition.** It is important to note that the same conditions apply to Maltese nationals and other EU nationals equally even after both would have been resident in Malta for a continuous period of five years. **Hence, this restriction is in line with the derogation as it is applied on a non-discriminatory basis on all EU nationals, including**

Maltese nationals, who have acquired property subject to an AIP Permit. (emphasis added by the respondent)

14. That the European Commission had accepted this reply from Malta without reservations and thus confirmed on 20 March 2014 that this case was closed, as is apparent from the notification generated by the website used exclusively by the Commission and the Member States for EU Pilot communications, annexed hereto and marked as 'Doc KT4';
15. That it is therefore clear and manifest that in the present case, which fits perfectly with the situation described in Malta's reply overturned by the only difference that the applicants acquired the fund prior to Malta's accession to the EU, there is no lesion of the applicants' rights under European Union law;

Subject to further exceptions.

Accordingly, and in view of the foregoing, the respondent respectfully submits that this Honourable Court should dismiss all the applicants claims as basely in fact and at law at the expense of the applicants.

Having considered all the acts of these proceedings.

Having seen the application filed by the applicants on the 2nd May, 2019 whereby they requested a correction in the defendant's name from "*Direttur Ġenerali, Fergħa tal-Capital Transfer Duty*" i.e. Director General, Capital Transfer Duty Department to "*Kummissarju tat-Taxxi Nterni*" i.e. Commissioner of Inland Revenue.⁴

Having seen the decree given on the 15th May, 2019 by which it accepted the correction requested by the applicants on the 2nd May, 2019 and therefore; authorised the change in the defendant's nomenclature.⁵

⁴ Fol 37.

⁵ Fol 60.

Having seen that on the 15th November, 2019, it accepted a request by the applicants for the proceedings to continue in the English language.⁶

Having seen the note filed by the respondent on the 20th November, 2019 wherein the respondent declared that while it had no contestation relating to the tax status of applicant Anthony Peter Swallow, the remaining submissions put forward by said applicant in his affidavit submitted to Court on the 2nd May, 2019⁷ were being contested.⁸

Having seen the record of the Court sitting of the 21st February, 2020 whereat counsel for the applicants declared that they were closing their evidence stage.⁹

Having seen the note filed by the respondent on the 21st April, 2021 with attached screenshots from the property letting website “Airbnb”.¹⁰

Having seen the document submitted at fol 97 as document “JG1” consisting of a licence issued by the Malta Tourism Authority for applicant Anthony Peter Swallow as a host family able to host 3 to 4 students.

Having seen the record of the Court sitting of the 4th February, 2022 whereat the parties declared that all the evidence has been produced and the case was adjourned for judgment with the parties authorized to file final notes of submissions within an established time-frame prior to judgment.¹¹

Having seen the decree delivered on the 24th June, 2022 and the raising, *ex officio*, of the preliminary plea of incompetence *rationae materiae* of this Court as well as the Court’s adjournment of the case for evidence regarding said plea.¹²

⁶ Fol 62 to 63.

⁷ Fol 39 to 41 with documents attached at fol 42 to 59.

⁸ Fol 64.

⁹ Fol 70.

¹⁰ Fol 81 to 86.

¹¹ Record of the Court sitting of the 4th February, 2022.

¹² Decree of the 24th June, 2022.

Having seen the record of the Court sitting of the 30th September, 2022, when the Court heard submissions on the preliminary plea of incompetence *rationae materiae* of this Court, and adjourned the case for judgment for today.

Having seen the final notes of submissions of the parties.

Having seen all the other acts of this case, including all the submitted documents, records of the sittings, as well as transcripts of testimonies and sworn affidavits.

B. Evidence:

The Court heard the evidence brought forward *viva voce* and considered that made in writing via affidavit by:

Anthony Peter Swallow, one of the applicants, gave testimony via affidavit.¹³ He declares that he and his partner, the co-applicant, purchased property in Kerċem, Gozo on the 6th December, 2000 after an AIP Permit was issued to them. That for 15 years he was happy with condition number 1 of the AIP Permit because neither he nor his partner were residents of Malta and the property purchased in Gozo was used as a secondary residence. That he retired from his profession on the 31st August, 2015 which is when he decided to move to Malta permanently and establish his primary residence in Malta. That he thus applied for and obtained a Maltese residency card bearing number 31805A and registered as a taxpayer in Malta whereat he was given a tax number. That he files tax returns and pays tax in Malta.

He further declares that when he moved to Malta he decided to start hosting guests in his home. That he therefore went to see a lawyer in Kerċem who confirmed that he could do so and thus, he started advertising rooms for rent online. That this was when the Malta Tourism Authority informed him that he couldn't obtain a letting permit due to the condition in his AIP Permit.

¹³ Fol 39 to 41 with documents attached at fol 42 to 59.

He further declares that his current lawyer informed him that he felt that since the property in Gozo is his primary residence, the condition in the AIP Permit should be waived. That this is when they wrote to the Ministry of Finance who replied that this was not possible. That judicial letters were exchanged between them and the Ministry of Finance.

He concludes by quoting articles of the Treaty on the Functioning of the European Union and declares that since the property in Malta which he lives in and wishes to host guests in is his primary residence, his fundamental liberties under the same are being breached.

He attaches several documents including a confirmation of change of address and Maltese tax return documents.

Additional testimony was given by applicant Anthony Peter Swallow via a second affidavit.¹⁴ He gives an outline of his educational and employment background. He declares that between 1972 and 1974 he paid tax in the United Kingdom, between 1974 and 1976 in Germany, and between 1976 and 2015 (his retirement) again in the United Kingdom.

He further declares that he purchased the property in Gozo on the 6th December, 2000 with the intention of living in it permanently. He confirms he had been living in Malta since September 2015 (his retirement).

He concludes by declaring that his only connection to the United Kingdom is an English passport he still holds, with no voting rights and no property in the United Kingdom, and his only connection to Belgium is via his husband, with Belgium not granting nationality to spouses of Belgian citizens.

In cross-examination,¹⁵ he confirms the clause in his AIP Permit as a clause *“there always is, which applied to people when I bought the property before Malta joined the European Union”*. He confirms that he

¹⁴ Fol 67 to 69.

¹⁵ Fol 100 to 105.

didn't pay much attention to this clause when he purchased the property in the year 2000. He confirms that he first rented out his whole house (not rooms within it) after he sought legal advice and was told he could.¹⁶

He confirms that he moved to Malta permanently in summer of 2015. Shown screenshots from the property letting website Airbnb he confirms the listing as that showing his farmhouse put up for rent while he was not in Gozo, including after he had established the property as his primary residence.

In re-examination,¹⁷ he states that he thinks that the condition which states that he can only use his property for residence purposes is in his contract of acquisition. He insists that at that stage he didn't give it much attention. Led by his counsel, he corrects himself saying that the condition was in the AIP Permit.

He states that he sought legal advice about leasing out property in Malta before 2015.

Dr. Joseph Grech, in representation of the Malta Tourism Authority gave testimony regarding the licensing process.¹⁸ Regarding the applicants' property he confirms that a licence had been issued by the Authority with effect from the 14th December, 2020 in the name of Anthony Peter Swallow. He confirms that the licence was for a host family to host 3 to 4 students.

He submits a copy of the licence as document "JG1"¹⁹ and obliges himself to submit copies of the application submitted by the applicant to obtain the said licence.

He confirms that the licence is limited to the hosting of students and not a general licence for renting out rooms to the wider public.

¹⁶ Later on in re-examination he states that he sought legal advice before 2015 – fol 106.

¹⁷ Fol 105 to 106.

¹⁸ Fol 107 to

¹⁹ At fol 97

Bernard Bonnici, in representation of the Commissioner of Revenue, gave testimony about the AIP Permit.²⁰ He states that the law prohibits the acquisition of immovable property by non-residents without an AIP Permit. That the law states that the property can only be used for residential purposes, including of family and friends, and this is also a condition in the AIP Permit.

He outlines the process for a non-resident to acquire an AIP Permit. He confirms that the application to obtain an AIP Permit requires the applicant to declare the reason he wishes to acquire property in Malta for. He states that if the declared reason is other than for residential purposes, the application would be refused.

He continues that if a buyer obtains a permit following a declaration that he wants to buy the property for residential purposes and then rents rooms within the property out, that person would be in breach of the law. That in such a case, they file a report with the police who would take action against said person.

He continues that the AIP Permit is issued to the buyer and it is attached to the contract of acquisition of the property and hence, everyone is aware of it, with the Notary also obliged to draw the parties attention to it.

He confirms that applicant Anthony Peter Swallow declared that he was acquiring property for residential purposes.

He further states that after the deed of acquisition is finalised they receive a copy of it and check that it is compliant with the AIP Permit issued to the buyer.

In cross-examination,²¹ he states that all AIP Permits issued prior to Malta's accession to the European Union remained valid. He states that the conditions continue to apply even if a person becomes an EU citizen after obtaining an AIP Permit. He confirms that if applicant Anthony Peter Swallow has now been residing in Malta for more than 5 years he could buy property without needing an AIP Permit. He states that the matter revolves around

²⁰ Fol 115 to 121.

²¹ Fol 123 to 135.

the 5 year of residency in Malta requirement so that; any EU citizen (including a Maltese person) who has lived in Malta for more than 5 years (uninterruptedly) can acquire any property without the need of an AIP Permit. He states that therefore, theoretically, the applicants could sell the property and re-purchase it without he need of an AIP Permit and thus without he condition for use of the property limitedly for residential purposes.

He further states that once property is purchased with an AIP Permit, the law states that it can only be used for residential purposes, including of family and friends.

In re-examination,²² he states that prior to Malta's accession in the EU in 2004, all they looked at was the passport of the person acquiring property, not the person's residence. That even if a Maltese person living abroad hasn't lived in Malta for five years, he would need an AIP Permit to purchase property.

He continues by stating that today, an EU citizen (including a Maltese person) who has not lived in Malta for five years wouldn't need an AIP Permit if he was going to purchase property for his primary residence but would need one if he was acquiring one as a secondary residence. He continues by saying that for a secondary residence a buyer needs an AIP Permit irrespective of how long he has lived in Malta.

He clarifies that by primary residence he means that the person is going to establish his abode in Malta.

He further clarifies that any person who has lived in Malta for more than 5 years can purchase any property without requiring an AIP Permit.

C. Considerations:

²² Fol 135 to 140.

The applicants purchased their property in Gozo on the 6th December, 2000, prior to Malta's accession to the European Union in 2004.

At the time of acquisition of the property, the applicants' primary residence was not in Malta. This is declared by applicant Anthony Peter Swallow himself in his affidavit at fol 39 to 41 where he declares that *"for fifteen years I was happy to abide by that condition because I was not a resident of Malta and, together with Michel, I was using the property solely as a secondary residence"*. He further declares that *"Michel is still a resident in Brussels"* and that *"The property in Brussels is occupied by my husband, who, as I have already stated, has retained his residence in Brussels for the time being since he is still employed in that country"*. Additionally, in his second affidavit at fol 67 to 69 he declares that *"between 2001 and 2015 I spent all my free time in Gozo, moving there permanently from Belgium in September 2015 when my contract with the Department for Education, London expired"*.

It is therefore clear that at the time of acquisition of their property in Gozo, Malta, the applicants had not lived in Malta for a continuous period of five years and were not intending to establish their primary residence in Malta.

Article 3(1)(b) of Chapter 246 of the Laws of Malta, The Immovable Property (Acquisition by Non-Residents) Act, states that:

3. (1) *Without prejudice to the other provisions of this Act:*

(b) a citizen of Malta and a citizen of a Member State who in either case is not a resident of Malta may not, without the necessity of obtaining a permit under this Act, acquire immovable property for secondary residence purposes by an act inter vivos in Malta.

Article 2(b) of the same Act, defines a non-resident person as:

"non-resident person" means and includes:
[...]

b) a citizen of Malta or of another Member State, who has not been

resident in Malta for a minimum continuous period of five years at any time preceding the date of acquisition [...]

[emphasis added]

In terms of changes in the quoted articles of the law pre and post 2000, the year the applicants purchased their property and pre and post 2015, the year applicant Anthony Peter Swallow declares to have moved his residence to Malta, Chapter 246 of the Laws of Malta was promulgated on the 9th August, 1974 by Act XXXVI.

Two amendments were made to the relative articles of this chapter as quoted above since then; one on the 2nd September, 2003 by Act IX of 2003 and another on the 14th May, 2004 by Act III of 2004, the relevant parts of which read as follows:

Act IX of 2003

Part IX

36. (1) *This Part amends and shall be read and construed as one with the Immovable Property (Acquisition by Non-Residents) Act, hereinafter in this part referred to as “the principal Act”.*

[...]

37. *Article 2 of the principal Act shall be amended as follows:-*

[...]

(c) for the definition “Minister” and “non-resident person” there shall be substituted the following definitions:

[...]

“non-resident person” means and includes:

[...]

(b) a citizen of Malta or of another Member State, even in either case, if in possession of a valid residence permit, who has not been resident in Malta for a minimum continuous period of five years at any time preceding the date of acquisition.

Act III of 2004

Part VXIII:

81. *This Part amends and shall be read and construed as one with the Immovable Property (Acquisition by Non-Residents) Act, as amended by the Various Laws (Amendment) Act, 2003, hereinafter in this Part referred to as “the principal Act”.*

[...]

83. *For the words “immovable porperty” in the English text of subarticle (2) of article 3 of the principal Act there shall be substituted the words “immovable property”*

Act IX of 2003 has therefore only removed from Article 2(b) as originally enacted the words *“even in either case, if in possession of a valid residence permit”*.

Act III of 2004 has therefore only performed a grammatical correction of a misspelled word.

Additionally, it does not appear that Malta’s accession into the European Union affected the cited laws since, Protocol 6 (regarding the acquisition of secondary residences in Malta) of the *Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded* stipulates that:

Protocol No 6

on the acquisition of secondary residences in Malta

THE HIGH CONTRACTING PARTIES,

HAVE AGREED AS FOLLOWS:

Bearing in mind the very limited number of residences in Malta and the very limited land available for construction purposes, which can only cover the basic needs created by the demographic development of the present residents, Malta may on a non-discriminatory basis maintain in force the rules on the acquisition and holding of immovable property for secondary residence

purposes by nationals of the Member States who have not legally resided in Malta for at least five years laid down in the Immovable Property (Acquisition by Non-Residents) Act (Chapter 246).

Malta shall apply authorisation procedures for the acquisition of immovable property for secondary residence purposes in Malta, which shall be based on published, objective, stable and transparent criteria. These criteria shall be applied in a non-discriminatory manner and shall not differentiate between nationals of Malta and of other Member States. Malta shall ensure that in no instance shall a national of a Member State be treated in a more restrictive way than a national of a third country [...]

[emphasis added]

It is thus clear that the criteria applicable to anyone in the same circumstances as the applicants, that is, anyone who whether a citizen of Malta or of another European Union Member State, has not been a resident of Malta for a minimum continuous period of five (5) years at any time preceding the date of acquisition of the property in Malta, is now, and was back when the applicants acquired their property, the same. That is: such a person is now, and was then, in the impossibility of acquiring a property in Malta for secondary residence purposes without first obtaining a permit under Chapter 246 of the Laws of Malta.

This leaves this Court with the necessity to examine whether condition number one (1) imposed in the Acquisition of Immovable Property Permit Number 135/2000 granted to the applicants on the 17th November, 2000 was valid.

Article 6 of Chapter 246 reads as follows:

6. (1) The Minister may grant a permit in writing to a non-resident person to acquire an immovable property specifically indicated in the permit if in the opinion of the Minister it is in the public interest or it is otherwise appropriate to grant such permit:

Provided that, if an application is made to the Minister for the acquisition of immovable property by a non-resident person, and such application is made in line with such policies, such form and in such manner, if any, as may be established by regulations made under this Act, and such information as may be prescribed by regulations has been given, the Minister shall not withhold his permit if he is satisfied that –

[...]

(b) in the case of an individual who is not a resident of Malta, the immovable property is a building the value of which is not less than eighteen thousand and five hundred euro (18,500) (which sum shall be adjusted in line with an immovable property price index that shall be published annually in the Gazette by the National Statistics Office) and which is intended to be used by the non-resident person as a residence for himself and his family and such non-resident person does not own or hold under any title whatsoever any other immovable property in Malta other than immovable property the acquisition of which is exempted under article 4(2) or 5 [...]

[emphasis added]

Condition number one (1) in the Acquisition of Immovable Property Permit Number 135/2000 granted to the applicants on the 17th November, 2000 reads thus:

1. That he property is solely used as a residence by applicant/s and his/her/their family/ies and for no other purpose.

It is thus apparent that condition number one (1) in the Acquisition of Immovable Property Permit Number 135/2000 is in line with the requirements of Article 6 of Chapter 246.

4. Further Considerations:

Alleged Discrimination:

It is a known and accepted principle of doctrine and jurisprudence that for a plea of discrimination to be upheld the party claiming discrimination must prove that another person in his/her same situation and under the same circumstances were treated differently to him/her.

It is the opinion of the Court that no evidence was provided to it to be able to arrive at a finding of discriminatory action or discriminatory behaviour.

The applicants main contention is with reference to the condition imposed upon them in the Acquisition of Immovable Property Permit Number 135/2000. No evidence has been produced showing that persons in their same situation and under their same circumstances were treated differently.

Incompetence of this Court *rationae materiae*:

Via its own decree of the 24th June, 2022, this Court *ex officio* raised the preliminary plea of its own incompetence *rationae materiae* and this, in line with observations made by the parties in their final notes of submissions.

The Court refers back to the demands as advanced by the applicants with which (succinctly) the applicants requested it to:

1. Declare that condition number 1 in the Acquisition of Immovable Property Permit Number 135/2000 which reads “that the property is solely used as a residence by applicant/s and his/her/their family/ies and for no other purpose” breaches the rights guaranteed to citizens of the European Union as enshrined in Articles 26 (2), 49 and 57 of the Treaty on the Functioning of the European Union, and is also discriminatory against the applicant, especially now that applicant Anthony Peter Swallow is a permanent resident of Malta, fulfills tax obligations in Malta, and is subject to the laws of Malta;

2. Consequently annul and revoke that condition and declare that the applicants are entitled to manage their capital, including their property in Gozo, Malta, in such a way as they deem best suited to their needs.

The Court is of the opinion that the real matter in this case relates to the interpretation of the quoted domestic laws, as notified to the Commission of the European Union.

Notification of the relative domestic laws to the Commission of the European Union is evidenced by document KT3 with the respondent's sworn reply, at fol 33, which consists of a letter dated the 18th October, 2013 and addressed to the Head of Unit at the European Commission, which has not been contested by the applicants. It is also evidenced by Protocol 6 regarding the acquisition of secondary residences in Malta as quoted above.

These laws are of uniform application across all acquisitions of property in Malta by non-resident persons and have been shown above to have remained applicable since the enactment of Chapter 246 of the Laws of Malta, including after Malta's accession into the European Union.

It is therefore this Court's opinion that the interpretation of domestic law is its remit and within its competence. Conformity of any national laws with European laws may only be reviewed in the context of infringement proceedings in line with the Treaty on the Functioning of the European Union; proceedings that are independent of these present.

The main aim of these current proceedings as instituted by the applicants is not to find a breach of European Union Law, but to annul and revoke a condition imposed on the applicants in terms of Maltese Law. The declaration with reference to European Union Law demanded by the applicants in their first request to this Court is only a means to that end, as clear even from the wording of the demands made by the applicants which are **consequential** to one another.

This Court therefore deems that the matter of European Union Law raised by the applicants is irrelevant to the case before it, in which it is proved that national laws as notified to the European Union have been abided to. It therefore rejects any request for referral of the matter to the Court of Justice of the European Union.

This particularly when noting that the articles of the Treaty on the Functioning of the European Union cited by the applicants refer to the set-up of an internal market area (A. 26(2)), restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State including the right to take up and pursue activities as self-employed persons and to set up and manage undertakings (A. 49) and; services provided by citizens of Member States: all matters which fall beyond and outside the ambit of this action which relates to a condition imposed on the acquisition of the immovable property that has been green lighted by the European Union.

Decision:

Therefore, and for the above reasons, this Court declares and decides this case by declaring the first plea of the respondent addressed by virtue of the correction demanded and accepted in terms of the decree delivered on the 15th May, 2019, declares the remainder of the respondent's pleas dealt with in terms of, and as consonant with the above deliberations, and disposes of the applicants' demands by rejecting them.

Costs for the applicants.

(ft.) Dr. Brigitte Sultana
Magistrate

(ft.) Daniel Sacco
Deputy Registrar

True Copy

For the Registrar