37 TC 493, 36 ATC 201, [1957] TR 231

Miesegaes v Commissioners of Inland Revenue
37 TC 493

Copy Citation

HIGH COURT OF JUSTICE (CHANCERY DIVISION)
26TH AND 27TH FEBRUARY, 1957

COURT OF APPEAL
16TH, 17TH AND 22ND JULY, 1957

Income Tax — Ordinary residence — Income Tax Act, 1918 (8 & 9 Geo. V, c. 40), Section 46(1).

The Appellant, a Dutch national, was born in Amsterdam in 1933 and was at all material times domiciled outside the United Kingdom. In August, 1939, he and his father came to the United Kingdom as refugees, and they remained here together until 1946. His father left the United Kingdom permanently in March, 1946, and died domiciled in Switzerland in July, 1948. The Appellant, however, remained at a boarding school in the United Kingdom until July, 1951. Up to his father's death he spent his school holidays with his father in Switzerland and thereafter partly in the United Kingdom and partly abroad. He went to Switzerland in August, 1951, and remained abroad at all material times thereafter. He did not at any time maintain a residence in the United Kingdom.

For the purpose of exemption from Income Tax on the interest from certain British Government securities the Appellant claimed that he was not ordinarily resident in the United Kingdom for the years 1947-48 to 1951-52. The Commissioners of Inland Revenue and, on appeal, the Special Commissioners refused the claim for each of the years in question.

Held, that the Special Commissioners had evidence before them on which they could reach their decision.

Case

Stated under the Income Tax Act, 1952, Section 64, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 14th May, 1956, Mr. Stanley A. Miesegaes (hereinafter called "the Appellant"), being aggrieved by a decision of the Commissioners of Inland Revenue that they were not, satisfied that he was not ordinarily resident in the United Kingdom for the years 1947-48 to 1951-52 inclusive so as to be entitled under Section 46 of the Income Tax Act, 1918, to exemption from Income Tax in respect of interest on certain British Government securities, made application to have his claim for relief under the said Section 46 heard and determined by us.

The sole question for our determination was whether in each of the years 1947-48 to 1951-52 inclusive the Appellant was or was not ordinarily resident in the United Kingdom for the purpose of the said Section 46.

2. The Appellant was born on 12th April, 1933, in Amsterdam of Dutch parents, and at all material times has had Dutch nationality and has been domiciled outside the United Kingdom. His parents were divorced prior to 1939 and his mother later married a Dutch national and has at all material times resided in Hollang. At all material times until his death the Appellant's father had the custody and control of the Appellant.

3. (1) On 26th August, 1939, the Appellant and his father came as refugees to England, where they remained together until 1946. During this period the Appellant and his father were treated as not ordinarily resident in the United Kingdom for Income Tax purposes. It was stated on behalf of the Respondents that they were so treated by virtue of an extra-statutory wartime concession; this was not admitted by the Appellant.

- (2) In March, 1946, the Appellant's father went to live in Switzerland for reasons connected with his health, with the intention of establishing his permanent residence there. There he stayed for some months in a sanatorium, and thereafter lived at an hotel at Klosters, in which village he bought a plot of land and started to build a house for his

residence. He died, domiciled in Switzerland, on 10th July, 1948, before the house was completed.

A bundle of correspondence containing copies of letters written by the Appellant's father was produced to us and is annexed hereto, marked "A", and forms part of this Case [1].

- [1] Not included in the present print.

4. At the time of his father's departure for Switzerland (March, 1946) the Appellant, who was then nearly 13, was attending a preparatory school in England. He remained at this school until 1947, spending the holidays with his father, and in 1947 be went to continue his education at Harrow, where he remained, so far as concerns the ordinary school terms, until July, 1951. In September, 1951, he went to continue his education at a college in Switzerland. It was not contended that he was resident in the United Kingdom at any time thereafter.

5. After his father's death the question of the Appellant's guardianship in England was never determined. His mother was thought to be his guardian in Dutch law, but never acted as such in England, and his only visits to her in Holland during the relevant years were for one period of eight days in 1950 and three periods of seven, two and nine days respectively in 1951. He had an aunt who resided in England, and she and a solicitor (who were together administrators of his father's English estate) acted unofficially as his trustees during his minority. He also had a friend in England, Miss Symons, who had been nurse and companion to his father and governess to him. He had no residence of his own during the years in question and has not at any time maintained any residence of his own in the United Kingdom.

6. During the period covered by the financial years 1947-48 to 1951-52 inclusive the Appellant was at school in England during the normal school terms. He spent his school holidays during his father's lifetime living with his father in Switzerland, and after his father's death partly with Miss Symons at Walton, Surrey, and partly abroad. The periods spent abroad were as follows:-

July to September, 1948, in Switzerland;

December, 1948, to January, 1949, in Switzerland;

August to September, 1949, in France;

3rd to 11th April, 1950, in Holland at his mother's, home;

24th August to 10th September, 1950, In Switzerland;

8th to 15th January, 1951, in Holland at his mother's home;

13th to 15th April, 1951, in Holland at his mother's home.

From 17th August, 1951, to 5th April, 1952, the Appellant was abroad, at college in Switzerland and at various other places, including Holland, where he visited his mother from 21st to 30th December, 1951.

7. It was contended on behalf of the Appellant that:

- (i) he was ordinarily resident with his father in Switzerland in the year 1947-48;
- (ii) he was not ordinarily resident in the United Kingdom in any of the years in question.

8. It was contended on behalf of the Commissioners of Inland Revenue that:

- (i) the capacity to form or pursue an independent intention was not essential to a person's becoming resident in this country;

- (ii) if and in so far as intention or motive might be relevant, it appeared from the evidence that the Appellant's father, and later his guardians, had decided that he should complete a course of education in the United Kingdom lasting more than five years;

- (iii) the evidence, and in particular the Appellant's sojourn in the United Kingdom for the greater part of each year whilst pursuing the said course, led to the conclusion that he was resident here during each of the said years;

- (iv) the Appellant's residence here was part of the regular and ordinary course of his and he was ordinarily resident here in each of the years in question.

9. We, the Commissioners who heard the appeal, considered that we should first decide whether the Appellant was resident in the United Kingdom in each of the years in question, and second, if he was so resident, whether his residence had the quality of ordinary residence.

With regard to the first question, we found that the Appellant was resident in the United Kingdom in each year. One of the facts which we had to take into account was that except for the last year, 1951-52, he spent by far the greater part of his time in England. It was said on This behalf that his presence here during this period was for the special purpose of schooling; in our opinion that consideration did not in the circumstances of the case point very strongly to the conclusion that he was not resident here. With regard to 1951-52, the Appellant was here for over four months; this was in continuation of what we found to be This residence here for the previous four years and we found that he was resident in the United Kingdom for 1951-52 also.

We considered the second question in the light of our conclusion that the Appellant was resident in the United Kingdom for each of the five years, and we found that such residence was the ordinary course of the Appellant's life during his adolescence. In the light of all the evidence we found, and so far as it is a question of law we held, that the Appellant was ordinarily resident in the United Kingdom for each of the years in question, and we held that his claim failed.

10. The Appellant immediately upon our determination of the claim expressed his dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1952, Section 64, which Case we have stated and do sign accordingly.

11. The question of law for the opinion of the Court is whether, in view of the facts hereinbefore set forth, our decision in paragraph 9 of this Case is justified.

R. A Furtado Commissioners for the Special

N. Rowe Purposes of the Income Tax Acts.

Turnstile House, 94-99, High Holborn, London W.C.1.

19th November, 1956.

High Court

The case came before Wynn-Parry, J., in the Chancery Division on 26th and 27th February, 1957, when judgment was given in favour of the Crown, with costs.

Mr. John Foster, Q.C., and Mr. John Creese appeared as Counsel for the taxpayer, and Sir Frank Soskice, Q.C., and Sir Reginald Hills for the Crown.
Wynn-Parry, J. -

This is an appeal from the Special Commissioners by way of Case Stated, they having upheld the decision of the Commissioners of Inland Revenue, who had taken the view that they were not satisfied that the Appellant was not ordinarily resident in England for the years 1947-48 to 1951-52 inclusive, so as to be entitled, under Section 46 of the Income Tax Act, 1918, to exemption from Income Tax in respect of interest on certain British Government securities.

In this Court the test which I conceive I have to apply is, I think, conveniently stated in the speech of Lord Warrington of Clyffe in Lysaght v Commissioners of Inland Revenue, 13 TC 511. Lord Warrington of Clyffe, in the course of his speech, said (at page 536):

"I have reluctantly come to the conclusion that it is now settled by authority that the question of residence or ordinary residence is one of degree, that there is no technical or special meaning attached to either expression for the purposes of the Income Tax Act, and accordingly a decision of the Commissioners on the question is a finding of fact and cannot be reviewed unless it is made out to be based on some error in law, including the absence of evidence on which such a decision could properly be founded."

In the same case Lord Sumner said (at pages 527-8):

"It is well settled that, when the Commissioners have thus ascertained the facts of the case and then have found the conclusion of fact which the facts prove, their decision is not omen to review, provided (a) that they had before them evidence from which such a conclusion could properly be drawn, and (b) that they did not misdirect themselves in law in any of the forms of legal error which amount to misdirection. My Lords, the word 'ordinarily' may be taken first. The Act on the one hand does not say 'usually' or 'most of the time' or 'exclusively' or 'principally', nor does it say on the other hand 'occasionally' or 'exceptionally' or 'now and then', though in various Sections it applies to the word 'resident', with a full sense of choice, adverbs
37 TC 493 at 497

like 'temporarily' and 'actually'. I think the converse to 'ordinarily' is 'extraordinarily', and that part of the regular order of a man's life, adopted voluntarily and for settled purposes, is not 'extraordinarily'. Having regard to the times and duration, the objects and the obligations of Mr. Lysaght's visits to England, there was in my opinion evidence to support, and no rule of law to prevent, a finding that he was ordinarily resident, if he was resident in the United Kingdom at all."

In the course of his opinion Lord Buckmaster said (at pages 533-4):

"My Lords, the real question that arises in this case is whether the finding of the Commissioners that the Respondent was resident and ordinarily resident in England is a finding of fact which cannot be disturbed, or whether it is open to examine the circumstances set out by the Commissioners for the purpose of seeing whether the conclusion they drew is one that this House will accept. The distinction between questions of fact and questions of law is difficult to define, but according to the Respondent whether a man is resident or ordinarily resident here must always be a question of law dependent upon the legal construction to be placed upon the provisions of an Act of Parliament. I find myself unable to accept this view. It may be true that the word 'reside' or 'residence' in other Acts may have special meanings, but in the Income Tax Acts it is, I think, used in its common sense and it is essentially a question of fact whether a man does or does not comply with its meaning. It is, of course, true that if the circumstances found by the Commissioners in the Special Case are incapable of constituting residence their conclusion cannot be protected by saying that it is a conclusion of fact since there are no materials upon which that conclusion could depend. But if the incidents relating to visits in this country are of such a nature that they might constitute residence, and their prolonged or repeated repetition would certainly produce that result, then the matter must be a matter of degree; and the determination of whether or not the degree extends so far as to make a man resident or ordinarily resident here is for the Commissioners and it is not for the Courts to say whether they would have reached the same conclusion."

In Thomson v Minister of National Revenue, in the Supreme Court of Canada, [1946] S.C.R. 209, at page 224, Rand, J., says this:

"The gradation of degrees of time, object, intention, continuity and other relevant circumstances shows, I think, that in common parlance ' residing ' is not a term of invariable elements, all of which must be satisfied in each instance. It is quite impossible to give it a precise and inclusive definition. It is highly flexible, and its many shades of meaning vary not only in the contexts of different matters, but also in different aspects of the same matter. In one case it is satisfied by certain elements, in another by others, some common, some new. The expression 'ordinarily resident' carries a restricted signification, and although the first impression seems to be that of preponderance in time, the decisions on the English Act reject that view. It is held to mean residence in the course of the customary mode of life of the person concerned, and it is contrasted with special or occasional or casual residence. The general mode of life is, therefore, relevant to a question of its application."

With respect, I regard that passage, and particularly the last paragraph I have read, as accurately reflecting the view of the English Courts on the question of what is meant by "ordinarily resident"

It is, therefore, against that background that I have to consider the material before the Special Commissioners and the conclusions to which they have come. I may say at once that in my view the Special Commissioners had ample material before them to arrive at the conclusions to which they did come. I think that there is great force in what Sir Frank Soskice emphasised, namely, that the Appellant at the age of six was brought by his father to this country on 26th August, 1939, and that the father and the son remained in this country until March, 1946, before which date the father clearly had the volition of departing from this country and either taking his son with him or sending him here, and it is plain upon the facts set out in the Case that the Appellant and his father were ordinarily resident in this country

over a period from 26th August, 1939, to March, 1946. Some difficulty was caused by the wording of paragraph 3 (1) of the Stated Case, because the Special Commissioners, having referred to the fact that the Appellant and his father came to this country in August, 1939, where they remained together until March, 1946, go on to say this:

"During this period the Appellant and his father were treated as not ordinarily resident in the United Kingdom for Income Tax purposes. It was stated on behalf of the Respondents that they were so treated by Virtue of an extra-statutory wartime concession; this was not admitted by the Appellant."

Now, it is clear that the last sentence which I have read does not contain any finding of fact. The only finding of fact in the previous sentence is that

"the Appellant and his father were treated as not ordinarily resident in the United Kingdom".

But that does not preclude either the Special Commissioners or this Court from forming a view on the material to be found elsewhere in the Case as to whether or not in fact they were ordinarily resident in the United Kingdom for Income Tax purposes during the period from August, 1939, down to March, 1946.

The importance of approaching the matter by considering what happened between 1939 and 1946 is that what happens afterwards can be said, so far as the son is concerned, to be in continuity with what has gone before. It is true that in March, 1946, the Appellant's father went to live in Switzerland for reasons connected with his health, and also, as the Cafe finds,

"with the intention of establishing his permanent residence there."

Mr. Foster pressed upon me the argument that that was such a change in circumstances that I should have no regard to what had gone before but should start the investigation in the critical years, 1947-48 to 1951-52, without having in mind the stay of the father and son in this country up to March, 1946. I do not think it is right to do that. The Commissioners were entitled - and it is enough for me to say that the Commissioners were entitled if they thought fit - to take into account that earlier period, and, indeed, they say at the end that they have taken into account all the evidence before them. It may well be that they did take into account this earlier period, and during that earlier period the son was, at any rate during a part of it, at school, and by March of 1946 he was attending a preparatory school in England. It is clear beyond doubt that he stayed in England for the purpose of completing his training at that preparatory school with a view to going on, as he did go on, to continue his education at Harrow, where he remained, as the Case says, as far as concerns the ordinary school terms, until July, 1951.

This type of case does not appear to me like a case of domicile, where an infant's domicile will depend on what Steps are taken by his father, and if the father changes his domicile, the domicile of the infant will change. This is a question of residence, and quite clearly the father and the son can have different residences and, indeed, as the authorities show, one person in this case the son - could have two residences. But to my mind the Special Commissioners were amply justified in treating the period which this boy, the Appellant, spent at school in this country as a period during which he was "ordinarily resident" in this country. Certainly I can find no justification for any interference with their conclusion upon that point.

Mr. Foster sought to divide the period in question in two, and I think he brought the first period by stages down to the end of the Easter term at Harrow, which ended on 1st April, 1949. But however one divides the period, it appears to me that, if I am right on the view which I take as to the first period, the case is a fortiori as regards the later period. In paragraph 6 there will be found set out the periods which the Appellant spent abroad during the years of assessment in question, and there is a finding that after his father's death he spent This school holidays partly with Miss Symons, who had been his governess, at Walton, Surrey, and partly abroad. The further one analyses those periods the more difficult, it seems to me, is it to quarrel with the decision of the Special Commissioners that the Appellant must be regarded as having been ordinarily resident in this country.

The only period which calls for any special mention is the last year of assessment, namely, the year 1951-52. The Commissioners held, in the result, that the Appellant was ordinarily resident during that fiscal year. They approached the matter in this way. They say at the beginning of paragraph 9 that they

"considered that we should first decide whether the Appellant was resident in the United Kingdom in each of the years in question, and second, if he was so resident, whether his residence had the quality of ordinary residence."

When they come to the year 1951-52 they find as a fact that the Appellant was resident in the United Kingdom for that year. They give as their reasons, or part of their reasons, that he was There during that year for over 4½ months and that that was in continuation of what they found to be his residence for the previous four years. I do not myself see any ground for quarrelling with that conclusion as being erroneous in law. Then the Special Commissioners, considering the question of whether the Appellant was ordinarily resident in the United Kingdom for that year, applied the test which seems to me clearly to be the right test: was he here in the ordinary course of his life during his adolescence? That is really applying the test referred to by Rand, J., in Thomson v Minister of National Revenue [1], in the passage which I read earlier in this judgment.

- [1] [1946] S.C.R. 209, at p. 224.

It therefore comes down to this, that on the analysis which I have made of the material which was before the Special Commissioners, and bearing in mind the limitations upon this Court to interfere with conclusions of fact, and also the passages I have read from the speeches in the House of Lords in Lysaght v Commissioners of Inland Revenue [2], I can see no justification for interfering with the decision of the Special Commissioners. The appeal, therefore, must be dismissed.

- [2] 13 TC 511.

Sir Frank Soskice. - Would your Lordship say it should be dismissed with costs?

Wynn-Parry, J. - With costs, yes.

Sir Frank Soskice. - If your Lordship pleases.

Court of Appeal

The taxpayer having appealed against the above decision, the case came before the Court of Appeal (Lord Evershed, M.R., and Morris and Pearce, L.JJ.) on 16th, 17th and 22nd July, 1957, when judgment was given unanimously in favour of the Crown, with costs.

Mr. John Foster, (Q.C., and Mr. John Creese appeared as Counsel for the taxpayer, and Sir Frank Soskice, Q.C., Sir Reginald Hills and Mr. Alan Orr for the Crown.*37 TC 493 at 500*
Lord Evershed, M.R. -

I will ask Pearce, L.J., to deliver the first judgment.

Pearce, L.J. -

This is an appeal from a judgment of Wynn-Parry, J., upholding, on appeal by way of Case Stated, a decision of the Special Commissioners that the Appellant was "ordinarily resident" in England for the Years from 1947-48 to 1951-52 inclusive and was therefore not entitled to exemption under Section 46 of the Income Tax Act, 1918, from tax on the interest on certain British Government securities. The Appellant contends that, on the facts of this case, it is not possible properly to find that he was ordinarily resident in England during the years in question, and that therefore, as a matter of law, this Court should overrule the Commissioners' decision.

The Case Stated shows that the Appellant was born on 12th April, 1933, in Amsterdam, of Dutch parents. His nationality is Dutch and his domicile has never been English. His parents were divorced before 1939, and he was at all material times in the custody of his father. In 1939 he came with his father as a refugee to England. In March, 1946, the father went to live in Switzerland for health reasons, intending to make his home there permanently. There, after some months in a sanatorium, he moved to an hotel, and started to build himself a house. Before it was completed he died in Switzerland on 10th July, 1948, When the father went to live in Switzerland the Appellant was nearly 13 years old. He was attending a preparatory school in England. There he stayed until 1947, when he went to Harrow. He

spent his school holidays with his father in Switzerland until his father's death, and thence-forth partly with his former governess in England but mostly abroad. He remained at Harrow until July, 1951. On 17th August, 1951, he went abroad, and continued his education at a Swiss university. Thereafter he has not lived in England. During the material years, therefore, it was only as a schoolboy at Harrow that he lived in England.

Mr. Foster's main argument is this. Such residence (assuming, but not admitting, that it can properly be called residence at all) cannot constitute ordinary residence. It has not the quality of ordinary residence. It is not voluntary residence; and it is institutional. If one asked a schoolboy, Mr. Foster argues, where he lived, he would never say that he lived at his public school. Although a person may admittedly have more than one ordinary residence, his school would never be one of them. In order to succeed in this appeal, he must establish that such residence by a boy at a public school cannot constitute an ordinary residence.

In the case of Levene v Commissioners of Inland Revenue, 13 TC 486, Lord Cave, L.C., said this, at page 505:

"My Lords, the word 'reside' is a familiar English word and is defined in the Oxford English Dictionary as meaning 'to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place'. No doubt this definition must for present purposes be taken subject to any modification which may result from the terms of the Income Tax Act and Schedules; but, subject to that observation, it may be accepted as an accurate indication of the meaning of the word 'reside'. In most cases there is no difficulty in determining where a man has his settled or usual abode, and if that is ascertained he is not the less resident there because from time to time he leaves it for the purpose of business or pleasure."

He then deals with various cases which have no bearing on the one before us, and continues, at the bottom of page 506,

"It remains to be considered whether during the period in question the Appellant 'ordinarily resided' in the United Kingdom for the purposes of Section 46 of the Act, and I think that there was material upon which the Commissioners could answer this question in the affirmative. The suggestion
37 TC 493 at 501

that in order to determine whether a man ordinarily resides in this country you must count the days which he spends here and those which he spends elsewhere, and that it is only if in any year the former are more numerous than the latter that he can be held to be ordinarily resident here, appears to me to be without substance. The expression 'ordinary residence' is found in the Income Tax Act of 1806 and occurs again and again in the later Income Tax Acts, where it is contrasted with usual or occasional or temporary residence; and I think that it connotes residence in a place with some degree of continuity and apart from accidental or temporary absences."

In Lysaght v Commissioners of Inland Revenue, 13 TC 511, Lord Buckmaster said this, at page 534:

"It could not, I think, be denied that, even although the Respondent had his home in Ireland, his sojourn in this country might be so prolonged as to place his residence here beyond dispute, but none the less I understand the judgment of the Court of Appeal to mean this, that they regard the purpose of his visits sufficient to show that he could not be regarded as resident. They state that it was not of his own free choice but in obedience to the necessities of his position in elation to he company of John Lysaght, Ltd., that he was over here, from which it would appear that the element of choice is regarded by the Court of Appeal as a factor of great, if not of final, consequence in determining residence. In my opinion this reasoning is not sound. A man might well be compelled to reside here completely against his will the exigencies of business often forbid the choice of residence and though a man may make his home elsewhere and stay in this country only because business compels him, yet none the less, if the periods for which and the conditions under which he stays are such that they may be regarded as constituting residence, it is open to the Commissioners to find that in fact he does so reside, and If residence be once established 'ordinarily resident' means in my opinion no more than that the residence is not casual and uncertain but that the person held to reside does so in the ordinary course of his life."

Lord Buckmaster's remarks as to the exigencies of business seem equally applicable to the exigencies of education. Education is a large, necessary and normal ingredient in the lives of adolescent members of the community, just as work or business is in the lives of its adult members. During the years of youth education plays a definite and dominating part in a boy's ordinary life. In this case the school terms at Harrow dictated the main residential pattern of the boy's life. Education is too extensive and universal a phase to justify such descriptions as "unusual" or "extraordinary". It would be as erroneous to endow educational residence with some esoteric quality that must, as a matter of law, remove it from the category of residence, or ordinary residence, as it would be to do so in the case of business residence. The argument based on the institutional or compulsory nature of a boy's life at school is misleading. The compulsion is merely the will of his parents, who voluntarily send him to that school. It would be hazardous, and in my opinion irrelevant, to investigate whether adolescents are residing voluntarily where their lot is

cast and how far they approve of their parents' choice of a home or school. The Appellant's argument might lead to the unreal conclusion that a boy whose parents were in the Far East and who was therefore boarded with a tutor, or at an educational establishment where boys remain all the year round, would not reside anywhere at all. The educational and institutional nature of the residence are, of course, factors to be taken into account; but it would be wrong to hold that such residence cannot be ordinary residence.

In a passage from Lysaght's case, which the learned Judge cited, Lord Sumner said, at page 527:

"It is well settled that, when the Commissioners have thus ascertained the facts of the case and then have found the conclusion of fact which the facts prove, their decision is not open to review, provided (a) that they had before
37 TC 493 at 502

them evidence, from which such a conclusion could properly he drawn, and (b) that they did not misdirect themselves in law in any of the forms of legal error which amount to misdirection. My Lords, the word 'ordinarily' may be taken first. The Act on the one hand does not say 'usually' or 'most of the time' or 'exclusively' or 'principally', nor does it say on the other hand 'occasionally' or 'exceptionally' or now and then', though in various Sections it applies to 'the word 'resident', with a full sense of choice, adverbs like temporarily' and 'actually'. I think the converse to 'ordinarily' is 'extra-ordinarily', and that part of the regular order of a man's life, adopted voluntarily and for settled purposes, is not 'extraordinarily'."

Other apt passages from the opinions in that case were cited by the learned Judge, who then applied them to the facts of the case. In his view, the correct test is: Was the Appellant living in England in the ordinary course of his life during his adolescence? He decided that the Special Commissioners were entitled to find as they did. Mr. Foster complains that the learned Judge based an argument On the fact that the son's presence in England during the relevant years was in continuity with what happened between 1939 and 1946. No inference should, lie argues, be drawn from those years; or, if any inference be drawn, it should be an inference in his favour, since the Case contains nothing to guide one as to the quality of the Appellant's residence during those earlier years. But in my view the learned Judge drew no inference that he was not filly entitled to draw from the facts stated in the Case. He was entitled, as were the Commissioners, to look at the facts as a whole. The broad picture was this. The Appellant came to this country with his father as a refugee at the age of 6 years, and was educated at an English preparatory school. When he was 12 his father went abroad again but left his son here during the school terms to continue his education in England and go on to Harrow. On those facts and the other facts in the Case Stated the Commissioners clearly bad material on which they could find that the Appellant was ordinarily resident in England during his years at Harrow. It is impossible for us to interfere with that finding.

Mr. Foster had a subsidiary argument, that in respect of the year 1951-52 the Commissioners should not have found that he was ordinarily resident, since he was only residing here during the first 4½ months of that year and that therefore no tax should be payable on any interest received after the expiration of that period of 4½ months. But in making a decision on the fiscal year 1951-52 the Commissioners relied on the fact that the 4½ months' period was in continuation of the Appellant's residence for the previous years, and in my opinion they were entitled to find as they did. But Sir Frank Soskice, on behalf of the Crown, has very fairly said that, as an act of grace, they are prepared to abandon any claim to tax on interest paid after the Appellant finally left this country on 17th August, 1951.

For those reasons, I would dismiss the appeal.

Morris L.J. -

I entirely agree with the judgment that my Lord has just delivered. There is very little that I would wish to add.

It seems to me that the Special Commissioners were correct in their approach when they decided that first they should consider whether the Appellant was resident in the United Kingdom in each of the years in question and, in the second place, whether his residence had the quality of ordinary residence.

In regard to the meaning of "residence", we are guided by what Lord Sumner said in Lysaght v Commissioners of Inland Revenue, 13 TC 511,

37 TC 493 at 503

at page 529, when he said that the meaning "is its meaning in the speech of plain men". In she same case Lord Buckmaster, at pages 533-4, said,

"It may be true that the word 'reside' or 'residence' in other Acts may have special meanings, but in the Income Tax Acts it is, I think, used in its common sense and it is essentially a question of fact whether a man does or does not comply with its meaning."

I would consider that a boy who spent the greater part of the year at a public school was "resident" in the United Kingdom during such year. It was forcefully submitted by Mr. Foster that the Appellant was only here for a special and limited purpose. In considering questions of domicile, or in considering whether it is likely that when schooling is over a boy will or will not stay in this country and make it his home, it might be appropriate to regard his presence, or his continued presence, here as due to a special or limited purpose. I need say no more about that because that, in my judgment, is not the issue with which we are concerned. But during a period at school it seems to me that the purpose of being educated is neither special nor limited; it is the central purpose of the boy's career at that stage of his life. It is because it is desired to fulfil and achieve that purpose that the boy either stays here or comes here to reside for a period. It seems to me that residence here is of the essence of the plan arranged for the boy's upbringing. The scheme decided upon over the period of certain formative years of life was, in this case, that the boy should either stay here or come here in order to live and move and have his being in a public school during all the school terms. I should have thought, therefore, that residence here was not only a part of the scheme for his life during that stage of it but that residence here was the central and essential feature of the scheme.

Mr. Foster in his submission referred us to a passage from the speech of Lord Simonds in Edwards v Bairstow [1], [1956] A.C. 14, at page 29. Lord Simonds said:

- [1] 36 TC 207, at p. 224.
  - "... it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying that the court should take that course if it appears that the commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained,"

Mr. Foster's submission is that the view of the facts formed by the Special Commissioners is one that could not reasonably be entertained. I find myself unable to accept that submission or that view of the matter. In Edwards v Bairstow Lord Radcliffe said this, at page 36 [2]:

- [2] Ibid., at p. 229.
  - "If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination."

Again, I can find here nothing ex facie which is wrong, and I cannot feel that any person acting judicially and properly instructed as to the relevant law could not have come to the determination now under appeal. Indeed, I should have thought, speaking for myself, that the decision of the Special Commissioners in this case was the inevitable decision.

It seems to me that there was ample evidence on which the Special Commissioners could arrive at their conclusion of fact. Even if it could be said that there are mixed questions of fact and of law, I see no error in the

decision. That leaves, then, only the question as to whether the residence was ordinary residence. On the guidance given to us in the passages cited by my Lord from speeches in the Lysaght case [1], it seems to me that, in the language used by Lord Sumner at page 528, there was

- [1] 13 TC 511.
  - "evidence to support, and no rule of law to prevent"

a finding that the Appellant in this case was, in the years in question, ordinarily resident here. I therefore think that the appeal fails.

Lord Evershed, M.R. -

I am also of the same opinion.

Lord Radcliffe in Edwards v Bairstow [2], [1956] A.C. 14, at page 33, said;

- [2] 36 TC 207, at p. 227.
    - "I think that it is a question of law what meaning is to be given to the words of the Income Tax Act 'trade, manufacture, adventure or concern in the nature of trade' and for that matter what constitute 'profits or gains' arising from it. Here we have a statutory phrase involving a charge of tax, and it is for the courts to interpret its meaning, having regard to the context in which it occurs and to the principles which they bring to bear upon the meaning of income."

The same may no doubt be said of the phrase "ordinarily resident"; though those two words constitute an obviously simpler formula than that with which the House was concerned in Edwards v Bairstow and one which would be certainly commonly met in "the speech of plain men" and one less susceptible to argument: Moreover, the meaning of the words "ordinarily resident" has been stated in the passage to which my brother Pearce referred in the speech (for example) of Lord Buckmaster in the Lysaght case [3], where he said that the phrase means

- [3] 13 TC 511, at p. 535.
    - "no more than that the residence is not casual and uncertain but that the person held to reside does so in the ordinary course of his life."

That being so, the Appellant's case cannot, as it seems to me, be put higher than this: Could a tribunal - could the Special Commissioners in this case - applying themselves judicially to the task before them reasonably come to the conclusion to which they did come, that this boy was, during the relevant period, ordinarily resident in the United Kingdom? In my judgment, the proper answer to that question is in the affirmative.

I only add that the cases of Levene [4] and Lysaght and the passages from the speeches in those cases cited at the beginning of his judgment by Wynn-Parry, J., and by my brethren in this Court seem to show that, these two words "ordinarily resident" having the meaning which they have "in the speech of plain men", the Courts will regard the question Aye or no, is an individual "ordinarily resident" here, as pre-eminently one of degree and therefore of fact. I therefore agree that this appeal fails and should be dismissed.

- [4] 13 TC 486.

Sir Frank Soskice. - Will your Lordships say that the appeal should be dismissed with costs?

Lord Evershed, M.R. - Yes; and then it is no doubt recorded somewhere, for the comfort of Mr. Foster, that you have made a concession in regard to the last years?

Sir Frank Soskice. - Yes, my Lord, it either has been or will be.

Lord Evershed, M.R. - Very well. We need not trouble with that.

Sir Frank Soskice. - If your Lordship pleases.