JUDGMENT OF THE COURT (SECOND CHAMBER)
20 FEBRUARY 1975 [1]

Jeanne Airola
v Commission of the European Communities

Case 21/74

Summary

Officials — Expatriation allowance — Male and female officials — Comparable situation — Nationality imposed by law on a female official upon her marriage — Difference of treatment — Inadmissibility
(Staff Regulations, Annex VII, Article 4)

The concept of 'nationals' contained in Article 4 (a) of Annex VII of the Staff Regulations of officials must be interpreted in such a way as to avoid any unwarranted difference of treatment as between male and female officials who are, in fact, placed in comparable situations. It is, therefore, necessary to exclude nationality imposed by law on a female official upon her marriage with a national of another State and which she was unable to renounce.

In Case 21/74

JEANNE AIROLA, official of the Commission of the European Communities, represented by Marcel Grégoire, of the Brussels Bar, with address for service in Luxembourg at the chambers of Tony Biever, 83 bd. Grande-Duchesse Charlotte,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Joseph Griesmar, with address for service at the office of Pierre Lamoureux,

defendant,

in the matter of

1 — Language of the Case: French.

principally, payment of expatriation allowance to the applicant with effect from 1 June 1973,

THE COURT (Second Chamber)

composed of: A. J. Mackenzie Stuart, President of Chamber (Rapporteur), H. Kutscher and M. Sørensen, Judges,

Advocate-General: A. Trabucchi
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts and the arguments developed by the parties in the course of the written procedure may be summarized as follows:

I — Facts and procedure

On 1 January 1964, the applicant, who was born in Belgium in 1933, became a student trainee at the Joint Research Centre at Ispra.

On 26 April 1965 she married an Italian. Under Article 10 of Italian Law No 555 of 13 June 1912, 'a married woman may not be of different nationality from her husband ... an alien who becomes the wife of an Italian citizen acquires Italian nationality'.

On 28 April 1965 she made a declaration under Article 22 of *the Belgian law codifying the law on acquisition, loss and reacquisition of nationality* that she wished to remain Belgian.

Owing to this declaration the applicant has, in accordance with Belgian law, retained her Belgian nationality which, under Article 18 (2) of the said law would otherwise have been lost.

On completion of her period of training, which had been extended, she entered the service as an official on 23 November 1966 and was simultaneously posted to the JRC at Ispra, but she received no expatriation allowance.

On 28 July 1972, following the judgments of the Court in *Sabattini v European Parliament* and *Bauduin v Commission* (Cases 20/71 and 32/71, Rec. 1972, pp. 345 and 363), the applicant submitted a request to be granted the expatriation allowance.

On 31 August 1972, the Head of the Administration and Personnel Division wrote to the applicant stating, amongst other things, that 'at the present time' he was not in possession of all the information relating to the judgments of the Court and that he had asked the 'authorities at the Centre' to report on the contents of the applicant's file. They had been asked to inform him, in due

course, of the advice they would be tendering to the appointing authority when it took its decision on the applicant's request.

On 4 September 1972 the applicant again requested the Head of the Personnel Department to be good enough to make the necessary arrangements for her to be paid the expatriation allowance. She also asked whether failure on his part to reply to the request was to be taken as an implied decision rejecting it.

On 22 September 1972 the Head of the Administration and Personnel Division replied as follows:

'Although this is merely an interim reply, I believe it may be regarded as sufficient to make your question unnecessary'.

On 19 December 1972 the applicant addressed a complaint to the appointing authority requesting to be paid the expatriation allowance with effect from 7 June 1972, the date of the abovementioned decision of the Court of Justice.

On 22 March 1973, as the result of an error on the part of the Commission, it was decided to pay the applicant an expatriation allowance covering the period from 1 July 1972 to 31 May 1973 and amounting to BF 75,647.

On 23 May 1973 the Head of the Administration and Personnel Division wrote a note to the applicant in which the following passage appeared:

'As you yourself are aware, the Commission of the European Communities is not yet in a position to announce its decision on the complaint which you submitted on 19 August 1972 under Article 90 of the Staff Regulations with a view to securing the grant of the aforementioned allowance. Incidentally, I have today been in touch with those in the central administration responsible for considering your complaint and I have been informed that this consideration has not yet been completed and that no definite decision has yet been taken.

Under the circumstances, there is obviously no justification for the payment which you have just received and which, on investigation, appears to have been caused by erroneous information inadvertently supplied by one of my colleagues to the Salaries, Pensions and Allowances Division at the Centre.

In the hope that you will accept our apologies, I have to inform you that I have given immediate instructions to the Division mentioned to stop payment of the allowance concerned. Meanwhile action on your case has been held over until the Commission has ruled on your complaint.'

On 24 May 1973 the applicant addressed a request to the appointing authority under Article 90 of the Staff Regulations to be paid the expatriation allowance.

On 16 August 1973 the applicant submitted a complaint to the appointing authority against the decision of 23 May 1973 cancelling the expatriation allowance and its subsequent non-payment.

On 10 December 1973 the applicant lodged a fresh complaint against the implied decision rejecting her request of 24 May 1973 to be granted the expatriation allowance.

On 13 March 1974 the applicant lodged the present appeal.

The written procedure followed the normal course. Having heard the report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court (Second Chamber) decided to open the oral procedure without any preparatory inquiry.

II — Submissions of the parties

In her application, the applicant claims that the Court should:

(1) Order the defendant to pay the applicant the expatriation allowance

with effect from 1 June 1973, as the payment made to the applicant under this head for the period 1 July 1972 to 31 May 1973 is the property of the applicant;

(2) As necessary, annul the decision of the defendant communicated on 23 May 1973 cancelling the decision communicated on 18 May 1973 to grant the applicant the privilege of the expatriation allowance with effect from 1 July 1972 or, in the alternative, declare that the defendant is acting unlawfully in not deciding to grant the applicant the expatriation allowance with effect from 1 July 1972 and, accordingly, order the defendant so to decide;

(3) As necessary, annul the implied decision rejecting the applicant's complaint of 16 August 1973 and, as necessary, any other decision on the part of the defendant which infringes the applicant's recognized right to the expatriation allowance;

(4) Order the defendant to pay the legal interest on the arrears of expatriation allowance calculated from the date when each instalment fell due to the date of actual payment and to pay the costs of the action.

In its reply the Commission contends that the Court should:

(1) Dismiss the appeal as without foundation;

(2) Order the applicant to pay the costs.

III — Submissions and arguments of the parties

The *applicant* submits that 'the Commission acted contrary to Article 1 (g) of Regulation (ECSC, EEC, EURATOM) No 558/73 of the Council of 26 February 1973 in that it abrogated paragraph 3 of Article 4 of Annex VII of the Staff Regulations, with effect from 1 July 1972; that it infringed Article 4 of Annex VII of the Staff Regulations as amended by that Regulation; and that it acted *ultra vires*'.

The applicant believes that she possesses all the qualifications for grant of the expatriation allowance as laid down in Article 4 (1) (a) of Annex VII of the Staff Regulations and that, therefore, the expatriation allowance could have been withheld from her up to 1 July 1972 only by virtue of the provision under Article 4 (3) of Annex VII, from which it must follow that she was entitled to the expatriation allowance when that provision was abrogated.

In its statement of defence, the *Commission* denies that when she entered the service the applicant possessed the general qualifications for grant of the expatriation allowance as laid down under Article 4 (1) of Annex VII.

As regards officials who are not and never have been nationals of the State to which they have been posted, Article 4 (1) (a) provides that the allowance shall be paid to officials who during the five years ending six months before they entered the service did not habitually reside or carry on their main occupation within the European territory of that State.

As regards officials who are or have been nationals of the State in whose territory the place where they are employed is situated, Article 4 (1) (b) provides that 'an allowance shall be paid if during the ten years ending at the date of their entering the service they habitually resided outside the territory of that State'.

The applicant cannot reasonably claim that she is not and never has been a national of the State in whose territory the place where she is employed is situated. Her rights must be determined in the light of the conditions provided for under Article 4 (1) (b).

In the Commission's view, it cannot be said that she has habitually resided

outside Italy in view of the fact that she has lived there since 1 January 1964. In the ten-year period referred to, from 22 November 1956 to 22 November 1966, she lived 7 years, 1 month and 8 days outside Italy and 2 years, 10 months and 22 days in Italy. Though she had lived for most of the time outside Italy, the relative length of residence in Italy appears to make it impossible to regard Mrs Airola's residence as having been outside Italy during those ten years. In the Commission's view, the applicant does not appear to satisfy the conditions laid down for payment of the expatriation allowance under Article 4 (1) (b) of Annex VII of the Staff Regulations.

As Article 4 (1) contains no reference to differentiation or exception based on the way in which nationality has been acquired, there is no reason for treating nationality acquired by marriage differently from nationality acquired by parentage or place of birth.

In support of this contention, the Commission quotes the opinion of Mr Advocate-General Mayras in Case 33/72 *Gunnella v Commission* (Rec. 1973, p. 475).

The Commission nevertheless recognizes that as women alone may acquire second nationality through marriage and alone may thereby suffer possible loss in terms of their statutory entitlement to the expatriation allowance, there is a *de facto* discrimination between male and female officials.

The marriage of a female official to a man who is the subject of the State in which she is based does not in itself in any way constitute a development putting an end to or alleviating the state of expatriation which is the *raison d'être* of the concession with which we are dealing. Whether unmarried, or married to a subject of the State in which he is based, the male official, not being a subject of that State, is always recognized as in principle entitled to the expatriation allowance, provided that, whether married or unmarried, he satisfies the same conditions, which are the most favourable, in Article 4 (1) (a). Although this does not apply as far as the female official is concerned and although in this connexion it can be said that there is a *de facto* discrimination or indirect discrimination, the reason for it is to be found not in the fact that she has married but in the simultaneous acquistion by her of a second nationality making her a subject of the State on whose territory she is based. The acquisition of a second nationality is not however the result of the Staff Regulations, which did not inject into the situation any element of discrimination which, as such, is open to criticism.

In her reply, the applicant denies that Article 4 (1) (b) of Annex VII applies to her.

As the applicant had Belgian nationality when she entered the service, Italian nationality was accordingly a second nationality acquired not only by the fact of her marriage but also by irrevocable operation of law, notwithstanding the wish expressed and implemented when she married to retain Belgian nationality.

It is the Staff Regulations which introduced a condition which, owing to the effect of the national laws to which it relates, discriminates between officials on grounds of sex and which, in certain cases, such as nationality acquired through marriage, has nothing to do with the state of expatriation.

The applicant believes that, as used in this provision and in Article 4 (1) (a) which is associated with it, the word 'nationality' must be understood only in the limited sense of nationality of origin, i.e. to have a meaning into which discrimination on grounds of sex cannot enter and which can be regarded as being associated with the state of expatriation.

In support of this contention, the applicant deploys three arguments:

(1) The meaning of a general term must, notwithstanding its generality, be

limited to what is required by legality and above all, in this case, the overriding principle of the right of officials to be treated alike. Words which, originally, had a wide meaning should, as a result of changes in prevailing attitudes on the subject concerned, be given a narrower meaning which does not permit discrimination between men and women.

(2) The law should go no further than its purpose requires. If nationality acquired by marriage has no relevance to the state of expatriation, the word nationality in Article 4 (1) (b) should not and cannot be taken to refer to anything other than nationality of origin and not nationality acquired by marriage.

(3) With two interpretations to choose from, one of which is consistent with legality and the other is not, the first must prevail. The applicant maintains that, in view of this, the Court is not bound by words whose meaning is clear and that therefore it has the power and the duty to circumscribe their meaning in accordance with the requirements of legality and its underlying purpose.

Alternatively the applicant maintains that in a case of dual nationality, the Commission should make a choice of nationality by applying the doctrine of 'effective nationality'.

In this case, it is beyond argument (according to the applicant) that her effective nationality is Belgian, not only because of her nationality of origin and the fact that her birthplace is in Belgium but also because at the time of her marriage she made an express declaration retaining her Belgian nationality. Consequently Belgian nationality is the only nationality of the applicant to be taken into account by the defendant.

Again in the alternative, if the Court were to conclude that the applicant's position was governed by Article 4 (1) (b) of Annex VII, it would have to decide whether she did not fulfil the condition laid down therein of having habitually resided outside Italy during the ten years ending at the date of entering the service.

During the period concerned, not only was the length of time which she lived outside Italy much longer than that in Italy — more than two-thirds of the total time — but it was closer to the meaning of living in the sense that, while living in Belgium, she obviously did not return to Italy whereas, when living in Italy, she frequently returned to Belgium where, moreover, she married.

The *defendant's* answer is that, by reason of the adoption of the test of nationality, there may in fact be many instances of *de facto* discrimination, but this does not amount to a *de jure* discrimination introduced by the Staff Regulations.

When the Staff Regulations were drawn up, nationality, however acquired, was regarded as part of belonging to a given State and the intention was, consequently, that a subject of the country on whose territory he is employed should not, as a general rule, receive the expatriation allowance. As those who have to interpret the Regulations did not wish to introduce any exception, distinction or variation when applying the general wording used by the legislators, they have no power to make a distinction or a variation where there is none in the enactment and in this way to limit application of an enactment couched in general terms.

In fact, the applicant is suggesting that the Court assess the legality of Article 4 (1), the provision which the Commission is said to have infringed. The provision has not been the subject of an objection on grounds of illegality within the meaning of Article 184 of the EEC Treaty; in any case, an objection on that ground must be regarded as a fresh issue which would be inadmissible under Article 42 (2) of the Rules of Procedure.

The Commission takes the view that the concept of 'effective nationality' has no relevance in the interpretation of Article 4 of Annex VII (Mr Advocate-General Mayras in *Gunnella v Commission,* Case 33/72, [1973] ECR 486).

Moreover, under international law, the determination of effective nationality is a question of fact which is generally settled on the basis of considerations such as the habitual residence of the person concerned, his place of business, and the language he speaks, including the express or implied preference he has shown in this respect.

In the event that the concept of effective nationality might be taken into account in applying the Staff Regulations, the defendant would deny that Belgian nationality is at this time the effective nationality of the applicant.

Although the applicant has lived for the most part outside Italy during the ten-year period referred to (about 7 years) this does not mean that she has habitually resided outside Italy for ten years. The Staff Regulations lay as much stress on the length of residence as on its habitual character. From this point of view there can be no doubt that from November 1956 to November 1966 the applicant did not live for ten years outside Italy.

IV — Oral procedure

The applicant, represented by Mr Lebrun, and the Commission, represented by Mr Griesmar, presented oral arguments at the hearing on 14 November 1974.

The Advocate-General delivered his opinion at the same hearing.

Law

1 The applicant seeks annulment of the decision of 23 May 1973 by which the Commission withdrew the decision granting her the expatriation allowance provided for under the Staff Regulations of Officials.

2 She is also seeking an order that the Commission shall pay her the expatriation allowance with effect from 1 June 1973.

3 She contends that the condition laid down in Article 4 (a) of Annex VII of the Staff Regulations, whereby an expatriation allowance shall be paid to officials who, in the words of the Article, 'are not and have never been nationals of the State in whose European territory the place where they are employed is situated' does not apply if, owing to circumstances outside her control and solely as the result of national laws, the individual concerned acquires dual nationality.

4 In the case of a female official who is granted the nationality of her husband as a result of her marriage with a national of another State, the application of that condition results in discrimination, since under no national legislation does the male official acquire the nationality of his wife.

5 On the question of nationality, the provisions of national legislations are not uniform; some laws, particularly those of recent date, provide that a foreign wife does not automatically acquire the nationality of her husband, whereas, under other legislations, it is still provided that, as was once the common rule, the nationality of a married woman depends upon that of her husband.

6 In accordance with the general pattern of Article 4 of Annex VII this provision adopts the official's habitual residence before he entered the service as the paramount consideration in determining entitlement to an expatriation allowance.

7 The official's nationality is regarded as being only a subsidiary consideration, i.e. as serving to define the effect of the length of such residence outside the territory in which the place where he is employed is situated.

8 The object of the expatriation allowance is to compensate officials for the extra expense and inconvenience of taking up employment with the Communities and being thereby obliged to change their residence.

9 Though 'expatriation' is a subjective state conditioned by the official's assimilation into new surroundings, the Staff Regulations of Officials cannot treat officials differently in this respect according to whether they are of the male or of the female sex since, in either case, payment of the expatriation allowance must be determined by considerations which are uniform and disregard the difference in sex.

10 The concept of 'nationals' contained in Article 4 (a) must therefore be interpreted in such a way as to avoid any unwarranted difference of treatment as between male and female officials who are, in fact, placed in comparable situations.

11 Such unwarranted difference of treatment between female officials and officials of the male sex would result from an interpretation of the concept of 'nationals' referred to above as also embracing the nationality which was imposed by law on an official of the female sex by virtue of her marriage, and which she was unable to renounce.

12 It is therefore necessary to define the concept of an official's present or previous nationality under Article 4 (a) of Annex VII as excluding nationality imposed by law on a female official upon her marriage with a national of another State, when she has no possibility of renouncing it.

13 In the present case the applicant, on her marriage, had the nationality of her husband conferred on her without the right to renounce it but by an express declaration she retained her Belgian nationality of origin.

14 Consequently, in applying the provision in question, the applicant's Italian nationality has not to be taken into account.

15 The applicant, accordingly, fulfils the condition of Article 4 (a) of Annex VII of the Staff Regulations.

16 The decision of 23 May 1973 by which the Commission withdrew its original decision to pay the applicant the expatriation allowance provided for by the Staff Regulations of Officials must, therefore, be annulled.

Application for legal interest

17 In conclusion the applicant applies for legal interest on the arrears of expatriation allowance calculated from the date when each became due until the date of actual payment.

18 In the course of the proceedings the applicant has made no attempt to justify this request.

19 As the defendant interpreted the provision in question erroneously but in good faith, it should not be called upon to pay interest.

Costs

20 Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

21 As the defendant has failed on the substance of the case, it must be ordered to pay the whole of the costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Annuls the decision of 23 May 1973 in which the Commission withdrew its original decision granting an expatriation allowance to the applicant;**
2. **Orders the defendant to pay the expatriation allowance to the applicant with effect from 1 June 1973;**
3. **Dismisses the application for legal interest;**
4. **Orders the defendant to pay the whole of the costs of the action.**

Mackenzie Stuart Kutscher Sørensen

Delivered in open court in Luxembourg on 20 February 1975.

A. Van Houtte
Registrar

A. J. Mackenzie Stuart
President of the Second Chamber