versions of Article 5(5) of Annex VII to the Staff Regulations, as is particularly clear from the English and Spanish versions of that provision.

It is therefore not possible to argue that in the German version the expression 'Dienstantritt' can be understood as covering both the taking up of new duties and entering the service of the Communities and that therefore the taking up of new duties giving rise to the payment of the installation allowance can constitute the point from which the period of two years referred to in Article 5(5) — during which the fact that an official voluntarily leaves the service of the Communities will cause him to have to refund all or part of the installation allowance — begins to run.

2. Since paragraphs 1 and 2 of Article 5 of Annex VII to the Staff Regulations draw no distinction between the two eventualities in which the installation allowance is paid, namely the official's first entering the service of the Communities and his being transferred to a new place of employment, the obligation provided for in Article 5(5) for part of the installation allowance to be refunded in proportion to the portion of the two-year period which is unexpired when the person concerned voluntarily leaves the service of the Communities applies without distinction to each of those eventualities. It follows that, where it is appropriate to apply Article 5(5), the starting point for the period laid down in that provision is the same in each of those eventualities, namely the date when the official entered the service of the Communities.

3. Once it is established that the assignment of an official to a new place of employment took place solely in the interest of the service, the Community institution cannot argue that an official who voluntarily left the service of the Communities only 14 months after settling at his new place of employment is entitled to only part of the installation allowance on the ground that he did not satisfy the condition of settling for an indeterminate but substantial period of time.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
4 July 1990 *

In Case T-42/89 OPPO,

European Parliament, represented by Jorge Campinos, jurisconsulte, and Manfred Peter, Head of Division, acting as Agents, with an address for service in Luxembourg at the general secretariat of the European Parliament, Kirchberg,

applicant,

* Language of the case: French.

v

Wolfdieter Graf Yorck von Wartenburg, a former temporary official with the Group of the European People's Party in the European Parliament, residing in Brussels and represented by Victor Elvinger, of the Luxembourg Bar, with an address for service in Luxembourg at the latter's chambers, 4 rue Tony Neuman,

defendant,

APPLICATION to set aside the judgment of the Court of First Instance given by default on 30 January 1990 in Case T-42/89,

THE COURT OF FIRST INSTANCE (Third Chamber)

composed of: A. Saggio, President of Chamber, C. Yeraris and K. Lenaerts, Judges,

Registrar: H. Jung

having regard to the written procedure and further to the hearing on 21 June 1990,

gives the following

Judgment

Facts and Procedure

1 By application received at the Registry of the Court of First Instance on 28 February 1990 the Parliament asked for the judgment of the Court of First Instance given by default on 30 January 1990 in Case T-42/89 to be set aside pursuant to Article 94(1) and (2) of the Rules of Procedure of the Court of Justice, which is applicable *mutatis mutandis* to proceedings before the Court of First Instance by virtue of the third paragraph of Article 11 of the Council Decision of 24 October 1988 establishing the Court of First Instance of the European Communities.

2 In a document lodged at the Registry of the Court of First Instance on 9 May 1990 the defendant asked the Court of First Instance to declare the application to set aside the judgment by default inadmissible, or, failing that, to confirm the judgment of 30 January 1990.

Conclusions of the parties

3 The Parliament claims that the Court of First Instance should:

' (i) reconsider the judgment of 30 January 1990 in the light of the foregoing observations (set out in its application), and

(ii) order Wolfdieter Graf Yorck von Wartenburg to refund part of the installation allowance (pursuant to Article 5(5) of Annex VII to the Staff Regulations)'.

Mr Yorck von Wartenburg contends that the Court of First Instance should:

' (i) declare the application to set aside the judgment by default inadmissible, or, failing that,

(ii) confirm the judgment of 30 January 1990;

(iii) accordingly, annul the decision of the Parliament refusing to grant the applicant (the defendant in the present proceedings) the installation allowance amounting to two months' basic salary;

(iv) order the Parliament to pay the applicant (the defendant in the present proceedings) the installation allowance provided for in Article 5 of Annex VII to the Staff Regulations amounting to two months' basic salary;

(v) take note that Wolfdieter Graf Yorck von Wartenburg received the sum in question, namely BFR 412 000, on 7 April 1990, that is to say, after the judgment of 30 January 1990;

(vi) order the Parliament to pay the costs'.

Admissibility

4 In his defence the defendant claimed that the application to set aside the judgment in default was inadmissible, but at the hearing he withdrew that submission.

5 The Court of First Instance finds that the application to set aside the judgment in default was lodged within one month of the date of service of the judgment in accordance with Article 94(4) of the Rules of Procedure. It is therefore admissible.

Substance

6 In the first place, the Parliament objects that the contested judgment annulled a measure of the Parliament which no longer existed and no longer had any effect, namely the decision of 29 February 1988, which was replaced by a fresh decision contained in the letter of 17 November 1988.

7 Mr Yorck von Wartenburg contests that view. He considers that the decision of 29 February 1988 was not rendered nugatory by a proposal for a settlement which was put forward when the proceedings before the Court had already been commenced. He adds that so long as no settlement has been reached the proceedings continue and a party cannot unilaterally change their subject-matter or their nature.

8 In that respect, it must to be borne in mind that the subject-matter of the proceedings was the Parliament's refusal to pay the defendant the installation allowance provided for in Article 5 of Annex VII to the Staff Regulations amounting to two months' basic salary and it was the decision to that effect which was annulled by paragraph 1 of the operative part of the judgment.

9 It appears from examination of the letter of 17 November 1988, and in particular from the fact that it bears a date subsequent to the bringing of the action before the Court, from the wording of its subject-matter and from the offer made therein

to bear the costs of the action, that it simply contains a proposal made to Mr Yorck von Wartenburg. Since it did not give him satisfaction the letter could not constitute a withdrawal of the decision annulled by the contested judgment and therefore did not cause the proceedings no longer to have any subject-matter.

10 Secondly, the Parliament observes that the judgment of 30 January 1990 is based on the consideration that the period of two years referred to in Article 5(5) of Annex VII to the Staff Regulations — during which the fact that an official voluntarily leaves the service of the Communities will cause him to have to refund the whole or part of the installation allowance — must be calculated in all cases from the date of the official's entering the service of the Communities, whereas the Court of First Instance recognized that that view conflicts with the French, Greek and Portuguese versions of the provision at issue. In that connection the Parliament refers to paragraph 16 of the judgment.

11 It must be held that the alleged inconsistency in the judgment is based on a misunderstanding of it. It was not held that Mr Yorck von Wartenburg's view conflicted with the French, Greek and Portuguese versions of Article 5(5) of Annex VII to the Staff Regulations: the judgment simply stated that those versions 'could leave room for the interpretation proposed by the Parliament' (paragraph 16 of the judgment). Although those versions could leave room for the interpretation proposed by the Parliament, they equally leave room for the interpretation adopted in the judgment (paragraphs 16 and 17 of the judgment).

12 Thirdly, the Parliament observed at the hearing that in the German version of the provision at issue the term 'Dienstantritt' could equally be understood as referring to the taking up of new duties or to entering the service of the Communities and that that was doubtless also the case of the versions in the other Germanic languages. It inferred therefrom that the time from which the period of two years referred to in Article 5(5) of Annex VII to the Staff Regulations began to run might, according to the German version, be the time at which new duties giving rise to the payment of the installation allowance were taken up.

13 It must be observed that, even if, considered in isolation, the term 'Dienstantritt' were to leave room for the Parliament's interpretation, in the context of Article

5(5) of Annex VII to the Staff Regulations it can only mean entering the service of the Communities. Article 71 of the Staff Regulations, the relevance of which was stressed by the Parliament in its application to set aside the contested judgment, places on the same footing 'taking up appointment' ('Dienstantritt'/'entrée en fonctions') and transfer, which is the taking up of a fresh appointment, possibly to a new place of employment. The juxtaposition of the expressions 'taking up appointment' ('Dienstantritt'/'entrée en fonctions') and 'transfer' in Article 71 of the Staff Regulations shows that the first expression can in no event encompass the second, and refers solely to entering the service of the Communities. It follows that the expression 'entering the service' ('Dienstantritt'/'entrée en fonctions') necessarily has that same meaning in all the language versions of Article 5(5) of Annex VII to the Staff Regulations, as is particularly clear from the English and Spanish versions of that provision ('the service of the Communities within two years of entering it'; 'el servicio de las Comunidades antes de dos años desde el día de su ingreso al servicio de éstas').

14 Fourthly, the Parliament argues from the structure of Article 5 of Annex VII to the Staff Regulations: it points out that Article 5(1) covers payment of the installation allowance upon the official's first entering the service and Article 5(2) payment of the installation allowance in the event of the official's being transferred to a new place of employment and infers therefrom that, since paragraph 5 applies to each of those distinct eventualities, the point from which the two-year period is to be calculated is bound to be different in the two cases.

15 It must be held that the obligation provided for in Article 5(5) for a pro rata refund to be made of the allowance applies without distinction to each of the events in which the installation allowance is paid, since the provision draws no distinction between them. It follows that, where it is appropriate to apply Article 5(5) of Annex VII to the Staff Regulations, the period laid down in that provision must be reckoned from the same starting point in each of those eventualities, that is to say, from the date when the official entered the service of the Communities.

16 Fifthly, the Parliament maintains that only established officials qualify for the installation allowance. It argues from this that if the right to the installation allowance arises when the official is established and not when he enters the service

of the Communities, likewise the period referred to in Article 5(5) of Annex VII to the Staff Regulations must begin to run as from the date when the official was established or took up appointment at his new place of employment.

17 It appears from paragraphs 1 to 4 of Article 5 of Annex VII to the Staff Regulations that any official, whether he be on probation or established, who is obliged to change his place of residence in order to comply with Article 20 of the Staff Regulations, is entitled to the installation allowance. Although the obligation to refund the allowance which is laid down in Article 5(5) is limited to established — as opposed to probationary — officials, that distinction has no bearing in this case in so far as Mr Yorck von Wartenburg is a former temporary official, to whom the provisions of Article 5 apply by virtue of Articles 22 and 24 of the Conditions of Employment of other Servants of the European Communities, and therefore the question of establishment cannot arise in his case. It follows that only his entry into the service of the Communities is relevant for the purposes of assessing, in the case of a posting to a new place of employment, the two-year period referred to in Article 5(5) of Annex VII to the Staff Regulations.

18 Sixthly, the Parliament maintains that its interpretation of Article 5(5) of Annex VII to the Staff Regulations is most consonant with the *ratio legis* of that provision. In that regard, the Parliament referred at the hearing to the judgment in *Verhaaf* v *Commission*, in which the Court of Justice held that 'the specific and characteristic purpose of an installation allowance is to enable an official to bear, in addition to removal expenses, the inevitable expenses incurred through integrating in new surroundings for an indeterminate but substantial period of time. With this in mind Article 5(5) provides that an official who has received an installation allowance must refund part of the allowance if he voluntarily leaves the service of the Communities within two years' (judgment in Case 140/77 *Verhaaf* v *Commission* [1978] ECR 2117, paragraphs 18 and 19). The Parliament infers therefrom that Mr Yorck von Wartenburg is entitled to only part of the installation allowance in so far as he did not settle 'for an indeterminate but substantial period of time', since he left the service of the Communities only 14 months after settling at his new place of employment.

19 In that respect it must be borne in mind that according to Article 7 of the Staff Regulations assignment to a post takes place solely in the interest of the service (paragraph 20 of the contested judgment).

20 The scope of the judgment of the Court of Justice in *Verhaaf* v *Commission* must be restricted to the facts in the case with which it was concerned. The Court of Justice stated that 'the applicant, who at his own request was transferred twice during a relatively short time in special circumstances which arose as a result of family difficulties, cannot contest the validity of the decision of the Commission which considered that under the principles of the proper management of public funds he cannot be granted a second installation allowance considerably in excess of the expenses which he actually incurred' (paragraph 20). The instant case differs from the facts of *Verhaaf* v *Commission* precisely because the Parliament's representative admitted at the hearing that Mr Yorck von Wartenburg's transfer did in fact take place solely in the interest of the service. Consequently, the defendant's situation is definitely on a par with the situation described in paragraph 19 of the contested judgment.

21 Seventhly, the Parliament maintains that Mr Yorck von Wartenburg conceded, in his originating application, the Parliament's right to be refunded part of the allowance in question.

22 It must be held that, although Mr Yorck von Wartenburg has never contested the principle of the possibility of a refund as provided for in Article 5(5) of Annex VII to the Staff Regulations, he has always denied that the conditions for applying that provision were satisfied in his case.

23 It follows from all the above considerations that the application to set aside the judgment of the Court of First Instance of 30 January 1990 in Case T-42/89 must be dismissed.

Costs

24 Under Article 69(2) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. Since the applicant has been unsuccessful in its application to set aside the contested judgment, it must be ordered to pay the costs of these proceedings.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

(1) Dismisses the application;

(2) Orders the Parliament to pay the costs of these proceedings.

Saggio Yeraris Lenaerts

Delivered in open court in Luxembourg on 4 July 1990.

H. Jung
Registrar

A. Saggio
President of the Third Chamber