JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
1 October 1992 *

In Case T-7/91,

Sibylle Schavoir, an official of the Council of the European Communities, residing at Ottignies-Louvain-la-Neuve (Belgium), represented by Jacques Buekenhoudt, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Patrick Birden, 5 Rue de la Reine,

applicant,

v

Council of the European Communities, represented by Rüdiger Bandilla, Director in the Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Xavier Herlin, Deputy Manager of the Legal Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

APPLICATION for the annulment of the Council Decision of 5 November 1990 refusing to grant the applicant an expatriation allowance,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of: B. Vesterdorf, President, A. Saggio and J. Biancarelli, Judges, Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 1 July 1992,

gives the following

* Language of the case: French.

Judgment

The facts

1 The applicant, a category C official, entered the service of the Council on 16 April 1982. She possesses both German and Belgian nationality, the latter through marriage to a Belgian citizen.

2 When she took up her post she was not granted the expatriation allowance provided for under Article 4 of Annex VII to the Staff Regulations of Officials of the European Communities, as is apparent from a memorandum sent by the Personnel Division to the 'Salaries and Allowances' Division on 20 April 1982.

3 On 9 October 1989, the applicant wrote to the Director of the Personnel and Administration Directorate of the Council, asking him to consider her case because the more junior officials handling the matter had not accepted her point of view that she fulfilled the eligibility requirements for that allowance.

4 In a letter dated 5 February 1990, the Director of the Personnel and Administration Directorate informed the applicant that 'despite an initial presumption that you might be entitled to the expatriation allowance, subsequent discussions within the Personnel Directorate and with other institutions have led me to the conclusion that I am not in a position at present to take a decision either on your request or on other cases now being assessed'. After noting that he had decided to submit the dossier to the Legal Service of the Council for its opinion, the Director concluded his letter in the following terms: 'I hope to receive the opinion of the Legal Service in a few weeks and therefore ask you to be patient for a little while longer until a definitive reply can be given.'

On 6 February 1990, the applicant sent the following note to the Legal Service: 'in his letter of 5 February 1990, Mr H. (the Director of the Personnel and Administration Directorate) informed me, in response to my letter of 9 October 1989, that he had decided to submit the matter to the Legal Service for its opinion. In fact, you have been in possession of my dossier for a number of years already and I have yet to receive a reply (see also the final paragraph of my letter of 9 October 1989 to Mr H.) For your information, please find enclosed some further documents concerning my case ...'.

6 On 27 April 1990, the Council rejected the applicant's request, citing as grounds for its decision considerations arising from a detailed examination of the issues raised. On 8 June 1990, the applicant lodged a complaint against that note in accordance with Article 90 of the Staff Regulations. This complaint was rejected by the defendant, by letter dated 5 November 1990, in the following terms: 'I have studied your letter very attentively. Given that at the time you took up your post you possessed not only German nationality but also Belgian nationality, entitlement to the expatriation allowance is in your case subject to the conditions set out in Article 4(1)(b) of Annex VII to the Staff Regulations. It is on the basis of those provisions that the expatriation allowance is granted .... However, bearing in mind that you have been registered since 15 May 1970 in the population registers of Ganshoren and Brussels, on the one hand, and that you have been working in Brussels since 1 July 1980, on the other, I find that you were resident outside Belgium for a period of less than ten years ending on 16 April 1982, the date you took up your post (see, the judgment of the Court of Justice of 17 February 1976 in Case 42/75 *Delveaux* [1976] ECR 167). Accordingly, I can only confirm the correctness of the decision — taken when you took up your post in 1982 — not to grant you an expatriation allowance.'

Procedure

7 In those circumstances the applicant submitted this application on 1 February 1991.

8 By a separate document lodged at the Court Registry on 25 March 1991, the Council raised an objection of inadmissibility, based on failure to observe the time-limits for completing the pre-litigation procedure as set out in Article 90 of the Staff Reg-

ulations. By order of 22 July 1991, the Court decided to reserve its decision on that objection for the final judgment.

9 The defendant did not submit its defence within the time-limit. At the request of the Council, and after inviting the applicant to submit its observations, the Court, by order of 7 October 1991, decided to re-open the written procedure.

10 The written procedure then followed the normal course and was completed on 19 March 1992.

11 By letter dated 9 April 1992, the Court invited the Council to submit all the documents from the applicant's personal file relating to the possible grant of the expatriation allowance. In reply, the Council submitted the applicant's personal file.

12 By letter dated 22 May 1992, the Court asked the defendant to state whether documents existed to show that a decision on the applicant's entitlement to expatriation allowance had been taken in 1982 and, if so, to produce them. In reply to that letter, the Council submitted the memorandum referred to in paragraph 2 of this judgment.

13 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure, to examine only the admissibility of the action, without conducting a preliminary inquiry.

14 The oral arguments of the parties were heard on 1 July 1992.

Forms of order sought

15 The applicant claims that the Court should:

— declare the action admissible and well founded;

— annul the Council's decision of 5 November 1990, notified on 6 November 1990, refusing to grant the applicant the expatriation allowance;

— declare that the applicant fulfils the eligibility criteria for the expatriation allowance under Article 4(1)(a) of Annex VII to the Staff Regulations or, alternatively, under Article 4(1)(b) thereof;

— reserve the question of default interest;

— order the Commission to pay the costs of the proceedings, pursuant to Articles 87 and 91 of the draft Rules of Procedure of the Court of First Instance or, alternatively, on the basis of Articles 69 and 73 of the Rules of Procedure of the Court of Justice.

In response to the plea of inadmissibility raised by the Council, the applicant claims that the Court should:

— take formal notice of her reservations concerning the defendant's quasi-delictual liability by virtue of the negligent and wrongful defensive strategy it adopted in the examination of this case.

16 The Council contends that the Court should:

— dismiss the application as inadmissible;

— alternatively, dismiss it as unfounded;

— order the applicant to bear the costs to the extent that they are not borne by the defendant pursuant to Article 88 of the Rules of Procedure of the Court of First Instance.

Admissibility

Pleas in law and arguments of the parties

17 In support of its plea of inadmissibility, the Council argues that the applicant failed to observe the time-limits set out in Article 90 of the Staff Regulations. According to the Council, the act adversely affecting the applicant was the decision to deny her the expatriation allowance, taken by the appointing authority when the applicant took up her post in 1982.

18 In this context the Council refers first to the case-law of the Court of Justice, in particular Joined Cases 15 to 33, 52, 53, 57 to 109, 116, 117, 123 132 and 135 to 137/73 *Schots-Kortner and Others* v *Council, Commission and Parliament* [1974] ECR 177, from which it is clear that a salary statement must be regarded as a decision taken in respect of the official to whom it is notified. The applicant's salary statements, featuring since April 1982 a '0' in the space marked 'expatriation allowance', made it plain that the administration had decided to refuse her that allowance and the applicant could not have failed to notice this.

19 The Council then refers to a number of notes sent by the applicant to the administration, beginning in 1988, showing that she was aware from the outset of the decision not to grant the allowance in her case. According to the Council, the note of 9 October 1989 proves that the applicant viewed this refusal as a decision taken

in her case on the basis of information she had supplied at the time of her recruitment. The Council considers that that information already contained all the essential details for taking a decision granting or refusing the allowance and that there has been no subsequent change in those details, namely the applicant's dual nationality and her successive places of residence since 1970.

20 The defendant considers that no other conclusion can be drawn from the fact that the appointing authority reassessed all aspects of the matter in response to the applicant's note of 8 June 1990 and replied to it in a note dated 5 November 1990, since the latter note merely expressly confirmed the decision already taken in 1982. Citing the judgment of the Court of Justice in Case 1/76 *Wack* v *Commission* [1976] ECR 1017, the Council points out that the underlying facts of the case, on which the Council's refusal in 1982 was based, have not changed in the meantime and the applicant has not brought forward any new fact which could be regarded as pertinent.

21 The applicant counters those arguments by stating that any comparison with the *Kortner* and *Wack* judgments is completely irrelevant to this case. In those two cases, when the salary statements were sent to the officials concerned, discussion about the expatriation allowance was already underway between the parties. In the *Kortner* case, in particular, the administration had initially granted the applicants the expatriation allowance and then withdrawn it; in those circumstances, the salary statement was the clear manifestation of that decision to withdraw the allowance. In the present case, however, before 1989 the applicant had made no request and there had been no discussions with the defendant, pursuant to Article 90 of the Staff Regulations, to determine whether the defendant was sufficiently well-informed about the applicant's situation at the time of her recruitment.

22 The applicant considers that notification of a salary statement could be regarded as setting time running for the purpose of the time-limit for an action against an administrative decision only where the existence of such a decision is clearly apparent from the statement. Referring to the judgment of the Court of Justice in Case 184/89 *Garganese* v *Commission* [1981] ECR 1785, the applicant asserts that the 'silence of her salary statement' on the subject of the allowance in question cannot

be assimilated to a decision within the meaning of the Staff Regulations. The conduct of the defendant necessarily implies that no decision on the granting of the allowance could have been taken before 1989. The decision taken by the Council on 5 November 1990 is therefore a legal act which is sufficient in itself.

23 The applicant also asserts that in its judgment in Case 159/86 *Canters* v *Commission* [1988] ECR 4859, the Court of Justice ruled that the omission of an allowance which was in dispute from a salary statement could not be regarded as a decision to refuse it where the administration was not able to ascertain whether the person concerned fulfilled the conditions for that allowance to be granted until the person applied for it. In this case, the applicant points out that in 1989 she enclosed with her request a file covering details previously unknown to the Council, showing in particular that she lived in Germany between 1972 and 1980, despite the entries automatically made in Belgian population registers.

24 The applicant asserts that the documents produced by the Council in this case clearly show that the departments of the Council themselves did not consider that a decision had been taken in 1982.

25 The applicant also points out that no provision of the Staff Regulations requires an official to submit a claim for the expatriation allowance, and that similarly there is no provision therein laying down a time-limit for claiming actual payment of that allowance. In the applicant's opinion, she is in this respect in a similar situation to that of Jeanne Airola, who entered the service of the Commission in 1965, was not granted the expatriation allowance and successfully claimed it only in 1972, that is after seven years' service (Case 21/74 *Airola* v *Commission* [1975] ECR 221). The applicant's situation may also be compared to that of Michele Canters who joined the Commission in 1975 and successfully applied for the expatriation allowance only in 1985, after ten years' service.

26 In the alternative, the applicant alleges that, with effect from 9 October 1989, the administration of the Council had, at her request, carried out, if not an assessment,

at least a thorough re-examination of her situation. Following that procedure, and for the first time, the Council set out its position, accompanied by a formal statement of the grounds on which it was based, within the meaning of Article 25 of the Staff Regulations. The decision of 5 November 1990 should therefore in any case be regarded as replacing any that might have been given before and could not be regarded as mere confirmation thereof (judgments of the Court of Justice in Case 293/84 *Sorani* v *Commission* [1986] ECR 967 and in Case 206/85 *Beiten* v *Commission* [1987] ECR 5301).

27 The applicant further considers that the conduct of the Council in this case is indicative of culpable negligence harmful to her interests as an official of the Council. The defendant's behaviour during the examination of this case had been 'improper, unnecessarily vexatious, and thus wrongful, and such as to incur the defendant's quasi-delictual liability'. It is obvious that the unrecoverable costs required to counter such a defensive strategy form part of the loss incurred by the applicant and requiring redress. It would be appropriate to award damages as a penalty for such conduct which 'without any justification imposes an excessive and vain burden on the opposing party'.

Assessment by the Court

28 At the outset, the Court notes first that it is clear from the above memorandum of 20 April 1982 drawn up by the personnel department of the Council and headed 'Note au service traitements et indemnités' (memorandum to the salaries and allowances division), which lists in tabular form a number of items of personal information concerning the applicant and which features the word 'non' alongside the heading 'Idepex', that at the time the applicant took up the post the administration decided not to grant her the expatriation allowance. The applicant does not deny having received a copy of the memorandum at that time.

29 Secondly, the Court notes that the copies of the salary statements for the applicant for the months of April and May 1982, produced in evidence before the Court by the defendant, contain a '0' in the column 'IND. DEP./EXP'.

30 Thirdly, it is undisputed that, in the letter she sent on 9 October 1989 to the director of the Personnel and Administration Directorate, the applicant used the following wording: 'I have always considered the decision taken by Mrs V. to be unjust and for this reason on a number of occasions during the first two years of my appointment I contacted Mrs V., Mrs L., and, from the Legal Service Mr S. ...'.

31 In view of those facts, and even conceding that it might be difficult for a newly recruited official to understand the full scope and implications of the entry 'Idepex' on the memorandum of 20 April 1992, the Court considers it proven that in 1982 the applicant knew both that she could be entitled under certain conditions to the expatriation allowance and that the administration had taken the decision not to grant her this allowance.

32 It is in the light of those findings that the Court has to assess the situation of the applicant with regard to the requirement to respect the time-limits set out in Articles 90 and 91 of the Staff Regulations, as interpreted in the case-law of the Court of Justice and the Court of First Instance.

33 Article 90(2) of the Staff Regulations states that a complaint against an act adversely affecting an official must be lodged within three months, in this case from the day on which the applicant became aware of it.

34 It should be noted that according to the case-law of the Court of Justice (see, most recently, *Canters*, cited above, at paragraph 6) 'notification of the monthly salary statement has the effect of setting time running for the purpose of the time-limit for an action against an administrative decision where the existence of such a decision is clearly apparent from the statement'.

35 Since in the light of the facts outlined above that condition is fulfilled in this case, the Court can only conclude that notification to the applicant in April 1982 of her first salary statement set time running for the proceedings under Article 90 of the Staff Regulations. It follows that the various steps taken in 1989-1990 leading up to the lodging of this application must be regarded as out of time.

36 Nor can the situation of the applicant be compared with those of the applicants in the cases of *Garganese* or *Canters,* cited above. Indeed it is clear from those judgments that the absence of any reference on the applicants' salary statements to the expatriation allowance, or the absence of a '0' in the corresponding space, merely indicate that the competent institution had not yet taken any decision in their case at the time the salary statements in question were notified. That is not the case in this instance, where the administration had already taken a decision to refuse payment of the expatriation allowance before the applicant was sent her first salary statement.

37 In respect of the applicant's argument that, following her letter of 9 October 1989, the defendant had assessed or re-assessed her situation, it should be pointed out that between 1982 and 1989 no new circumstance arose that could have altered the assessment of the applicant's situation with regard to the conditions for the grant of the expatriation allowance.

Moreover, the letters sent in 1990 by the defendant to the applicant, which expressly refer to the 1982 decision and do not set out any reservation with regard to the latter such as to modify its scope, cannot be regarded as embodying a new decision replacing that taken when the applicant took up her post, as erroneously asserted by the applicant. Consequently, this argument must be rejected.

38 In the circumstances of this case, it should be pointed out that the fact that a Community institution does not raise, at the stage of the pre-litigation procedure, any problems of admissibility and proceeds to examine the substantive issues cannot have the effect, where, as here, the case concerns a purely confirmatory decision, of re-opening, to the benefit of the official concerned, the time-limit for a complaint and an action which has already expired.

39 It follows from the foregoing that the application must be dismissed as inadmissible.

Costs

40 In accordance with Article 87(2) of the Rules of the Procedure of the Court of First Instance, costs are to be borne by the unsuccessful party if they have been applied for in the successful party's pleadings. However, Article 88 of those Rules provides that, in proceedings between the Communities and their servants, the institutions are to bear their own costs.

41 Taking account in particular of the uncertainty in which the defendant kept the applicant as a result of the various letters addressed to her, and the fact that the defendant, even if it was not obliged to do so, did not during the pre-litigation procedure draw the applicant's attention to the problems as to the inadmissibility of her proceedings in the light of the established case-law of the Court, the defendant is ordered, in accordance with Article 87(3) of the Rules of Procedure, to pay half of the applicant's costs.

42 Consequently, the Council is to bear its own costs and half of the applicant's costs. The applicant is to bear the other half of her own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Dismisses the application as inadmissible;

2. Orders the Council to bear its own costs and half of the applicant's costs and orders the applicant to bear the other half of her own costs.

Vesterdorf Saggio Biancarelli

Delivered in open court in Luxembourg on 1 October 1992.

H. Jung B. Vesterdorf

Registrar President of the Third Chamber