JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

13 September 2005 *

In Case T-72/04,

Sonja Hosman-Chevalier, official of the Commission of the European Communities, residing in Brussels, represented by J.-R. García-Gallardo Gil-Fournier, E. Wouters and A. Sayagués Torres, lawyers,

applicant,

v

Commission of the European Communities, represented by J. Currall and M. Velardo, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of the Commission's decision of 20 October 2003 refusing to pay the applicant the expatriation allowance under Article 4 of Annex VII to the Staff Regulations of Officials of the European Communities and the allowances associated therewith,

* Language of the case: French.

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

composed of J.D. Cooke, President, R. García-Valdecasas and V. Trstenjak, Judges,

Registrar: I. Natsinas, Administrator,

having regard to the written procedure and further to the hearing on 5 April 2005,

gives the following

Judgment

Legal context

1 Article 69 of the Staff Regulations of Officials of the European Communities in the version applicable to the present case ('the Staff Regulations') states that the expatriation allowance is to be equal to 16% of the total of the basic salary, household allowance and dependent child allowance to which the official is entitled.

2 Article 4(1) of Annex VII to the Staff Regulations stipulates that an expatriation allowance is to be paid, equal to 16% of the total amount of the basic salary plus household allowance and the dependent child allowance paid to the official:

'a) to officials:

— who are not and have never been nationals of the State in whose territory the place where they are employed is situated, and

— 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. For the purposes of this provision, circumstances arising from work done for another State or for an international organisation shall not be taken into account;

...'

3 The first paragraph of Article 5(1) of Annex VII to the Staff Regulations provides that an installation allowance equal to two months' basic salary in the case of an official who is entitled to the household allowance or to one month's basic salary in

other cases is to be paid to an established official who qualifies for expatriation allowance or who furnishes evidence of having been obliged to change his place of residence in order to comply with Article 20 of the Staff Regulations. Finally, under the first paragraph of Article 10(1) of Annex VII to the Staff Regulations, where an official furnishes evidence that he must change his place of residence in order to satisfy the requirements of Article 20 of the Staff Regulations, he is to be entitled for a specified period to a daily subsistence allowance.

Background to the action

4 The applicant, an Austrian national, studied and worked in Austria until 14 May 1995. From 15 May 1995 to 17 March 1996 she worked in Belgium for the Verbindungsbüro des Landes Tyrol, the Liaison Office for the *Land* Tyrol, located in Brussels.

5 From 18 March 1996 to 15 November 2002, the applicant was a member of staff of the Permanent Representation of the Republic of Austria to the European Union in Brussels. As such, she worked, first for the Verbindungsstelle der Bundesländer ('the VB'), the *Länder* Liaison Office and, then, for the Österreichischer Gewerkschaftsbund ('the OGB'), the Austrian Federation of Trade Unions.

6 On 16 November 2002, the applicant took up her duties at the Commission as an official. The five years referred to in the second indent of Article 4(1)(a) of Annex VII to the Staff Regulations for the purposes of payment of the expatriation allowance, known as 'the reference period', were fixed between 16 May 1997 and 15 May 2002.

7 By memorandum of 8 April 2003, the applicant was informed by the Directorate-General for Personnel and Administration of the Commission that she could not be granted payment of the expatriation allowance.

8 On 7 July 2003, the applicant submitted a complaint, under Article 90(2) of the Staff Regulations, about that memorandum of 8 April 2003. By email of 14 August 2003 and by fax of 11 September 2003, she sent two additions to that complaint.

9 By memorandum of 29 October 2003, brought to the applicant's attention on 3 November 2003, the appointing authority rejected the applicant's complaint.

10 According to that decision the applicant was refused the expatriation allowance and the allowances associated therewith primarily on the ground that the work that she did in Brussels during the reference period could not be considered 'work done for another State' within the meaning of the exception laid down in Article 4(1)(a) of Annex VII to the Staff Regulations. The appointing authority considered that, although it was true that the VB was located on the premises of the Permanent Representation of the Republic of Austria, it was nevertheless an independent and distinct entity set up by the *Länder* and responsible for defending their interests and not those of the *Bund* (Federal State). As regards the OGB, the documents sent by the applicant and, in particular, her contract of employment made no reference to a link of any kind with the Republic of Austria. This was the reason why the work done for the OGB could not be classed as work done for that State either.

Procedure and forms of order sought

11 By application lodged at the Registry of the Court of First Instance on 20 February 2004, the applicant brought the present action.

12 On 10 June 2004, the Court held, in accordance with Article 47(1) of its Rules of Procedure, that a second exchange of pleadings was unnecessary because the documents before the Court were sufficiently comprehensive to enable the parties to elaborate their pleas and arguments in the course of the oral procedure. The applicant made no observations on this.

13 Upon hearing the report of the Judge-Rapporteur the Court (First Chamber) decided to open the oral procedure. By way of measures of organisation of procedure the Court invited the applicant to produce certain documents. The applicant complied with that request within the prescribed period.

14 The parties presented oral argument and replied to the questions put by the Court at the hearing on 5 April 2005. During that hearing and as measures of organisation of procedure, the Court decided to place the defence and the rejoinder lodged by the Commission in Case T-83/03 *Salazar Brier* v *Commission* in the case file. The parties were heard in respect of those documents.

15 The applicant claims that the Court should:

— annul the decision of 29 October 2003 refusing her payment of the expatriation allowance and the allowances associated therewith;

— order the Commission to pay the costs.

16 The Commission claims that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay her own costs.

Subject-matter of the proceedings

17 Although the applicant's pleas seek annulment of the Commission's decision of 29 October 2003 dismissing the complaint submitted on 7 July 2003, under Article 90 (2) of the Staff Regulations, about the decision of 8 April 2003, the present action has the effect, according to settled case-law, of bringing before the Court the act adversely affecting the official against which the complaint was submitted (Case

T-156/95 *Echauz Brigaldi and Others* v *Commission* [1997] ECR-SC I-A-171 and II-509, paragraph 23, and Case T-300/97 *Latino* v *Commission* [1999] ECR-SC I-A-259 and II-1263, paragraph 30). It follows from this that the present action seeks annulment of the Commission's decision of 8 April 2003 refusing the applicant payment of the expatriation allowance and the allowances associated therewith.

Law

18 The applicant puts three pleas forward in support of her application. The first plea alleges error in the assessment of the facts. The second plea alleges infringement of Article 4(1)(a) of Annex VII to the Staff Regulations, and finally, the third plea alleges infringement of the principle of equal treatment.

19 It is first of all necessary to examine the second plea alleging infringement of Article 4(1)(a) of Annex VII to the Staff Regulations.

The second plea alleging infringement of Article 4(1)(a) of Annex VII to the Staff Regulations

Arguments of the parties

20 The applicant claims that the Commission erred in law in affirming that the work that she did for the VB and the OGB at the Permanent Representation of the

Republic of Austria to the European Union cannot be classed as 'work done for another State' within the meaning of the exception laid down in Article 4(1)(a) of Annex VII to the Staff Regulations.

21 First of all, the applicant claims that the Commission misinterpreted the concept of 'State' as used in the exception laid down in Article 4(1)(a) of Annex VII to the Staff Regulations. She worked for the Republic of Austria regardless of the body with which she had a contractual relationship. The applicant recalls that the Staff Regulations allow circumstances arising from 'work done for another State' to be disregarded in the reference period. It is therefore irrelevant that that work is done for a ministry or for another administrative organ, since the crucial factor is that the work is done for another State. According to the applicant, since she was recognised not only by the Republic of Austria but also by the Kingdom of Belgium to be a member of the Technical and Administrative Services of the Permanent Representation of the Republic of Austria to the European Union, the Commission could not adopt a different decision.

22 Secondly, the applicant submits that the Commission's contention that the Permanent Representation of the Republic of Austria does nothing more than house the bodies — the VB and the OGB — which are completely independent of that State, stands in contradiction with the Commission's own previously held position on the subject of work done for a permanent representation. All the staff of the VB and the OGB are accredited to the Belgian protocol services by the Permanent Representation of the Republic of Austria. The VB carries out tasks assigned to it by the Republic of Austria in accordance with its constitution. The OGB is a party to the relationship between management and labour in Austria and is involved in State legislation by giving its opinion on legislative proposals or other political projects, and that is why its staff are integrated into the Permanent Representation and under the authority of the Austrian ambassador. The applicant concludes that the work done for the VB and the OGB within the Permanent Representation of the Republic of Austria should have been considered as 'work done for another State' within the meaning of Article 4 of Annex VII to the Staff Regulations.

23 The Commission submits that the plea must be rejected as the work done for the VB and the OGB cannot be considered to be 'work done for another State' so as to fall within the exception laid down in Article 4(1)(a) of Annex VII to the Staff Regulations.

24 The Commission claims that the expression 'work done for another State' has to be given an interpretation independent of the various national laws in order to avoid discrepancies, as affirmed by the Court of Justice in Joined Cases C-122/99 P and C-125/99 P *D and Sweden* v *Council* [2001] ECR I-4319, paragraph 11. Such an approach is necessary in particular so as to avoid differences which could arise in the treatment of persons working for the same institution if that expression were to be understood as a reference to different national laws. The strict interpretation it proposes is in conformity with the underlying principle of Article 4 of Annex VII to the Staff Regulations. By contrast, the applicant's interpretation would amount to considering all public or private bodies to which a central government has transferred internal powers as States. This is not the intention of the Community legislature. The legislature used the term 'State', although at that time States with a federal structure already existed, which illustrates that if it had wanted to broaden that definition and include political subdivisions or regional authorities in the provision at issue it would have done so expressly.

25 As regards the work done for the VB, the Commission points out that although it is true that Austrian *Länder* have wide powers of their own, conferred on them directly by the Constitution, that does not mean that the *Länder* are States within the meaning of the exception laid down in Article 4 of Annex VII to the Staff Regulations. The Commission submits that only work done by a body whose activities have an effect on the whole of the territory of a State can be considered to be work done for another State. This is not the case with *Länder* whose purpose is to exercise their powers within their territory and, in any event, only in the interests of that particular territory. Furthermore, the applicant cannot infer from the fact that she enjoyed diplomatic status while working for the VB that that body has the character of a State. She did not have genuine diplomatic status but rather status as a member of the administrative and technical staff and besides, she did not even claim

to enjoy diplomatic status within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961 but only certain advantages related to that status.

26 As regards the work done for the OGB, the Commission contends that that body represents entirely private interests.

Findings of the Court

27 According to settled case-law, the fundamental purpose of the expatriation allowance is to compensate for the extra expense and inconvenience of taking up permanent employment in a country with which the official has established no lasting tie before his entry into service (Case T-4/92 *Vardakas* v *Commission* [1993] ECR II-357, paragraph 39, Case T-72/94 *Diamantaras* v *Commission* [1995] ECR-SC I-A-285 and II-865, paragraph 48, and Case T-28/98 *J* v *Commission* [1999] ECR-SC I-A-185 and II-973, paragraph 32). For such a lasting tie to be established, thus entailing the loss to the official of the benefit of the expatriation allowance, the legislature requires that the official should have had his habitual residence or exercised his main professional activity for a period of five years in the country where he is posted (*Diamantaras* v *Commission*, cited above, paragraph 48).

28 It is also necessary to bear in mind that in the second indent of Article 4(1)(a) of Annex VII to the Staff Regulations an exception is provided for in favour of an official who during a period of five years ending six months before entry into the service resided in the country in which he is employed where he was in the service of another State or of an international organisation. That exception was established in order to take account of the fact that, in those circumstances, an official cannot be deemed to have established a lasting tie with the country in which he is employed due to the temporary nature of the secondment in that country (Case 1322/79 *Vutera* v *Commission* [1981] ECR 127, paragraph 8, and Case 246/83 *De Angelis* v *Commission* [1985] ECR 1253, paragraph 13).

29 The issue to be determined is whether the work done by the applicant for the Permanent Representation of the Republic of Austria to the European Union in Brussels during the reference period is to be considered, as the applicant claims, as work done for a State within the meaning of Article 4(1)(a) of Annex VII to the Staff Regulations. The term 'State' used in that article relates only to the State as a legal person and unitary subject of international law and its government bodies.

30 It is not disputed that work done for bodies such as the Permanent Representation of a Member State to the European Union or the embassies of a State is considered to be work done for a State within the meaning of Article 4 of Annex VII to the Staff Regulations.

31 In the present case, according to the documents before the Court, the applicant worked for the Permanent Representation of the Republic of Austria to the European Union in Brussels as a member of staff in that representation for the entire reference period, namely from 16 May 1997 to 15 May 2002.

32 Thus the certificate from the Permanent Representation of the Republic of Austria to the European Union dated 7 August 2002 affirms that the applicant 'has been a member of the Technical and Administrative Services of the Permanent Representation of the Republic of Austria to the European Union since 18 March 1996', namely throughout the entire reference period.

33 The letter from the Permanent Representation of the Republic of Austria, sent to the Belgian Ministry of Foreign Affairs, External Trade and Development Cooperation on 9 March 1996, demonstrates that that representation requested a special identity card from the Belgian authorities on behalf of the applicant for the start of her employment with that representation on 18 March 1996. Similarly the letter of 26 April 1996 from the Belgian Ministry of Foreign Affairs is evidence of the fact that the Belgian authorities sent the special identity card to the Permanent Representation of the Republic of Austria on behalf of the applicant. That letter was sent

together with a copy of the identity card in question which was delivered on 16 April 1996 and valid until 16 April 2000 and on which it was expressly stated that the applicant was a member of the Technical and Administrative Services of the Permanent Representation of the Republic of Austria. Furthermore, the special identity cards subsequently issued to the applicant by the Belgian authorities show that the validity of the card was extended until 16 April 2003.

34 The letter of the Permanent Representation of the Republic of Austria sent to the Belgian authorities on 21 January 2003 shows that that representation informed the Belgian Ministry of Foreign Affairs that '[the applicant], a member of the Technical and Administrative Services of the representation, [had] left the representation definitively' and that the special identity card had thus been returned.

35 Finally, the applicant submitted a value added tax (VAT) exemption form to the Belgian authorities on 7 August 1997 as a member of the Technical and Administrative Services of the Permanent Representation of the Republic of Austria in respect of the purchase of certain goods and services for her personal use. Similarly, the letter of the Finance Administration of the Ministry of the Brussels-Capital Region is evidence that the applicant was exempted from regional taxes on property for the financial year 1997 as the Vienna Convention on Diplomatic Relations of 18 April 1961 was applicable to her.

36 It is thus clear from all that evidence that the applicant was a member of staff of the Permanent Representation of the Republic of Austria, that she was subject to the supervisory authority of the ambassador, a permanent representative of the Republic of Austria to the European Union, and that her status was the same as that of the other officials assigned to that representation. Consequently, the work done by the applicant for the Permanent Representation of the Republic of Austria throughout the reference period must be considered to be work done for that State.

37 That conclusion is not invalidated by the Commission's arguments that the applicant, although indeed employed by that permanent representation, did not work for the Republic of Austria since she worked for the VB and the OGB, which are bodies responsible for defending the interests of the *Länder* and trade unions and not those of the State.

38 In support of its argument, the Commission puts forward a series of arguments based on the effects and the extent of the powers of the Austrian *Länder*, the VB and the OBG, and on their relations with the State on the basis of Austrian national law.

39 The Commission's argument cannot be upheld.

40 That argument is, as was just stated, effectively based on matters deriving from Austrian national law and, for that reason, it runs counter to the requirement for a uniform application of Community law and the principle of equality which require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the relevant regulations. In the absence of an express reference, the application of Community law may sometimes necessitate a reference to the laws of the Member States where the Community court cannot identify in Community law or in the general principles of Community law criteria enabling it to define the meaning and scope of such a provision by way of independent interpretation (Case 327/82 *Ekro* [1984] ECR 107, paragraph 11, Case T-43/90 *Díaz García* v *Parliament* [1992] ECR II-2619, paragraph 36, Case T-264/97 *D* v *Council* [1999] ECR-SC I-A-1 and II-1, paragraphs 26 and 27, upheld in *D and Sweden* v *Council*, cited above). In the present case, the reference to Austrian law is not necessary since it is not disputed that a Permanent Representation of a Member State to the European Union is amongst those State bodies falling within the scope of Article 4(1)(a) of Annex VII to the Staff Regulations.

41 In addition, that argument of the Commission is contradicted by its own position in the present case, namely that the term 'work done for another State' has to be given an interpretation independent of the various national laws in order to avoid discrepancies, as held by the Court of Justice in *D and Sweden* v *Council*, paragraph 11. Moreover, that argument is directly contrary to the position it adopted itself at the same point in other cases brought before the Court concerning the same issue as the one under discussion in the present case. Thus, in Case T-83/03 *Salazar Brier* v *Commission*, the Commission firmly contended in its rejoinder lodged on 30 September 2003 that bodies such as Permanent Representations to the European Union were covered by the term 'State' in Article 4 of Annex VII to the Staff Regulations and that those considerations were valid regardless of the particular functions carried out by a person within those bodies. It submitted in effect that it was not necessary to analyse the particular and specific functions carried out by an official working for a permanent representation since the fact that that official was working for that body and that that body is covered by the term 'State' within the meaning of the exception laid down in the second indent of Article 4(1)(a) of Annex VII to the Staff Regulations was sufficient to make that provision applicable.

42 It is therefore sufficient that a person works for a body which is part of the State in the sense referred to, such as a permanent representation, in order to fall fully within the exception laid down in Article 4(1)(a) of Annex VII to the Staff Regulations regardless of the particular and specific functions carried out by that person within that body. If this were not the case it would be necessary to carry out a detailed analysis of the tasks and functions carried out from the point of view of national law, which would be contrary to the requirements mentioned above. That is all the more so since it is the exclusive role of every Member State to organise its services as it deems most appropriate and to thus determine the objectives and functions it assigns to its officials and employees.

43 It follows from the above, without there being any need to examine all of the Commission's arguments based on provisions of Austrian national law, that the work done by the applicant for the Permanent Representation of the Republic of Austria during the reference period must be considered to be work done for the

State within the meaning of Article 4 of Annex VII to the Staff Regulations. Consequently, those years have to be disregarded and not taken into account under that provision. Therefore, bearing in mind that the applicant worked for the Permanent Representation of the Republic of Austria from 18 March 1996 and for the entire reference period, the five years referred to above have to be deemed to be between 18 March 1991 and 17 March 1996.

44 However, it is sufficient to establish in that respect that the applicant neither resided nor worked in any way in Belgium before 15 May 1995, the date on which she moved to Brussels to work for the Central Office for the *Land* Tyrol. Consequently, not having habitually resided in Brussels during the five years prescribed in Article 4 of Annex VII to the Staff Regulations, the applicant satisfies the eligibility requirements laid down in that provision for the expatriation allowance.

45 It follows from the above that the Commission was wrong to refuse to disregard the period during which the applicant had worked for the Permanent Representation of the Republic of Austria and thus consider that she did not satisfy the eligibility requirements laid down in Article 4(1)(a) of Annex VII to the Staff Regulations for the expatriation allowance.

46 The second plea alleging infringement of Article 4 of Annex VII to the Staff Regulations must therefore be upheld.

47 Accordingly, without there being any need to rule on the other pleas in law relied on by the applicant, the present action must be declared well founded and the contested decisions must be annulled is so far as they refuse payment of the expatriation allowance to the applicant.

The allowances associated with the expatriation allowance

The arguments of the parties

48 The applicant claims that, if she is found eligible for the expatriation allowance the case-law resulting from Case C-62/97 P *Commission* v *Lozano Palacios* [1998] ECR I-3273 must be applied according to which she is automatically entitled to the daily subsistence allowance and the installation allowance.

49 The Commission regards that case-law as inapplicable to the present case since the applicant is not entitled to payment of the expatriation allowance.

Findings of the Court

50 The Court maintains that the first subparagraph of Article 5(1) of Annex VII to the Staff Regulations provides that an installation allowance equal to two months' basic salary in the case of an official who is entitled to the household allowance or to one month's basic salary in the case of an official not so entitled is to be paid to an official who meets one of the following alternative conditions: he must qualify for the expatriation allowance or he must furnish evidence of having been obliged to change his place of residence in order to comply with Article 20 of the Staff Regulations (Case T-33/95 *Lozano Palacios* v *Commission* [1996] ECR-SC I-A-575 and II-1535, paragraphs 57 and 58, upheld by the Court on appeal in *Commission* v *Lozano Palacios*, cited above, paragraphs 20 to 22).

51 Thus, given that the installation allowance provided for by Article 5(1) of Annex VII to the Staff Regulations is to be paid to an official who qualifies for the expatriation allowance, it must be held that the applicant is entitled to the installation allowance.

52 As regards the daily subsistence allowance, it is necessary to bear in mind that this allowance is not linked to the expatriation allowance and that it is only granted, pursuant to Article 10(1) of Annex VII to the Staff Regulations, where an official furnishes evidence that he must change his place of residence in order to satisfy the requirements of Article 20 of the Staff Regulations. Having failed to request that allowance when bringing her complaint through official channels it is necessary to declare unfounded the head of claim relating to that allowance.

53 It follows from the above that it is also necessary to annul the contested decisions in so far as they refuse the applicant payment of the installation allowance.

Costs

54 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must, in accordance with the form of order to that effect sought by the applicant, be ordered to bear all the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. **Annuls the decisions of 8 April and 29 October 2003 in so far as they refuse to grant the applicant payment of the expatriation allowance laid down in Article 4(1)(a) of Annex VII to the Staff Regulations of Officials of the European Communities and payment of the installation allowance laid down in Article 5(1) of that same annex;**

2. **Dismisses the remainder of the application;**

3. **Orders the Commission to bear all the costs.**

Delivered in open court in Luxembourg on 13 September 2005.

Cooke García-Valdecasas Trstenjak

H. Jung J.D. Cooke

Registrar President