JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
28 September 1993 *

In Case T-90/92,

Pedro Magdalena Fernández, an official of the Commission of the European Communities, residing in Brussels, represented by Alain H. Pilette, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Marc Loesch, 11 Rue Goethe,

applicant,

v

Commission of the European Communities, represented by Sean van Raepenbusch, of its Legal Service, acting as agent, with an address for service at the office of Nicola Annecchino, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of the decision of the Commission of 24 July 1992 not to pay an expatriation allowance to the applicant and, in the alternative, for an order that the Commission pay an *ad personam* allowance amounting to 12% of the applicant's total basic salary,

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

composed of: J. Biancarelli, President, B. Vesterdorf and R. García-Judges,

Registrar: H. Jung,

* Language of the case: French.

having regard to the written procedure and further to the hearing on 24 June 1993,

gives the following

Judgment

Facts and Procedure

1 The applicant, Pedro Magdalena Fernández, a Spanish national, was born on 17 September 1954 in Santianes (Spain). He lived and was educated in Belgium from 1965 to 1 May 1986, apart from a period of nine months from 1 October 1980 to 28 June 1981 which he spent in Torrevieja (Spain) with the stated intention of looking for a job. The applicant was employed professionally in a commercial company in Belgium from 29 June 1981 to 30 April 1986.

2 By decision of 4 June 1986 he was appointed a probationary official in the Commission at Grade B5 with effect from 1 May 1986 and was posted to the Statistical Office of the European Communities in Luxembourg. He was established with effect from 1 February 1987.

3 By decision of 7 August 1986, Amay (Belgium) was determined as his place of origin and place of recruitment within the meaning of Article 7(3) of Annex VII to the Staff Regulations of Officials of the European Communities (the 'Staff Regulations').

4 Following a request for review submitted by the applicant, who argued that the centre of his interests was not the same as his place of recruitment on the basis that his parents lived in Torrevieja and that he exercised his rights of citizenship there, Torrevieja was determined as his place of origin by decision of 18 March 1987.

5 Throughout his posting to Luxembourg the applicant received the expatriation allowance provided for by Article 4 of Annex VII to the Staff Regulations.

6 On 1 February 1992 the applicant was posted to Brussels, to the Directorate-General for the Internal Market and Industrial Affairs (DG III). Payment of his expatriation allowance was stopped as of 1 March 1992.

7 By letter of 17 March 1992 to the general secretariat of the Commission, the applicant submitted a complaint under Article 90(2) of the Staff Regulations to the effect that the expatriation allowance was not credited to his account in his salary statement for March 1992.

8 By decision of 24 July 1992, of which the applicant was notified on 29 July 1992, the Commission expressly rejected the applicant's complaint.

9 Accordingly, the applicant lodged the present application at the Registry of the Court of First Instance on 28 October 1992.

10 Following the written procedure, the Court decided to prescribe measures of organization of procedure pursuant to Article 64 of its Rules of Procedure. It asked the Commission to produce to the Court file all the conclusions of the heads of administration concerning the application of Article 4(1) and (2) of Annex VII to the Staff Regulations and the procedure for payment of expatriation and foreign residence allowances and it asked all the Community institutions to submit information on their administrative practice relating to the payment of expatriation and foreign residence allowances.

11 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure. The oral arguments of the parties' representatives and their replies to the questions put by the Court were heard at the hearing on 24 June 1993.

Forms of order sought

12 The applicant claims that the Court of First Instance should:

— declare the application admissible and well founded;

— accordingly, annul the decision of the Commission of 24 July 1992 refusing payment to the applicant of the expatriation allowance;

— order the Commission to pay the expatriation allowance as of 1 February 1992 with interest at the statutory rate from that date until full payment has been made;

— in the alternative, order the Commission to pay an *ad personam* allowance amounting to 12% of the applicant's total basic salary as of 1 February 1992 with interest at the statutory rate until full payment has been made;

— order the defendant to pay the costs.

13 The defendant contends that the Court of First Instance should:

— dismiss the application as unfounded;

— make an appropriate order as to costs.

The main heads of claim

Arguments of the parties

14 The applicant puts forward only one plea in support of the main heads of claim, alleging breach of Article 4(1)(a) of Annex VII to the Staff Regulations. There are two parts to this plea. The applicant argues, first, that the Commission made an error of assessment in determining his place of habitual residence during the period covered by that Article, namely the five years ending six months before he entered the service. Secondly, he argues that the expatriation allowance had become an established right and points to the purpose of that allowance.

15 As to the first part of the plea, the applicant argues that, at the time of his recruitment by the Commission, his place of habitual residence was Spain. He makes the following points in support of that claim: he has never relinquished his political rights in Spain; most of his financial interests were in Spain; he hoped to be able to settle in Spain once he found a job there; he spent nine months, from 1 October 1980 to 28 June 1981, that is to say at the beginning of the abovementioned reference period, looking for work in Torrevieja (Spain), the town held to be his place of origin; although he lived in Belgium during that reference period, he never intended to make it his permanent centre of interests, nor to reside there permanently.

16 The applicant points out that the Court of Justice and the Court of First Instance have consistently held the definition of habitual residence to be the place where the person concerned has established his permanent centre of interests with the intention that it should remain so. The applicant thus concludes that, although his actual place of residence was in Belgium, all the factors outlined above militated against the designation of Belgium as his habitual residence during the reference period. He takes the view that, for the purposes of Article 4(1)(a) of Annex VII to the Staff Regulations, the criterion is that of habitual residence and that it is clear from the

case-law that this is the factor taken into account for the purposes of granting the expatriation allowance.

17 The applicant acknowledges that the Court of First Instance held in Case T-18/91 *Costacurta Gelabert* v *Commission* [1992] ECR II-1655 that Article 4(1)(a) of Annex VII to the Staff Regulations must be interpreted as giving entitlement to an expatriation allowance to an official who during the reference period has resided permanently outside the State in whose territory the place where he is employed is situated. However, he argues, nothing in that judgment invites the conclusion that the Court of First Instance intended to alter the very terms of Article 4(1)(a) of Annex VII to the Staff Regulations by replacing the requirement that an official should not have been habitually resident in the State where he is employed with one that he should not have been resident there at all. In the view of the applicant, the Court simply wished to make the point that eligibility for the expatriation allowance arose where an official was not resident in his place of employment during the reference period. In his opinion, it cannot be inferred from this that an official who cannot prove that he has lived permanently outside his place of employment throughout the reference period is not eligible for the expatriation allowance under Article 4(1)(a). That line of argument would lead to the 'absurd' conclusion that an official who has spent brief periods in all the countries where he is likely to be posted will, logically, be ineligible for the expatriation allowance.

18 The Commission outlines the provisions of Article 4(1)(a) of Annex VII to the Staff Regulations and points out that it has consistently been held that eligibility for the expatriation allowance is conditional on an official's not having habitually resided or carried on his main occupation within the European territory of the State where he is employed during the reference period (Case 246/83 *De Angelis* v *Commission* [1985] ECR 1253, paragraph 14; *Costacurta Gelabert* v *Commission*, cited above, paragraph 44, and Case T-63/91 *Benzler* v *Commission* [1992] ECR II-2095, paragraph 6).

19 The Commission argues that the mere 'hope' of one day settling in Spain, the exercise of political rights there, the fact of having financial interests in the country and a stay of nine months in Spain during 1980 and 1981 are not sufficient to call into question the fact that, during the reference period, the applicant habitually resided or pursued his occupation on Belgian territory. The Commission points out that

the decisions of the Court of Justice and the Court of First Instance relating to the conditions for the application of Article 4(1)(a) of Annex VII to the Staff Regulations (Case 211/87 *Nuñez* v *Commission* [1988] ECR 2791, paragraphs 9 and 10, and *Costacurta Gelabert* v *Commission*, paragraph 42) have made it clear that there are 'simple, objective criteria' underlying the provision and that there is no need for the administration to look for the 'hidden motives' of officials in establishing their permanent centre of interests. Those criteria are the official's place of habitual residence or the fact that he does not carry on an occupation within the territory where he is employed during the reference period. In the view of the Commission, it cannot be denied, in this case, that the applicant, having lived in Belgium from 1965 to 1 October 1980 and from 29 June 1981 to 30 April 1986, habitually resided in that State during the reference period, namely from 1 November 1980 to 30 October 1985.

20 As to the second part of the plea, the applicant points out, first, that the Court of Justice has held that the purpose 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 and move to the country of employment and integrate themselves in their new environment (*De Angelis* v *Commission* and *Nuñez* v *Commission*). The applicant argues that the payment of the expatriation allowance is intended to cover a specific situation, namely that obtaining on the date when the official concerned takes up his duties with the Communities. Unlike the daily allowance which is paid on a temporary basis for a limited period to compensate for the expense and inconvenience arising from the need for an official to move and settle provisionally in his place of employment, while retaining his former home on an equally provisional basis, the expatriation allowance is paid to an official throughout the period of his employment, even though the extra expense and inconvenience arising when he takes up his duties have long since ceased.

21 The applicant points out that Article 4(1)(a) of Annex VII to the Staff Regulations makes provision for an exception to the general rule in stipulating that 'circumstances arising from work done for another State or for an international organization shall not be taken into account' and that the Court of Justice has interpreted that exception to mean that its purpose is to avoid penalizing persons who have

established themselves in the country of employment in order to work in the service of another State or an international organization but do not have any lasting tie with that country, by depriving them of the expatriation allowance (*Nuñez* v *Commission*, paragraph 11). The applicant argues that it is most probably on the basis of this line of reasoning that the Community legislature decided to pay the expatriation allowance to the officials concerned throughout the time they work for the Communities. It is thus possible to argue that the expatriation allowance should continue to be paid in the case of an official who is posted, as a result of a transfer within the institution, to a State where he would not have received the expatriation allowance if he had taken up his duties with the Communities there initially. Payment of the expatriation allowance should therefore be considered to be an established right in the case of an official who has received it at any time during his career with the Communities. The applicant takes the view that, while Article 4(1)(a) of Annex VII to the Staff Regulations does lay down 'simple and objective, and at the same time clear and unconditional' criteria (*Costacurta Gelabert* v *Commission*, paragraph 41), those criteria are intended to cover a particular situation at a specific time and the expatriation allowance should continue to be paid in the future in the case of an official who met the conditions for payment of the allowance at a particular time in his career with the Communities.

22 Secondly, the applicant points out that, in this case, it is clear that the extra expense and inconvenience which the Court considers the expatriation allowance to be intended to allay are more in evidence since his transfer to Belgium than they were during the latter part of the time he spent in Luxembourg, given that he is of Spanish nationality and had broken all ties with Belgium after spending five years and 10 months working for the Commission in Luxembourg.

23 The Commission submits, first, that the applicant's argument constitutes an *ultra legem* interpretation of Article 4(1)(a) of Annex VII to the Staff Regulations. The place of employment to be taken into account under that article is not merely that assigned when an official first takes up his duties and it follows that the conditions for payment of the expatriation allowance must be re-examined each time there is a change in an official's place of employment. To argue otherwise, the Commission maintains, would give rise to an 'absurd' situation, in the light of the purpose of Article 4(1)(a), under which the allowance would have to be paid to an official or

employee of Belgian nationality who, after a period spent working in Luxembourg where he was eligible for the allowance, is posted to Brussels where he was recruited. Referring to the case-law of the Court of Justice concerning the purpose of the expatriation allowance, the Commission points out that, in any event, the applicant has not adduced any evidence, in support of his argument, of any extra expense and inconvenience in Belgium for which compensation is required in the form of payment of the expatriation allowance.

Findings of the Court

24 Article 4(1)(a) of Annex VII to the Staff Regulations stipulates that the expatriation allowance is paid 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.

25 As to the first part of the plea relied on by the applicant, it is to be noted that the question before the Court concerns the interpretation of the concept of habitual residence in Article 4(1)(a) since the applicant argues that he was habitually resident in Spain during the reference period.

26 It is settled law that payment of the expatriation allowance is conditional on an official's not having habitually resided or carried on his main occupation during the reference period on the European territory of the State where he is employed (Case 21/74 *Airola* v *Commission* [1975] ECR 221, paragraph 6; Case 37/74 *Van den Broeck* v *Commission* [1975] ECR 235, paragraph 6; *De Angelis* v *Commission*, paragraph 14; *Costacurta Gelabert* v *Commission*, paragraph 44; and *Benzler* v *Commission*, paragraph 16).

27 The concept of habitual residence has consistently been interpreted in Community case-law as referring to the place where the person concerned has established the permanent or habitual centre of his interests with the intention that it should remain so (Case 13/73 *Angenieux* v *Hakenberg* [1973] ECR 935; Case 76/76 *Di Paolo* v *Office Nationale de l'Emploi* [1977] ECR 315; Case 284/87 *Schäflein* v *Commission* [1988] ECR 4475; Case C-297/89 *Ryborg* [1991] ECR I-1943, paragraph 19; and *Benzler* v *Commission*, paragraph 25) and as being a question of fact requiring that account be taken of the actual place of residence of the person concerned (*Benzler* v *Commission*, paragraph 17).

28 In this case, it is clear from the documents before the Court that the applicant habitually resided in Belgium from 1965 until 1 May 1986 and thus during the reference period, namely from 1 November 1980 to 30 October 1985. In this connection, suffice it to point out that the applicant himself admits in his rejoinder (p. 3, paragraph 2) that he lived in Belgium during the reference period, that the certificate issued on 3 May 1986 by the police authorities for Amay (Province of Liège) states that the applicant had resided in Amay since 9 February 1978 and that the certificate issued on 2 October 1989 by the Spanish Consulate-General in Liège indicates that the applicant went 'temporarily' to Torrevieja from 1 October 1980 to 28 June 1981.

29 After his stay of nine months in Spain between the above dates, the applicant continued to live and work in Liège as he had done beforehand. Absence of such a sporadic and brief nature from his country of employment cannot be considered sufficient to deprive the applicant's residence in the State of employment of its habitual nature within the meaning of the relevant provision of the Staff Regulations (Case 188/83 *Witte* v *Parliament* [1984] ECR 3465, paragraph 11). That absence related solely to the first eight months of the reference period and is thus not sufficient for the applicant's habitual residence, which had been in Belgium since 1965, to be considered to have been interrupted, since he had lived in that State without interruption throughout the remainder of the reference period.

30 Moreover, the fact that the applicant may have had the intention of looking for a job in Spain and settling there, that he exercised his political rights there and that he had financial interests there is not in itself such as to undermine the conclusion reached in the above paragraph as regards the determination of his habitual residence in Belgium, since it is accepted that, throughout the reference period, the applicant maintained the centre of his interests in Belgium where he had his home and where, for most of the period, he carried on his occupation (see Case 42/75 *Delvaux* v *Commission* [1976] ECR 167, paragraph 8). Furthermore, the fact that the Commission determined his place of origin to be Spain, at his request, cannot have any relevance to the solution of this dispute, as the fixing of an official's place of origin and the granting of an expatriation allowance meet different needs and interests (Case 201/88 *Atala-Palmerini* v *Commission* [1989] ECR 3109, paragraph 13).

31 Accordingly the first part of the plea must be rejected.

32 As to the second part of the plea, alleging that payment of the expatriation allowance should be viewed as an established right to be maintained in the case of an official who met the conditions for its payment at one point in his career with the Communities, that interpretation is not supported by the wording of Article 4(1)(a) of Annex VII to the Staff Regulations. It has consistently been held that the purpose of the expatriation allowance is to compensate an official for the extra expense and inconvenience of working permanently in a country with which he had not established lasting links before taking-up his post (*Nuñez* v *Commission*, paragraph 9; *Costacurta Gelabert* v *Commission*, paragraph 42; Case T-4/92 *Vardakas* v *Commission* [1993] ECR II-357, paragraph 39). Accordingly, that provision must be interpreted to mean that the expatriation allowance is paid to an official in consideration of the fact that he is posted to a State with which he has not established lasting links before taking-up his post and the concept of taking up a post must be understood to mean the initial taking-up of a post with the Communities. However, where an official is posted to a State with which he has established lasting links before taking up his post, more specifically to a State where, under the terms of Article 4(1)(a), he habitually resided or carried on his occupation during the

reference period, he loses the right to the expatriation allowance. The right to the expatriation allowance thus depends on the particular connection which an official has with each of his places of employment.

33 As for the applicant's argument that, in his case, the extra expense and inconvenience for which the expatriation allowance is intended to compensate affect him more since his transfer to Brussels, it has been held above that, before he took up his post, the applicant's habitual residence was in Belgium. As he is thus carrying out his duties in a country with which he had established lasting links before taking up his post, the applicant cannot rely on any extra expense or inconvenience justifying payment of the expatriation allowance.

34 The second part of the plea must therefore also be rejected and, accordingly, the main heads of claim of the application must themselves be rejected. Consequently, and in any event, the claim seeking an order that the Commission pay the expatriation allowance with interest must be rejected.

The alternative heads of claim

Arguments of the parties

35 The applicant maintains that some officials working for the Commission, who have habitually lived or worked in their country of employment during the reference period referred to in Article 4(1)(a) of Annex VII to the Staff Regulations, none the less receive the expatriation allowance. In the main this occurs, he says, in the case of officials who were initially posted, for the reference period, outside the State on whose territory their habitual residence is situated and were subsequently posted within that territory. That situation is identical to that in which he would find himself if the Court were 'inconceivably' to determine his place of habitual residence during the reference period to be Belgium. In the applicant's opinion, this practice by the appointing authority clearly gives rise to a difference in treatment contrary to the principle of equal treatment and non-discrimination between officials who

are in fact in comparable positions. The applicant therefore calls on the Court of First Instance, under Article 49 of its Rules of Procedure, to prescribe the necessary investigations within the Commission.

36 In the alternative, the applicant claims the payment of an *ad personam* allowance amounting to 12% of his basic salary, as the only way to restore equality of treatment between him and the other officials in a comparable position who do receive the expatriation allowance.

37 The Commission counters by pointing out that, apart from the fact that it does not know to which specific cases the applicant is referring, if the illegality of paying the expatriation allowance to the officials mentioned by the applicant were established, it should lead only to the withdrawal of the decision granting them that right and should certainly not induce the administration to disregard the Staff Regulations in the applicant's case. Even if allowances have been wrongfully paid, 'the objection of discrimination can scarcely be raised with the consequence that the applicant ... should be treated in the same way' (Opinion of Advocate General Roemer in Joined Cases 55/71 to 76/71, 86/71, 87/71 and 95/71, *Besnard and Others* v *Commission* [1972] ECR 543 at p. 572).

Findings of the Court

38 As the Commission has rightly argued, it is settled law that the principle of equal treatment may be invoked only in the context of a review of legality (*Besnard*, paragraph 39) and that no person may rely, in support of a claim, on an unlawful act committed in favour of another (*Witte* v *Parliament*, paragraph 15). The plea alleging breach of the principle of equal treatment cannot, therefore, be granted either. Accordingly, the claims made in the alternative must also be rejected.

39 It follows from the foregoing that the application is unfounded and must, therefore, be dismissed.

Costs

40 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs 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. The Court must therefore order the parties to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Dismisses the application;

2. Orders the parties to bear their own costs.

Biancarelli Vesterdorf García-Valdecasas

Delivered in open court in Luxembourg on 28 September 1993.

H. Jung J. Biancarelli

Registrar President