JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

16 April 1997 *

In Case T-66/95,

Hedwig Kuchlenz-Winter, the ex-wife of a former official of the European Parliament, residing at Kehlen (Luxembourg), represented by Dieter Rogalla, Rechtsanwalt, Sprockhövel, with an address for service in Luxembourg at the Chambers of Armin Machmer, 1 Rue Roger Barthel, Béreldange,

applicant,

v

Commission of the European Communities, represented by Joseph Griesmar, Legal Adviser, and Julian Currall, of its Legal Service, acting as Agents, and Bertrand Wägenbaur, Rechtsanwalt, Brussels, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: German.

APPLICATION for a declaration that the defendant is under a duty, on the one hand, to continue to guarantee the applicant cover under the Common Sickness Insurance Scheme and, on the other hand, to use its right of initiative *vis-à-vis* the Council with a view to enabling persons in the applicant's position to qualify for cover under the Common Sickness Insurance Scheme and, in the alternative, for a declaration drawing the German Government's attention to the gap in its national legislation on sickness insurance and calling upon it to take appropriate measures to rectify that situation,

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

composed of: A. Saggio, President, V. Tiili and R. M. Moura Ramos, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 5 November 1996

gives the following

Judgment

Facts and procedure

1 The applicant, a German national, entered the employ of the Court of Justice of the European Coal and Steel Community ('ECSC') in Luxembourg in 1956. In 1957 she married Mr Kuchlenz, also a German national. In 1958 she was transferred to Brussels to the Commission of the European Atomic Energy Community ('Euratom'). Her husband, who in the interim had become an official of the European Parliament, was transferred in 1963 to Luxembourg. At this point, the

applicant gave up her job and went to live in Luxembourg with her husband. In all, she was in the service of the Communities for something over seven years.

2 From the time when she gave up her job, the applicant ceased to be affiliated to the Common Sickness Insurance Scheme of the institutions of the European Communities ('the Common Scheme') in her own right, but continued to be insured by virtue of her husband's being an official affiliated to the scheme.

3 By decree of 10 December 1993, which was made absolute on 1 April 1994, the Cour d'Appel (Court of Appeal), Luxembourg, dissolved the marriage of the applicant and Mr Kuchlenz. Following that decree, they agreed to split the retirement pension which Mr Kuchlenz receives from the Communities, pursuant to the provisions of the Bürgerliches Gesetzbuch (German Civil Code — BGB), which provides for the compensatory splitting of pension rights in the event of divorce (Paragraph 1587 et seq. of the BGB). By document of 5 January 1995, the Juge de Paix (Magistrate), Luxembourg, endorsed that agreement.

4 Under Article 72(1*b*) of the Staff Regulations of Officials of the European Communities, which provides that the ex-spouse of an official may, in certain circumstances, continue to be insured against sickness for a maximum of one year following the date of the decree absolute, the applicant continued to qualify for benefits under the Common Scheme.

5 It appears from the documents before the Court that Mrs Kuchlenz-Winter, as a Luxembourg resident, is entitled to be affiliated to the Luxembourg statutory social security scheme. In contrast, since she has not completed the requisite periods of insurance in Germany, she has no right to be affiliated to the German statutory social security scheme. Furthermore, she does not satisfy the requirements for voluntary affiliation to that scheme and private sickness insurance schemes refuse to insure her because she is seriously ill. In any event, her social security cover in Luxembourg is dependent upon her residing in that country. The applicant claims

that as a result she can no longer transfer her residence to Germany, since she would have no social security cover there and departure from Luxembourg would cause her to lose the benefit of the only sickness insurance scheme which is at present available to her.

6 On 7 February 1994, the applicant submitted to the Parliament, the institution of which her ex-husband had been an official, and the Commission requests pursuant to Article 90 of the Staff Regulations that they take a decision enabling her to continue to be covered by the Common Scheme beyond the one-year time-limit laid down by Article 72 of the Staff Regulations. When the request submitted to the Commission was impliedly rejected, the applicant submitted a complaint against that decision on 26 July 1994 pursuant to Article 90(1) of the Staff Regulations.

7 By letter dated 26 April 1994, the Luxembourg office for settling claims ('the Claims Office') informed her that she would cease to be covered by the Common Scheme on 31 March 1995, one year after the date of her divorce.

8 By letter dated 11 January 1995, the Commission rejected the complaint of 26 July 1994. On 24 February 1995, the applicant brought this action.

9 On 24 February 1995, the applicant also brought an application for interim measures, which was rejected by order of the President of the Court of First Instance of 10 April 1995 in Case T-66/95 R *Kuchlenz-Winter* v *Commission* [1995] ECR-SC II-287.

Forms of order sought

The applicant claims that the Court should:

— declare that the defendant is under a duty to continue to guarantee the applicant cover against sickness under the Common Scheme;

— require the Commission to use its right of initiative *vis-à-vis* the Council with a view to enabling persons in the applicant's situation to qualify for cover under the Common Scheme;

— in the alternative, draw the German Government's attention to the gap in its national legislation on sickness insurance and call upon it to take appropriate measures in order to rectify that situation;

— order the defendant to pay the costs.

The defendant claims that the Court should:

— dismiss the application as inadmissible or, in the alternative, as unfounded;

— order the applicant to pay the whole of the costs.

Admissibility

Pleas and arguments of the parties

10 In its defence, the Commission raises three pleas as to inadmissibility, the first alleging that the action should have been brought against the Parliament and not

against the Commission; the second that the form of order sought by the applicant would, if granted, result in the Court's issuing directions to the Commission, reviewing the legality of a general provision in the abstract and addressing itself to a Member State; and the third that the letter of 26 April 1994 did not constitute a decision open to challenge.

11 The Commission puts forward three arguments in support of its first plea alleging that the action should have been brought against the Parliament. First, the object of the application is that the applicant should continue to be eligible for cover under the Common Scheme. Such cover could, however, be granted only by virtue of her ex-husband, an official in receipt of retirement pension from the Parliament, who has never at any time been an official of the Commission. Consequently, only the Parliament could decide on such a request.

12 Secondly, the defendant points out that the applicant's action is also based on the fact that, by virtue of the divorce decree, she became entitled in her own right to half of her ex-husband's pension and that consequently she has the *de facto* status of a retired official of the Parliament. It is on this footing, and not on the basis of her status as a former official of the Euratom Commission, that she seeks to be covered by the Common Scheme.

13 Thirdly, the Commission avers that the fact that, according to the applicable rules, the Common Scheme is administered by the Commission and that, as a result, the letter from the Claims Office of 26 April 1994 bears the stamp of an administrative unit of the Commission does not mean that an action against acts of that office will lie against the Commission. On the contrary, the action should have been brought against the institution of which the applicant is an official, which status qualifies her for cover under the Common Scheme. In this case, this signifies that the applicant, who was insured by virtue of her ex-husband's status of an official of the Parliament and seeks to continue to be affiliated to the Scheme, ought to have brought her action against that institution. That interpretation is confirmed by the fact that the applicant submitted a request and a complaint pursuant to Article 90(1) and (2) of the Staff Regulations to the Parliament, which, by rejecting them as unfounded, considered itself to be competent in the matter.

14 In response to that plea, the applicant asserts that, in the sphere of the bodies common to Community officials, it makes no difference against which institution the action is brought. In any event, by reason of the allocation of votes and its position on the political level, the Commission has a preponderant influence over those bodies. The applicant further maintains that the Commission acts as the institution responsible for the common bodies, as the applicable provisions make clear. It creates the impression — confirmed by the use of its stamp — that it is responsible and should therefore accept that it incurs responsibility. Moreover, the fact that the Parliament responded to the applicant's complaint does not have the consequence which the Commission seeks to attribute to it, since the Commission also responded to the complaint addressed to it.

15 Next, the applicant claims that the Commission cannot rely on the status by virtue of which she has brought this action in order to claim that it is inadmissible. The relevant provisions of the Staff Regulations are addressed to all officials and their families. Moreover, contrary to what the Commission claims, the applicant's ex-husband had been a Commission official inasmuch as he worked for 10 years for Euratom and for the High Authority of the ECSC, which were absorbed into the Commission.

16 In its second plea, the Commission alleges that the form of order sought by the applicant as formulated in the application is inadmissible. The request made by the applicant in her reply to the effect that she should be allowed to defer setting out the form of order sought until the hearing is unlawful, since, according to Article 44(1)(d) of the Rules of Procedure, it is for the party, and not the Court, to formulate the form of order sought. The first head of the form of order sought does not seek to deprive a specific Commission decision of effect, but instead is intended to have the Court issue a direction to the defendant institution so as to allow the applicant to continue to be affiliated to the Common Scheme, outside the provisions of the Staff Regulations. It is settled law that the Community judicature is not entitled to issue directions to a Community institution because that would encroach upon the prerogatives of the administrative authority (Case T-510/93 *Obst* v *Commission* [1994] ECR-SC II-461, paragraph 27; Case T-15/91 *Bollendorff* v *Parliament* [1992] ECR II-1679, paragraph 57). Nor can the Court oblige

the Commission to act contrary to the binding provisions of the Staff Regulations (Joined Cases C-41/88 and C-178/88 *Becker and Starquit* v *Parliament* [1989] ECR 3807).

17 As regards the second head of the form of order sought concerning the exercise of its right of initiative *vis-à-vis* the Council, the Commission observes that it is for it alone to decide whether it is necessary to exercise that right (Case T-134/89 *Hettrich and Others* v *Commission* [1990] ECR II-565, paragraph 22). That head of the form of order sought is therefore inadmissible. It is also inadmissible in so far as it presupposes that the Court will rule in the abstract on the legality of a provision of a general nature (Case T-110/89 *Pincherle* v *Commission* [1991] ECR II-635, paragraph 30; Case T-41/90 *Barassi* v *Commission* [1992] ECR II-159, paragraph 38, and Case T-42/90 *Bertelli* v *Commission* [1992] ECR II-181, paragraph 38).

18 Lastly, the Commission submits that the third head of the form of order sought is also inadmissible on the ground that the Court has no jurisdiction to draw a Member State's attention to a particular legal situation.

19 In response to that second plea, the applicant asks that, since in the meantime she has brought an action for failure to act against the Commission, the Court should take the necessary steps to defer formulation of the form of order sought until the hearing.

20 In its third plea as to inadmissibility, the Commission submits that the letter of 26 April 1994 is not a challengeable decision and that, moreover, it is not clear from the form of order sought by the applicant that she seeks annulment of the implied decision rejecting her request of 7 February 1994 or of the decision of 26 April 1994. It has been consistently held, however, that only an act directly and immediately affecting the applicant's legal situation can be regarded as an act adversely affecting her (order of 7 June 1991 in Case T-14/91 *Weyrich* v *Commission* [1991]

ECR II-235, paragraph 35, and judgment in Case T-135/89 *Pfloeschner* v *Commission* [1990] ECR II-153, paragraph 11). In the letter in question the Claims Office merely informed the applicant of the date on which her affiliation to the Common Scheme would come to an end. That effect arose directly out of Article 72(1*b*) of the Staff Regulations, which provides that the cover of the ex-wife of an official is to terminate automatically one year after the divorce. There was therefore no need for the Claims Office to take a decision to that effect, and there is no act adversely affecting the applicant. Moreover, assuming that the letter of 26 April 1994 is an act open to challenge, the Commission questions whether the applicant complied with the three-month time-limit for submitting a complaint, since the complaint was registered on 9 August 1994.

21 In response to this plea, the applicant alleges that her complaint related to the implied rejection of her request of 7 February 1994, which was made in accordance with Article 90(1) of the Staff Regulations. In view of the four-month period after which the request was deemed to have been rejected, the complaint was submitted in time. In any case, the applicant avers that, in the event that the letter of 26 April 1994 has to be taken into account in order to calculate the period within which the complaint ought to have been submitted, regard should be had to the post-office date stamp of the complaint, namely 21 July 1994, and not the stamp showing the date of receipt by the Commission's staff, namely 26 July 1994.

Findings of the Court

22 In order to rule on the admissibility of the application, it will be necessary first to identify its object and appraise the Commission's second plea as to inadmissibility in the light of it. The Court observes in this connection that it appears from the first head of the form of order sought in the application that it seeks continuing cover for the applicant under the Common Scheme beyond the time-limit laid down by Article 72(1*b*) of the Staff Regulations.

23 When the application was brought, the applicant was faced with the Commission's letter of 26 April 1994 informing her of the forthcoming termination of her cover under the Scheme and with the implied rejection of the request she had made for continued cover on 7 February 1994 under Article 90(1) of the Staff Regulations. It must also be noted that on 26 July 1994 she submitted a complaint against those two acts, which was rejected by the Commission.

24 In view of the foregoing, the Court finds that the first head of the form of order sought in the application, by which the applicant seeks a declaration that she is entitled to cover under the Common Scheme, must be interpreted as seeking annulment of those two acts, together with the decision rejecting her complaint of 26 July 1994, given that that decision is not confined to confirming the earlier acts.

25 It follows that that head of the form of order sought cannot be rejected as inadmissible for the reasons put forward by the Commission in its second plea as to inadmissibility.

26 As far as the other heads of the form of order sought in the application are concerned, the Commission's arguments must be accepted. As far as concerns the second head of the form of order sought asking the Court to require the Commission to use its right of initiative, suffice it to say that it has been consistently held that the Community judicature is not entitled to issue directions to a Community institution (Case T-507/93 *Branco* v *Court of Auditors* [1995] ECR-SC II-797, paragraph 49). As for the third head of the form of order sought, the Court points out that it has no jurisdiction to rule on the conduct of a Member State (see, in this connection, Case 28/83 *Forcheri* v *Commission* [1984] ECR 1425).

27 Consequently, the Commission's second plea as to inadmissibility must be upheld in part and the second and third heads of the form of order sought must be declared inadmissible.

28 As regards the first plea as to inadmissibility, which alleges that the action ought to have been brought against the Parliament, the Court finds in the first place that, ever since she left the Euratom Commission in 1963, the applicant has no longer had the status of a Community official and has qualified for cover under the Common Scheme by virtue of her ex-husband, a retired official of the Parliament. On 7 February 1994 she submitted a request to that institution pursuant to Article 90(1) of the Staff Regulations with a view to obtaining continued cover, which was rejected.

29 On the same date, the applicant submitted an identical request to the Commission, which was registered by its staff on 14 February 1994. That request was impliedly rejected. In the meantime, the applicant received the aforementioned letter of 26 April 1994, stamped with the words 'Commission européenne/RCAM'. Next, on 26 July 1994, the applicant submitted a complaint to the Commission, in which she referred, *inter alia*, to the institution's duty to have regard for her welfare. That complaint was rejected by decision of 21 December 1994, which was notified to the applicant on 11 January 1995.

30 In the second place, the Court finds that both the request of 7 February 1994 and the complaint of 26 July 1994 were addressed to the appointing authority of the Commission and that, in the decision rejecting the complaint, the Commission did not state at any time that it was not the competent institution and that the applicant should have addressed herself to the Parliament. On the contrary, it appraised the applicant's arguments, including that alleging that it was under a duty to have regard for her welfare, and gave a reasoned rejection.

31 It follows from the foregoing that the applicant was faced with an act which had been addressed to her by the Commission following a request made to the appointing authority of that institution, in which the institution did not refer to its lack of competence in the matter. The Court considers that that situation, which is due to the defendant's conduct, created uncertainty in the applicant such that she cannot be criticized for having contested the Commission's act (see Case 50/74 *Asmussen and Others* v *Council and Commission* [1975] ECR 1003, paragraph 16).

32 It must further be noted that, as appears from Articles 16 to 20 of the Rules on Sickness Insurance for Officials of the European Communities, the Commission plays a particularly important part in administering the Common Scheme.

33 In those circumstances, it cannot be held that an action will not lie from the applicant against such an act on the ground that it emanates from the Commission, since otherwise the act would not be amenable to review at all and the applicant would be obliged, in order to exercise her right of access to the courts, to make a fresh request to the Parliament.

34 As regards the third plea as to inadmissibility, the Court considers that the contested act proceeds to interpret provisions which are applicable to the applicant's situation. Just as it followed from that act that the applicant would cease to be covered by the Common Scheme at the end of the one-year period prescribed by Article 72(1*b*) of the Staff Regulations, if the act were to be annulled, the applicant would be able to obtain continuing cover under the Scheme. It follows that, contrary to the Commission's claims, the contested act adversely affects the applicant and may therefore be the subject of an action brought pursuant to Article 91 of the Staff Regulations.

35 It follows from the foregoing that the first head of the form of order sought, as interpreted in paragraph 24 of this judgment, is admissible.

Substance

36 The applicant bases her application on four pleas, the first three of which allege infringement of the duty to have regard for her welfare, of the principle of free movement of persons and of the principle of equal treatment, whilst the fourth is based on the claim that she has an entitlement to a pension in her own right which was recognized by the divorce decree.

First plea: infringement of the duty to have regard for the welfare of the person concerned

Arguments of the parties

37 By her first plea, the applicant argues that, in view of her desperate plight, the Commission's duty to have regard for her welfare should prompt it to provide continuing cover for her under the Common Scheme. The duty to have regard for her welfare should be exercised so as to offset the effects caused by the fact that the applicant does not satisfy the conditions which would enable her to be covered by the Common Scheme, and her request should not be refused in view of the fact that she is suffering from a serious illness. The applicant contests the Commission's claim that the duty to have regard for her welfare has to be applied subject to the rules in force, which would prevent her from obtaining the relief she seeks. In her view, the duty to have regard for her welfare should be exercised within the framework of the 'law and legal principles', which would enable a measure to be adopted to the desired effect.

38 In response to the first plea, the Commission starts by claiming that it is inadmissible for having been raised in this form for the first time in the application. In her complaint, the applicant raised the duty to have regard for her welfare only in connection with the entitlement of a person insured under the Common Scheme to be covered by the statutory sickness insurance scheme in force in her country of origin when she ceased to be affiliated to the Common Scheme.

39 Secondly, the Commission claims that the applicant has been treated generously inasmuch as she was able to continue to be affiliated to the Common Scheme for one year after the date of the decree absolute. Since she had the possibility of being covered by the Luxembourg sickness insurance scheme, she should not even have been entitled under Article 72(1*b*) of the Staff Regulations to qualify for cover under the Common Scheme after her divorce. There was therefore no breach on the defendant's part of the duty to have regard for the applicant's welfare. Besides, the provision in question is itself a manifestation of the duty to which the institutions are subject to have regard for the welfare of the person concerned.

40 Thirdly, the Commission argues that the duty to have regard for the welfare of the person concerned has to be applied subject to the rules in force (Case T-65/92 *Arauxo Dumay* v *Commission* [1993] ECR II-597, paragraphs 36 and 37, and Case T-123/89 *Chomel* v *Commission* [1990] ECR II-131, paragraph 32). Consequently, it would be impossible for it to provide continuing cover for the applicant under the Common Scheme without derogating from the binding provision of Article 72(1*b*) of the Staff Regulations. Moreover, according to the case-law, that provision has to be interpreted strictly (Case T-41/89 *Schwedler* v *Parliament* [1990] ECR II-78, paragraph 23).

41 Lastly, the Commission considers that, in so far as the applicant seeks continuing cover in her capacity as the ex-wife of a former official of the Parliament, the question of any infringement of the duty to have regard for the applicant's welfare can arise only with regard to that institution.

Findings of the Court

42 The Court takes the view in the first place that this plea must be taken into consideration. It is clear from the case-law that, whilst the form of order sought which is placed before the Community Court may contain only heads of claim based on the same matters as those raised in the complaint, the former may none the less be developed in the application by pleas and arguments which need not necessarily appear in the complaint but must be closely linked to it (Case T-496/93 *Allo* v *Commission* [1995] ECR-SC II-405, paragraph 26, Case T-36/93 *Ojha* v *Commission* [1995] ECR-SC II-497, paragraph 56, and Case T-361/94 *Weir* v *Commission* [1996] ECR-SC II-381, paragraph 28). This was the case here inasmuch as the duty to have regard for the welfare of the person concerned was raised in the complaint and only the consequences which the applicant claims should flow from that duty were altered in the application.

43 As to whether that plea is well founded, it should be noted that the duty to have regard for the interests of the person concerned must be subject to the rules in force and, in particular, it cannot enable an applicant to obtain a different result

from that which must follow from provisions whose sense is clear (*Arauxo Dumay* v *Commission*, paragraph 37). Since the applicant's claim is for her cover under the Common Scheme to be continued beyond the period prescribed by Article 72(1*b*) of the Staff Regulations, the duty to have regard for her welfare cannot have the effect of ousting the application of that provision, whose clarity the applicant does not deny. The plea must therefore be rejected.

Second plea: infringement of the principle of free movement of persons

Arguments of the parties

44 In her second plea, the applicant claims that her right to move freely in the Community is seriously restricted by the fact that she cannot settle in Germany because if she left Luxembourg she would lose the only sickness cover available to her. Even if, as the Commission points out in the defence, some classes of persons are covered by special rules which grant them more extensive rights, the existence of such rules cannot preclude her from relying on the principle of free movement. It is contrary to that principle that a person such as the applicant should be prevented from transferring her residence to her country of origin for want of availability of appropriate sickness cover, owing to specific circumstances.

45 The Commission contests that plea on the ground that the free movement of persons, such as the applicant, who do not have an occupation is governed by Directives 90/364/EEC, 90/365/EEC and 90/366/EEC of 28 June 1990 on, respectively, the right of residence, the right of residence for employees and self-employed persons who have ceased their occupational activity, and the right of residence for students (OJ 1990 L 180, pp. 26, 28 and 30). All those directives make recognition of the right of residence subject to the condition that the person concerned is covered by sickness insurance in the host State. The Commission further argues that

the source of the applicant's problem is to be found in the German legislation; neither the defendant nor the Common Scheme can be held responsible for the effects of that legislation.

Findings of the Court

46 The Court finds in the first place that the applicant does not allege that she is the victim of a German statutory provision restricting her right of residence in that country. That right, as the Court of Justice has held, is directly connected with her German nationality (Case C-370/90 *Singh* [1992] ECR I-4265, paragraph 22). It therefore follows that she is subject to no restriction in Germany on account of the fact that she resided and was employed in another country in the past.

47 However, in so far as the applicant claims that the fact that it is impossible for her to obtain sickness insurance in Germany constitutes a restriction on her right to move freely, it should be recalled, as Article 8a of the EC Treaty provides, that that right is subject to the limitations and conditions laid down, *inter alia*, in secondary legislation. The Court finds that it is clear from the provisions of secondary legislation governing the exercise of the right of residence, in particular Directives 90/364 and 90/365, that persons, such as the applicant, who are not in active employment, must have sickness insurance in the host State in order to exercise that right.

48 It follows that, in the case of persons who are not in active employment, the existence of sickness insurance is a condition, laid down by Community secondary legislation, to which the exercise of the right of free movement is subject, and not, as the applicant claims, a consequence of that right. Accordingly, the applicant is not entitled, by virtue of the directives in question, to claim the benefit of social security cover, in her case under the Common Scheme, in order to remove any practical obstacle to her return to the country of which she is a national.

49 Moreover, again with regard to the consequences which the applicant claims she can derive from the fact that she has no cover under the German social security system, it must be held that, in so far as she was not linked to any social security system of a Member State at any time during her working life, she does not come within the scope *ratione personae* of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416). Consequently, she is not eligible for the rights provided for in that regulation.

50 It follows that the question of the applicant's cover by a sickness insurance scheme with a view to her being able actually to establish her residence in her country of origin cannot be connected with the principle of free movement as enshrined in the Treaty and implemented by secondary legislation. In the absence of harmonization of social security schemes in the Community, she comes only within the scope, on the one hand, of the relevant provisions of the Staff Regulations of Officials of the European Communities considered above (see, in particular, paragraph 44 of this judgment) and, on the other hand, of the applicable national laws, in this case German law.

51 Accordingly, the plea must be rejected.

Third plea: infringement of the principle of equal treatment

Arguments of the parties

52 In her third plea, the applicant claims that the refusal to grant her the benefit of sickness cover under the Common Scheme constitutes an infringement of the principle of equal treatment in so far as former Members of the Commission, the Court of Justice, the Court of First Instance and the Court of Auditors continue to be covered by the Common Scheme if they are not covered by another public sickness insurance scheme. That rule should be applied by analogy to the

applicant, who is not covered by any sickness insurance in her country of origin and hence finds herself in the same situation as former Members of the aforesaid institutions.

53 In response, the Commission first submits that no infringement of the principle of equal treatment is involved, since the applicant does not claim to have been treated differently than any other person who has been divorced from an official affiliated to the Common Scheme. Secondly, it maintains that the former Members of the institutions to whose arrangements the applicant refers are affiliated on account of the duties which they carry out and of the fact that their term of office is for a limited period. The situation of the applicant, who was insured by virtue of the fact that her ex-husband was an official, is therefore not on all fours with that of the Members in question. Lastly, the Commission avers that it is the applicant's claim that Article 72 of the Staff Regulations should not be applied which seeks to obtain discriminatory treatment by comparison with other persons in a situation comparable to her own.

Findings of the Court

54 The Court finds that the infringement of the principle of equal treatment alleged by the applicant is based on the fact that Council Regulation (ECSC, EEC, Euratom) No 2426/91 of 29 July 1991 amending Regulation No 422/67/EEC-5/67/Euratom determining the emoluments of the President and Members of the Commission, the President, Judges, Advocates General and Registrar of the Court of Justice and the President, Members and Registrar of the Court of First Instance and Regulation (EEC, Euratom, ECSC) No 2290/77 determining the emoluments of the Members of the Court of Auditors (OJ 1991 L 222, p. 1; 'Regulation No 2426/91') enables the persons to whom it applies to continue to enjoy cover under the Common Scheme in certain circumstances after they have ceased to hold office.

55 It has been consistently held that there is a breach of the principle of equal treatment where two classes of persons whose factual and legal situations are not

essentially different are treated differently or where different situations are treated in an identical manner (Case T-100/92 *La Pietra* v *Commission* [1994] ECR-SC II-275, paragraph 50).

56 In this connection, the Court points out that, unlike in the case of officials, the link with the Community of the persons covered by Regulation No 2426/91 is limited in time as a result of the conditions attaching to their term of office. In the event that, at the end of their term of office, such persons do not engage in any gainful occupation enabling them to be covered by a public sickness insurance scheme, the new wording given by Article 1 of Regulation No 2426/91 to Article 11 and Article 12, respectively, of the amended regulations, enables them to continue to be covered by the Common Scheme. That advantage is therefore designed to mitigate the disadvantages suffered by the persons concerned as a result of the interruption of their former professional activities by the duties which they carried out at the Community institutions.

57 Consequently, in view of the different nature of the relationship connecting officials with the institutions, which is reflected by the fact that that relationship is not limited in time, the situation of officials is not the same as that of the persons to whom Regulation No 2426/91 applies. As a result, the difference in the rules introduced by that regulation does not infringe the principle of equal treatment.

Fourth plea: the fact that the applicant is entitled in her own right to a pension

Arguments of the parties

58 In her last plea, the applicant avers that she is personally entitled to half of her ex-husband's retirement pension. That right arises under German law, which, in case of divorce, provides for the compensatory splitting of pension rights acquired by married couples, and was granted to her by the divorce decree of the Luxembourg court. The applicant therefore claims that she is entitled to a Community

pension and infers from this that the Commission is obliged to give her the benefit of cover under the Common Scheme as is enjoyed by other persons in receipt of retirement pension.

59 The Commission contests this plea on the ground that the applicant is not entitled in her own right to a pension under the Staff Regulations, but has the right, recognized by a decree given by the competent Luxembourg court, to rely, *vis-à-vis* her ex-husband, on a compensatory splitting of the pension rights which he has acquired. The fact that her ex-husband receives a pension from the Parliament does not mean that his ex-wife can claim that she is entitled in her own right to a pension from the Communities. Moreover, the applicant, who resigned from Euratom more than 30 years ago, does not satisfy the requirements laid down with regard to pension rights or the requirements for entitlement to affiliation in her own right to the Common Scheme.

Findings of the Court

60 The Court considers that by this plea the applicant seeks to be recognized as having the status of a person entitled to a Community pension on the ground that the divorce decree ordered the pension rights acquired by her ex-husband in his own right to be split. That interpretation amounts in fact to recognizing that a decision of a court of a Member State, given pursuant to national legislation applicable to divorce, has the effect of conferring a status the conditions for the acquirement of which are laid down by the Staff Regulations of Officials of the European Communities.

61 It must be held, however, in the first place that that status is denied by the rules of the Staff Regulations in this particular case. First, the concept of an official entitled to a retirement pension, as it emerges in particular from Articles 77 and 78 of the Staff Regulations, does not cover persons who have not completed ten years' service, which includes the applicant, who was an official between only 1956 and 1963.

62 Likewise as regards the concept of a person entitled to a survivor's pension, it is clear from Articles 79 to 81a of the Staff Regulations that such a pension is conditional on the death of the spouse, or ex-spouse, of the person concerned and that is not the case here.

63 It follows from the aforementioned rules of the Staff Regulations that entitlement to a pension is conditional upon an official's having paid contributions for a minimum period. In the case of a retirement pension, contributions will have been paid directly by the pensioner; in the case of survivors' pensions, the pensioner — the surviving spouse or ex-spouse of the official who paid the contributions — has the benefit of the rights which the official acquired. It is clear from the facts of the case that that is not the situation in the applicant's case; she is therefore not entitled to a pension under the applicable Community rules.

64 Consequently, if the decision declaring the applicant divorced were to be given the effect intended by the applicant, this would conflict with the rules of the Staff Regulations in so far as it would bring within their scope a factual situation which they do not cover. Since the benefit of cover under the Common Scheme is a social security entitlement of a public nature, the definition of the scope of that scheme is a matter for the Community legislature (Case C-163/88 *Kontogeorgis* v *Commission* [1989] ECR 4189, paragraph 11). Consequently, a national decision cannot have the effect of creating such an entitlement.

65 Secondly, in so far as the applicant seeks recognition that certain effects in Community law attach to a judicial decision applying a rule of German law, the Court should interpret the aims of that rule. In that connection, the Court finds that the effect which the applicant would like to have recognized is not related to the aims pursued by the German rule providing for the compensatory splitting, in the event of divorce, of pension rights acquired by a married couple. That rule is intended only to give the spouse who has not paid contributions in his or her own right to a pension scheme the right to share the rights acquired by the other spouse. In this case, that aim is satisfied by the Community institutions in so far as the Parliament pays part of the ex-husband's pension directly to the applicant pursuant to the divorce decree.

66 In contrast, the rule in question has no effect *per se* on affiliation to any sickness insurance scheme, since it relates only to pension rights. The effect which the applicant would like to see attributed to it is therefore not necessary in order to achieve the aims sought by the rule in question and by the national court's decision applying that rule, and, in any event, is extraneous to that rule.

67 In those circumstances, that plea must also be rejected. As a result, the application must be dismissed.

Costs

68 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, since the application sought annulment of an act terminating rights which the applicant derived from the Staff Regulations owing to the fact that she had been married to an official, the proceedings come under Article 88 of the Rules of Procedure in so far as the costs are concerned. Consequently, that provision, which provides that in proceedings between the institutions and their servants the institutions are to bear their own costs, should be applied.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Dismisses the application;

2. Orders the parties to bear their own costs.

Saggio Tiili Moura Ramos

Delivered in open court in Luxembourg on 16 April 1997.

H. Jung A. Saggio

Registrar President