JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
30 March 1993 *

In Case T-4/92,

Evangelos Vardakas, an official of the Commission of the European Communities, residing in Brussels, represented by E. Lebrun and, at the hearing, by E. Boigelot, both of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Louis Schiltz, 2 Rue du Fort Rheinsheim,

applicant,

v

Commission of the European Communities, represented by G. Valsesia, Principal Legal Adviser, and A. M. Alves Vieira, of its Legal Service, acting as Agents, assisted by D. Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the office of R. Hayder, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of the decision of the Commission of 11 February 1991 refusing to grant the applicant the expatriation allowance,

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

composed of: D. P. M. Barrington, President, K. Lenaerts and A. Kalogeropoulos, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 11 February 1993,

* Language of the case: French.

gives the following

Judgment

Facts

1 On 1 January 1991 the applicant, Evangelos Vardakas, was recruited by the Commission and posted to Brussels as a member of the temporary staff in Grade A 2. His place of recruitment was fixed as Brussels. On 1 May 1991 he was appointed an official.

2 From 1 January 1984 until the date of his recruitment, Mr Vardakas had worked in Brussels for the European Committee for Standardization ('the ECS'), as Secretary-General.

3 Before his recruitment, Mr Vardakas consulted the Commission to ascertain whether the ECS could be recognized as an international organization for the purposes of Article 4(1)(a) of Annex VII to the Staff Regulations of Officials of the European Communities ('the Staff Regulations'), thus making him eligible for the expatriation allowance provided for therein.

4 By letter of 18 October 1990, he received the following answer: 'The question raised regarding your eligibility for the expatriation allowance has been examined by the personnel department. The ECS is not recognized as an international organization for the purposes of Article 4 of Annex VII to the Staff Regulations.'

5 By letter of 19 November 1990, Mr Vardakas stated that he would collect all relevant information and submit it at the time of his entry into service for review of the question whether the ECS was an international organization for the purposes of Article 4 of Annex VII to the Staff Regulations.

6 By memorandum of 11 February 1991, the head of the unit responsible for individual rights told Mr Vardakas:

'I have forwarded the documents which you submitted in the course of the formalities on your entry into service to the head of the Staff Regulations and Discipline Unit for reference in reviewing the status of the "European Committee for Standardization" in order to determine whether it is an international organization according to the criterion established on 30 May 1986 by the heads of administration, whereby "an organization is to be regarded as an international organization for the purposes of Article 4 of Annex VII to the Staff Regulations only if it satisfies the following condition: it was created by States or by an organization which itself was created by States".

In view of his negative response, I regret to have to inform you that you do not meet the conditions set out in the second indent of Article 4(1)(a) of Annex VII to the Staff Regulations for entitlement to the expatriation allowance.'

7 On 2 May 1991 Mr Vardakas submitted a complaint under Article 90(2) of the Staff Regulations against the decision of 11 February 1991.

8 By letter of 18 October 1991, received by Mr Vardakas on 23 October 1991, that complaint was rejected.

9 In those circumstances, Mr Vardakas brought these proceedings by application lodged at the Registry of the Court of First Instance on 22 January 1992. The written procedure followed the normal course. On hearing the Report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure without any preparatory inquiry.

10 The parties presented oral argument and answered questions put by the Court at the hearing on 11 February 1993.

Forms of order sought by the parties

11 The applicant claims that the Court should:

(1) declare the action admissible and well founded;

(2) annul the Commission's decision of 11 February 1991 refusing to grant the applicant the expatriation allowance, and its decision rejecting the applicant's complaint in that regard;

(3) order the Commission to pay the expatriation allowance with effect from 1 January 1991 — less the sum which the applicant has already received by way of foreign residence allowance — together with interest at 10% per annum from the date each monthly payment of the expatriation allowance fell due until the actual date of payment;

(4) order the Commission to pay the costs.

The Commission claims that the Court should:

— dismiss the application as unfounded;

— make an appropriate ruling as to costs.

Pleas in law and arguments of the parties

12 In support of his application, Mr Vardakas puts forward two pleas in law, alleging infringement of Article 110 of the Staff Regulations and of Article 4(1)(a) of Annex VII to the Staff Regulations.

The first plea: infringement of Article 110 of the Staff Regulations

Arguments of the parties

13 The applicant submits that the second paragraph of Article 110 of the Staff Regulations, which provides that all general provisions for giving effect to the Staff Regulations and all rules adopted by agreement between the institutions can only be invoked against staff if they have previously been brought to the attention of the staff, has been infringed in that the opinion adopted by the Board of Heads of Administration on 28 May 1986 ('the opinion of 28 May 1986') was neither published nor notified to the staff.

14 Mr Vardakas considers that, pursuant to the second paragraph of Article 110 of the Staff Regulations, the opinion of 28 May 1986 cannot be relied on against him and that the decision of 11 February 1991, which is based on that opinion, must therefore be annulled.

15 The Commission contends that the opinion of 28 May 1986 constitutes only an interpretation of Article 4(1)(a) of Annex VII to the Staff Regulations by the Heads of Administration of the Community institutions. They had established standard criteria on which to base findings regarding the international character of any particular organization. Consequently, the opinion of 28 May 1986 was neither a 'general provision for giving effect to the Staff Regulations' nor a 'rule' for the purposes of the second paragraph of Article 110 of the Staff Regulations.

Findings of the Court

16 The Court notes that, as Mr Vardakas admitted at the hearing, the complaint made during the pre-litigation procedure contains no reference, direct or indirect, to an infringement of the second paragraph of Article 110 of the Staff Regulations. It is, however, settled that, in staff cases, the forms of order sought before the Court may only have the same subject-matter as the claims in the complaint and may contain only heads of complaint having the same legal basis as relied on in the complaint and, although submissions and arguments made to the Court in support of those heads of complaint need not necessarily appear in the complaint, they must be

closely linked to it (see, in particular, Case 242/85 *Geist* v *Commission* [1987] ECR 2181, paragraph 9, Case 224/87 *Koutchoumoff* v *Commission* [1989] ECR 99, paragraph 10, and Case T-57/89 *Alexandrakis* v *Commission* [1990] ECR II-143, paragraph 8 et seq.). It has also been consistently held that the question of consistency between the complaint and the application is a matter of public policy and should be considered by the Court of its own motion (see, in particular, the *Alexandrakis* case, cited above).

17 The first plea must therefore be dismissed as inadmissible.

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

Arguments of the parties

18 Mr Vardakas submits that the opinion of 28 May 1986 was adopted contrary to Article 4(1)(a) of Annex VII to the Staff Regulations in that it espouses too restrictive an interpretation of the term 'international organization' by adding a requirement not mentioned in Article 4(1)(a), namely that the organization be not only international, but also public.

19 According to Mr Vardakas, his argument that the opinion of 28 May 1986 is unlawful is borne out by the rationale underlying the exception provided for in Article 4(1)(a) of Annex VII to the Staff Regulations, as set out by the Court of Justice (see Case 1322/79 *Vutera* v *Commission* [1981] ECR 127, paragraph 8). According to that judgment, the central issue is not whether or not the international organization in question is a public body, but whether or not the ties established between the official concerned and the country in which he is employed are of a lasting character.

20 Mr Vardakas maintains that there is therefore no difference which can justify discrimination between officials who, like himself, were employed by a 'private' international organization and those who were employed, in the State to which they are later posted, by a public international organization as defined in the opinion of 28 May 1986.

21 That is all the more true, according to Mr Vardakas, in the case of an international organization which is entrusted, by States and supranational organizations in particular, with tasks in the public interest. In that connection, Mr Vardakas points out that, after the ECSC was established, the task of standardizing the European steel sector was initially carried out by the ECSC itself but later transferred, in 1986, to the ECS pursuant to a special protocol. On that point, he notes that the ECS's members were national bodies for standardization of the steel sector, who appointed the heads of the national delegations. Furthermore, the ECS was recognized as a European standards institution by Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8), and in November 1984 it signed a special memorandum on cooperation with the Commission. Lastly, Mr Vardakas points out that Council Resolution 85/C 136/01 of 7 May 1985 on a new approach to technical harmonization and standards (OJ 1985 C 136, p. 1) authorizes the ECS to adopt European harmonized standards conforming to the 'essential requirements' laid down by the Council directives. On the basis of that resolution and subsequent directives, the ECS received a mandate from the Commission to draw up approximately one thousand European standards.

22 Mr Vardakas concludes that, having regard to its object and role, the ECS operates as a public international organization and, applying a functional criterion, it is therefore of a public nature.

23 He further submits that, contrary to the Commission's contention, the judgment of the Court of Justice in Case 211/87 *Nuñez* v *Commission* [1988] ECR 2791 confirms his interpretation of the last sentence of Article 4(1)(a) of Annex VII to the Staff Regulations, since the Court decided that that provision could not apply in the case of an official who, although he had worked in an embassy in the State to which he was later posted, already had lasting ties with that country, since he had habitually resided there and carried on his occupation there for a long time previously. Thus the Court of Justice placed more importance on the criterion of lasting ties with the country of employment than on the criterion of work done for another State.

24 Mr Vardakas again stresses that the first opinion adopted by the Board of Heads of Administration on Article 4(1)(a) of Annex VII to the Staff Regulations on 26 and 27 June 1975 ('the opinion of 26 and 27 June 1975'), which was in force for 11 years, interpreted the term 'international organization' much more broadly and that, on that construction, he would automatically have received the expatriation allowance.

25 Mr Vardakas maintains that the opinion of 28 May 1986, on which the contested decision is based, gives a definition or interpretation of the term 'international organization' which is incompatible with the provision of the Staff Regulations at issue and that the contested decisions must therefore be annulled.

26 The Commission replies that Article 4(1)(a) of Annex VII to the Staff Regulations refers to situations in which an official cannot be regarded as having established lasting ties with the country to which he is posted. In that regard there are considerable differences between the situation of an official in the service of a public international organization and an official in the service of an international association governed by private law, even though its members are of different nationalities.

27 After rehearsing the legal differences between a public international organization and an international association governed by private law, such as the ECS, the Commission asserts that, from a practical point of view, a person working for an international organization or embassy is in a sense detached from the State of his posting. By virtue of his status, the nature of his work and his interests, an official of that kind does not form genuine contacts with that country and therefore establishes no lasting tie with it.

28 According to the Commission, the same cannot be said of a person called on to work in a particular country for a company or private-law association which is governed entirely by the laws of that country. Such was the applicant's position,

since the ECS, for which he worked from 1 January 1984, is an international non-profit-making association established under Belgian law, which has its seat in Brussels and is entirely governed by Belgian legislation. Thus, from 1 January 1984, the applicant resided and worked in Brussels, without ever enjoying the privileges and immunities which characterize the situation of senior officials working for an international organization.

29 By way of conclusion, the Commission maintains that the interpretation adopted in the opinion of 28 May 1986 is consistent with the definition of a public international organization and judiciously reflects the special legal rules governing public international organizations and the special situation of their officials.

30 The Commission adds that that interpretation is perfectly in keeping with the rationale underlying the exception provided for in Article 4(1)(a) of Annex VII to the Staff Regulations, as set out in the case-law of the Community judicature. The paramount consideration in determining entitlement to an expatriation allowance is the official's habitual residence before his entry into service (see Case 21/74 *Airola* v *Commission* [1975] ECR 221 and Case 37/74 *Van den Broeck* v *Commission* [1975] ECR 235). The concept of expatriation therefore depends on the personal situation of the official, that is to say, on the extent to which he is integrated in his new environment, which is demonstrated, for example, by habitual residence or by the main occupation previously pursued (see, most recently, Case 201/88 *Atala-Palmerini* v *Commission* [1989] ECR 3109).

Findings of the Court

31 The question before the Court concerns the interpretation of the last sentence of Article 4(1)(a) of Annex VII to the Staff Regulations, which provides that an expatriation allowance is to be 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 [;] for the purposes of this provision, circumstances arising from work done for another State or for an international organization shall not be taken into account'.

32 The applicant relies on the interpretation given to that provision in the opinion of 26 and 27 June 1975, whereas the Commission relies on that given in the opinion of 28 May 1986. According to the former, for the purposes of Article 4 of Annex VII to the Staff Regulations the term international organization is to be understood as referring to organizations meeting the following criteria: '(a) they must be international in composition; that is to say, they must have members from different countries and be open to similar participation from various nations; (b) they must carry on an international activity of general interest in, *inter alia*, the political economic, social, humanitarian, scientific or cultural spheres; (c) they must be permanent in nature and have an organized structure under which the members periodically have the right to appoint the persons in charge of the organization (permanent headquarters, secretariat, etc.); (d) they must be non-profit-making'. According to the opinion of 28 May 1986, however, an organization is to be recognized as an international organization if it satisfies the sole criterion of having been 'created by States or by an organization which itself was created by States'.

33 In order to resolve this question of interpretation, reference must be made, first, to the wording of the last sentence of Article 4(1)(a) of Annex VII to the Staff Regulations, secondly, to its purpose and, thirdly, to the way in which the Commission itself has interpreted that provision.

34 As regards the wording and context of the provision at issue, the Court first notes that it is contained in an article comprising three parts. The first part sets out the condition which an official must in principle satisfy in order to receive the expatriation allowance, namely that he must never have been a national of the State in whose territory the place where he is employed is situated. The second provides, by way of an exception to that principle, that an official who, during the five years ending six months before he entered the service, habitually resided or carried on his main occupation within the European territory of that State is not eligible for that allowance. By way of a derogation from that exception, the third part provides that circumstances arising from work done for another State or for an international organization are not to be taken into account. Accordingly, as an exception to an exception, it must be interpreted broadly.

35 Furthermore, reference is made to 'an international organization' not only in subparagraph (a) but also in subparagraph (b) of Article 4(1) of Annex VII. According to Article 4(1)(a), 'circumstances arising from work done for another State or for an international organization' allow an official to receive an expatriation allowance, even though he has, during the five years ending six months before he entered the service, habitually resided or carried on his main occupation in the State in whose territory the place where he is employed is situated. However, under Article 4(1)(b) 'the performance of duties in the service of a State or of an international organization' renders an official ineligible for that allowance where he is or has been a national of the State in whose territory the place where he is employed is situated but has habitually, during a particular period, resided outside the territory of that State.

36 It should be emphasized that the expression 'circumstances arising from work done for ... an international organization' has a much wider scope than the expression 'the performance of duties in the service of ... an international organization' and that, consequently, the Staff Regulations have been framed in broad terms where the intention was to grant officials the expatriation allowance and in restrictive terms where the opposite effect was desired.

37 It follows that the legislature's intention was to confer a broad entitlement to the expatriation allowance.

38 Secondly, the Court finds that each party relies in support of its view on the fundamental purpose of Article 4(1) of Annex VII to the Staff Regulations, as defined by the Court of Justice.

39 In this Court's view, 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. The expenses incurred on first entering into service are compensated once only for each posting to one place by the reimbursement of

removal expenses and payment of the installation allowance. By contrast, the expatriation allowance is paid throughout the period of the official's service even though he may have integrated himself in the country of employment.

40 Viewed in that light, it must be recognized that the expatriation of a person is independent of the special status which, as a member of the staff of a public international organization, he enjoys under international law. Thus, a person may be an expatriate while not being accorded that special status, just as a person may have that special status without actually being an expatriate (on that last point, see the *Nuñez* case).

41 In this context too, therefore, the term 'international organization' in the last sentence of Article 4(1)(a) of Annex VII to the Staff Regulations cannot be interpreted restrictively.

42 Thirdly, the Court notes that the Commission stated at the hearing that the opinion of 26 and 27 June 1975 was not unlawful — a fact confirmed by Case T-123/89 *Chomel* v *Commission* [1990] ECR II-131, paragraph 34, in which that opinion was held to be 'a legal measure' — but at the same time the Commission maintains that the opinion of 28 May 1986, like that of 26 and 27 June 1975, constitutes merely an interpretation of the provision of the Staff Regulations at issue and not a general provision for giving effect to those Regulations, as referred to in the second paragraph of Article 110 thereof.

43 It is clear from the comparison of those two interpretations, that the opinion of 28 May 1986 appreciably narrows the category of persons entitled to the expatriation allowance by comparison with the opinion of 26 and 27 June 1975, which the Commission applied for nearly 11 years.

44 The Court would observe that an interpretation given by the Board of Heads of Administration, which has not been published and has not been submitted for consultation in accordance with the first paragraph of Article 110 of the Staff Regulations, cannot narrow the category of persons entitled under a provision of the Staff Regulations by comparison with an interpretation previously given by the same Board whose lawfulness, as just noted, has not been contested. An amendment of that kind, which affects the category of persons entitled under the provision interpreted, cannot in any event take place solely on the ground of 'a concern for clarity and simplification'.

45 It follows that the narrowing by the opinion of 28 May 1986 of the category of persons entitled to the expatriation allowance as delimited by the opinion of 26 and 27 June 1975 disregards the intention of the Community legislature. The opinion of 28 May 1986 is therefore unlawful on account of its effects.

46 Since the decision of 11 February 1991 was based solely on the interpretation of the last sentence of Article 4(1)(a) of Annex VII to the Staff Regulations given in the opinion of 28 May 1986, the unlawfulness of that opinion necessarily entails that of the contested decision, which must be annulled.

47 Furthermore, it is common ground that the ECS is an 'international organization' within the meaning of the opinion of 26 and 27 June 1975. That classification is confirmed by the fact that, although the ECS was not, admittedly, created by States or by international organizations themselves created by States, it has been recognized by States and by international organizations created by States, such as the European Communities, and has been entrusted with tasks in the public interest by those States and international organizations. It follows that the ECS must be regarded as an 'international organization' for the purposes of the last sentence of Article 4(1)(a) of Annex VII to the Staff Regulations and that the applicant is therefore entitled to the expatriation allowance as from his entry into service on 1 January 1991.

48 Consequently, the Commission must be ordered to pay the applicant the amounts corresponding to the expatriation allowance to which he is entitled, with effect from 1 January 1991 — less the sum which the applicant has already received by way of foreign residence allowance — together with default interest from the date each amount fell due until the actual date of payment.

49 As regards the rate of default interest, the Court considers the rate of 10% claimed by the applicant to be excessive, as the Commission maintained at the hearing, and that it should be set at 8% per annum.

50 It should be added that, according to the application, the claim for payment of default interest was made solely in the event that the contested decision would be annulled, which means that there was no need for it to have already been expressly mentioned in the complaint addressed by the applicant to the Commission (see Case 54/77 *Herpels* v *Commission* [1978] ECR 585, paragraph 17).

Costs

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 in its pleadings and the applicant claimed that it should be ordered to pay the costs, the Commission must be ordered to pay the costs in their entirety.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Annuls the decision of the Commission of 11 February 1991 refusing to grant the applicant the expatriation allowance;

2. Orders the Commission to pay the applicant the amounts corresponding to the expatriation allowance with effect from 1 January 1991 — less the sum which the applicant has already received by way of foreign residence allowance — together with interest at 8% per annum from the date each amount fell due until the actual date of payment;

3. Orders the Commission to pay the costs in their entirety.

Barrington Lenaerts Kalogeropoulos

Delivered in open court in Luxembourg on 30 March 1993.

H. Jung D. P. M. Barrington

Registrar President