

not therefore make it impossible that there should be 'no decision' within the meaning of that provision.

4. The periods laid down in Article 91 of the Staff Regulations are matters of public policy. Therefore, the provision that at the expiration of two months from the date when a complaint has been lodged, the fact that the authority has taken no decision must be considered an implied decision rejecting it applies even where, at the time when that implied deci-

sion is deemed to have been made, the said authority still hoped to be able to give a favourable reply to the complaint.

5. A decision which merely confirms a previous decision, even an implied decision, cannot affect an official adversely. Therefore an appeal lodged against that subsequent decision cannot start the period laid down by the Staff Regulations for lodging the appeal directed against the previous decision to run afresh.

### In Case 79/70

**HELMUT MÜLLERS**, an official of the Economic and Social Committee of the EEC and EAEC, residing at 31 avenue Marius-Renard, Anderlecht, represented by Marcel Slusny, Advocate at the Cour d'appel, Brussels, with an address for service in Luxembourg at the Chambers of Ernest Arendt, Centre Louvigny, 34 B/IV rue Phillippe-II,

applicant,

v

**ECONOMIC AND SOCIAL COMMITTEE OF THE EEC AND EAEC**, represented by Pierre Pixius, acting as Agent, assisted by André Elvinger, Advocate of the Luxembourg Bar, with an address for service in Luxembourg at the Chambers of the said Advocate, 84 Grand-rue,

defendant,

### Application in particular for the annulment

- of the decision of 10 September 1970 whereby the Secretary-General of the defendant Committee rejected the applicant's complaint of 12 February 1970 in which he asked to be reimbursed by way of education allowance for the expenditure incurred by him in using his private car to transport his son to the European School;
- in so far as is necessary, of Decision No 1001/65 of the Chairman of the defendant Committee of 23 December 1965 containing 'general implementing provisions for the grant of the education allowance',

## THE COURT (Second Chamber)

composed of: A. Trabucchi, President of Chamber, P. Pescatore and H. Kutscher (Rapporteur), Judges,

Advocate-General: A. Dutheillet de Lamothe

Registrar: A. Van Houtte

gives the following

## JUDGMENT

## Issues of fact and of law

## I—Facts and procedure

The facts which form the basis of this case and the procedure may be summarized as follows:

1. Under the Provisions of the first paragraph of Article 3 of Annex VII to the Staff Regulations of Officials, 'An official shall receive an education allowance equal to the actual education costs incurred by him up to a maximum of Bfrs 1325 per month for each dependent child...'

The first paragraph of Article 4 of the Decision No 1001/65 of the defendant Committee, as amended by the first paragraph of Article 4 of Decision No 1852/69A of the same Committee of 22 December 1969, which decision bore the same title and came into force on 1 January 1969, provides:

'Up to the maximum monthly amount laid down in the first paragraph of Article 3 of Annex VIII to the Staff Regulations, the education allowance shall cover the reimbursement of:

- (a) entrance and examination fees,
- (b) transport costs,
- (c) compulsory expenditure actually incurred, in particular for the purchase of books, school equipment, sports equipment, to pay for school insurance and medical expenses and all other expenses relating to the completion of the curriculum of the educational establishment.'

Article 6 of Decision No 1001/65 provides:

'Reimbursement of expenditure incurred by the use of a public means of transport or a private means of transport serving the school shall be made on production of supporting documents.

Where neither of the abovementioned means of transport are used, reimbursement shall be made on the basis of the cost of a season ticket for the public means of transport or private means of transport serving the school which is the cheapest and takes the shortest route from home to school.'

Identical provisions were adopted by the other institutions of the Communities.

2. The applicant's son, Torsten Müllers, who was born in 1963, has been attending the European School at Uccle, Brussels, since 19 September 1969.

On 8 December 1969, the applicant sent the administration an 'Application for the grant of the education allowance' which was made on the printed form and related to the period from 17 September to 31 December 1969. In a schedule, he stated that he was applying for 'the reimbursement of the transport costs which I have actually incurred within the framework of the maximum laid down by the Staff Regulations', that is, Bfrs 4410. For this purpose, he specified that:

- as there was no school bus serving the area where he lived (Anderlecht), he had had to use his private car to drive his son to the European School which is ten kilometres from his home;
- since the number of school days in 1969 was 63 and the cost of maintaining and running the car was DM 0.25 per kilometre, the figure of Bfrs 4410 is the result of the following calculation:  $63 \times 20 \times DM 0.25 = DM 315 = Bfrs 4410$ .

On 12 December 1969, the Personnel Department fixed the allowance owed to the applicant for the period in question at Bfrs 3250 on the printed form 'Calculation of the Education Allowance'; on 15 December 1969 this document was signed by the Financial Controller and the Authorizing Officer. On 9 February 1970, the Personnel Department corrected certain figures making up the abovementioned amount on the printed form 'Regularization of Payments for the Education Allowance for the period from 1 October 1969 to 31 December 1969' so that the amount was fixed at Bfrs 3331; on 27 February 1970, this form was signed by the Financial Controller and the Authorizing Officer. The sum of Bfrs 3331 was composed of:

- the standard monthly allowance intended to cover the expenditure referred to in Article 4 (1) (c) of Decision No 1001/65 as amended by Article 4 of Decision No 1852/69 A (Bfrs 450 for September and Bfrs 477 for each of the three remaining months, that is Bfrs 1881 altogether);
- transport costs calculated in accordance with Article 6 (2) of Decision No 1001/65 (four monthly season tickets for the European School Bus, that is Bfrs 1450 altogether).

3. On 19 February 1970, the applicant sent a memorandum ('Vermerk') to Mr Pixius, Head of Division C, in which he stated that he was 'submitting an objection' ('Widerspruch einlegen')

against the calculation of 12 December 1969. In that memorandum he repeated his request of 8 December 1969; as a secondary point, he asked for the reimbursement of tram fares for his son and for someone to accompany him. In support of his request he claimed in particular that:

- Article 3 of Annex VII to the Staff Regulations provides for the reimbursement of 'actual education costs', which expression covers actual transport costs;
- Decision No 1001/65 is based on the Staff Regulations and may not be interpreted as restricting the scope of the said Article 3;
- Since no school bus operates between the Anderlecht district and the European school, the applicant is obliged to use his private car to drive his son to that School (or, at least, to have him accompanied on the tram by someone else); in fact, a child of six years old cannot be expected to use public means of transport alone, or to change routes several times.

By a memorandum of 31 March 1970, Mr Pixius informed the applicant as follows:

'With a view to solving the question raised in your... complaint, the Secretary-General of the Economic and Social Committee has asked the Board of the Heads of Administration of the Institutions of the Communities to give an opinion in principle on Article 3 of Annex VII and Article 6 of the implementing provisions relating to the education allowance. I would therefore ask you to be so good as to wait a little longer for the final solution of the matter. When the Heads of Administration have come to their decision you will receive a further reply.'

By a letter of 1 April 1970 addressed to the Chairman of the Board of the Heads of Administration, the Secretary-General of the defendant Committee, referring to the applicant's case, stated in particular that:

- the Committee ‘wonders’ whether Article 6 (2) of Decision No 1001/65 and identical decisions adopted by the other institutions is in accordance with Article 3 of Annex VII to the Staff Regulations. In other words, does the strict obligation laid down in Article 6 (2) lead to an infringement of the right of officials to be reimbursed to the extent of their actual expenditure?
  - the Committee considered that such was in fact the case, so that a third paragraph should be added to Article 6 worded as follows:  
‘However, an official shall have the right to request reimbursement of his expenses upon production of supporting documents’.
- At its meeting on 20 May 1970, the preparatory Committee for the Board of the Heads of Administration decided to submit to the latter the question whether ‘an official who is obliged to drive his son to school in his private car because there are no adequate public means of transport may be reimbursed for the actual transport costs’. At their meeting on 12 June 1970, the Heads of Administration replied to this question in the negative.
4. By decision of 10 September 1970, notified on 18 September 1970, the Secretary-General of the defendant Committee rejected the applicant’s ‘objection’ of 19 February 1970, holding in particular that:
- the transport costs in question are not ‘education costs’ within the meaning of Article 3 of Annex VII to the Staff Regulations but expenditure arising from private everyday life;
  - therefore, the possibility of reimbursing the said costs is derived solely from Article 6 of Decision No 1001/65, which is ‘much more favourable to officials’ than Article 3 mentioned above;
  - the fact that the reimbursement laid down in Article 6 is not based on costs which have actually been in-

curred is founded ‘on the finding that transport costs are normally equivalent to those which arise from the use of a public means of transport. The refusal to reimburse costs on the basis of individual evidence is therefore one of the fundamental considerations of the general implementing provisions, the aim of which is to avoid possible abuses’.

5. On 11 December 1970, the applicant lodged the present application. After hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court (Second Chamber) decided to open the oral procedure without a preparatory inquiry. The parties presented oral argument at the hearing on 9 June 1971. The Advocate-General delivered his opinion at the hearing on 24 June 1971.

## II — Conclusions of the parties

In his application, the *applicant* claims that the Court should:

1. declare that the decision of the Secretary of the Economic and Social Committee of 10 September 1970 is null and void;
2. in so far as is necessary, declare that Decision No 1001/65 on the application of Article 3 of Annex VII to the Staff Regulations is void;
3. order the defendant to pay the applicant the education allowance in accordance with the methods of calculation which he indicated in the complaint through official channels of 19 February 1970 with the maximum amount laid down by Article 3 of Annex VII to the Staff Regulations, such sum being assessed at Bfrs 10 000 subject to increase;
4. order the defendant to bear the costs of the action.

In his reply the applicant, whilst maintaining the conclusions in the applica-

tion in other respects, alters heading 3 of those conclusions by requesting reimbursement of the difference between the allowances for transport costs which he has been granted and the costs actually incurred as indicated by him in his memorandum of 8 December 1969.

At the hearing, the applicant stated that he abandoned the conclusions for the annulment of Decision No 1001/65 and requested only that the Court declare Article 6 of that decision illegal on a point of law to the extent to which the interpretation of that provision given by the defendant is held to be correct.

The *defendant* contends that the application should be dismissed as unfounded.

### III — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

#### 1. *Designation of the defendant*

The *applicant* designates as defendant the Economic and Social Committee and 'in so far as is necessary', the Council. The *defendant Committee* states that in accordance with the second paragraph of Article 1 of the Staff Regulations of Officials and the case-law of the Court it must be considered as the only defendant.

#### 2. *Admissibility*

In its defence, the defendant did not contest the admissibility of the application but declared that it was 'very interested in seeing that the case is decided in principle'. The parties were requested by the Court to adopt a definite opinion on admissibility and during the oral procedure they stated as follows.

The *applicant* considers that the application is not out of time. In fact, the first decision addressed to him was that of

10 September 1970. On the other hand, the documents fixing the amount of the education allowance did not constitute measures which could be contested, since they were not issued by a body which was competent to take decisions of principle. Then again, the 'objection' of 19 February 1970 could not be called a 'request' or 'complaint' within the meaning of Article 90 of the Staff Regulations since it was not addressed to the appointing authority. Therefore, that 'objection' could not give rise to an implied decision rejecting it, in accordance with the second paragraph of Article 91 (2) of the Staff Regulations. Finally, the applicant would have acted improperly if he had immediately referred the matter to the Court when he knew that the defendant was at that time trying to obtain a favourable solution.

The *defendant* states that it leaves the question of the admissibility of the application to the discretion of the Court. The legal nature of the 'objection' submitted by the applicant is doubtful. This letter was not addressed to his immediate superior as required by Article 90 of the Staff Regulation. However, it can be considered that this is an admissible complaint within the meaning of that provision, since the 'objection' was sent to the competent authority.

#### 3. *The substance of the case*

In the discussion on the substance of the case, the parties reiterate the arguments which they have already submitted during the administrative procedure. The main additional arguments which they put forward may be summarized as follows:

The *applicant* is of the opinion that a reasonable interpretation of the expression 'education costs' includes transport costs. In fact, a child can only have access to an educational establishment if it goes there, which in cases like this is only possible if he or she uses a means of transport. The defendant Com-

mittee moreover stated the same idea by also providing in its general implementing decisions for the reimbursement of transport costs.

If Article 6 of Decision No 1001/65 had the narrow meaning which the defendant gives it, it would have to be considered void because it conflicts with Article 3 of Annex VII to the Staff Regulations. But, in fact, it must be interpreted to mean that it only refers to the case which there are means of transport serving the school and which the child does not use; this is not so in the present case.

The general decisions adopted by the defendant provide that costs other than transport costs may be reimbursed not only at a standard rate but also on production of supporting documents. The applicant seems to deduce from this that the same should apply if necessary as regards transport costs.

The defendant cannot claim that the way in which it applies Articles 6 puts officials on an equal footing. In fact, at the present time, children living in certain districts further from the European School than the home of the applicant are transported by a school bus with the result that the parents obtain full reimbursement of the costs incurred not only for transport but also for supervision of the children.

The argument that the applicant can only blame himself for having made his home in a district which does not have good communications with the European School cannot be accepted.

Nor can any argument be based upon the danger of possible abuses of the system, since the maximum amount of Bfrs 1325 per month enables exactly this danger to be avoided.

The applicant explains the alteration to heading 3 of his original conclusions and states that he only requests the Court to take a decision of principle and to leave it to the parties to make the calculations.

The *defendant* maintains that the expression 'education costs' only refers to

costs incurred directly and compulsorily within the context of the curriculum and not to those which are only indirectly related to attending school and the amount of which depends largely on the personal decision of the official concerned. In these circumstances, the institutions were free to limit the expense of this allowance only for the sake of fairness, by providing nevertheless that transport costs could be reimbursed. They had placed all officials concerned on an equal footing by fixing a uniform basis of calculation for all officials who had to incur transport costs for their children.

Decision No 1001/65 was taken on the basis of Article 110 of the Staff Regulations whereby 'The general provisions for giving effect to these Staff Regulations shall be adopted by each institution . . .'. Article 6 of the decision would only be void if it restricted the scope of Article 3 of Annex VII of the Staff Regulations; but, for the reasons which have been given, on the contrary it widens the field of application of that provision. The interpretation of Article 6 suggested by the applicant is incorrect. In fact, the expression 'means of transport serving the school' refers to private means of transport and not public means of transport, since the latter are by definition at the disposal of the general public. Therefore, Article 6 (2) is applicable whenever a means of transport either public or serving the school is not used, and it is not important whether such a means exists or not. The applicant's statement that a child of six years old cannot be expected to make a complicated journey alone every day, although true, is however irrelevant. Moreover, the applicant chose of his own accord to live in a district where not many Community officials live and which therefore does not have good communications with the European School. If the applicant's argument were correct, the Administration would be obliged to reimburse particularly expensive transport costs such as taxi fares.

## Grounds of judgment

- <sup>1</sup> The application basically seeks the annulment of the decision of the Secretary-General of the defendant Committee of 10 September 1970 relating to the education allowance for the applicant's son and rejecting the 'objection' submitted against this by the applicant on 19 February 1970.

### Designation of the defendant

- <sup>2</sup> The applicant has designated as defendant the Economic and Social Committee and 'in so far as is necessary' the Council of the European Communities which however has not appeared as defendant.
- <sup>3</sup> Under the second paragraph of Article 1 of the Staff Regulations of Officials, 'Save as otherwise provided, the Economic and Social Committee shall, for the purposes of these Staff Regulations, be treated as one of the institutions of the Communities'.
- <sup>4</sup> In the absence of such provisions to the contrary, it must therefore be acknowledged that the said Committee has the capacity to appear before the Court in proceedings between it and one of its officials.
- <sup>5</sup> The present application must therefore be considered as directed solely against the Economic and Social Committee.

### Admissibility

- <sup>6</sup> Although the defendant has not challenged the admissibility of the application, the Court must examine of its own motion whether the application is out of time.
- <sup>7</sup> On 8 December 1969, the applicant asked the Administration, giving detailed reasons in support of his request, to grant him an education allowance of Bfrs 4 410 for the period from 17 September to 31 December 1969.
- <sup>8</sup> By a document dated 12 December 1969 and signed by the Financial Controller and the Authorizing Officer on 15 December, this allowance was fixed at Bfrs 3 250 for the period in question.
- <sup>9</sup> By memorandum of 19 February 1970 addressed to the relevant head of division, the applicant stated that he was 'submitting an objection' against the calculation of his allowance and he repeated his request of 8 December 1969.

- 10 By memorandum of 31 March 1970 he was given the reply that the Secretary-General of the defendant Committee had requested the Heads of Administration of the Community Institutions to take a decision of principle on the problem raised by the applicant and the latter was asked in these words to: 'be so good as to wait a little longer for the final solution of the matter. When the Heads of Administration have come to their decision you will receive a further reply'.
- 11 The Heads of Administration made a decision unfavourable to the applicant and the Secretary-General of the defendant Committee rejected the 'objection' of the applicant by decision of 10 September 1970 which was notified on 18 September.
- 12 On 11 December 1970, the applicant lodged the present application.
- 13 The document of 15 December 1969, which was drawn up by the competent authority at that stage constituted a decision because it indicates, briefly but clearly, that the transport costs should be calculated on a basis different from that which the applicant had claimed and in support whereof he had given reasons in his letter of 8 December 1969.
- 14 The applicant then had the choice of either directly lodging an appeal within the period of three months laid down by the first paragraph of Article 91 (2) of the Staff Regulations of Officials, or of preserving the right of appeal by submitting to the appointing authority within that period under Article 90 of the same Staff Regulations a complaint against the decision taken relating to him.
- 15 In fact he used the second possibility by his memorandum of 19 February 1970 which, although it was described by him as an 'objection' and did not observe the conditions for lodging a complaint laid down in Article 90, must be considered as a complaint within the meaning of that article since it obviously sought to obtain a decision from the appointing authority on the question at issue.
- 16 Under the second subparagraph of Article 91 (2) of the Staff Regulations, 'Where the competent authority takes no decision in respect of a request or a complaint from a person covered by these Staff Regulations within two months from the date on which it was lodged, this shall be deemed to constitute an implied decision rejecting it' and 'an appeal against such decision shall be lodged within a further two months'.
- 17 The memorandum of 31 March 1970 merely gave notice that a final reply would be given subsequently and it did not constitute a decision so that, in



accordance with the provision quoted, the defendant was deemed to have rejected the complaint of 19 February 1970 by an implied decision made in April 1970.

- 18 Although it is correct that at that time the defendant still hoped to be able to give a favourable reply to the complaint, this does not alter the fact that it is not for the parties who are directly concerned to extend at their own convenience the periods laid down in Article 91 of the Staff Regulations since these are matters of public policy and rigorous compliance with them is calculated to ensure the clarity and certainty of legal situations.
- 19 In accordance with the same article, the applicant should have lodged an application against the implied decision of April 1970 within a period of two months, that is, not later than June 1970, on pain of being barred as out of time, but he did not do this.
- 20 Although this application, which was directed against the express decision rejecting his complaint, was lodged within the required period, this decision however simply confirms the express decision and cannot therefore affect the applicant adversely.
- 21 In this respect, the objection cannot be raised that the express decision contains a new factor relating to the legal or factual situation which existed at the time of the implied rejection, on the ground that the defendant had not at that time yet decided finally to reject the complaint.
- 22 In fact, the defendant constantly considered that a favourable decision could not be given on that complaint with the regulations as they stood.
- 23 The application is therefore inadmissible.

### Costs

- 24 It follows from Article 69 (2) and Article 70 of the Rules of Procedure that the unsuccessful party shall be ordered to pay the costs but that institutions shall bear their own costs in applications by servants of the Communities.
- 25 However, under Article 69 (3) where the circumstances are exceptional, the Court may order that the parties shall bear their own costs in whole or in part.
- 26 In this case, since the applicant was misled by the letter of 31 March 1970 requesting him to 'wait', that provision must be applied and the defendant must be ordered to bear the applicant's costs.

On those grounds,

Upon reading the pleadings,

Upon hearing the report of the Judge-Rapporteur;

Upon hearing the parties;

Upon hearing the opinion of the Advocate-General;

Having regard to the Staff Regulations of Officials, especially Articles 1, 90 and 91;

Having regard to the Protocol on the Statute of the Court of Justice;

Having regard to the Rules of Procedure, especially Articles 69 (2) and (3) and 70;

THE COURT (Second Chamber)

hereby:

1. Dismisses the application as inadmissible;
2. Orders the defendant to pay all the costs.

Trabucchi

Pescatore

Kutscher

Delivered in open court in Luxembourg on 7 July 1971.

A. Van Houtte  
Registrar

A. Trabucchi  
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL  
DUTHEILLET DE LAMOTHE  
DELIVERED ON 24 JUNE 1971

*Mr President,  
Members of the Court,*

The present case relates to the calculation of the allowance which Mr Müllers, an official of the Economic and Social Committee, claims to be entitled to for 1969 to reimburse the transport costs of his six year-old son who attends the European School in Brussels.

In my opinion the application seems

plainly inadmissible.

In fact, the applicant set out his claims in an application for the grant of the education allowance dated 8 December 1969 and those claims were rejected by a decision of 15 December 1969.

On 19 February 1970, the applicant protested against this rejection in a letter, the nature of which I shall come back to presently.

In application of Article 91 (2) of the

1 -- Translated from the French.