JUDGMENT OF THE COURT (SECOND CHAMBER)
8 MAY 1973 [1]

Monique Gunnella
v Commission of the European Communities

Case 33/72

1. *Officials — Disputes with the administration — Time limits for bringing an action — Nature — Examination by the Court of its own motion*
   (Staff Regulations, Article 91)
2. *Officials — Disputes with the administration — Act confirming an earlier act — Expiry of the time limit for bringing an action*
   (Staff Regulations, Article 91)

1. It is for the Court to examine, even of its own motion, the question whether the time limits for bringing an action have been observed, these being a matter of public interest.

2. An act confirming an earlier act does not set a new time limit.

In Case 33/72

MONIQUE GUNNELLA, an official of the Commission of the European Communities, resident at Via Alberto 17, in Ranco (Varese, Italy), represented by Marcel Slusny, advocate at the Brussels Court of Appeal, having chosen her address for service in Luxembourg c/o Mlle Victoria Zandona, 1 rue Gillaume Schneider,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its legal adviser, Pierre Lamoureux, acting as agent, having chosen its address for service in Luxembourg at the office of its legal adviser Emil Reuter, 4 boulevard Royal,

defendant,

Application for the grant of expatriation allowance

1 — Language of the Case: French.

THE COURT (Second Chamber)

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

Advocate-General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:

The applicant was born at Calais (France) in 1925 of an Italian father and a French mother. She had dual nationality, Italian and French, until, on attaining her majority in 1946, she elected for French nationality.

After passing most of her youth in Italy, where she declares she was resident from 1930 to 1945, the applicant returned to live in that country in 1949. After being recruited by the Allied High Commission for Germany, she was employed in Rome by that organization until August 1951. For the next ten years she continued to live in that city, where she worked as a secretary at the French Embassy.

On 1 April 1961 she was engaged by the Commission of the European Atomic Energy Community as a shorthand-typist and posted to Brussels. After being granted special leave she returned to Rome on 15 November 1962 to work there in the accounts department of the French Ministry of Finance.

On 20 September 1965 at her own request she was taken back into the service of the Commission of the European Communities and posted to the Joint Research Centre at Ispra in Italy.

On this occasion the several components of her remuneration were fixed by a decision of 5 October 1965. A copy of this decision was filed in the personal file of the applicant, and another copy was sent to her, according to the note at the foot of this document. This administrative document contains a series of items of information appropriate to fix the individual status of the official: category, grade, incremental step and seniority, and in addition the basic salary and allowances he is legally entitled to claim. An examination of this document shows that under the symbol 'ID', meaning expatriation allowance, there was written 'no'.

By letter dated 30 August 1971, addressed to the Directorate of Personnel of the Commission, the applicant asked for payment of the expatriation allowance provided for in Article 69 of the Staff Regulations, on the basis of Article 4 of Annex VII to the Regulations, which reads:

'1. An expatriation allowance shall be paid equal to 16 % of the total

amount of the basic salary plus head of household allowance and dependant child allowance to which the official is entitled.

(a) to officials

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

— who during the five years ending sixth 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 purpose of this provision, circumstances arising from work done for another State or for an international organization shall not be taken into account.

(b) to officials who are or have been nationals of the State in whose territory the place where they are employed is situated but who during the ten years ending at the date of their entering the service habitually resided outside the European territory of that State for reasons other than the performance of duties in the service of a State or of an international organization,

.....'

By letter dated 9 March 1972, the Directorate of Personnel replied that the expatriation allowance asked for could not be granted so long as she remained posted to Ispra. Her case was considered to be governed by the provisions of sub-paragraph (b) of the first paragraph of Article 4, since she had not only been of French nationality but also of Italian nationality until the age of 21. Moreover, since she had lived in Italy from 1949 to 1961 -- that is for the last twelve years before entering the service of the European Communities — she did not fulfil the condition expressly imposed by the provision of the Staff Regulation quoted.

On 14 June 1972 the applicant brought the present proceedings.

The written procedure followed the normal course.

On the report of the Judge-Rapporteur, having heard the Advocate-General, the Court (Second Chamber) decided to start oral proceedings without any preparatory inquiries.

The parties presented oral argument at the hearing on 1 March 1973.

The Advocate-General presented his opinion at the hearing on 22 March 1973.

II — Submissions of the parties

The applicant asks the Court, in substance

1. to, annul the decision of 9 March 1972.
2. to rule that she has a right to the expatriation allowance provided for by Article 69 of the Staff Regulations, and Article 4 of Annex VII to the Staff Regulations, with effect from 30 September 1965.
3. to order the Commission to pay the arrears.

In addition the applicant asks that the Commission be ordered to pay the costs.

The Commission asks that the application be rejected as unfounded and that the applicant be ordered to pay the costs.

III — Pleas and arguments of the parties

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

A — Admissibility

In the course of the oral proceedings, the *Commission* raised two pleas of

inadmissibility arising out of the late submission of the application, indicating that it is for the Court, even of its own motion, to examine the question whether the time limits have been observed, these being a matter of public interest.

The Commission first raised the point that the position of the applicant was fixed, as regards the right to expatriation allowance, by the decision of 5 October 1965, that is to say by a decision prior to that now the subject of this application. The applicant should therefore have contested that decision of 5 October 1965, either by a complaint through official channels within two months or by an appeal to the Court of Justice within three months, under the provisions of Article 91 of the Staff Regulations then in force.

The Commission secondly maintains that, in accordance with the abovementioned provisions, the request made by the applicant on 30 August 1971 must be deemed to have been rejected impliedly two months after the administration received it. The applicant, by virtue of the same Article should have appealed within the time limit of two months following that implied rejection. She did not do so. Her application is made against the express rejection of her request on 9 March 1972. The Court has ruled on several occasions that applications made against express rejections, which have become final by reason of not being contested within the time limit for contentious applications, are inadmissible.

The *applicant* counters by saying that an official cannot be prevented from raising a personal problem on the basis of a fresh submission. At the time of the decision in 1965, no discussion took place. The decision of 1965 did not render it impossible *ad vitam aeternam* for the applicant to ask for her position to be re-examined.

The applicant maintains moreover that before the definite refusal by the administration in March 1972, the Commission asked her for explanations and that these requests for explanations must be considered as suspending the time limits.

The applicant observes that in any event the costs of the proceedings must fall on the Commission which, up to the time of the oral proceedings, left her under the impression that it accepted that the merits of the case should be discussed.

B — Merits

1. *First plea:* Infringement of Article 4 (1) (a) of Annex VII to the Staff Regulations.

The *applicant* maintains that her case should be governed not by Article 4 (1) (b) of Annex VII to the Staff Regulations but by sub-paragraph (a) of the same paragraph. She does not question that she had dual nationality, French and Italian, up to the age of 21. She claims, however, that the provisions quoted cannot be interpreted literally, but by taking account of the *ratio legis*. This is in her view to prevent an official from obtaining the expatriation allowance by voluntarily changing his previous nationality. The position is different when, as in the present case, an involuntary dual nationality is at issue, *a fortiori* when as here the applicant renounced her dual nationality as soon as the law enabled her to do so.

The application of sub-paragraph (b) of the above-mentioned Article to such a case is not only unjust but would also lead to inequality of treatment as between officials. Following this line of thought, the applicant invokes the general principles of law, among which are the right of an individual to change his nationality and the requirement that nationality should be given its full effect. In this case it must be considered that the dominant nationality of the applicant has always been French and it is of this nationality alone that account must be taken in applying the above-mentioned provisions.

The *Commission* in reply, maintains that the provision quoted established no distinction as to the way in which a previous nationality has been lost and that it allows of no exception either expressly or impliedly. The *ratio legis* is not what the applicant deduces from the provision, viz. to prevent officials fabricating schemes concerning nationality with a view to obtaining the benefit of an expatriation allowance, but to have regard to the fact, on the one hand, that the absence of affinity with a State is a factor of expatriation and, on the other hand, that nationality is a very close affinity with a State. In the present case, the affinity to Italy has been particularly strong, the applicant having lived in that country for many years in her childhood and afterwards.

The authors of the Staff Regulations had in view the nationality, or nationalities, which the official now has or once had as clear matters of fact without wanting to start or to allow theoretical arguments on the difficulties or abnormal nature of dual nationality, still less on questions of loss of nationality which may arise with or without the consent of the official concerned. The Regulations are concerned with a single matter, the affinity which the official now has, or once could have had, with the State in whose territory he is employed, through the medium of a present or former nationality, however that nationality was acquired and whether or not it was a single nationality.

The authors of the Staff Regulations recognized moreover the shades of meaning covered by expatriation in relation to nationality, in adding to this first factor a second relative to the territory in which the person concerned habitually resided for a certain period before entering the service.

As regards the requirement in the second indentation of Article 4 (1) (a) the *applicant* maintains that she fulfils this requirement. Her stay in Italy for the five years ending six months before she entered the service in 1961 derived from her work in the service of the French State and consequently cannot be taken into consideration. Moreover, on entering the service in 1961, she was posted to Brussels and in this way her stay in Italy was interrupted from 1 April 1961 to 15 November 1962. It was not until 20 September 1965 that she took up duty at Ispra in Italian territory, and it was the taking up of this appointment in the territory of the State to which she was posted which must be taken into account in determining whether or no there was an expatriation.

The *Commission* has offered no observations on the requirements of Article 4 (1) (a)

2. *Second plea:* Infringement of Article 4 (1) (b).

As a subsidiary plea, and on the assumption that she is considered as having been of Italian nationality for the purpose of the provisions relating to expatriation allowance, the *applicant* maintains that she has a right to such an allowance by virtue of sub-paragraph (b) of the provisions quoted.

According to sub-paragraph (b), the official's right to the expatriation allowance is conditioned by habitual residence, outside the territory to which the official is posted for the period of ten years expiring at the time of entering the service. The 'entering the service' must be taken to mean entering the service in the territory of the State where the official is employed as distinct from entering the service of the Community authority. In the present case, 20 September 1965 must be taken as the date from which she was employed at Ispra on Italian territory, and not 1 April 1961 on which she entered the service of the Communities.

The applicant maintains that, at the time she entered service in Italy in 1965, she had lived outside Italian territory for a certain period during the previous ten years, viz. from 1 April 1961 to 15 November 1962, the period during which she was employed in Brussels. This break of her stay in Italy was not

occasional, so that she had in fact habitually resided outside Italian territory during this period.

The *Commission's* reply is that the applicant is putting forward a wrong interpretation of the requirements of sub-paragraph (b). The term 'entering the service' cannot be interpreted as meaning, for an official, being employed in the territory in question, since this is only a case of transfer and not one of entering the service. The applicant can only have a claim to the expatriation allowance under paragraph (1) (b) if, during the ten years prior to entering the service of the Communities, that is to say before 1961, she had resided outside Italy for reasons other than the performance of duties in the service of a State or of an international organization. During the ten years preceding her entering the service of the Communities she had on the contrary, resided in Italy.

In addition, even on the assumption that the time of her posting to Ispra must be considered, the applicant cannot avail herself of her stay in Brussels from 1 April 1961 to 15 November 1962, since this was due to her performing duties in the European Communities and Article 4 (1) (b) expressly excludes the performance of duties in the service of a State or of an international organization.

3. At the request of the *applicant* the Court invited the Commission to give its observations on the specific case of two female officials, who had acquired Italian nationality by marriage and to whom the expatriation allowance had been restored in accordance with the Court's judgment of 7 June 1972 in cases 20/71 and 32/71. In this respect the *Commission* replied that the restoration of the expatriation allowance took place not because no account had previously been taken of the Italian nationality of the parties concerned but because they had been considered as fulfilling requirements of Article 4 (1) (b) as to habitual residence during the period ending at the date of their entering the service of the Community institutions.

Grounds of judgment

1 The applicant asks for the annulment of the decision of 9 March 1972 whereby the Commission refused to grant her the expatriation allowance provided by the Staff Regulations;

2 She asks in addition that her claim to be granted such an allowance with effect from 30 September 1965 be recognized as founded in law;

3 The defendant has raised in the course of the oral proceedings a plea of inadmissibility arising out of the late submission of the application;

4 It is for the Court even of its own motion, to examine whether the time limits have been observed, these being a matter of public interest;

5 The applicant having been granted special leave was taken back into the service of the Commission with effect from 20 September 1965 and posted to the Joint Research Centre at Ispra;

6 On this occasion the several components of her salary were fixed by a decision of 5 October 1965;

7 It appears from the document in which this decision was recorded a copy of which was sent to the applicant, that the expatriation allowance was not granted to her;

8 The applicant did not contest this decision either by a complaint through official channels within two months, or by an appeal to the Court of Justice within three months, as she could have done by virtue af Article 91 of the Staff Regulations then in force.

9 The applicant contests, by the present application, the letter dated 9 March 1972 in which the Directorate of Personnel of the Commission asserted, in reply to a note which the applicant addressed to it on 30 August 1971, that the applicant did not fulfil the requirements prescribed by Article 4 of Annex VII to the Staff Regulations so as to obtain the expatriation allowance;

10 That letter, while setting out in detail the facts it had taken into account, only confirmed the previous decision whereby the Commission refused to grant the applicant the expatriation allowance and informed her that this could not be paid so long as she was employed at Ispra;

11 Such a communication could not have the effect of setting a fresh time limit in the applicant's favour;

12 The application is therefore inadmissible;

Costs

13 The applicant has failed in her application;

14 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs;

15 However, under Article 70 of the Rules of Procedure, costs incurred by the institutions, in applications by servants of the Communities, shall be borne by the institutions;

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the submissions of the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Protocol on the Statute of the Court of Justice;
Having regard to the Staff Regulations of the European Communities, especially Article 91;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Articles 69 and 70;

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application as inadmissible;**

2. **Orders each party to bear its own costs.**

Pescatore Kutscher Sørensen

Delivered in open court in Luxembourg on 8 May 1973.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber