

OPINION OF MR ADVOCATE GENERAL WARNER
DELIVERED ON 30 OCTOBER 1980

My Lords,

This is an application by the Commission under Article 91 of the Rules of Procedure of the Court for a decision on a preliminary objection that it has raised as to the admissibility of an action brought against it by Mr Giuseppe Grasselli, a former official of the High Authority of the ECSC and, later, of the Commission itself. The Commission contends that the claims made by Mr Grasselli in that action are inadmissible because they are time-barred.

The dispute between the parties arises in the following way.

Your Lordships will remember that, on 29 February 1968, following the entry into force of the Merger Treaty, the Council adopted Regulation (EEC, Euratom, ECSC) No 259/68, which had two purposes, first to lay down the Staff Regulations of the merged institutions, and secondly to institute special and temporary measures for a reduction in the Commission's staff.

Article 4 (1) of that Regulation authorized the Commission to terminate the service of officials in manner provided for by the Regulation; and Article 4 (3) provided that, if the interests of the service should permit, the Commission

should take into account an official's request that his service be terminated under Article 4 (1).

Article 5 laid down, in ten detailed paragraphs, what were to be, *prima facie*, the financial consequences for an official of his being laid off under Article 4. He was to be entitled for an initial period to an allowance computed in accordance with the provisions of paragraphs 1 to 4. Thereafter he was to be entitled to an early retirement pension. There were provisions also as to family allowances, sickness insurance and other matters.

Article 6 conferred an option on an official who had completed less than 11 years' service to renounce his pension rights and to take, instead, a severance grant computed as therein provided.

Article 7 conferred on former ECSC officials an option to require that their financial rights be determined in accordance with the provisions of Article 34 of the Staff Regulations of the ECSC and Article 50 of the Rules and Regulations of the ECSC. (The authentic English text of Article 7 does not in fact refer to "financial rights", but to "remuneration". This is however a manifest mistranslation of the original texts. The German text of it has "vermögensrechtlichen Ansprüche", the French "droits pécuniaires", the Italian "diritti in materia pecuniaria" and the Dutch "financiële aanspraken".)

I need not, I think, take up Your Lordships' time with an analysis of the differences between the provisions of Article 5 of Regulation No 259/68 and those applicable under Article 34 of the Staff Regulations of the ECSC. Suffice it to say that, according to his personal circumstances, an official might find either the former or the latter more attractive.

Mr Grasselli who was born on 15 January 1916, became an official of the High Authority in 1961, so that by 1968 he was 52 years old and had completed some seven years' service as a Community official.

On 8 April 1968 he submitted a request that his service be terminated under Article 4 of Regulation No 259/68. By a letter dated 21 June 1968 the Director-General for Personnel and Administration of the Commission informed him that the Commission had acceded to his request and that its decision would take effect (unless he demurred) on 1 October 1968. The Director-General also drew Mr Grasselli's attention to the options conferred on him by Articles 6 and 7 of Regulation No 259/68 and asked him to state how he wished to exercise them. On 16 September 1968 the Directorate-General for Personnel and Administration sent Mr Grasselli a memorandum to which was annexed a table setting out what, in the view of the Commission, his financial rights would be under, respectively, Article 5 of Regulation No 259/68 and Article 34 of the Staff Regulations of the ECSC. It appeared from that table that, in the Commission's view, if Mr Grasselli opted for the application of Article 34, he would be entitled to no dependent child allowance and his pension would be reduced by reference to his age. On 27 September 1968 Mr Grasselli wrote to the President of the Commission arguing

that in those two respects the Commission was mistaken and requesting that his rights be reconsidered. On the same day he wrote to the Director-General stating, among other things, that he had decided to opt, under Article 6, for a pension, but that he wished to keep his option under Article 7 open until after the Commission had reached a decision on his request. By letter dated 18 October 1968 he was informed that his request had been considered but that his arguments could not be accepted. Thereupon he brought an action in this Court, Case 32/68 *Grasselli v Commission* [1969] ECR 505, claiming essentially that the "decision" communicated to him as an annex to the memorandum of 16 September 1968 be declared void in so far as it envisaged that, in the event of his opting for the application of Article 34, he would be denied dependent child allowances and a pension of the full amount. By a judgment dated 10 December 1969, the Court dismissed the 'action as inadmissible, principally on the ground that the table annexed to that memorandum was intended only to convey information and did not embody a decision. The Court accordingly did not deal with the substance of Mr Grasselli's claims. Mr Advocate General Roemer on the other hand did so and, as was pointed out to us, although it is not strictly relevant to the present application, he expressed the opinion that the Commission's interpretation of the relevant regulations was correct.

On 30 January 1970, the Directorate-General of Personnel and Administration wrote again to Mr Grasselli asking him to state on which basis he wished his financial rights to be computed. In reply to that, Mr Grasselli, by letter dated 27 February 1970, opted unequivocally for his rights to be determined in accordance with Article 34.

In the result Mr Grasselli became entitled for a period of two years from 1 October 1968 to an allowance equal to the salary appropriate to his grade and step (A 6—6) and for a further two years to an allowance equal to half that salary. He duly received those allowances and there is no dispute between the parties about them. As from 1 October 1972, by which time he was 56, he became entitled to a pension. On 30 October 1972 he wrote to the Directorate-General of Personnel and Administration asking for immediate payment of his pension, and enquiring about the precise amount to which he was entitled and about the method of payment. In reply he was sent, on 13 November 1972, a questionnaire and some information relating to his pension rights. He was told, among other things, that family allowances (including the dependent child allowance) were not payable to officials in receipt of a retirement pension before the age of 60. On 1 December 1972 Mr Grasselli wrote returning the questionnaire completed and arguing that, on the true interpretation of the relevant regulations, he was entitled to dependent child allowances and to a full pension. His arguments to that effect were essentially the same as those that he had put forward earlier both to the Commission and to this Court. On 11 April 1973 the Director of Personnel made a formal decision granting Mr Grasselli a pension as from 1 October 1972. On the same day the Head of the "Individual Rights and Privileges" Division sent to Mr Grasselli a statement setting out a computation of his pension rights ("Avviso della determinazione dei diritti relative alla pensione di anzianità"). That statement showed clearly that he was to receive a pension reduced by reference to his age and no dependent child or other family allowance. In a covering letter the Head of the Division explained once more why in the opinion of the Commission that must be so. On 9 July 1973, Mr Grasselli

wrote to the Director of Personnel, raising the question of the omission of his wife from the list of his dependents set out in the statement. Although Mr Grasselli was aware, as his letter shows, of the legal significance of the statement (for he says "l'importanza giuridica del documento di cui trattasi è rilevante"), he made no complaint about the reduction in his pension or about the refusal to pay him dependent child allowances. Over the years correspondence continued between Mr Grasselli and the Commission on various other matters, such as his rights under the sickness insurance scheme.

Nearly six years after he had received the statement of 11 April 1973, that is on 9 April 1979, Mr Grasselli wrote to the Director of Personnel referring to the fact that he had since 1 October 1972 been in receipt of a pension granted in accordance with the provisions of Regulation No 259/68, and complaining that he had been deprived of family allowances and that the amount of his pension had been reduced. He asked that his right to family allowances and to a full pension as from 1 October 1972 be recognized. He based his complaint on a belief that he had been the victim of discrimination as compared with former officials of the ECSC who had left the service under the provisions of Council Regulations (Euratom, ECSC, EEC) No 2530/72 and (ECSC, EEC, Euratom) No 1543/73.

Those regulations, Your Lordships remember, introduced special and temporary measures for the recruitment and for the termination of the service of Community officials in consequence of the accession of the new Member States. They were adopted on 4 December 1972 and 4 June 1973 respectively, and published in the Official Journal on 5 December 1972 and 11 June 1973 respectively. Chapter II of each of them contained provisions on the lines of those of Regulation No 259/68 for the termination of the service, in the case of Regulation No 2530/72, of officials in Grades A 1 to A 5 inclusive and, in the case of Regulation No 1543/73, of officials paid from research and investment funds. However, Article 5 (3) of the former and Article 6 (3) of the latter expressly provided for a former ECSC official who chose to have his rights determined in accordance with Article 34 of the ECSC Staff Regulations to receive dependent child allowance whatever his age and a pension at the full rate if he was at least 55 and had served at least 10 years.

It is common ground between the parties that Mr Grasselli's letter of 9 April 1979 to the Director of Personnel is to be regarded as a complaint under Article 90 (2) of the Staff Regulations. On 6 June 1979 a letter was written to Mr Grasselli on behalf of the Secretary-General of the Commission informing him that his complaint had been registered on that day. The period of four months within which it was open to the Commission to reply to the complaint accordingly expired on 6 October 1979. The Commission did not reply to it within that period or, so far as I am aware, at all. Under Article 91 (3) of the Staff Regulations Mr Grasselli therefore had three months from 6 October 1979 in which to lodge an

appeal to this Court. Since, however, Mr Grasselli lived in Italy, that period was, by virtue of Annex II to the Rules of Procedure of the Court, extended for ten days. It thus expired on 16 January 1980. His application originating this action (in which he claims, essentially, a declaration that he has been unlawfully deprived of dependent child allowances and of a pension at the full rate) was in fact lodged at the Registry of the Court on 15 January 1980. It was therefore in time so far as those provisions are concerned.

The Commission's objection to the admissibility of the action is not, however, founded on them. It is founded on the provisions of Article 90 (2) of the Staff Regulations under which a complaint must be lodged within three months of (so far as here relevant) the date of the notification of the decision complained of to the person concerned; and on the provisions of Article 91 (2) of those regulations under which an appeal to this Court lies only if (so far as here relevant) "the appointing authority has previously had a complaint submitted to it pursuant to Article 90 (2) within the period prescribed therein". Here, says the Commission, Mr Grasselli was notified of the relevant decision by the letter and statement sent to him on 11 April 1973 by the Head of the "Individual Rights and Privileges" Division, which Mr Grasselli's letter of 9 July 1973 shows he had received by the latter date at the very latest. A complaint against that decision lodged on 9 April 1979 was therefore years out of time, and no appeal to this Court could be based on it. Nor does it make any difference that the complaint was founded on the provisions of Regulations No 2530/72 and No 1543/73, for those regulations were adopted and published as long ago as 1972 and 1973.

In my opinion the Commission's objection is clearly well-founded.

The main argument adduced by Counsel for Mr Grasselli, in an endeavour to escape from that conclusion, was, as I understood it, this.

He referred us to decisions of superior Italian courts, the Consiglio di Stato and the Corte Costituzionale, and in particular to a decision of the latter dated 14-15 June 1980, in which it has been held that in Italian law a distinction must be drawn between, on the one hand, administrative decisions taken in the exercise of an "authoritative power" ("una potestà autoritativa") and, on the other hand, decisions taken on matters over which the public authority concerned and the person to whom its decision is addressed are to be regarded as equals; that decisions as to the remuneration or pension rights of public servants are of the latter type, because they are about individual rights of a proprietary character ("un diritto soggettivo di natura patrimoniale"); and that, in the case of decisions of that type, short limitation periods of a kind warranted in the case of decisions taken in the exercise of an "authoritative power", may not be imposed or relied upon.

Counsel then argued that Article 41 of Annex VIII to the Community Staff Regulations reflected those principles, so that, in the case of a request by a former official that the amount of his pension be reviewed, the limitation periods prescribed by Articles 90 and 91 of the regulations did not apply.

In my opinion that is not so.

Article 41 provides, Your Lordships remember:

"The amount of pension may at any time be calculated afresh if there has been error or omission of any kind.

They shall be liable to modification or withdrawal if the award was contrary to the provisions of the Staff Regulations or of this Annex".

To my mind that provision confers a power, and to some extent imposes an obligation, on the institution concerned, but it does not create a procedure that a pensioner may invoke as an alternative to the procedures provided for in Articles 90 and 91. My view thus accords with the views expressed by Mr Advocate General Reischl in Case 95/76 *Bruns v Commission* [1977] 2 ECR at p. 2425 and (more fully) by Mr Advocate General Capotorti in Case 219/78 *Michaelis v Commission* [1979] ECR at pp. 3360-3364, to which we were referred on behalf of the Commission. Counsel for Mr Grasselli pointed out that in neither of those cases did the Court adopt the view of the Advocate General. That, however, was because in each case the Court was satisfied that the action was ill-founded in substance so that it did not need to consider the question of admissibility.

That is not to say that in my opinion a pensioner may not at any time request under Article 90 (1) that the amount of his pension be recalculated for the future pursuant to Article 41. Nor, despite the submission of the Commission to the contrary, am I persuaded that, in such a case, the pensioner may not, if his request is rejected, pursue the procedure under Articles 90 (2) and 91. But it is not necessary to express a concluded view on that point in this case, since Mr Grasselli's letter of 9 April 1979 to the Director of Personnel was not such a request.

Counsel for Mr Grasselli also submitted, though only at the hearing, that his client should not be held to the strict requirements of Articles 90 and 91 because he had been given repeated assurances on behalf of the Commission that his rights would be reconsidered. I can find, however, in the papers before the Court (including those in Mr Grasselli's personal file) no trace of any such assurance having been given to him. Challenged on behalf of the Commission to produce evidence of such assurances, Counsel for Mr Grasselli put in two letters, dated 21 February 1979 and 2 August 1979 respectively, from the Commission's "mediator" to Mr Grasselli. These show that in 1979 the mediator had taken up Mr Grasselli's case. They show no more than that.

The Commission attributed to Counsel for Mr Grasselli an argument to the effect that Mr Grasselli's complaint could be regarded as having been lodged in time if it were related to his latest monthly pension slips. I did not for my part understand Counsel for Mr Grasselli to be putting forward any such

argument, though he did say that the Commission's failure each month to pay Mr Grasselli any dependent child allowance or a full pension represented a continuing breach on its part of its obligations, which meant that the total loss to Mr Grasselli became worse as time went by. Assuming however that the Commission's interpretation of what Counsel said, rather than mine, was correct, the argument was, in my opinion, amply met by the Commission's citation of the authorities in this Court, among them Cases 15 etc./73 *Schots-Kortner and Others v Council and Others* [1974] 1 ECR 177, Case 1/76 *Wack v Commission* [1976] 1 ECR 1017 and Case 142/79 *Fonti-Geronimo v Parliament* (22 May 1980, not yet reported), from which it may be deduced that, whilst a salary or pension slip may constitute evidence of a decision concerning the rights of its addressee and so start time running, subsequent slips are not evidence of fresh monthly decisions but merely confirmatory of the earlier decision, so that they do not start time running afresh.

In the result I am of the opinion that this action should be dismissed as inadmissible, with the consequences as to costs prescribed by Article 70 of the Rules of Procedure of the Court.