In Case 142/78

MARCELLE EXNER, NÉE BERGHMANS, an official of the Commission of the European Communities, residing at 28 Rue Gatti de Gamond, Uccle, 1180 Brussels, represented and assisted by Marcel Slusny, of the Brussels Bar, 272 Avenue Brugmann, Uccle, 1180 Brussels, with an address for service c/o Mr Cassaignau, 24 Rue du Nord, Luxembourg-Helmsange,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Joseph Griesmar, acting as Agent, assisted by Daniel Jacob, of the Brussels Bar, 36 Rue de Praetere, 1050 Brussels, with an address for service in Luxembourg at the office of its Legal Adviser, Mario Cervino, Jean Monnet Building, Kirchberg, Luxembourg,

defendant,

APPLICATION for the recognition of the applicant's right to the household allowance and, accordingly, for the annulment of the Commission's decision of 6 February 1978 refusing to recognize that right and, in implementation of Article 85 of the Staff Regulations, continuing to claim recovery of the sums which it regards as overpaid, as well as for the reimbursement of those sums, which have already been repaid to the Commission,

THE COURT (Second Chamber)

composed of: Lord Mackenzie Stuart, President of Chamber, P. Pescatore and A. Touffait, Judges,

Advocate General: G. Reischl
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the procedure, the conclusions and the submissions and arguments of the parties may be summarized as follows:

I — Facts and procedure

On 1 June 1974 Mrs Exner was recruited by the Commission in the post of assistant switchboard-operator as a probationer in Grade C 5, step 3. At present she is established in Grade C 4, step 3.

The applicant has two children from an earlier marriage and on 16 February 1974 — shortly before her recruitment by the Commission — she married Hans-Joachim Exner, who is at present employed at Eurocontrol in Grade B 4. When she took up her duties the applicant filled in a questionnaire on 4 June 1974 in which, in reply to point No 18 which stated "Give details of the family allowances which you receive from other sources", she stated "Bfr 3 840". In fact that sum only related to the allowance for the two dependent children and did not include the household allowance which the Commission paid to her from that date. Subsequently, as the applicant did not inform the Commission of the increases in the allowances received by her husband, it also paid the difference in her favour between the allowances for dependent children to which she was entitled as an official and those paid to her husband. The applicant claims that when she filled in her questionnaire she was informed by Hugo Sterck, an official in Grade A 4 in Directorate-General IX, "that the fact that her husband drew a head of household allowance at Eurocontrol did not prevent her from drawing the household allowance in her own name".

The Commission states, on the other hand, that that official "formally denies ever having informed the applicant that it was not necessary to take account of the 'other benefits' received by her husband from Eurocontrol".

Following a check carried out by the administration, which ascertained that Mrs Exner had not informed the Commission of the increases in the dependent child allowances drawn by her husband, she received a memorandum from the Individual Rights and Privileges Division dated 26 July 1976 which asked her for information concerning the changes in the allowances received and, in particular, "the various changes in the family allowance paid from outside the Communities" from 1 June 1974 to 26 July 1976.

The applicant claims that even when she received that memorandum she "was convinced that she was not required to declare the household allowance drawn by her husband", first, because of the statements made by Mr Sterck and, secondly, because as she came to the Communities from the private sector she

understood the term "family allowances" to cover only dependent child allowances, since they alone "exist within the Belgian social security system".

The Commission subsequently contacted Eurocontrol and was informed by letter of 21 October 1976 that Mr Exner had been drawing a household allowance since 1 January 1975. In fact, a letter from Eurocontrol dated 10 October 1977 informed the Commission that that allowance had been paid from 1 February 1974. As a result of the first letter the Commission decided no longer to pay the household allowance previously granted to the applicant with effect from December 1976 and requested the recovery of the sums overpaid with effect from 1 January 1975.

The fact that the household allowance was no longer paid did not form the subject of a memorandum but may be ascertained from a comparison of the salary statement for December 1976 with that for November of the same year. However, the applicant — to whom the salary statements are not readily comprehensible — sent a memorandum to the Director for Personnel at the Commission on 24 February 1977 in which she asks for "an explanation of the reduction in the amount of [her] remuneration". The Director for Personnel replied by a memorandum of 4 March 1977 in which he stated "that the difference ascertained between [the] remuneration for February 1977 and that for November 1976 is explained by the fact that the household allowance and the dependent child allowance are no longer paid as from 1 December 1976".

Following that reply the applicant wrote on 15 March 1977 and 20 April 1977 to ask "pursuant to which provisions of the Staff Regulations [the] departments [of the Commission]:

— granted [her] the household allowance and the dependent child allowance on [her] entry into the service of the Communities;

— no longer paid those allowances".

The Commission replied to those questions by a memorandum dated 18 May 1977 which stated that the household allowance and the dependent child allowances were no longer paid on the ground that as those two allowances paid by Eurocontrol were equal to or greater than those paid by the Commission, the latter was not required, by virtue of Article 67 (2) of the Staff Regulations, to make "any payment on that account". In the same memorandum the Commission informed the applicant that as she had not declared the household allowance paid to her husband the sums paid to her on that account since 1 January 1975 had to be repaid in accordance with the terms of Article 85 of the Staff Regulations.

The applicant then submitted a complaint in accordance with Article 90 of the Staff Regulations by letter of 15 July 1977 in which she asked the Commission to grant her exemption from recovery of the overpayments. She was, however, informed by a memorandum of 23 August 1977 that the overpayment to her amounted to Bfr 22 218. The same memorandum also fixed the arrangements for the recovery of that sum.

By letter of 6 February 1978 from Mr Tugendhat, the Commissioner with special responsibility for personnel, which was notified to the applicant on 20 March 1978, the Commission rejected the complaint against the application of Article 85 of the Staff Regulations. The present application was lodged against that decision and was received at the Court Registry on 19 June 1978.

The procedure followed the normal course. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court (Second Chamber) decided to open the oral procedure, to ask Geoffrey Campey, an official in DG/IX/A/I to give evidence at the hearing and to request Mrs Exner to appear.

II — Conclusions of the parties

In her application the *applicant* claims that the Court should:

"(1) Rule that the applicant is entitled to payment of the household allowance, with all the legal consequences, in particular as regards the allowances due from the date on which the defendant suspended payment;

(2) Accordingly, declare null and void the decision of the Commission of 6 February 1978;

(3) Order the defendant to repay to the applicant the sum of Bfr 22 218 with interest at the normal rate from the submission of the complaint on 15 July 1977.

In the alternative:

(4) Declare that there is no ground for the application of Article 85 of the Staff Regulations of Officials;

(5) Grant the requests made in paragraphs (2) and (3) above;

(6) Order the defendant to pay the costs of the proceedings".

In her reply the applicant also claims that the Court should:

"Take formal note that the applicant adheres to the conclusions in her application considered here as set out in full, subject only to the fact that the conclusion in paragraph (6) also relates to the principal request."

In the alternative

Order the following facts to be proved by witnesses:

(a) When the applicant saw Mr Sterck for the purpose of filling in the declaration as to allowances he informed her that the fact that her husband received a head of household allowance at Eurocontrol did not prevent her drawing the household allowance in her own name;

Witness called: Hugo Sterck, an official in DG/IX/A/4;

(b) When, after submission of her complaint, that is, after 15 July 1977, the applicant saw Mr Campey, a lawyer, he informed her that she was right and that she ought to win her case;

Witness called: Geoffrey Campey, an official in DG/IX/A/I;

The *Commission* contends that the Court should:

"— Dismiss the application as inadmissible and in any event unfounded;

— Order the applicant to pay the costs;

— Without prejudice."

III — Summary of the submissions and arguments of the parties

A — Admissibility

The question of admissibility was raised in relation to the Commission's decision no longer to pay the household allowance on the ground, principally, that no prior complaint had been lodged

on that specific point and, in the alternative, that the complaint was out of time.

Principally: the absence of any prior complaint

The *applicant* considers that having regard to her grade (C) and in accordance with the case-law of the Court in its judgment in the *Sergy* case (Case 58/75, *Sergy* v *Commission of the European Communities*, [1976] ECR 1139) it is proper "not to confine oneself to the wording of the complaint" and that it "had always been her intention to challenge the legality of the administration's decision to recover the sums already paid by way of the household allowance and not simply the decision itself".

The *Commission* states that the complaint of 15 July 1977 only concerned the decision to recover the overpayments and that as a result the application lodged against the Commission's refusal to grant the household allowance to Mrs Exner was not preceded by a complaint.

The Commission considers, furthermore, that it was unable to know of the applicant's complaints concerning the fact that the household allowance was no longer paid and that, accordingly, the reference to the judgment in the *Sergy* case was "irrelevant", since it is stated not only in paragraph 32 of the decision in that judgment that the primary purpose of the prior complaint is to enable the administration to be in a position "to know the complaints or requests of the person concerned" but also in paragraph 33 that although "it is not the purpose of that provision to bind strictly and absolutely the contentious stage of the proceedings" it is nevertheless essential "that the claims submitted at that stage change neither the cause nor the subject-matter of the complaint". The Commission further maintains that the subject-matter of the claim concerning the right to payment of the household allowance in the future is "completely different from that of the complaint, which only related to the recovery of the overpayments" by way of the household allowance.

Finally, the Commission points out that the applicant puts forward no evidence of such a nature as to establish her "intention" to challenge the decision of the administration and, furthermore, that she has waited 18 months in order to do so.

The *applicant* states that in view of the fact that on 4 March 1977 the Commission replied that the reduction in the amount of her salary was caused by the fact that the household allowance was no longer paid it cannot claim that it did not know of her complaint as regards the fact that it was no longer paid. Moreover, she expressed her complaint orally during her discussions with Mrs Nicora and Mr Campey (the latter also told her "that she was right to request payment of the household allowance, since she was entitled to it").

Furthermore, the letter from Mrs Delauche of 18 May 1977 in reply to the applicant's memoranda shows that the defendant "had understood what the complaint was".

Finally, the defendant has never considered opening a discussion with a view to an amicable settlement of the dispute, since in its defence it "states that the applicant is not entitled to the household allowance". In those circumstances a complaint would have been a useless formality and is therefore no longer to be regarded as an essential procedural requirement since it serves no purpose. The applicant accordingly asks for the case-law of the Court in the *von Wüllerstorff und Urbair* case, *Ritter von Wüllerstorff und Urbair* v *Commission*, Case 7/77 [1978] ECR 769) and in the

Marcato cases *(Marcato* v *Commission,* Case 44/71 [1972] 1 ECR 427 and Case 37/72 [1973] 1 ECR 361) to be applied to her.

The applicant returns to the case-law in the *Sergy* case and states that complaints drawn up by employees in person must be given a wide interpretation and that it is therefore logical to accept in this instance that the complaint was contained by implication in the formal complaint, particularly as the Commission "was not for one minute unaware of the applicant's real aim".

The *Commission* maintains that the applicant's various memoranda "contain essentially requests for an explanation and are not in any way evidence of the applicant's desire to challenge the suspension of payment of the household allowance" and formally denies that Mr Campey told the applicant that she was right.

The Commission "strongly objects" to the application in this instance of the case-law laid down in the *von Wüllerstorff und Urbair* case, in which it was accepted that the prior complaint was "devoid of purpose where a complaint is directed against the decisions of a selection board in a competition since the appointing authority is not empowered to review such decisions", and maintains that the lodging of a prior complaint is a condition of admissibility, as was stated by the Court in its judgments in the *de Lacroix* and *Reinarz* cases *(Joëlle de Lacroix* v *Court of Justice of the European Communities,* Case 91/76 [1977] ECR 225, *Reinarz* v *Commission and Council of the European Communities,* Case 48/76 [1977] ECR 291). Moreover, in the defendant's opinion the applicant's reasoning results in a paradox since an official would only be obliged to lodge a prior complaint if "it appeared to him that the decision of the administration was not firmly adopted". Furthermore, the applicant's reasoning disregards the difference between the administration, which adopts the measure adversely affecting the official, and the appointing authority, which has the power to amend it.

As regards the argument that the ground of complaint in question was contained by implication in the formal complaint the defendant recalls, first, that the applicant's memoranda gave "absolutely no" grounds for believing that she intended to challenge the fact that the household allowance was no longer paid and, secondly, maintains that even if a complaint may be drafted in a summary manner it "must set out, in a manner sufficient to enable the authority involved to decide with full knowledge of the facts, the subject-matter of the complaint and the grounds underlying it" *(Küster* v *European Parliament,* judgment of 12 March 1975 in Case 23/74 [1975] ECR 353).

Alternatively: the belated nature of the complaint

The *Commission* states that even if it were necessary to accept that the ground of complaint concerning the fact that the household allowance was no longer paid was contained by implication in the formal complaint the latter was submitted out of time, since the fact that that allowance was no longer paid was notified by means of the pay slip for December 1976 which showed that that allowance was no longer paid. The Commission considers that the applicant could not have been unaware of the significance of the headings on her salary statement since "officials are regularly reminded of it" and that the pay slip accordingly constitutes "an act adversely affecting" an official. In that connexion the Commission refers to the judgments in Case 1/76 *(Wack* v *Commission of the European Communities,* [1976] ECR 1017) and in Joined Cases 15 to 33, 52,

53, 57 to 109, 116, 117, 123, 132 and 135 to 137/73 *(Schots, née Kortner, and Others* v *Council and Commission of the European Communities and European Parliament,* [1974] ECR 177).

Even if that argument is not accepted the Commission states, nevertheless, that the administration replied to Mrs Exner on 4 March 1977 and that as the complaint was submitted on 22 July 1977 the time-limit of three months was not complied with.

The Commission states, finally, that "in no case can the memorandum of 18 May 1977 be regarded as constituting notification of the decision no longer to pay the household allowance" since it is "purely confirmatory" and cannot enable an official "to postpone indefinitely the expiry of the time-limits for lodging complaints by asking on several occasions for additional information". In that connexion the Commission relies on the judgments in Case 56/72 *(Goeth-Van ... r Schueren* v *Commission of the ...ropean Communities* [1973] 1 ECR 181), Case 33/72 *Gunella* v *Commission of the European Communities* [1973] 1 ECR 475) and Case 1/76 *(Wack* v *Commission of the European Communities* [1976] ECR 1017).

The *applicant* again states that in her particular case the salary statements cannot constitute a clear communication of the administration's decision and therefore disputes that the date of notification is the date on which she received that salary statement.

Similarly, she claims that it is also impossible for the memorandum of 4 March 1977 to be regarded as notification since it contains no written statement of the reasons on which the decision is based — which is "the *ratio legis* of the provisions of Article 25 of the Staff Regulations". The memorandum of 4 March 1977 provided Mrs Exner with no explanation, which caused her to make subsequent approaches to the administration. Only after Mrs Nicora had explained to her "that she was not entitled to the household allowance because her husband was an official of a European organization" did she become aware for the first time of the reasons for the fact that her household allowance was no longer paid. She therefore submitted her complaint and, accordingly, maintains that the reply of 18 May 1977 cannot constitute a purely confirmatory measure.

Finally, the applicant considers that although it is certainly right that failure to comply with the time-limits makes an application inadmissible inasmuch as the action concerns "a past right" it is desirable that as regards recurring and therefore future rights officials are not time-barred. In this connexion she refers to the opinion of Mr Advocate General Mayras in the *Gunella* case *(supra)* in which, although he concluded that the application was inadmissible, he nevertheless considered the substance of the case in order — according to the applicant's interpretation "either to persuade the official that he was wrong" or "to make the institution aware of its responsibilities, at least as regards the future".

The *Commission* states that Article 25 cannot be relied on as regards the memorandum of 4 March 1977 since in accordance with the opinion of Mr Advocate General Trabucchi (in the above-mentioned *Schots* case) "Where a sufficiently clear and exact rule of the regulations is currently being applied, explicit and detailed reasoning need not be held indispensable."

As regards the explanations said to have been given by Mrs Nicora the defendant states that the official in question contests them and claims that she never gave the explanation referred to by the applicant.

Finally, while not denying the jurisprudential interest of the applicant's observation regarding the absence of a time bar in relation to recurring rights, the

defendant states that those considerations cannot apply in the present case, since what is at issue is a "contested right" and not a "ludicrous example". In any event Mr Advocate General Mayras had himself given different reasons to justify the purpose of considering the merits of the *Gunella* case, as follows:

"However, if, without dwelling on the inadmissibility, you were to decide to examine the merits of the action, we believe that you would likewise be led to reject the appeal. For this reason we feel it worth while to give you our opinion in this connexion."

Thus, the applicant's interpretation of that opinion was incorrect.

B — The substance of the case

The applicant relies principally upon a submission which is divided into two parts, one of which is based on the infringement of Article 67 (2) of the Staff Regulations and the other on the infringement of Article 1 (3) and (4) of Annex VII to those regulations. She also relies, in the alternative, on a submission based on the inapplicability to the present case of Article 85 of the Staff Regulations.

Principal submission — first part

Infringement of Article 67 (2) of the Staff Regulations

The *applicant* states that "Article 67 (2) refers only to those allowances which are drawn by the official himself".

The *defendant* recalls that by virtue of the provision referred to officials "shall declare allowances of like nature paid from other sources; such latter allowances shall be deducted from those paid" to those officials. It also recalls that the Court held in Case 106/76 *(Gelders née Deboeck* v *Commission of the European Communities* [1977] ECR 1623) and Case 14/77 *(Emer née van den Branden* v *Commission of the European Communities* [1977] ECR 1683) that "the manifest objective of Article 67 (2) is to prevent a couple from receiving family allowances twice in respect of the same children". There is thus no legal basis for that submission.

The *applicant* abandons that part of her submission while observing that the case-law referred to is not applicable in this instance since the overlapping of household allowances is provided for in Article 1 (3) to Annex VII.

Principal submissions — second part

Infringement of Article 1 (3) and (4) of Annex VII to the Staff Regulations

The *applicant* maintains that by virtue of Annex VII, which is applicable in this instance by virtue of the general principle *specialia generalibus derogant*, an official is entitled to receive the household allowance unless the husband or wife is also employed by the Communities. She also recalls that her husband is employed at Eurocontrol which, despite statements made by the defendant's officials, is an organization separate from the Communities.

The *Commission* does not dispute that argument in any way but maintains that that rule must be combined with that contained in Article 67 (2) of the Staff Regulations "since the household allowance drawn by Mr Exner and that awarded in theory to the applicant are undoubtedly 'of like nature' ". That is confirmed by the case-law of the Court (see the judgments in the above-mentioned *Gelders née Deboeck* and *Emer née van den Branden* cases) which states

that "only allowances which are comparable and which have the same purpose can be taken into consideration as being 'of like nature' ". Therefore Article 67 applies and not Annex VII. Thus as a result of the rule against overlapping laid down in the former the household allowance was no longer paid to the applicant.

The *applicant* recalls, first of all, that Mrs Nicora informed her that her household allowance was no longer paid owing to the fact that as her husband works at "Eurocontrol, which is a European organization" both spouses are employed within the Communities. She then contests the defendant's argument that Article 67 applies, since such a proposition thereby upsets "all the traditional rules of interpretation whose application is in particular expressed in the maxim *specialia generalibus derogant*". She states that Article 67 lays down general rules and that the conditions are stipulated in Article 1 of Annex VII to the Staff Regulations, which provides that if the spouses have dependent children "the official is in any event entitled to the household allowance". In accordance with that interpretation therefore the applicant is entitled to the household allowance in this instance.

The Commission recalls and states once more that Mrs Nicora has denied the statements made by the applicant. It then explains the conditions governing the grant of the household allowance and concludes that "the rule against the overlapping of allowances applies in all cases, whether or not the official has dependent children and whether the spouse is or is not employed in the service of the Communities". It also maintains that the maxim referred to by the applicant does not apply to the two provisions in question since their subject-matter is not the same: one of them establishes a general rule against the overlapping of allowances and the other refers to "a specific case (the existence of dependent children) of continued receipt of the household allowance even though the income from employment of the official's spouse exceeds a certain amount".

The defendant considers, finally, that the applicant's argument would result in inequality since, to take the example of a couple with dependent children, if both husband and wife were employed by the Communities they would receive only one household allowance whereas if one of the spouses worked outside the Communities they would receive two.

Alternative submission

Inapplicability of Article 85 of the Staff Regulations

The *applicant* maintains that as she was not aware that the payment might be irregular and since it cannot be regarded as so patent that she could not have been unaware of it "there are no grounds for applying Article 85 of the Staff Regulations".

The *Commission* refers to the judgment in the *Kuhl* case (*Kuhl* v *Council of the European Communities*, Case 71/72 [1973] ECR 705) and recalls that if one of the two conditions referred to by the applicant is satisfied the overpayment must be recovered. It maintains that the applicant's "situation is irregular as a result of her own conduct and she cannot rely on good faith in order to

challenge successfully the recovery of the overpayments". To support that argument the Commission refers to the facts: the applicant failed to provide the supporting document relating to the Frs 3 840 declared as family allowances received by her spouse, from which it would have been easy to ascertain that the spouse received a household allowance. The applicant cannot therefore claim to have been unaware of the irregularity of the payment. The applicant also failed to grasp the opportunity to rectify the situation by sending to the administration the supporting documents relating to the allowances received by her husband in order to inform it of the increases in those allowances as requested by the Commission in Administrative Notices No 63 of 13 October 1975. In that connexion the defendant refers to the case-law laid down in the *Kuhl* case *(supra)* and in the *Meganck* case *(Meganck* v *Commission of the European Communities,* judgment of 30 May 1973, Case 36/72 [1973] 1 ECR 527) in which the Court held that officials who had failed for four months to inform the administration of changes which had occurred in their family situation "were themselves responsible for the irregular payments and the irregularity was therefore patently such that they could not have been unaware of it".

The *applicant* maintains that as the error was excusable it is necessary to discover the circumstances in which the payment was made and, *inter alia,* to take account of the applicant's personal situation.

Accordingly, she maintains that:

— First, she did not make any omission in her reply to the questionnaire and Mr Sterck, whose "authority was infinitely greater than the applicant's as regards the scope of the Staff Regulations", not only did not ask for any documents but, furthermore, "informed her that she was entitled to receive the household allowance". The administration thus "provoked, or encouraged, or even simply permitted" the conduct on the part of Mrs Exner for which she is now criticized.

— Secondly, "she was not deemed to be aware of the information contained in Administrative Notices and, in any event, since she was convinced that she was entitled to the household allowance she could not have suspected that that information might apply to her particular case.

— Thirdly, assuming that she is not entitled to the household allowance, "the crux of the matter" is whether or not her error was excusable, that is, in this instance, whether she was justified in believing that she was entitled to the allowance. She recalls that Mr Sterck and Mr Campey "shared her point of view" and that Mrs Nicora explained the fact that the household allowance was no longer paid by the fact that "Eurocontrol was a European organization" and asks "how, therefore, the error could be called inexcusable".

The *Commission* again challenges the reference to the "alleged statements" of the three officials mentioned and states that, in any event, those made by Mr Campey and Mrs Nicora were made

after the administration adopted the decision to recover the overpayments.

It claims that the personal situation of the applicant cannot be taken into account, since to do so "would amount to preventing Article 85 of the Staff Regulations from ever being applied" and, furthermore, that in its judgment in the *Acton* case (Joined Cases 44, 46 and 49/74, *Acton and Others* v *Commission of the European Communities*, [1975] ECR 383) the Court "accepted that Article 85 of the Staff Regulations was applicable to the applicants, who numbered more than 500 and therefore represented all grades and categories, without making any distinction on the basis of the level at which they performed their duties."

The defendant also states that "the principle of good faith which prohibits the administration from recovering overpayments having caused or even simply permitted the overpayment of the household allowance" cannot be relied on in this instance since "there can be no doubt that the payment in question was made as a result of the incomplete declarations made by the applicant when she took up her appointment and of her failure to provide the supporting documents requested."

As a result the defendant concludes that both the conditions laid down in Article 85 of the Staff Regulations are satisfied in this instance, although one alone would have been sufficient to allow recovery of the overpayments.

IV — Oral procedure

During the oral procedure the Court heard the evidence of Mr Campey and Mrs Exner.

Mr Campey stated, first, that he "does not remember Mrs Exner" and, secondly, while not disputing that he has "certainly spoken to her on the telephone", that there has probably been a "misunderstanding" and that he does not believe that he could have told Mrs Exner that she was right.

Mrs Exner stated that she "met Mr Campey in his office" and that the informed her "that he believed that there was no problem and that [she] must be right". She did not deny that there may have been a misunderstanding since the conversation took place in French — Mr Campey is British — but she claimed to have "understood Mr Campey to have said that [she] was right in what [she] said."

Mrs Exner also stated that when she took up her appointment Mr Sterck informed her that "as Eurocontrol does not form part of the Commission [she] could also be entitled to the household allowance."

After the witnesses were heard the parties presented their oral argument at the hearing on 14 June 1979.

The Advocate General delivered his opinion at the sitting on 13 September 1979.

Decision

1 By application received at the Registry on 19 June 1978 the applicant requests the Court to declare, first, that she is entitled to a household

allowance within the meaning of Article 67 (1) (a) of the Staff Regulations and Article 1 of Annex VII to the Staff Regulations and, secondly, that Article 85 of the Staff Regulations, which relates to the recovery of overpayments, was wrongly applied to her by the administration of the Commission.

The right to the household allowance

2 As regards that point the Commission claims that the application is inadmissible since it was not preceded, as required by Article 91 of the Staff Regulations, by a complaint relating to the decision no longer to grant the household allowance and that even if the complaint lodged by the applicant were regarded as also extending to that question it was not lodged in good time, which also renders the application inadmissible.

However, in view of the fact that the submissions relied on by the applicant directly challenge the decision adopted by the Commission, namely that the applicant is not entitled to the household allowance, the close links between the material submissions relied on by the applicant and the objections of their admissibility put forward by the Commission require the former to be examined first.

3 The applicant claims that Article 67 (2) of the Staff Regulations, which requires an official to declare allowances of like nature paid from other sources so that they may be deducted from those paid under Articles 1, 2 and 3 of Annex VII, merely expresses a general principle.

However, the special provision contained in the final sentence of Article 1 (3) of Annex VII, which provides that the official shall "however" be entitled to the allowance where the married couple have one or more dependent children takes precedence over that general provision. That provision is limited by Article 1 (4) to the payment of the household allowance to only one of the spouses, the one whose basic salary is the higher, where both are employed in the service of the Communities.

Consequently — according to the applicant — it follows from those provisions that the right to the household allowance exists in any event where the spouses have one or more dependent children and that the prohibition on the overlapping of benefits only applies where both spouses are employed in the service of the Communities.

4 As against that it must be stated that the clear aim of Article 67 (2), which establishes a general principle applicable in every case, is to prevent a married couple from drawing two household allowances since they are of like nature and paid for the same purpose: to facilitate the life of an official who is married or who, whatever his family situation, has one or more dependent children.

5 On the other hand, Article 1 of Annex VII, in particular paragraph 3 thereof, contains in fact no rule which prohibits the overlapping of benefits and its subject-matter is different from that of Article 67 (2): it provides that the household allowance is lost where the income of the spouse of the official exceeds a certain limit, regardless of whether the spouse receives such an allowance, and that the official is entitled to that allowance only where the spouses have one or more dependent children. It cannot therefore be deduced from that provision that a couple with dependent children may in any event draw the household allowance twice.

6 Furthermore, Article 1 (4) of Annex VII specifies that where a husband and wife are employed in the service of the Communities and are both entitled to the household allowance, it shall be payable only to the person whose basic salary is the higher.

7 Accordingly, it is clear that the aim of Article 67 is to enable each family to receive only one household allowance, paid at the maximum rate.

8 As in this instance it is not disputed that the applicant's husband draws a household allowance and that it is greater than that which the applicant could draw, she was rightly refused the household allowance under Article 67 (2) of the Staff Regulations and the submission must be rejected as unfounded.

In those circumstances it is unnecessary to consider the preliminary objections raised by the Commission.

Recovery of the overpayments on the basis of Article 85 of the Staff Regulations

9 On that point the dispute concerns whether the administration of the Commission is entitled to demand the repayment of the overpayments in accordance with Article 85 of the Staff Regulations which provides that "Any sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it." It follows from that provision that for a sum paid without justification to be recovered evidence must be produced to show that the recipient was actually aware that there was no due reason for the payment or that the fact of the overpayment was patently such that he could not have been unaware of it.

10 Since the applicant disputes both that she was aware that there was no due reason for payment and the evidence to show that, it is necessary to consider the circumstances in which the administration was led to pay the household allowance to the applicant.

11 The administration calculates the family allowances payable to its married employees on the basis principally of the reply to point No 18 in the questionnaire filled in by any person entering its service. Point No 18 is worded as follows: "Give details of the family allowances which you receive from other sources." Under that question there are two dotted lines on the form set close together on which is to be written the reply to the question, which is marked by an asterisk referring to the bottom of the page where it is stated "Attach supporting document."

In reply to that point the applicant merely wrote the figure "Frs 3 840" and did not provide any supporting document.

12 In view of the fact that Article 67 of the Staff Regulations clearly specifies that family allowances comprise:

(a) the household allowance;

(b) the dependent child allowance;

(c) the education allowance,

the applicant is criticized for having provoked the error on the part of the administration by failing to indicate the legal reason for the sum of Frs 3 840, which was solely an allowance in respect of the applicant's dependent children.

13 It must be observed, however, that in the Member States the concept of family allowances is generally understood to mean essentially dependent child allowances and that that is also the meaning given to the term in the Belgian legislation to which the applicant was subject before she entered the service of the Commission. It is therefore difficult to criticize the applicant for having failed to find out the precise definition of the term "family allowances" after entry into service by referring to Article 67 of the Staff Regulations.

14 The administration of the Commission must also be criticized for failing to draw up questionnaires which on that point were sufficiently explicit, unlike in fact those of the other Community institutions; they were even ambiguous since the amount of space reserved for the reply did not allow any details to be given as to the three constituent elements of family allowances within the meaning of the Staff Regulations of Officials of the Communities. It must also be emphasized that the special office of the administration to which the applicant returned the questionnaire did not react either to the wording of the reply or to the absence of any supporting document and that its conduct in this instance was both remiss and negligent.

15 In addition, the conversations which took place between the officials responsible in that field and the applicant were, at the least, capable of giving rise to a misunderstanding on her part as to the extent of her rights so that it must be concluded that it has not been shown that the applicant was actually aware that there was no due reason for the payment to her of the household allowance and that it cannot be complained that she caused the error on the part of the administration by an incorrect statement or an omission.

16 Finally, as regards the question whether or not the fact that there was no due reason for the payment of the allowance, the amount of which was trifling, was patent, it must be observed that it was not, since the conduct of the administration was such as to have given rise on the part of the applicant to the reasonable belief that she was entitled to the sums paid to her.

17 It results from the foregoing that the administration of the Commission is not justified in claiming from the applicant the recovery of the overpayments of the household allowance in respect of the period from 1 January 1975 to 30 November 1976 and that the Commission's decision of 18 May 1977 on that point must be annulled.

Costs

18 Under Article 69 (3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order that the parties bear their own costs in whole or in part.

As the applicant has been successful on some of her heads of claim the Commission must be ordered to pay a part of her costs, estimated at 50%.

Furthermore, under Article 70 of the Rules of Procedure, in proceedings by officials or other servants of the Communities, institutions shall bear their own costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application inasmuch as it sought recognition that the applicant was entitled to the household allowance;**

2. **Annuls the decision adopted by memorandum of 18 May 1977 (Ref. IX/A/4/2995) in which the Commission ordered the applicant to repay the overpayments by way of the household allowance;**

3. **Orders the Commission to repay the applicant the sum of Bfr 22 218;**

4. Orders the Commission to bear its own costs and one-half of the costs incurred by the applicant.

Mackenzie Stuart Pescatore Touffait

Delivered in open court in Luxembourg on 11 October 1979.

A. Van Houtte
Registrar

A. J. Mackenzie Stuart
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 13 SEPTEMBER 1979 [1]

Mr President,
Members of the Court,

The proceedings in which I am giving my opinion today concern, first, the applicant's claim for payment of a household allowance within the meaning of Article 67 (1) (a) of the Staff Regulations of Officials and Article 1 of Annex VII to the Staff Regulations of Officials, to which *inter alia* married officials are entitled. Secondly, they concern the disputed duty of the applicant to repay the household allowance which, it is alleged, was for a certain period wrongly paid to her, in accordance with Article 85 of the Staff Regulations of Officials, which provides that:

"Any sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it."

In this connexion the following details should be borne in mind. The applicant, who has two children (born in 1969 and 1971) by a previous marriage, married on 16 February 1974 an employee of Eurocontrol who had been in Grade B 5, step 1, since September 1972 and who has been classified in Grade B 4 since December 1976. In accordance with the service regulations of Eurocontrol, which are modelled on those of the European Communities, the applicant's husband has, from the date of the marriage, drawn a household allowance and an allowance for two dependent children. Since June 1975 he has also been drawing an education allowance and since November 1977 a second education allowance.

On 1 June 1974 the applicant entered the service of the Commission as a probationer in Grade C 5, step 3. She was established with effect from

1 — Translated from the German.