

ORDER OF THE COURT
17 OCTOBER 1984¹

N. M.
v Commission and Council of the European Communities

Cases 83 and 84/84

Action for failure to act — Natural and legal persons — Omissions in respect of which an action may be brought

(EEC Treaty, third para. of Art. 175)

Annulment of measures — Measures in respect of which an action may be brought — Measures having legal effects

(EEC Treaty, second para. of Art. 173)

In Cases 83 and 84/84

N. M., represented by Panagiotis G. Charitos of the Rhodes Bar, with an address for service in Luxembourg at the Chambers of Marie-José Berchem, 78 Rue Eugène-Welter, 2723 Howald,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Dimitrios Gouloussis and Antonio Marchini Camia, acting as Agents, with an address for service in Luxembourg at the office of Manfred Beschel, a member of its Legal Department, Jean Monnet Building (Case 83/84),

and

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by David Gordon-Smith, Director-General of its Legal Department, acting as Agent, assisted by Christos Mavrakos, a member of that department, also acting as Agent,

¹ — Language of the Case: Greek.

with an address for service in Luxembourg at the office of the Director of the Legal Department of the European Investment Bank, 100 Boulevard Konrad-Adenauer (Case 84/84),

defendants,

concerning the defendants' refusal to take action to secure the applicant's release from penal detention,

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco, O. Due and C. Kakouris (Presidents of Chambers), P. Pescatore, A. O'Keefe, T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot and R. Joliet, Judges,

Advocate General: M. Darmon

Registrar: P. Heim

makes the following

ORDER

- 1 By applications received at the Court Registry on 27 March 1984, Mr N. M. has brought actions against the Commission and the Council under the first and third paragraphs of Article 175 and the first and second paragraphs of Article 173 of the EEC Treaty. He seeks, first, a declaration that, by failing to address to him an act declaring that his detention in prison, the penalties imposed upon him by the Greek authorities and the legislative measures on which those penalties are based are contrary to Community law and, in particular, to fundamental freedoms and to the principle that the criminal law should not be retroactive, the Commission and the Council are in breach of their obligations under Community law. Secondly, and in the alternative,

he requests the Court to declare void the Council's letter of 22 December 1983 and the Commission's letter of 30 January 1984 in which the Council and the Commission refused to adopt such an act or to take any measures in respect of the applicant.

- 2 In his applications, the applicant states that he was sentenced to death, a sentence which was subsequently commuted to life imprisonment, for his part in establishing the régime which was in place in Greece between 1967 and 1973, under which he held the offices of minister and deputy prime minister. By two letters of 2 December 1983, he requested the Commission and the Council to adopt measures with a view to terminating his detention, which he considers to be contrary to fundamental freedoms recognized by Community law and, more specifically, to the principle that the criminal law should not be retroactive. The Council, in a letter of 22 December 1983, and the Commission, in a letter of 30 January 1984, replied that they could not contemplate any action, since the applicant's request did not fall within the scope of their powers.

- 3 The applicant contends that the Commission, by virtue of Article 155 of the Treaty, and the Council, by virtue of Article 145, had a legal duty to act against the violations of fundamental rights recognized by Community law of which he claims to be a victim and to acknowledge that those violations have taken place. He claims that the Court should:

Declare that the general principles of law and the rules designed to protect human rights are an integral part of Community law and take precedence over the retroactive penal legislation introduced by the Hellenic Republic in 1974 and in 1975 to punish acts committed in 1967 and that the applicant's detention and all the ancillary penalties are therefore illegal under Community law;

Declare that the Commission and the Council were obliged, but failed, to address to the applicant an act attesting the matters set out above and that — in breach of the applicable law and, in particular, the general legal principles of the non-retroactivity of the criminal law and of equality before the law

and the general legal principle that no one may be removed from the jurisdiction of the ordinary courts — he is prevented from exercising the rights which Community law confers upon him.

- 4 Since the first claim, which is for a declaration that a given situation exists in law, serves as the ground for the second claim, the applications must be viewed chiefly as actions for failure to act, within the meaning of the first and third paragraphs of Article 175 of the Treaty. In addition, the applicant refers to Article 173 of the Treaty, requesting in the alternative that the Court declare void the refusals to adopt the acts referred to in the applications.
- 5 By applications lodged pursuant to Article 91 (1) of the Rules of Procedure, the Commission and the Council contend that the actions are inadmissible and ask the Court to decide that question without examining the substance of the case. The Commission and the Council consider that the requirements of the second paragraph of Article 175 of the Treaty are not satisfied, since the two institutions adopted a definitive position; moreover, in the absence of any decisions on the matter, the actions for a declaration of nullity are also inadmissible. The Council adds that it has no power under the Treaties to issue declarations of the kind requested by the applicant and that in any event the actions are out of time.
- 6 In his written observations on the objections of inadmissibility the applicant argues essentially that both the Council and the Commission were under a duty to act in a case of such manifest injustice. A mere refusal to act, unaccompanied by a statement of the reasons for the refusal, does not, in his view, constitute the definition of a position within the meaning of the second paragraph of Article 175 of the Treaty. He maintains that, since the institutions did not define their position, time did not start to run until two months after the institutions were called upon to act and therefore the time-limit was in fact complied with.
- 7 In view of the fact that the two cases are related, it is appropriate that they should be joined pursuant to Article 43 of the Rules of Procedure.
- 8 By virtue of Article 91 (3) of the Rules of Procedure, where an application is lodged under Article 91 (1), the remainder of the proceedings relating to that application are to be oral unless the Court decides otherwise. In the present instance, the Court considers that the documents before it provide it with sufficient information. It is therefore appropriate that the Court should give its decision on the objections of inadmissibility in the form of an order and dispense with the oral procedure.

- 9 The third paragraph of Article 175 of the Treaty provides that any natural or legal person may complain to the Court of Justice that an institution has failed to address to that person "any act other than a recommendation or an opinion".
- 10 In that connection, it is clear — and undisputed by the applicant — that the defendant Community institutions have no power to adopt a measure putting an end to the detention of a person or otherwise directly influence his position under national criminal law. The applicant has failed to specify clearly in his letters of 2 December 1983 and during the present proceedings before the Court the nature of the measure which he was calling upon the Commission and the Council to adopt. However, it emerges from his claims that he was asking them to express an opinion on the legal situation. Such an opinion could not have a direct legal effect on his position under national criminal law or on the detention of which he complains. Consequently, the requirement laid down in the third paragraph of Article 175 of the Treaty is not satisfied and the actions for failure to act are in any event inadmissible.
- 11 In so far as the applicant bases his actions in the alternative on the second and third paragraphs of Article 173 of the Treaty, it is sufficient to observe that the refusal on the part of the Commission and the Council to express such an opinion could not, *per se*, be considered a decision having legal effects. Therefore the said refusal cannot be the subject of an action brought under Article 173 of the Treaty.
- 12 Consequently, the applications must be dismissed as inadmissible.

Costs

- 13 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. Since the applicant has failed in his submissions, he must be ordered to pay the costs.

On those grounds,

THE COURT

hereby orders as follows:

1. **The applications are dismissed as inadmissible.**
2. **The applicant is ordered to pay the costs.**

Luxembourg, 17 October 1984.

P. Heim
Registrar

A. J. Mackenzie Stuart
President