

JUDGMENT OF THE COURT (Third Chamber)

15 September 1994 \*

In Case C-452/93 P,

**Pedro Magdalena Fernández**, an official of the Commission of the European Communities, residing in Brussels, represented by Juan Ramón Iturriagagoitia, of the Madrid and Brussels Bars, with an address for service in Luxembourg at the Chambers of Marc Loesch, 8 Rue Zithe,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Third Chamber) of 28 September 1993 in Case T-90/92 between Pedro Magdalena Fernández and the Commission ([1993] ECR II-971), seeking to have that judgment set aside,

the other party to the proceedings being:

**Commission of the European Communities**, represented by Sean van Raepenbusch, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, also of its Legal Service, Wagner Centre, Kirchberg,

\* Language of the case: French.

THE COURT (Third Chamber),

composed of: J. C. Moitinho de Almeida (Rapporteur), President of the Chamber,  
F. Grévisse and M. Zuleeg, Judges,

Advocate General: G. Tesauro,  
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 2 June 1994,

after hearing the Opinion of the Advocate General at the sitting on 16 June 1994,

gives the following

### Judgment

- 1 By application lodged at the Registry of the Court of Justice on 26 November 1993, Mr Magdalena Fernández brought an appeal under Article 49 of the EEC Statute and the corresponding provisions of the ECSC and Euratom Statutes of the Court of Justice against the judgment of 28 September 1993 in Case T-90/92 *Pedro Magdalena Fernández v Commission* [1993] ECR II-971 in which the Court of First Instance dismissed his application for the annulment of the Commission's decision of 24 July 1992 refusing to grant him the expatriation allowance.

2 According to the judgment under appeal, the facts which gave rise to the case are as follows:

‘1. The applicant, Pedro Magdalena Fernández, a Spanish national, was born in Santianes (Spain) on 17 September 1954. He lived in Belgium, where he received his education, from 1965 until 1 May 1986, save for a period of nine months — from 1 October 1980 until 28 June 1981 — which he spent in Torrevieja (Spain) for the purpose, according to his statement, of seeking employment. From 29 June 1981 until 30 April 1986, the applicant worked in Belgium for a commercial undertaking.

2. By decision of 4 June 1986 he was appointed, with effect from 1 May 1986, a probationary official of the Commission in Grade B 5 and assigned to the Statistical Office of the European Communities in Luxembourg. He was established with effect from 1 February 1987.

3. By decision of 7 August 1986, the applicant’s place of origin and the place where he was recruited, within the meaning of Article 7(3) of Annex VII to the Staff Regulations of Officials of the European Communities (hereinafter “the Staff Regulations”), were determined as being Amay (Belgium).

4. Following a request for review submitted by the applicant who, on the grounds that his parents lived at Torrevieja and that he exercised his full rights as a citizen there, had claimed that the centre of his interests did not coincide with the place where he was recruited, his place of origin was fixed by decision of 18 March 1987 as being Torrevieja.

5. Throughout his period of employment in Luxembourg, the applicant received the expatriation allowance provided for in Article 4 of Annex VII to the Staff Regulations.

6. On 1 February 1992 the applicant was assigned to Brussels, to the Directorate-General for the Internal Market and Industrial Affairs (DG III). With effect from 1 March 1992, he no longer received the expatriation allowance.

7. By letter of 17 March 1992, addressed to the Secretariat-General of the Commission, the applicant submitted a complaint under Article 90(2) of the Staff Regulations contesting his salary statement for the month of March 1992, in so far as it failed to credit him with the amount corresponding to the expatriation allowance.

8. By decision of 24 July 1992, of which the applicant received notification on 29 July 1992, the Commission expressly rejected the applicant's complaint.'

- 3 Those are the circumstances in which, by application lodged at the Registry of the Court of First Instance on 28 October 1992, Mr Magdalena Fernández brought an action for the annulment of the Commission's decision or, in the alternative, for an order that the Commission pay him an *ad personam* allowance equal to 12% of the total amount of his basic salary.
- 4 By the judgment under appeal, the Court of First Instance dismissed Mr Magdalena Fernández's application.
- 5 In his appeal Mr Magdalena Fernández calls in question the reasoning which led the Court of First Instance to reject the first limb, alleging infringement of Article 4(1)(a) of Annex VII to the Staff Regulations, of the plea in law upon which he had based his claim for the annulment of the Commission's decision of 24 July 1992.
- 6 According to the first limb of that plea the Commission committed an error of appraisal in determining his place of habitual residence during the reference period provided for in Article 4(1)(a) of Annex VII to the Staff Regulations.

In its judgment the Court of First Instance first of all recalled (paragraph 27) the concept of habitual residence as consistently interpreted in Community case-law, and pointed out that that was a question of fact requiring the actual place of residence of the person concerned to be taken into account.

The Court of First Instance subsequently found (paragraphs 28 and 29) that, during the reference period in question — from 1 November 1980 until 30 October 1985 — Mr Magdalena Fernández had habitually resided in Belgium and that the nine months spent in Spain, which constituted an episodic and brief absence from the country of employment, could not be considered sufficient to deprive Mr Magdalena Fernández's residence in the country of his employment of its habitual character for the purposes of Article 4(1)(a) of Annex VII to the Staff Regulations. According to the Court of First Instance, that absence concerned exclusively the first eight months of the reference period and was not sufficient to cause Mr Magdalena Fernández's habitual residence in Belgium since 1965 to be regarded as interrupted, in view of the fact that, throughout the remainder of the reference period, he resided continuously in that State.

Lastly, the Court of First Instance stated (paragraph 30) that that conclusion could not be called in question by any intentions on the part of Mr Magdalena Fernández of seeking employment in Spain and of settling there, or by his exercise of political rights and possession of financial interests there, in view of the undisputed fact that, for the duration of the reference period, he maintained the centre of his interests in Belgium, where he resided and where, for the greater part of the reference period, he pursued his occupation. The Court of First Instance added that the fact that, at Mr Magdalena Fernández's request, the Commission had fixed

Spain as his place of origin could have no influence on the outcome of the case, since the fixing of the official's place of origin and the granting of an expatriation allowance meet different needs and are subject to different criteria.

- 10 In support of his plea Mr Magdalena Fernández claims that the Court of First Instance wrongly disregarded, for the purpose of the grant of the expatriation allowance, the eight months which he spent in Spain during the reference period. By regarding the 52 months during which he lived in Belgium as the reference period, the Court of First Instance deducted eight months from that five-year period, thus infringing Article 4 of Annex VII to the Staff Regulations.
- 11 Mr Magdalena Fernández further observes that, at paragraph 28 of its judgment, the Court of First Instance states that from 1965 until 1 May 1986 and, therefore, during the reference period in question, the applicant habitually resided in Belgium, whereas at paragraph 29, it acknowledges the existence of 'a nine months' stay in Spain between those two dates ...' which, however, it classifies as 'episodic and brief', erroneously basing itself on the judgment in Case 188/83 (*Witte v Parliament* [1984] ECR 3465, paragraph 11). Mr Magdalena Fernández notes in that connection that 'episodic' implies irregularity and he raises the question whether a stay of eight months may be regarded as episodic.
- 12 Furthermore, Mr Magdalena Fernández states, although the Court of First Instance draws a distinction in paragraph 29 of the judgment under appeal between an absence from the place of employment during the first eight months of the reference period and an absence at any other time — for example, in the middle or towards the end of the reference period — it fails to indicate the point in the reference period at which absence from the place of employment would entitle the official to claim the expatriation allowance. Article 4 of Annex VII to the Staff Regulations cannot in any circumstances bear the construction placed on it by the Court of First Instance, since the five-year period provided for in that provision represents a continuous and uniform span of time, and absence from the place of

employment at any point during that span of time would entitle the official to the expatriation allowance.

13 Lastly, Mr Magdalena Fernández states that the authors of the Staff Regulations drafted Article 4 of Annex VII in unconditional terms and conferred no discretion on the administration.

14 The Commission contends that, contrary to what is permissible in an appeal, which is restricted to questions of law, Mr Magdalena Fernández is challenging the findings of fact made by the Court of First Instance at paragraph 28 of the judgment under appeal. The appeal is therefore inadmissible.

15 The Commission contends moreover that, for the purpose of the application of Article 4 of Annex VII to the Staff Regulations, the Court of First Instance had to ascertain, not whether the nine months spent in Spain amounted to habitual residence, but whether the administration could properly have taken the view that, during the reference period, Mr Magdalena Fernández had habitually resided in Belgium.

16 Lastly, the Commission maintains that, contrary to Mr Magdalena Fernández's assertion, habitual residence in a place during a given period does not imply the official's continuous physical presence in that place.

17 The Commission's preliminary objection to the admissibility of the appeal on the ground that Mr Magdalena Fernández is challenging solely the findings of fact made by the Court of First Instance must be dismissed.

- 18 Mr Magdalena Fernández does not deny that he in fact resided in Belgium for almost the entire reference period. He merely denies that the Court of First Instance was entitled to take the view that the eight months of the reference period spent in Spain were not sufficient to constitute a break in his period of residence in Belgium which began in 1965 and thus to entitle him to the expatriation allowance. Since that ground of challenge relates to a question of law, the appeal is admissible.
- 19 None of the arguments put forward by Mr Magdalena Fernández in support of his plea, and alleging that the Court of First Instance infringed Article 4(1)(a) of Annex VII to the Staff Regulations, can be upheld.
- 20 As the Court of Justice has consistently held, the purpose of the expatriation allowance is to compensate officials for the extra expense and inconvenience of taking up employment with the Communities if they have been thereby obliged to change their residence and move to the country of employment and to integrate themselves in a new environment. Furthermore, the concept of expatriation also depends on the personal position of an official, that is to say, on the extent to which he is integrated in his new environment, which is demonstrated for example, by habitual residence or by the main occupation pursued (see the judgment in Case 201/88 *Atala-Palmerini v Commission* [1989] ECR 3109, paragraph 9).
- 21 Having regard to the purpose underlying the expatriation allowance, as described above, and to the wording of Article 4(1)(a) of Annex VII to the Staff Regulations, the criterion for awarding an expatriation allowance is habitual residence.
- 22 As the Court of First Instance, referring to the settled case-law of the Court of Justice, pointed out, the place of habitual residence is that in which the official con-



cerned has established, with the intention that it should be of a lasting character, the permanent or habitual centre of his interests. However, for the purposes of determining habitual residence, all the factual circumstances which constitute such residence must be taken into account.

23 The Court of First Instance found that, from 1965 until 1 May 1986, Mr Magdalena Fernández habitually resided in Belgium. The fact that the applicant moved temporarily to Torrevieja, from 1 October 1980 until 28 June 1981, does not mean that he moved the permanent centre of his interests to Spain and cannot, therefore, be regarded as terminating, for the purposes of Article 4(1)(a) of Annex VII to the Staff Regulations, his habitual residence in Belgium.

24 It follows that the Court of First Instance correctly interpreted Article 4(1)(a) of Annex VII to the Staff Regulations in considering that, during the reference period, Mr Magdalena Fernández habitually resided in Belgium.

25 The appeal must therefore be dismissed.

### Costs

26 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Under Article 70 of those Rules, in proceedings between the Communities and their servants, the institutions are to bear their own costs. However, under Article 122 of the Rules of Procedure, Article 70 is not to apply

to appeals brought by officials or other servants of the institutions. Since Mr Magdalena Fernández has been unsuccessful, he must be ordered to pay the costs of these proceedings.

On those grounds,

THE COURT (Third Chamber)

hereby:

- 1. Dismisses the appeal;**
- 2. Orders the appellant to pay the costs.**

Moitinho de Almeida

Grévisse

Zuleeg

Delivered in open court in Luxembourg on 15 September 1994.

R. Grass

J. C. Moitinho de Almeida

Registrar

President of the Third Chamber