JUDGMENT OF THE COURT (Third Chamber)
10 July 1986 *

In Case 153/85

Carmen De Fraye, née Trenti, an official of the Economic and Social Committee, residing at 28 rue Africaine, 1050 Brussels, represented by Jean-Noël Louis of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Nicolas Decker, 16 avenue Marie-Thérèse, Luxembourg,

applicant,

v

Economic and Social Committee, represented by Detlef Brüggemann, a member of its Personnel Directorate, assisted by Alex Bonn, of the Luxembourg Bar, with an address for service in Luxembourg at the latter's Chambers, 22 côte d'Eich,

defendant,

APPLICATION for the grant of the foreign residence allowance,

THE COURT (Third Chamber)

composed of: U. Everling, President of the Chamber, Y. Galmot and J. C. Moitinho de Almeida, Judges,

Advocate General: G. F. Mancini
Registrar: J. A. Pompe, Deputy Registrar

after hearing the Opinion of the Advocate General delivered at the sitting on 26 June 1986,

gives the following

* Language of the Case: French.

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an application lodged at the Court Registry on 21 May 1985 Mrs Carmen De Fraye, née Trenti, an official of the Economic and Social Committee, brought an action essentially for the annulment of the decision of the Economic and Social Committee of 17 August 1984 refusing to grant her the foreign residence allowance and for the annulment of the decision of the Economic and Social Committee of 15 February 1985 rejecting the applicant's complaint.

2 Mrs De Fraye, an Italian national by birth, married her second husband, a Belgian national, on 7 June 1978. By that marriage she automatically acquired Belgian nationality and therefore lost her Italian nationality. However, the dissolution of her previous marriage was not recognized under Italian law.

3 By a letter dated 3 April 1979 the Director General for Administration of the Economic and Social Committee informed the applicant that she was entitled to the foreign residence allowance for the period between 1 May and 30 June 1978 but that payment of the allowance would be discontinued with effect from 1 July 1978 since, by her second marriage, she had acquired Belgian nationality and had had the possibility of renouncing that nationality under Belgian law. For those reasons the administration considered that following her second marriage the applicant no longer satisfied the requirements laid down in Article 4 (3) of Annex VII to the Staff Regulations of Officials. That article provides in essence that 'an official who has by marriage automatically acquired and cannot renounce the nationality of the State in whose territory he or she is employed' is entitled to the foreign residence allowance on the same conditions as an official who is not and has never been a national of that State.

4 By a letter dated 25 April 1984 the applicant asked the Secretary General of the Economic and Social Committee to reconsider her case. In support of her request, she referred to certain legal and administrative difficulties which she would have faced had she renounced Belgian nationality after her second marriage. Those difficulties, which were connected with the fact that under Italian law the dissolution of her first marriage was not recognized, were such as to make it impossible for her in fact to renounce Belgian nationality.

5 On 17 August 1984 that request was rejected as inadmissible by the Secretary General on the ground that payment of the foreign residence allowance had been discontinued by the decision of 3 April 1979 and that since that decision had not been contested within the prescribed period it was no longer open to challenge.

6 The applicant's complaint under Article 90 (2) of the Staff Regulations was rejected by the Secretary General on 15 February 1985, and the applicant thereupon brought this case.

7 The Econonic and Social Committee raised a number of objections to the admissibility of the action. It contends that the action is in reality directed against the decision of 3 April 1979, which is no longer open to challenge since the periods within which action must be taken under Articles 90 and 91 of the Staff Regulations have expired. The fact that the administration subsequently and on several occasions re-examined the file in order to provide the applicant with further clarification at her request cannot cause the time within which action must be taken to start running again.

8 The applicant replies that the application was lodged in good time. In that connection she submits two arguments.

9 In the first place she relies on the existence of a new fact justifying an application for review of the decision of 3 April 1979. She states that in February 1982 the

administration consulted a legal expert who concluded that the applicant could, in law and in fact, renounce Belgian nationality within six months of her second marriage. However, after the applicant had herself contacted that expert he acknowledged, in a second opinion dated 21 March 1984, that she was in fact unable to renounce Belgian nationality, in view of the prejudicial effects of such a renunciation. That second opinion constitutes, according to the applicant, a new fact capable of causing the time within which action must be taken to start running again.

10 Secondly, the applicant maintains that the letter of 3 April 1979 was not sent by the appointing authority and therefore amounted not to a decision but merely to administrative information. Consequently, the first act which may be regarded as a decision was the communication of the Secretary General of the Economic and Social Committee on 17 August 1984, which was challenged within the prescribed period.

11 In that regard it must be noted that Article 90 (1) of the Staff Regulations provides that any official may request the appointing authority to take a decision relating to him. However, the Court has consistently held that that right does not allow an official to set aside the time-limits laid down in Articles 90 and 91 of the Staff Regulations for the lodging of a complaint and an appeal by indirectly calling into question by means of a request a previous decision which has not been challenged within the period prescribed. Only the existence of new substantial facts may justify the submission of a request for a review of such a decision.

12 In this case the first act amounting to a decision within the meaning of the aforementioned provisions of the Staff Regulations is the administration's letter of 3 April 1979. That letter adversely affected the applicant inasmuch as it directly affected her legal position, by discontinuing payment of the foreign residence allowance with effect from 1 July 1978. That letter was, moreover, followed by measures for its implementation terminating the payment of the allowance on that date. Since that decision was not contested within the period laid down in the Staff Regulations, it is necessary to examine whether it can be called into question after the expiry of that period on the ground that an important new fact has arisen.

13 In the first place, the fact that the administration subsequently re-examined the applicant's case on her request in order to provide her with further information cannot be regarded as a new fact permitting derogation from the system of mandatory time-limits laid down in Articles 90 and 91 of the Staff Regulations.

14 Nor may the applicant rely on the legal expert's opinon of 21 March 1984 in support of her argument that her application to the Court is admissible. Without prejudice to the question whether the expert's report on a legal question may be regarded in the particular circumstances of this case as a new fact, it must be stated that it was open to the applicant from the beginning to consult a legal expert and to submit his conclusions to the administration in good time. In those circumstances, the applicant is precluded from producing such an opinion after the expiry of the time-limit in order to justify an application for a review of the decision.

15 It should be added that in any event the opinion of 21 March 1984 is not capable, in view of its content, of calling into question the decision of 3 April 1979. That opinion simply states the practical consequences of a renunciation of Belgian nationality, whereas the decision of 3 April 1979 is based on the conclusion that the applicant was able, as a matter of law, to renounce that nationality, by virtue of the relevant national law. The aforementioned opinion does not in any way contradict the conclusions set out in the decision of 3 April 1979.

16 For the foregoing reasons the application must be dismissed as inadmissible.

Costs

17 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 succcessful party's pleading. However, Article 70 of the Rules provides that in proceedings brought by officials of the Communities the institutions are to bear their own costs.

On those grounds,

THE COURT (Third Chamber)

hereby:

(1) Dismisses the application as inadmissible;

(2) Orders the parties to pay their own costs.

Everling Galmot Moitinho de Almeida

Delivered in open court in Luxembourg on 10 July 1986.

P. Heim
Registrar

U. Everling
President of the Third Chamber