JUDGMENT OF THE COURT (FIRST CHAMBER)
9 JUNE 1964[1]

Mrs Anne-Marie Marcillat (née Capitaine) v Commission of the European Atomic Energy Community

Case 69/63

Summary

1. Officials — Appeals relating to decisions prior to the publication of the Regulations — Time-limits
(Staff Regulations of officials of the EAEC, Articles 91 and 102)

2. Officials — Contract of employment concluded before the entry into force of the Staff Regulations — Appeal relating to the interpretation of such contracts — Applicability of the Staff Regulations after establishment
(Staff Regulations of officials of the EAEC, Article 91)

3. Officials — Employment on a contractual basis — Legal system

1. Article 91, in so far as it lays down time-limits for the filing of appeals, applies to previous decisions only from the date of its publication.
This rule applies in particular to disputes concerning the application of Article 102 of the Staff Regulations, which lays down transitional provisions to enable the Staff Regulations to be applied to servants who are already employed. These provisions are in addition to the rules prescribed by the Staff Regulations for the recruitment of officials.
2. However, where there is a dispute which concerns the interpretation of a contract concluded during the period before the entry into force of the Staff Regulations, the rules of the Regulations, and especially those of Article 91, cannot be applied before establishment has been duly granted.
3. It is generally accepted that public servants employed on a contractual basis are subject to the application of regulations relating to the functioning of the service and that these regulations apply to servants taking up their duties.

In Case 69/63

ANNE-MARIE CAPITAINE, THE WIFE OF GÉRARD MARCILLAT, a secretary at the Joint Nuclear Research Centre at Ispra, residing at Laveno (Italy), assisted by Ernest Arendt and Jean Welter, Advocates of the Cour Supé-

1 — Language of the Case: French.

rieure de Justice of the Grand Duchy of Luxembourg, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 6 rue Willy-Goergen,

applicant,

v

COMMISSION OF THE EUROPEAN ATOMIC ENERGY COMMUNITY, represented by its Legal Adviser, Jean-Pierre Delahousse, acting as Agent, with an address for service in Luxembourg at the office of Henri Manzanarès, Secretary of the Legal Department of the European Executives, 2 place de Metz,

defendant,

Application for the reversal of the decisions withdrawing the separation allowance following the applicant's marriage and for an order for the defendant to pay the arrears from the date of such withdrawal;

THE COURT (First Chamber)

composed of: A. Trabucchi, President of Chamber, L. Delvaux (Rapporteur) and W. Strauß, Judges,

Advocate-General: M. Lagrange
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

The facts may be summarized as follows:

The applicant was recruited in March 1960 as a secretary in the Commission of the EAEC.
The terms of the letter of engagement (Schedule 1 to the application) which was sent on 2 March 1960 and accepted on 5 March are very succinct. In fact the Administration only goes as far as to indicate the basic elements of remuneration, namely the basic salary fixed by it and certain additional allowances. The Administration used for this purpose a duplicated form which was at that time in use for the recruitment of staff. In the form it was stated that these provisions '. . . may be cancelled at any time by either side on one month's notice', and that 'this letter is without prejudice to the subsequent drawing up of a contract'.

Among the additional allowances prescribed in the letter there appears one entitled 'separation allowance' the grant of which is subject solely to a well-defined condition relating to the residence of the servant at the time of engagement. As the applicant fulfilled this condition, she received the allowance from the first month of taking up her duties.

On 6 May 1961 the applicant married Gérard Marcillat, an engineer, himself a servant of the institution, working for the Centre at Ispra to which she had in the meantime been transferred. On 14 June 1961 the applicant was notified of a decision 'withdrawing the separation allowance following her marriage' (Schedule 1A to the application). She expressed her surprise in a letter of 24 July 1961 (Schedule 2 to the application) in which, referring to the express provisions of the letter of engagement, she asked the Administration, if it was not able to comply with the letter, to be good enough to point out to her the criterion capable of 'causing the letter of engagement to be legally deficient'.

The Director-General of Administration explained to the applicant on 2 August 1961 (Schedule 3 to the application) that the 'withdrawal' of her separation allowance had been made in accordance with Article 9 (c) of the General Staff Regulations of the ECSC on which the Euratom Commission based its relations with its staff and which provides that:

> 'When a husband and wife are employed by the Community this allowance shall be payable only to the spouse whose salary is the higher.'

Moreover, on 29 August 1961, the local directorate of Ispra notified the applicant (Schedule 4 to the application) that her basic monthly salary was increased to 8350 BF, 'corresponding to Step 3 of Grade 11 of Category C in the salary scale of the ECSC applied provisionally by the Euratom Commission'. This decision, which took effect retroactively from 1 October 1960, was taken in the sphere of operations called 'reclassification at the end of the probationary period', which the Administration carried out on the basis of a periodic report drawn up at the end of the first six months of service. The applicant was informed in addition that the provisions of the letter of engagement remained unchanged.

By letter of 26 October 1961 (Schedule 7 to the application) the applicant asked the Legal Department to resubmit her case to the Directorate General of Administration, as the decision of 14 June appeared to her to be inconsistent with the letter of engagement and the aforementioned note of 29 August.

There being no reply to this request, the applicant reminded the Legal Department in a registered letter of 5 March 1962 (Schedule 8 to the application) of her 'request' of 26 October 1961 a copy of which she enclosed.

The Administration, in the person of its Director-General, rejected this request by letter of 4 May 1962 (Schedule 10 to the application), merely confirming 'the opinion' expressed on 2 August 1961 and, consequently, the decision of 14 June.

The applicant lodged her application at the Registry on 22 June 1963, at the expiration of a period of four months from the sending of another written complaint on 22 February 1963 to the Deputy Director of the Ispra Centre (Schedule 11 to the application), to which there was no reply. The application has as its object the reversal of the decision suspending the grant of the allowance in dispute, the reversal of the express or implied measures of the Administration directed towards that same end and that the defendant be ordered to pay the arrears.

It is also to be noted that the applicant was established in February 1963 under Article 102 of the Staff Regulations of officials of the EEC and EAEC. She was asked in accordance with Article 104 of those Regulations to waive in

writing the benefit of the provisions of her contract.

The waiver by the applicant, occurring several months after she had made the present application, was, with the express agreement of the Administration, made subject to the following condition: 'Without prejudice to the dispute pending before the Court of Justice of the European Communities (Case 69/63)'.

II — Conclusions of the parties

A. The *applicant* claims in her *application* that the Court should:

'1. Declare that it has jurisdiction to entertain this dispute;
2. Declare the application to be admissible;
3. Reverse the decisions taken and declare that, despite her marriage, the applicant has the right to the separation allowance prescribed by the letter of engagement of 2 March 1960;
4. Consequently, order the defendant to pay the applicant the arrears of separation allowance as from the date of its withdrawal;
5. Order the defendant to pay the costs and expenses of the proceedings.'

In her *reply* she claims that the Court should:

'Accept the conclusions set out in the application and, consequently, order the defendant to pay the applicant the separation allowance from the date of its withdrawal up to the present day.'

B. The *defendant* contends that the Court should:

'Declare the application to be out of time and therefore inadmissible; alternatively, dismiss it as unfounded; order the applicant to pay the costs.'

III — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

The application is directed against the following decisions:

1. The express decision of the Commission, notified to the applicant on 14 June 1961 (Schedule 1A to the application), by which the applicant's separation allowance was withdrawn following her marriage;
2. In so far as they constitute confirmatory decisions, the letters sent to the applicant on 2 August 1961 and 4 May 1962 (Schedules 3 and 10 to the application) by Mr Funk, the Director-General of Administration and Personnel;
3. The implied decision of refusal of the applicant's request to the Deputy Director on 22 February 1963 (Schedule 11 to the application), arising from the silence of the Director of the Centre at Ispra.

A — *On admissibility*

The *applicant* does not dispute that, according to Article 91 of the Staff Regulations of officials of the EEC and EAEC an appeal must be filed within three months of the notification of the decision in dispute, but asserts that the said Regulations apply only to officials of the Community and, pursuant to Article 1, the status of official stems from the manner of appointment. As she was not appointed under the Staff Regulations, the applicant cannot be considered as an official of the Community and the time-limits provided for by the Regulations thus cannot operate against her. In the absence of provisions which limit in time the manner of proceeding with this application, it is admissible.

The *defendant* considers that this application falls under the provisions of Article 91 of the Staff Regulations and that it must be considered as being out of time and therefore be held to be inadmissible. Article 91 applies to disputes of a financial character between one of the Communities and 'any person to whom

these Staff Regulations apply'.
The applicant belongs to the category of servants referred to in Article 102 of the Regulations who may be established under the conditions laid down in that Article. With the entry into force of the Regulations, such servants were automatically made subject to the provisions of Article 91 as regards methods of recourse. By that provision, the authors of the Staff Regulations have followed Article 152 of the EAEC Treaty, by which: 'The Court of Justice shall have jurisdiction in any dispute between the Community and its servants within the limits and under the conditions laid down in the Staff Regulations or the Conditions of Employment'. In that way the Regulations circumvented the lacuna which arose from the fact that, in view of the afore-mentioned Article 152, the Rules of Procedure of the Court of Justice of 3 March 1959 were not able to reproduce, on the subject of time-limits for appeals by Community servants, the provisions of the Rules of Procedure of 21 February 1957, relating to disputes as prescribed by the old Staff Regulations of the ECSC.
The defendant then goes on to examine the admissibility of the application in respect of each of the impugned decisions.
According to the defendant, the present application by the applicant is directed against a decision of 14 June 1961 which the Administration, following a number of subsequent complaints, merely confirmed expressly or by implication.
By virtue of the principle of the immediate applicability of provisions relating to procedure, the time-limit for the applicant's appeal began to run on the date of the entry into force of the Staff Regulations. In principle, the applicant ought therefore to have appealed to the Court no later than 31 March 1962 to avoid being time-barred. Although it appears, however, that, despite the provisions of the implementing Regulation, Article 91 cannot be applied from 1 January 1962 because of the delay in the publication of the Staff Regulations in the Official Journal, the appeal could have been validly lodged at the Court within three months from 14 June 1962, the date of publication, in other words on 15 September 1962 at the latest.
The applicant's attempt to obtain for herself a new time-limit by submitting a complaint on 22 February 1963 to the administration of the Ispra Establishment was ineffective. That request, in so far as its aim was to have the case brought before the Combined Committee set up by circular no 66 of 27 May 1959, was unacceptable since the same circular provided for its automatic abrogation on the entry into force of the Staff Regulations and from that date the Committee was replaced by bodies set up by those Regulations. Moreover the complaint of 22 February only repeated the grievances aired by the applicant in the course of 1961 and 1962 and contested the decision on the ground that the consequences of the decision taken on 14 June 1961 were still present at the time of her establishment. The silence with which this complaint was met, in so far as it can be considered as equivalent to an implied decision of refusal, has thus a purely confirmatory character and cannot have the effect of making the time-limit for appeal against the decision of 14 June 1961 start to run afresh.
The *applicant* replies that the submission of inadmissibility based on the allegation that the application is out of time must be dismissed.

1. The decision of 14 June 1961 and the confirmatory notes dated 2 August 1961 and 4 May 1962

The *applicant* denies that the time-limit for bringing an appeal specified in Article 91 of the Staff Regulations applies to servants who have not been

established.

(a) Since, in the applicant's opinion, Article 152 of the EAEC Treaty provides for the implementation of the Staff Regulations of officials, the application of time-limits for bringing an appeal is only conceivable after the Regulations have come into force (a situation realized on 14 June 1962) and after they have become applicable to the applicant and to the dispute.

The question whether Article 91 of the Staff Regulations applies to servants who are not established has not yet been resolved by the Court of Justice.

It follows from the judgment of 12 December 1956, *Mirossevich* v *High Authority* (Rec. 1955–1956, p. 369, Summary, paragraph 2), that a time-limit similar to that of Article 33 of the ECSC Treaty and of Article 39 of the Statute of the Court of Justice of the ECSC cannot be applied by analogy.

The Rules of Procedure of the Court of Justice of 3 March 1959 did not adopt the time-limit of two months fixed by the Rules of Procedure of 21 February 1957. The Second Chamber of the Court decided in its judgment of 4 April 1960, *Elz* v *High Authority* (Rec. 1960, p. 228), that the entry into force of the Rules of Procedure of 3 March 1959 did not prejudice either rights of appeal acquired before that date or time-limits running under the former Rules of Procedure.

In respect of the Mirossevich decision, the *defendant* replies that, although the Court dismissed the plea of inadmissibility raised on the ground that the application was out of time, it was because at that time there was no provision laying down the time-limits for bringing appeals in so-called disputes 'concerning officials'. Today, however, such a provision does exist: Article 91 of the Staff Regulations. In respect of the Elz decision, the defendant alleges that the applicant is trying to give it a meaning which it does not have, by taking one clause out of context. It is in fact sufficient to read the end of the judgment to convince oneself that the Court was merely reaffirming the principle of non-retroactivity of rules of procedure, without at the same time invalidating the principle, equally well established, of the immediate applicability of those same rules.

(b) The *applicant* considers that in this case the conditions for the application of Article 91 of the Staff Regulations are not fulfilled.

She points out that the issue in dispute is not concerned with a difficulty of application of the Staff Regulations but with a difficulty of interpretation of the contract of employment which was concluded before the entry into force of the Staff Regulations. The applicant states on this point that the question of admissibility is closely connected with the substance of the case.

She infers from this that, as the matter in dispute is outside the ambit of the Staff Regulations, the applicant is not 'one of the persons to whom these Staff Regulations apply' in the words of Article 91. She claims that the time-limits laid down by that Article cannot operate against her.

The *defendant* replies that the applicant's reasoning is not consistent with the letter and spirit of the provision.

The wording of Article 91 does not restrict its field of application to mere 'difficulties of application of the Staff Regulations'; on the contrary it includes on a very general basis any dispute, especially of a financial nature, between one of the Communities and any person to whom the Staff Regulations apply. The determinative criterion is consequently the status of the parties and not the legal nature of the relationship of employment which binds them. From the entry into force of the new rules the applicant possessed the status of a 'person to whom the Staff Regulations apply'. From the mere fact of her holding a permanent post, she can become established and auto-

matically enjoy the guarantees specified in Article 102. According to the Commission this condition is necessary but sufficient to bring the present dispute within the sphere of Article 91. The fact that this dispute has its origin in a divergence of interpretation regarding the scope of a contractual provision is not such as to remove it from the ambit of Article 91, given that the action concerns one of the financial elements of the legal relationship established between the applicant and the institution employing her.

The '*ratio legis*' supports, if that were necessary, the interpretation taken from the text. To restrict the application of Article 91 only to disputes relating to the interpretation of the Staff Regulations amounts in fact to leaving undecided the question of the time-limits for appeals in disputes concerning the termination of contracts entered into before the existence of the Staff Regulations, for example where, despite the provisions of Article 104, the servant refuses to waive the benefit of the contract. A lacuna of this kind, clearly contrary to the aim of Article 152 of the EAEC Treaty, has in addition the effect of extending up to some hypothetical time-limit the legal protection given to servants governed by contracts 'of limited duration' as provided by Article 214 (3) of the EAEC Treaty, while, at the same time, that protection is confined to narrow limits when it is a question of officials or those entitled under them.

In short, Article 91 of the Staff Regulations of officials and the corresponding provisions of the Conditions of Employment of Other Servants, which refer to the former, constitute without doubt the 'regulatory provision', the lack of which the applicant wrongly believes she has to invoke in order to avoid the application of the time-limits in force. Such a provision, made necessary by the express provisions of Article 152 of the EAEC Treaty, was to be found nowhere else and cannot have a scope restricted to a fraction of the possible disputes between the institutions and their servants.

2. The implied decision of refusal resulting from the silence in respect of the request of 22 February 1963

The *applicant* asserts that, even if it were admitted that the time-limits in Article 91 of the Staff Regulations applied to this dispute, the silence in respect of her request of 22 February 1963 cannot be considered as a mere confirmation of a previous express decision of refusal.

(a) On 6 February 1963 the applicant became established. Consequently she was asked, in accordance with Article 104 of the Staff Regulations, to 'waive the benefit of her contract'.

The establishment of the applicant with the status of official constitutes for her and for the defendant a new circumstance which justified a new request, since the mere waiver of the contract signified the surrender of the claim to payment of the separation allowance.

The Commission of the EAEC was thus bound to take account of this new circumstance and at the very least let the applicant know what were the consequences, with regard to her claim, of the waiver of the contract.

As the applicant's legal position had changed, her request of 22 February 1963 deserved a new inquiry forming the basis for a new express decision. The Administration's silence which lasted for more than four months must be regarded as an implied decision of refusal and not as confirmation of a previous express decision.

The *defendant* replies that it cannot see how the establishment of the applicant can constitute a 'new circumstance' such as to affect the existence and extent of her financial rights during the period of validity of her contract, since

waiver of the said contract excludes, as it must, any retroactive effect to the time before establishment took place and is subject, moreover, (with the express agreement of the Administration) to an express reservation as regards the result of the present dispute.

(b) The *applicant* goes on to assert that, as in its notes of 2 August 1961 and 4 May 1962 the Administration mentioned only 'suspension' of the separation allowance and not its 'withdrawal', it gave to the decision of 14 June 1961 a clearly provisional nature and it was consequently only valid until the advent of subsequent decisions. At the time of her establishment the applicant had thus the best reasons for pressing for a new, and this time definite, decision. And that is what she did by her request of 22 February 1963.

The *defendant* replies that the notes of 2 August 1961 and 4 May 1962 cannot be interpreted as revoking the decision of 14 June 1961 (relating to the withdrawal of the separation allowance) and as substituting for it an alleged provisional decision simply 'suspending' the said allowance. One has only to read them again to perceive that the Director General of Administration, in rejecting the claim presented by the applicant on 24 July 1961, is merely specifying the reasons for the decision of 14 June 1961 without altering its scope.

The defendant adds that it clearly follows from the expressions used by the applicant in the letters sent to the Administration on 5 and 26 October 1961 and 22 February 1963 that the applicant herself considered the decision of 14 June 1961 as an act 'adversely affecting' her.

The silence met by the complaint of 22 February 1963, through which the applicant attempted, she states today, to 'force a decision', can only, in any case, be interpreted as merely confirming the decision of 14 June 1961.

B — *On the substance of the case*

The *applicant* points out that the letter of engagement, which forms the contract following her acceptance on 5 March 1960, specifies clearly and fully the conditions for the grant of the separation allowance and that there is no need to search elsewhere for a provision which is capable of limiting the exercise of the right which is thus recognized by contract. The contract contains no reservation or limitation with the exception of that relating to the distance from work of the place of residence at the time of engagement. To be more precise, she comments that it does not in fact mention the withdrawal of the allowance in the event of the marriage of the person concerned to another servant or official of the Community. Consequently the Administration is disregarding the applicant's right conferred by her contract when it refers to a restrictive clause contained in rules which have nothing to do with the relationship of employment established.

The *defendant* replies that a purely 'literal' appraisal of the applicant's rights, which does not take account of the detailed rules and general conditions applied consistently and in a known manner by the new institutions to all their servants, leads inevitably to an over-formalistic solution which conflicts with the principle of equal treatment accorded to all employees with the aim of avoiding discrimination.

After the entry into force of the Treaties of Rome the institutions unanimously agreed that during the initial period the provisions enacted in Luxembourg should serve as a guide for the administration of the staff of the institutions in Brussels. These provisions subsequently prompted the drawing up of contracts of limited duration as prescribed by Article 214 (3) of the EAEC Treaty and the application of interim provisions for employment such as the standard letter sent to the applicant, which did not

adversely affect the drawing up of a subsequent contract. By a decision of 25 January 1958 the Councils authorized the Presidents of the Institutions to apply the provisions of the Staff Regulations of officials of the ECSC to senior officials.

This principle was then extended to all the staff of the institutions in Brussels. With regard to this matter, see the budget of the EAEC for the 1959 financial year (OJ of 28 August 1959, p. 987, note under Article 11).

The prohibition where two spouses are both employed in the Communities on combining their separation allowances, like its corollary, namely the prohibition on combining the installation allowance and the resettlement allowance, is a settled practice which is both general and well-known, applied to all the staff from the date when the institutions were set up. This practice, which is connected with the very nature of the allowance at issue and was confirmed in Luxembourg by the first Staff Regulations of the ECSC, became a rule of good administration and was spontaneously applied in Brussels from the beginning and incorporated without any reservation or discussion in the Staff Regulations of the new Communities.

The *applicant* replies that an imperative requirement of legal certainty and orthodox administration is that the letter as well as the spirit of the contract of employment be observed by the Administration, which was perfectly free to modify it, if it had so wished. The applicant does not intend to enter into the 'ins and outs of administration' to which the defendant refers nor to dispute the argument that a 'literal' application of the contract of engagement leads to a result which is contrary to the principle of equality of treatment granted to all with the aim of avoiding discrimination. If that were in fact the case, the defendant can only blame itself and the imperfect way in which it has organized its relations — which are governed by public law — with its servants.

The applicant cannot moreover be responsible for the delay in the implementation of the Staff Regulations of officials of the European Communities. The basic uncertainty in which the applicant, like the rest of her colleagues, lived during the period before the entry into force of the Staff Regulations gave rise to anxieties as numerous as they were worrying. It is now time to wipe out the past by applying strictly the terms of the contract entered into before the advent of the Staff Regulations.

The present dispute raises no problems of interpretation, literal or otherwise. The terms of the letter of engagement are clear and unequivocal. In order to counter the applicant's allegation it is for the defendant to prove that the applicant agreed with the application by analogy of the provisions of the Staff Regulations of the ECSC. From the evidence it appears that the opposite is the case. Far from being improper, the applicant's allegation is well-founded in law.

The applicant points out that the note of 29 August 1961 in which she was informed that her basic salary had been increased to 8350 BF emphasizes in precise terms that: 'this decision, which has effect from 1 October 1960, alters *in no other respect*, apart from the basic salary, the provisions of the letter of engagement sent to you'. This express confirmation of the letter of engagement came after her marriage, which occurred on 6 May 1961, her complaint of 24 July 1961 and the note of 2 August 1961.

The applicant then replies to the arguments pleaded by the defendant in its statement of defence.

1. She starts by expressing serious doubts as to the legality of the decision of the Councils of 25 January 1958 and denies that it can operate against her, as it was never published, as she was totally unaware of it and in any case as

it only applies to senior officials.

Further, the applicant points out that the Court in its judgment of 15 July 1960 in Joined Cases 43, 45 and 48/59, *von Lachmüller and Others* v *High Authority* (Rec. 1960, pp. 937 and 938, Summary, paragraph 4) held that the position of servants of the ECSC before the entry into force of the Regulations is different from that of servants of the new Communities.

The *defendant* replies that it is doubtful whether Article 214 of the EAEC Treaty and the corresponding provision of the EEC Treaty directly confer on the Councils the power of decreeing the provisional application of the financial system of the ECSC not only in their departments but also in those of the Commissions. Without doubt the binding force of the 'decision' of 25 January 1958 is debatable and the scope of the 'authorization' which it enacted is uncertain. It is no less the case that, in the circumstances in which the 'examination' prescribed by Article 214 of the EAEC Treaty was carried out, agreement was reached without reservation from that date to apply the financial system in question to senior officials of the institutions which were 'parties' to the examination. Thus the 'decision' of 25 January 1958 did not have to be published as such in that part of the Official Journal reserved for measures of the Councils. At the most it had to be applied in conformity with the agreement reached.

The defendant alleges that the applicant must have known of the decision of 25 January 1958.

The application of the financial system of the ECSC to servants newly recruited by the institutions in Brussels had been, even before the engagement of the applicant, the general, settled and well-known practice.

In addition, its extension to all categories of servants, which was carried out immediately with the desire for simplification and with the aim of avoiding discrimination, was both well-known and made public. In order to convince oneself that this is the case it is enough to read the issues of the Official Journal of the Communities in which the budgets were published (OJ of 28 August 1959, p. 987; OJ of 16 February 1960, p. 221; OJ of 7 February 1961, p. 187, etc.).

2. The *applicant* then points out that, during the period before the entry into force of the Staff Regulations, there was nothing to prevent the Administration from substituting for a contract of engagement of 2 March 1960 a contract based on the provisions of the Staff Regulations of officials of the ECSC.

The *defendant* replies that it had most certainly been well-founded in its repeated use of the power to give notice of termination, provided in the Brussels contracts, in order to impose on each servant the alteration of his contract every time the absence or omission of relevant provisions rendered reference to the provisions of the Staff Regulations of the ECSC necessary. The defendant considers however that it was not obliged to insist on formalism to that extent. The clearly brief, provisional and uncertain nature of the letter of engagement, the relationship of public law between the institution and its servants and the knowledge which, from the time of their engagement, the latter necessarily acquired as to the detailed rules of the financial and administrative system applying to their position constitute reasons enough for asserting that the provisions of the ECSC would be applied to them automatically to the extent necessary to clarify and complete the terms of the letter of engagement.

3. The *applicant* finally maintains that the application by analogy of the Staff Regulations of the ECSC to the contract created by the letter of engagement is only possible to the extent that the provisions of the said Regulations do not conflict with the terms of the letter

of engagement. But, as regards the separation allowance, there is inconsistency between the terms of the letter of engagement and the provisions of the Staff Regulations of the ECSC.

The *defendant* replies that the only contradiction which it sees as regards the terms relates to the criterion determining the commencement of the right to the separation allowance following engagement, in other words the condition relating to the place of residence of the official during the six months before that date. It is clear that, on this specific point, the Brussels contract stipulates a condition as to distance (70 km) which is different from that laid down by the ECSC rules (25 km) and it is obvious that on that point the contract prevails over the Luxembourg provisions.

As to the case in which marriage takes place between a servant and a colleague and the consequences which it can have on the right to the allowance, there is no mention of this in the terms of the letter of engagement. The contract is simply silent on this point. When, therefore, the applicant tries to shelter behind the 'terms' of her contract when claiming the continuance of the allowance she is in fact relying upon a lacuna or omission and not a 'clear and unequivocal provision'.

IV — Procedure

The statements of the parties were lodged in due form and within the prescribed time-limits and the procedure followed the normal course.

Having heard the preliminary report of the Judge-Rapporteur and the opinion of the Advocate-General, the First Chamber decided at the hearing on 22 January 1964 to open the oral procedure without making any preparatory inquiry.

The oral observations of the parties were submitted at the hearing on 4 March 1964.

The Advocate-General delivered his opinion at the hearing on 11 March 1964.

Grounds of judgment

I—As to admissibility

The defendant alleges that, in respect of the decision of 14 June 1961 withdrawing the grant of the separation allowance at issue, the time-limits prescribed in Article 91 of the Staff Regulations began to run from the publication of the Staff Regulations (14 June 1962) and had thus expired by the time the application was made (22 June 1963); the subsequent decisions, which are also dealt with in the application cannot be taken into account in calculating the time-limits because they merely confirm the first decision.

The preliminary objection of inadmissibility raised by the defendant cannot be accepted.

Article 91, in so far as it lays down time-limits for the filing of appeals, applies to previous decisions only from the date of its publication.

This rule applies in particular to disputes concerning the application of Article 102 of the Staff Regulations, which lays down transitional provisions to enable the Staff Regulations to be applied to servants who are already employed. These provisions are in addition to the rules prescribed by the Staff Regulations for the recruitment of officials.

However, where there is a dispute which, as in this case, concerns the interpretation of a contract concluded during the period before the entry into force of the Staff Regulations, the rules of such Regulations, and especially those of Article 91, cannot be applied before establishment has been duly granted.

In fact, if the immediate applicability of the new Staff Regulations to these matters were to be accepted, this would amount to prejudging the decision to establish which, apart from the case of officials having benefited from establishment granted under the rules of the old Staff Regulations of officials of the ECSC, is only granted under the conditions prescribed by Articles 102 et seq. of the Staff Regulations of the EEC and of the EAEC.

The applicant pointed out during the written procedure that she had been established on 6 February 1963.

As this claim has not been contradicted by the defendant one can infer from it that the time-limits for appeal against the decision of 14 June 1961 began to run, in respect of the applicant, from 6 February 1963.

On 22 February 1963 the applicant sent to the Administration of the Ispra Centre an administrative complaint which referred expressly to her previous complaints relating to the withdrawal of the separation allowance.

She received no reply and her appeal of 22 June 1963 was lodged exactly 4 months after the above-mentioned administrative complaint.

Under the terms of Article 90 of the Staff Regulations any official may submit to the appointing authority of his institution a request of complaint.

A preliminary administrative procedure is highly desirable in the matter of disputes concerning officials, as this enables the Administration to carry out an internal examination of requests and thereby possibly to avoid legal proceedings.

Moreover, the dictates of fair play require that an official should attempt to

obtain an amicable solution of his dispute with his Administration before bringing a case to the Court.

The establishment of the applicant on 6 February 1963 had the effect of causing the time-limits under Article 91 to begin to run in respect of the decision of 14 June 1961.

Thus the applicant acted with both diligence and good judgment in lodging an administrative complaint against the above-mentioned decision as early as 22 February 1963.

Then, because of the failure of the defendant to reply to this administrative complaint within two months, the time-limit for appeal was extended to 22 June 1963, or four months after the lodging of the administrative complaint.

The question whether the express or implied decisions rejecting the applicant's complaints against the decision of 14 June 1961 have a purely confirmatory character is not relevant to this case.

In short, the application directed against the withdrawal of the separation allowance is obviously aimed at the express decision of 14 June 1961.

The implied decision of refusal dating from 22 April 1963 is only relevant for the computation of the time-limits for the appeal.

In this case there are no grounds for the Court to raise the question of admissibility of its own motion.

As the appeal was lodged within the prescribed time-limits it is admissible.

II—As to the substance of the case

The applicant alleges that her contract of engagement provides for a separation allowance, subject only to one condition relating to the distance between her residence and her place of employment.

It is generally accepted that public servants employed on a contractual basis are subject to the application of regulations relating to the functioning of the service and that these regulations apply to servants taking up their duties.

The conditions for the grant and withdrawal of the separation allowance, and especially its withdrawal where the spouse of the servant concerned is in

the service of the Community, form part of the general rules concerning the functioning of the service.

The applicant's contract contains no term which derogates from these rules.

The provision of Article 9 (c) of the General Staff Regulations of the ECSC, which lays down a principle which is logically an integral part of the general rules concerning the functioning of the service, establishes that when a husband and wife are employed by the Community the separation allowance is only payable to the spouse whose salary is the higher.

The rules concerning the system of salaries, allowances and pensions in force in the ECSC were expressly made applicable to servants employed on a contractual basis in the service of the Commission of the EAEC.

It can be seen from the communication published by the defendant in the Official Journal of the European Communities of 28 August 1959, p. 987, that 'in the absence of any other appropriate scale and in order to avoid any discrimination between the different categories of the staff of Euratom, the Commission has applied the rules in use with the ECSC to all its servants'.

This text, which is reported in the form of a commentary to the budget for the year 1959, refers expressly to Article 11, heading 112, of that budget, concerning the residence and separation allowances.

By this publication in the Official Journal of the Communities those concerned were enabled to acquaint themselves with the system in force in the ECSC on the question of separation allowances.

In addition, the alignment of the position of holders of so-called Brussels contracts with that of officials of the ECSC as regards their financial status was well-known by the staff of the Institutions concerned.

It follows from the foregoing considerations that the decision impugned correctly applied the provisions in force.

The application must be dismissed as unfounded.

III—Costs

The applicant has failed in her application.

Under the terms of Article 70 of the Rules of Procedure, in proceedings

brought by servants of the Communities the institutions shall bear their own costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Protocol on the Statute of the Court of Justice of the European Atomic Energy Community;
Having regard to Article 152 of the Treaty establishing the European Atomic Energy Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;
Having regard to the Staff Regulations of officials of the European Atomic Energy Community;

THE COURT (First Chamber)

hereby:

1. Dismisses Application 69/63 as unfounded;

2. Orders that each of the parties shall bear its own costs.

Trabucchi Delvaux Strauß

Delivered in open court in Luxembourg on 9 June 1964.

A. Van Houtte
Registrar

A. Trabucchi
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL LAGRANGE DELIVERED ON 11 MARCH 1964[1]

Mr President,
Members of the Court,

Miss Capitaine, a secretary at the Joint Nuclear Research Centre at Ispra, was recruited by the Euratom Commission following a letter of engagement of 2 March 1960 and was thereby made subject to the system of so-called Brussels contracts. Following her marriage

1—Translated from the French.