JUDGMENT OF THE COURT

9 September 2003 *

In Case C-361/01 P,

Christina Kik, represented by E.H. Pijnacker Hordijk and S.B. Noë, advocaaten, with an address for service in Luxembourg,

appellant,

Appeal against the judgment of the Court of First Instance of the European Communities in Case T-120/99 *Kik* v *OHIM* [2001] ECR II-2235, seeking to have that judgment set aside,

the other parties to the proceedings being:

Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), represented by A. von Mühlendahl, O. Montalto and J. Miranda de Sousa, acting as Agents,

defendant at first instance

* Language of the case: Dutch.

supported by

Commission of the European Communities, represented by W. Wils and N. Rasmussen, acting as Agents, with an address for service in Luxembourg,

intervener on appeal

Hellenic Republic, represented by K. Samoni-Rantou and S. Vodina, acting as Agents, with an address for service in Luxembourg,

Kingdom of Spain, represented by S. Ortiz Vaamonde, acting as Agent, with an address for service in Luxembourg,

and

Council of the European Union, represented by G. Houttuin and A. Lo Monaco, acting as Agents,

interveners at first instance,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissochet, M. Wathelet, R. Schintgen and C.W.A. Timmermans, Presidents of Chamber, C. Gulmann, D.A.O. Edward, A. La Pergola, P. Jann, V. Skouris, F. Macken, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues and A. Rosas (Rapporteur), Judges,

Advocate General: F.G. Jacobs,
Registrar: H.A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 26 November 2002, at which Ms Kik was represented by E.H. Pijnacker Hordijk, the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) by A. von Mühlendahl, J. Miranda de Sousa and S. Bonne, acting as Agent, the Council by G. Houttuin and A. Lo Monaco and the Commission by W. Wils,

after hearing the Opinion of the Advocate General at the sitting on 20 March 2002,

gives the following

Judgment

1 By an application lodged at the Registry of the Court on 21 September 2001, Ms Kik brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 12 July 2001 in Case T-120/99 *Kik* v *OHIM* [2001] ECR II-2235 (hereinafter 'the contested judgment'), in which the Court of First Instance dismissed her application for annulment of the decision of 19 March 1999 of the Third Board of Appeal of the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (hereinafter 'the Office') dismissing her appeal against the examiner's refusal to register the word KIK as a Community trade mark (hereinafter 'the contested decision').

Legal background

2 Article 217 of the EC Treaty (now Article 290 EC) provides:

'The rules governing the languages of the institutions of the Community shall, without prejudice to the provisions contained in the Rules of Procedure of the Court of Justice, be determined by the Council, acting unanimously.'

3 Article 1 of Regulation No 1 of the Council of 15 April 1958 determining the languages to be used by the European Economic Community (OJ, English Special

Edition (I) (1952-1958), p. 59), as amended by the various accession treaties, most recently the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21 and OJ 1995 L 1, p. 1), provides as follows:

'The official languages and the working languages of the institutions of the Union shall be Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish and Swedish.'

4 Article 2 of Regulation No 1 provides:

'Documents which a Member State or a person subject to the jurisdiction of a Member State sends to institutions of the Community may be drafted in any one of the official languages selected by the sender. The reply shall be drafted in the same language.'

5 Article 4 of that regulation provides:

'Regulations and other documents of general application shall be drafted in the eleven official languages.'

6 Article 5 of Regulation No 1 provides:

'The *Official Journal of the European Communities* shall be published in the eleven official languages.'

Since the entry into force of the Treaty of Nice, pursuant to Article 2(38) thereof, its title has changed to the *Official Journal of the European Union.*

7 The Office was established by Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark (OJ 1994 L 11, p. 1). The use of languages in proceedings before the Office is governed by Article 115 of that regulation, which is worded as follows:

'1. The application for a Community trade mark shall be filed in one of the official languages of the European Community.

2. The languages of the Office shall be English, French, German, Italian and Spanish.

3. The applicant must indicate a second language which shall be a language of the Office the use of which he accepts as a possible language of proceedings for opposition, revocation or invalidity proceedings.

If the application was filed in a language which is not one of the languages of the Office, the Office shall arrange to have the application, as described in Article 26(1), translated into the language indicated by the applicant.

4. Where the applicant for a Community trade mark is the sole party to proceedings before the Office, the language of proceedings shall be the language used for filing the application for a Community trade mark. If the application was made in a language other than the languages of the Office, the Office may send written communications to the applicant in the second language indicated by the applicant in his application.

5. The notice of opposition and an application for revocation or invalidity shall be filed in one of the languages of the Office.

6. If the language chosen, in accordance with paragraph 5, for the notice of opposition or the application for revocation or invalidity is the language of the application for a trade mark or the second language indicated when the application was filed, that language shall be the language of the proceedings.

If the language chosen, in accordance with paragraph 5, for the notice of opposition or the application for revocation or invalidity is neither the language of the application for a trade mark nor the second language indicated when the application was filed, the opposing party or the party seeking revocation or invalidity shall be required to produce, at his own expense, a translation of his application either into the language of the application for a trade mark, provided that it is a language of the Office, or into the second language indicated when the application was filed. The translation shall be produced within the period prescribed in the implementing regulation. The language into which the application has been translated shall then become the language of the proceedings.

7. Parties to opposition, revocation, invalidity or appeal proceedings may agree that a different official language of the European Community is to be the language of the proceedings.'

8 Title I of Article 1 of Commission Regulation (EC) No 2868/95 of 13 December 1995 implementing Regulation (EC) No 40/94 (OJ 1995 L 303, p. 1) sets out a number of rules. Rule 1, on the content of the application, repeats the requirement in Article 115(3) of Regulation No 40/94 that the application for registration of a Community trade mark must indicate a 'second language'.

Background to the dispute

9 The facts of the dispute are set out as follows in the contested judgment:

'3 On 15 May 1996 the applicant, who is a lawyer and trade mark agent in the Netherlands in a firm specialising in intellectual property work, submitted an application for a Community word trade mark to the Office pursuant to Regulation No 40/94.

4 The trade mark in respect of which registration was requested is the word KIK.

5 The services covered by the application for registration are within class 42 of the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks of 15 June 1957, as revised and amended.

6 In her application, which was in Dutch, the applicant indicated Dutch as a "second language".

7 By a decision of 20 March 1998 the examiner dismissed the application on the ground that a formal condition, that is to say the requirement that the applicant indicate English, French, German, Italian or Spanish as a "second language" was not satisfied.

8 On 4 May 1998 the applicant brought an appeal against that decision in which she argued, *inter alia*, that the decision by which the examiner had dismissed her application for registration was unlawful because it was based on unlawful legislation. She brought the appeal in Dutch and also, without prejudice, in English.

9 On 2 June 1998 the appeal was remitted to the Board of Appeal of the Office.

10 The appeal was dismissed by decision of 19 March 1999..., on the ground that the applicant had indicated as a "second language" the same language as that used for filing the application for registration, with the result that the application was vitiated by a formal irregularity distinct from the other irregularity committed by the applicant, which was not to indicate one of the five languages of the Office as a "second language"....'

The proceedings before the Court of First Instance and the contested judgment

10 The application for annulment was lodged at the Registry of the Court of First Instance on 19 May 1999.

11 The Hellenic Republic intervened in support of the appellant.

12 The Kingdom of Spain and the Council of the European Union intervened in support of the Office, the defendant before the Court of First Instance.

13 In the contested judgment, the Court of First Instance began by considering a plea of inadmissibility raised by the Office against the action. The Office submitted that the application, by way of a plea of illegality, for a declaration that Article 115 of Regulation No 40/94 was unlawful was inadmissible because there was no legal connection between the contested decision and the provision in respect of which the plea of illegality was raised, namely Article 115(3). The Office had dismissed the appellant's application for registration on the ground that she had not chosen a 'second language', as required by that provision, at all, not on the ground that she had not indicated one of the languages of the Office as a 'second language'.

14 The Court of First Instance pointed out at paragraph 24 of the contested judgment that the appellant had indicated Dutch as a 'second language'; it considered that the question of the legality of the rule that a language other than that used for the application for registration must be indicated as a 'second language' was no different from the question whether it was lawful to exclude

Dutch and certain other official languages of the Community as 'second languages'. It therefore held, at paragraph 25 of the contested judgment, that it was the legality of the rule in Article 115(3) of Regulation No 40/94, whereby the applicant had to accept that she did not automatically enjoy the right to participate in all proceedings before the Office in the language of filing, which constituted the direct basis for the contested decision to which the plea of illegality raised by the appellant was directed.

15 Concluding its consideration of the plea of inadmissibility raised by the Office, the Court of First Instance held as follows at paragraphs 32 and 33 of the contested judgment:

'32 It follows from the foregoing that, in so far as the plea of illegality raised by the applicant in support of her action for annulment or alteration of the contested decision relates to the obligation under Article 115(3) of Regulation No 40/94 and Rule 1(1)(j) of Article 1 of Regulation No 2868/95, it is admissible. To that extent, the subject-matter of the plea of illegality encompasses the obligation laid down by those provisions, as clarified — in regard to its scope and legal effects — by certain other paragraphs of Article 115 of Regulation No 40/94.

33 However, in so far as the plea of illegality raised by the applicant relates to the remainder of Article 115 of Regulation No 40/94, it is inadmissible. The provisions in the remainder of Article 115 did not constitute any basis for the contested decision, since that decision related only to an application for registration and the obligation on an applicant to indicate a second language which he accepts as a possible language of proceedings for opposition, revocation or invalidity proceedings that might be filed against him.'

16 Secondly, ruling on the substance, the Court of First Instance first considered whether there was a principle in Community law of non-discrimination as between the official languages of the European Communities. At paragraphs 58 and 59 of the contested judgment, it held as follows:

'58 In that regard, it must first be pointed out that Regulation No 1 is merely an act of secondary law, whose legal base is Article 217 of the Treaty. To claim, as the applicant does, that Regulation No 1 sets out a specific Community law principle of equality between languages, which may not be derogated from even by a subsequent regulation of the Council, is tantamount to disregarding its character as secondary law. Secondly, the Member States did not lay down rules governing languages in the Treaty for the institutions and bodies of the Community; rather, Article 217 of the Treaty enables the Council, acting unanimously, to define and amend the rules governing the languages of the institutions and to establish different language rules. That Article does not provide that once the Council has established such rules they cannot subsequently be altered. It follows that the rules governing languages laid down by Regulation No 1 cannot be deemed to amount to a principle of Community law.

59 Accordingly the applicant cannot rely on Article 6 of the [EC] Treaty [now, after amendment, Article 12 EC], in conjunction with Regulation No 1, as a basis for demonstrating that Article 115 of Regulation No 40/94 is illegal.'

17 The Court of First Instance also considered whether Article 115(3) of Regulation No 40/94 contravened the principle of non-discrimination. In that regard it held as follows:

'60 As regards the obligation on an applicant for registration of a Community trade mark under Article 115(3) of Regulation No 40/94 and Rule 1(1)(j) of

Article 1 of Regulation No 2868/95 to "indicate a second language which shall be a language of the Office the use of which he accepts as a possible language of proceedings for opposition, revocation or invalidity proceedings", it is clear that, contrary to the claims of the applicant and the Greek Government, this does not involve an infringement of the principle of non-discrimination.

61 First, it is apparent from the actual wording of Article 115(3) of Regulation No 40/94 that, by indicating a second language, the applicant accepts use of that language as a language of proceedings only in relation to opposition, revocation or invalidity proceedings. It follows, as indeed is confirmed by the first sentence of Article 115(4) of Regulation No 40/94, that so long as the applicant is the sole party to proceedings before the Office, the language used for filing the application for registration remains the language of proceedings. Consequently, in such proceedings, Regulation No 40/94 cannot be taken, in itself, as in any sense implying differentiated treatment as regards language, given that it in fact guarantees use of the language of the application filed as the language of proceedings and thus the language in which procedural documents of a decisional character must be drafted.

62 Next, in so far as Article 115(3) of Regulation No 40/94 requires the applicant to indicate a second language for the purposes of the possible use of that language as the language of proceedings for opposition, revocation or invalidity proceedings, the fact remains that that rule was adopted for the legitimate purpose of reaching a solution on languages in cases where opposition, revocation or invalidity proceedings ensue between parties who do not have the same language preference and cannot agree between themselves on the language of proceedings. In that regard, it is to be noted that, under Article 115(7) of Regulation No 40/94, parties to opposition, revocation or invalidity proceedings are entitled to agree that any one of the official languages of the European Community is to be the language of the proceedings, an option which might particularly suit parties with the same language preference.

63 In pursuing the objective of determining the language of the proceedings where parties who do not share the same language preference fail to agree, the Council must be considered to have made an appropriate and proportionate choice, even if the official languages of the Community were treated differently. First of all, Article 115(3) of Regulation No 40/94 accords the applicant for registration of a trade mark an opportunity to fix, from among the most widely known languages in the European Community, the language that is to be used for opposition, revocation or invalidity proceedings in the event that the first language chosen by the applicant is not that requested by another party to the proceedings. Secondly, by limiting that choice to the languages which are the most widely known in the European Community, and thus avoiding the possibility of the language of proceedings being particularly remote in relation to the linguistic knowledge of the other party to the proceedings, the Council remained within the limits of what is necessary for achieving the aim in view (Cases 222/84 *Johnston* [1986] ECR 1651, paragraph 38, and C-285/98 *Kreil* [2000] ECR I-69, paragraph 23).

64 Finally, the applicant and the Greek Government are not entitled to rely on the paragraph added by the Amsterdam Treaty to Article 8d of the [EC] Treaty (now, after amendment, Article 21 EC) according to which "every citizen of the Union may write to any of the institutions or bodies referred to in this Article or in Article 7 [EC] in one of the languages mentioned in Article 314 [EC] and have an answer in the same language". Article 21 EC refers to the Parliament and the Ombudsman and Article 7 EC mentions the Parliament, the Council, the Commission, the Court of Justice and the Court of Auditors and also the Economic and Social Council and the Committee of the Regions. In so far as the paragraph in question is applicable *ratione temporis* to this case, the Office is in any event not one of the institutions or bodies referred to in Article 7 EC or Article 21 EC.'

18 Accordingly the Court of First Instance dismissed the action.

Procedure before the Court of Justice and forms of order sought

19 By letter of 25 January 2002 Ms Kik's counsel informed the Court of Justice that his client had died and gave formal notice that the case would be continued by her heirs and beneficiaries. He stated that an application for registration of a Community trade mark is, under Netherlands civil law, a property right that forms part of Ms Kik's estate, and that he had been instructed by the testamentary executor representing her heirs and beneficiaries to continue the appeal. The term 'appellant' is used in the remainder of this judgment to refer to those heirs and beneficiaries.

20 By an application lodged at the Registry of the Court on 18 December 2001, the Commission requested leave to intervene in the appeal in support of the Office. Leave was granted by order of the President of the Court of 18 March 2002.

21 The appellant requests that the contested judgment be set aside, that the forms of order sought by her at first instance for annulment of the contested decision be upheld and that the Office be ordered to pay the costs of the first instance and appeal proceedings

22 The Hellenic Republic also claims that the contested judgment should be set aside and all the forms of order sought by the appellant granted.

23 The Office, the Kingdom of Spain and the Commission contend that the appeal should be dismissed and the contested judgment upheld.

24 The Council submits that the appeal is inadmissible and, in the alternative, that it should be dismissed as unfounded and that in either case the appellant should be ordered to pay the costs.

The appeal

25 The appellant advances two grounds of appeal. The first is incorrect interpretation by the Court of First Instance of Article 115 of Regulation No 40/94. The second is infringement by the Court of First Instance of Community law and, more specifically, of Article 6 of the Treaty, in not declaring Article 115 of the Regulation No 40/94 to be unlawful.

First ground of appeal: incorrect interpretation of Article 115 of Regulation No 40/94

Arguments of the parties

26 The appellant claims that the Court of First Instance erred in Community law by incorrectly interpreting Article 115 of Regulation No 40/94 which determines the language regime of the Office. The interpretation by the Court of First Instance did not take account of the second sentence of Article 115(4) which states as follows: 'If the application was made in a language other than the languages of the Office, the Office may send written communications to the applicant in the second language indicated by the applicant in his application.' Since the contested judgment is based on that incorrect interpretation, it should be annulled for that reason.

27 The appellant argues that, as the Office's representative acknowledged at the hearing before the Court of First Instance, during the entire proceedings, including the automatic examination of the absolute and relative grounds for refusal to register a Community trade mark, the Office always exercises the option of using the second language indicated at the time of filing of the application if the application is not made in one of the languages of the Office. All the applicant receives in the language of filing is evidence of the entry in the register of Community trade marks at the end of the registration procedure.

28 The appellant submits that, in view of the correct interpretation to be given to Article 115 of Regulation No 40/94, the conclusion reached by the Court of First Instance at paragraph 61 of the contested judgment, to the effect that the regulation cannot in itself entail differentiated treatment as regards language since, in proceedings where the applicant is the sole party before the Office, the language used for filing the application for registration as a Community trade mark remains the language of proceedings, is clearly wrong.

29 The Office, the Kingdom of Spain and the Council challenge the admissibility of the first ground of appeal in so far as it relates to the second sentence of Article 115(4) because the Court of First Instance, at paragraph 32 of the contested judgment, declared the plea of illegality admissible only in so far as it relates to Article 115(3) or to certain other paragraphs of that article which clarify the obligation under Article 115(3). First, according to the Office and the Kingdom of Spain, the appellant has not challenged paragraph 32 of the contested judgment. Secondly, according to the Council, the second sentence of Article 115(4) of Regulation No 40/94 cannot be regarded as clarifying the scope or legal effects of the obligation to indicate, on the form on which the application for a Community trade mark is made, a language other than that used for the application.

30 As to the substance, the Office, the Council and the Commission submit that it is clear from a reading of paragraph 61 of the contested judgment that the Court of First Instance undertook a legal analysis of the whole of Article 115(4) of Regulation No 40/94, including the second sentence.

31 The Office submits that the appellant is overestimating the scope and practical consequences for Community trade mark applicants of the application of the second sentence of Article 115(4) of Regulation No 40/94. Contrary to what the appellant contends, the fact that the Office has the option of sending written communications to the applicant in the second language of his choosing does not mean that all the rest of the proceedings will be conducted in the second language, or that all the applicant will receive in the language of filing is evidence of the entry in the register of Community trade marks.

32 The Office contends that those assertions do not take account of the fact that more than 98% of those legal and natural persons who apply for registration of a Community trade mark do so using a professional representative whom they can choose freely from among those established throughout the territory of the Community. It further observes that any person who files an application for registration in a language that is not a language of the Office retains the right to use the language of filing in his written and oral communications with the Office so long as he remains the only party to the proceedings.

33 The Office points out that the fact that it has the option of sending written communications in the second language chosen by an applicant for a Community trade mark is no more than possibility, and that, if the applicant wishes all written communications addressed to him to be in the language in which the application is filed so long as he remains the only party to the proceedings, the Office may refuse that request only where there are serious and compelling reasons.

34 In that regard the Office states that it does not interpret Article 115(4) of Regulation No 40/94 in the same way as the Court of First Instance. The third sentence of paragraph 61 of the contested judgment states that the language of filing should be used as the language of proceedings and thus the language in which procedural documents of a decisional character must be drafted. The Office, on the other hand, considers that the term 'written communications' in the second sentence of Article 115(4) of Regulation No 40/94 covers every kind of written document issued by it, including those of a decisional character.

35 The Office notes the difficulty of defining what is to be understood by 'procedural documents of a decisional character' and mentions by way of example the letter by which it requests Community trade mark applicants to remedy certain deficiencies under Rule 9(3) of Regulation No 2868/95. Such a letter cannot be the subject of an appeal but, if the applicant fails to remedy the deficiencies drawn to his attention, the Office will adopt a decision rejecting the application, which could be the subject of an appeal. The interpretation of Article 115 given by the Court of First Instance could give rise to confusion among applicants since they would receive documents drawn up in both the language in which the application is filed and the second language.

36 The Office also points out that it acts in the way that it does with the implicit consent of the Community trade mark applicant and that, despite the number of applications filed, this is the first time that the language rules have been challenged. It states that if necessary it could in future request the applicant's express consent to the use of the second language for written communications as it understands them.

37 The Council considers that in no circumstances can the Office's interpretation of the second sentence of Article 115(4) of Regulation No 40/94, which is reflected in a particular way of applying that provision, have any effect on the legality of the article.

Findings of the Court

38 It must be stated by way of preliminary observation that, contrary to the premiss underlying the plea of inadmissibility raised by the Office, the Council and the Kingdom of Spain, by her first ground of appeal the appellant is challenging the interpretation given by the Court of First Instance, at paragraph 61 of the contested judgment, to Article 115 of Regulation No 40/94, in that it failed to take account of the second sentence of Article 115(4); she is not, however, challenging the legality of the provision as such.

39 In any event it is clear from a reading of paragraphs 32 and 33 of the contested judgment that the Court of First Instance declared the plea of illegality admissible in so far as it relates to the obligation under Article 115(3) of Regulation No 40/94 to indicate a second language, but also in so far as that obligation is clarified in regard to its scope and legal effects by certain other paragraphs of Article 115.

40 The Court of First Instance did not therefore rule out a challenge to the legality of the second sentence of Article 115(4) of Regulation No 40/94, which is one of the provisions that define the scope and legal effects of the choice of a second language, in providing that '[i]f the application was made in a language other than the languages of the Office, the Office may send written applications to the applicant in the second language indicated by the applicant in his application'.

41 It follows that the first ground of appeal is admissible.

42 With regard to the analysis of the substance of this ground of appeal, it must be observed that it essentially concerns the way in which the second sentence of Article 115(4) of Regulation No 40/94 is interpreted and applied by the Office, a factor which the Court of First Instance is alleged not to have taken into account in its reasoning in paragraph 61 of the contested judgment.

43 The appellant submits in this regard that the Office deals with nearly all the procedure relating to a Community trade mark application in the second language indicated by the applicant. The Office does not deny that but, on the other hand, states that it disagrees with the interpretation given by the Court of First Instance of Article 115(4) of Regulation No 40/94, taking the view that not all procedural documents of a decisional character need necessarily be in the language of proceedings, and that some of those documents fall within the definition of 'written communications' in that provision.

44 It is first necessary to determine how Article 115(4) of Regulation No 40/94 should be interpreted.

45 According to Article 115(4), the language of proceedings before the Office is to be the language used for filing the application for a Community trade mark, although the second language chosen by the applicant may be used by the Office to send him written communications. It follows from that provision that the option of using a second language for written communications is an exception to

the principle that the language of proceedings be used, and that the term 'written communications' must therefore be interpreted strictly.

46 Since the proceedings comprise all such acts as must be carried out in processing an application, it follows that the term 'procedural documents' covers any document that is required or prescribed by the Community legislation for the purposes of processing an application for a Community trade mark or necessary for such processing, be they notifications, requests for correction, clarification or other documents. Contrary to the Office's submissions, all such documents must therefore be drawn up by it in the language used for filing the application.

47 In contrast to procedural documents, 'written communications', as referred to in the second sentence of Article 115(4) of Regulation No 40/94, are any communications which, from their content, cannot be regarded as amounting to procedural documents, such as letters under cover of which the Office sends procedural documents, or by which it communicates information to applicants.

48 In the light of the interpretation to be given to Article 115(4) of Regulation No 40/94, it must be considered that the Court of First Instance was right to conclude, at paragraph 61 of the contested judgment, that 'Regulation No 40/94 cannot be taken, in itself, as in any sense implying differentiated treatment as regards language, given that it in fact guarantees use of the language of the application filed as the language of proceedings'.

49 It follows that the ground of appeal alleging that the Court of First Instance erred in law in its interpretation of that provision must therefore be rejected.

Second ground of appeal: infringement of Community law, in particular Article 6 of the Treaty

Arguments of the parties

50 The appellant submits that the Court of First Instance erred as to Community law, in particular Article 6 of the Treaty, in dismissing her action in so far as she argued that the entire language regime established by Article 115(2) to (6) of Regulation No 40/94 was unlawful.

51 She contends first of all that the regime infringes the fundamental principle of equality of languages. In her view, that principle manifests itself several times in Community law. Thus, one example is Article 248 of the EC Treaty (now, after amendment, Article 314 EC), which provides that all the language versions of the Treaty are authentic. Another is Regulation No 1, which lays down the official languages of the Community, provides that any national of a Member State may write to an institution in one of the official languages and receive a reply in that language and states that the *Official Journal of the European Union* is to appear in all eleven official languages. The third paragraph of Article 8d of the Treaty, which was inserted in that provision by the Treaty of Amsterdam, confirms the right of every citizen of the Union to write to any of the institutions or bodies referred to in that article or in Article 4 of the EC Treaty (now Article 7 EC) in one of the languages mentioned in Article 248 of the Treaty and to have an answer in the same language. The applicant also refers to the Court's settled law on the principle of equality, of which the prohibition of discrimination on grounds of nationality mentioned in Article 6 of the Treaty is one expression. Under that case-law, particular importance is attached to the protection of rights and to facilitating matters for citizens as regards languages.

52 Next, the appellant argues that the language regime instituted by Article 115 of Regulation No 40/94 infringes Article 6 of the Treaty. The regime amounts to discrimination on grounds of language and indirectly, therefore, of nationality, which is incompatible with the prohibition of discrimination laid down in Article 6.

53 In the appellant's view, the language regime puts nationals of Member States whose language is not one of the working languages of the Office in a significantly less favourable position compared to nationals of Member States where the language is one of the languages of the Office. This primarily concerns the processing of Community trade mark applications, since in practice the Office always deals with such applications in the second language where the language of filing is not one of the languages of the Office. It also, however, affects opposition, revocation and invalidity proceedings because, other than where there is agreement between the parties under Article 115(7) of Regulation No 40/94, such proceedings are always conducted in one of the languages of the Office.

54 That has the effect of distorting competition in the internal market in so far as, since applicants for Community trade marks prefer to use the services of a trade mark agent whose mother tongue is one of the working languages of the Office, trade mark agents whose mother tongue is not one of those languages are placed at a competitive disadvantage.

55 Finally, the appellant submits that, in view of the fundamental nature of the principle of equal treatment in Community law, infringement of that principle cannot be justified by considerations of pure convenience. In so far as it can be justified at all, the solution chosen by the Community legislature is neither appropriate nor proportionate.

56 In that regard she argues that the institutions cannot rely on a purely economic factor, such as the cost of additional translators, to justify a limitation on the fundamental principles of Community law. The Council has in any event not proved that a language regime that is not discriminatory would have a disproportionate effect on the Community's financial resources. She also observes that the institutions and other bodies of the Union have for years been able to communicate with citizens in all the official languages, whether they are dealing with concentrations or notifications of aid. She cites as an example the Community Plant Variety Office created by Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights (OJ 1994 L 227, p. 1), which operates in all the official languages without any difficulty.

57 Even if it were possible to justify a derogation from the principle of equal treatment on practical and financial grounds, the language regime under Regulation No 40/94 would still not be proportionate because it would have been less discriminatory, and would have distorted competition to a lesser extent, to choose a single second language, such as English.

58 Although it is hardly necessary, the appellant points out that the fact that the Council adopted Regulation No 40/94 unanimously cannot be a factor to be taken into consideration, because the Community legislature too is bound by the rule of law.

59 In the event that the Court should decide that the Office's language regime introduced by Article 115 of Regulation No 40/94 is not wholly unlawful, the appellant asks the Court in the alternative at least to declare that the Court of First Instance erred in law in not holding the second sentence of Article 115(4) unlawful. She submits that, as well as being incompatible with the prohibition of discrimination, that sentence is also incompatible with the principle on which

Article 115(1) and the first sentence of Article 115(4) are founded, namely that the language in which the Community trade mark is filed should be the language of proceedings. The second sentence of Article 115(4) renders that principle meaningless, as the Office's consistent practice demonstrates. The various provisions of Article 115 are therefore incompatible with one another.

60 The Hellenic Republic, which intervened at first instance in support of the appellant, states that it concurs with most of the appellant's submissions in her appeal, in particular with regard to the principle of equality and non-discrimination. It points out that multilingualism is an indispensable component of the effective operation of the rule of law in the Community legal order, since many rules of primary and secondary law have direct application in the national legal systems of the Member States.

61 The Court of First Instance was therefore wrong to take the view that Regulation No 1 is 'a pure and isolated emanation of positive law', thus appearing to disregard the existence of fundamental principles of primary law which permeate all Community rules.

62 The Hellenic Republic recalls the importance for the citizen of being able to take cognisance of provisions which affect him in his mother tongue, in application of the principle that 'ignorance of the law is no excuse'. It also emphasises the importance of respecting the language of citizens in a Community in which it is intended that decisions be taken 'as closely as possible to citizens', and that the operation of its institutions be governed by the principle of transparency.

63 The Hellenic Republic points out the contradiction between the programmed reduction in the number of languages on the one hand, and the Community's

objectives under Article 126 of the EC Treaty (now Article 149 EC), which provides that the Community is to respect the linguistic diversity of the Member States, on the other. It observes that, in its case-law on the interpretation of Community law, the Court of Justice has always ruled in favour of the equality of languages.

64 The Hellenic Republic also argues that, since the Office is a Community body, it should be possible to apply Articles 4 and 8d of the Treaty to it by analogy.

65 All the other parties disagree with the appellant and argue, for different reasons, that the second ground of appeal is inadmissible in whole or in part. The first argument relates to the fact that the appellant has no interest in seeking a declaration that the second sentence of Article 115(4) of Regulation No 40/94 is unlawful. The Office states that, even if the provision were unlawful, it would not follow that the contested decision was unlawful because the decision is not based on that provision. The Kingdom of Spain and the Office also assert that the appellant has not proved that the application of that provision caused her any damage in this case. The Office points out in this regard that once the appellant had made known her desire to receive communications in the language in which her Community trade mark application was filed, and the Office had no serious and compelling reasons not to comply with her request, it used Dutch, which is the language in which the application was filed, for all procedural documents, including those of a decisional character.

66 The main limb of this ground of appeal is, moreover, inadmissible, according to the Office and the Commission, in that it simply restates the arguments advanced at first instance. The Council, on the other hand, submits that this limb of this ground of appeal is inadmissible because the appellant has not identified the passages of the contested judgment where the Court of First Instance failed to have regard to rules of law with which it was bound to comply.

67 As regards the alternative limb of this ground of appeal, the Council argues that it is the same as the first ground of appeal. The Commission, on the other hand, contends that it is inadmissible because the appellant has not challenged paragraph 33 of the contested judgment, in which the Court of First Instance declared the plea of illegality relating to the provisions of Article 115 of Regulation No 40/94 other than Article 115(3) to be inadmissible.

68 As to the substance, the Office submits that the appellant has not shown how the Court of First Instance erred in law in finding that the Office's language regime was an appropriate, necessary and proportionate means of achieving a legitimate objective. It contends that the arguments advanced in support of the appeal show a retreat from the submissions made at first instance, since the appellant now asserts that the legislature could have laid down just one official language for all proceedings before the Office.

69 The Council refers to the reasoning of the Court of First Instance at paragraphs 57 to 64 of the contested judgment. As regards the language regime at the Community Plant Variety Office, it points out that, in determining that regime, account was taken of the fact that *inter partes* proceedings are exceptional in relation to the right to Community protection of plant varieties.

70 As regards the principle of equality, which prohibits, save on objectively justified grounds, treating identical situations differently, the Kingdom of Spain considers that there is no question that there are differences in the numbers of Community and non-Community citizens who speak each language.

71 The Kingdom of Spain acknowledges that the Office's language regime treats certain languages differently, but considers that the difference in treatment is not

as the appellant maintains it to be. The Office may address the applicant in the second language designated in the Community trade mark application form, but a trade mark agent will almost certainly know one of the Office's languages. It is therefore rare to have to cater for translations of the Office's documents. It is only where the proceedings involve another party that translations are necessary, but in such a case they are also needed for that other party.

72 There are therefore nuances to the difference in treatment, and the appellant has not advanced any arguments that call into question the conclusions reached by the Court of First Instance with regard to the objective reason that justifies the difference. The Kingdom of Spain emphasises that the Council acted within its powers and that the chosen criterion, namely use of the five languages most widely spoken within and outside the Community, is reasonable.

73 The Kingdom of Spain points out that the appellant has not indicated what, in her view, would constitute an adequate and proportionate system enabling the Office to function. Furthermore, she contradicts herself in regard to the arguments she put forward at first instance because she now favours choosing a single language, namely English. That statement calls into question all her allegations relating to infringement of the principle of the equality of languages.

74 The Commission also maintains that this ground of appeal is unfounded. As the Court of First Instance found at paragraph 58 of the contested judgment, Regulation No 1 cannot be deemed to amount to a principle of Community law. As to the alleged infringement of the principle of non-discrimination, the Court of First Instance cogently found, at paragraphs 60 to 63 of the contested judgment that the Council's choice was appropriate and proportionate.

Findings of the Court

75 It is necessary to start by considering the arguments seeking to establish that the second ground of appeal is inadmissible.

76 With regard to the appellant's not having an interest in seeking a declaration that the second sentence of Article 115(4) of Regulation No 40/94 is unlawful, on the ground that there is no legal connection between that provision and the contested decision, it must be observed that a plea that the action was inadmissible in that it sought a declaration that Article 115 of Regulation No 40/94 was unlawful was raised by the Office before the Court of First Instance and indeed is set out by that court at paragraphs 15 to 17 of the contested judgment. The Court of First Instance rejected that argument at paragraphs 24 and 25 of the judgment and, at paragraphs 32 and 33, set limits on the admissibility of the plea of illegality. As was stated at paragraphs 39 and 40 of this judgment, the second sentence of Article 115(4) of Regulation No 40/94 is one of the provisions that define the scope and legal effects of the choice of a second language and in respect of which the Court of First Instance, in the second sentence of paragraph 32 of the contested judgment, found the plea of illegality to be admissible. Since the Office does not challenge those facts and advances no reason why the analysis of the Court of First Instance, which led it to conclude that there is a direct legal connection between the contested decision and the obligation whose legality the appellant is challenging, should be contrary to Community law, the argument that the appellant lacks any interest in a declaration of invalidity in relation to that provision of Regulation No 40/94 must be rejected.

77 The contention that the appellant has failed to show damage by reason of the manner in which the Office applied the second sentence of Article 115(4) of

Regulation No 40/94 in this case must similarly be rejected. This argument is directed at seeking to establish the inadmissibility, not of the appeal or of any of the grounds of appeal put forward in support of appeal, but of the action brought by the appellant. It was not, however, raised before the Court of First Instance but put forward for the first time before the Court of Justice. The argument must therefore be declared inadmissible because, in so far as it was raised for the first time at the stage of the appeal, it is not directed at seeking to establish that the Court of First Instance erred in law in its assessment of the plea of inadmissibility.

78 Contrary to the submissions of the Office and the Commission, the appeal does not simply repeat the arguments advanced by the appellant at first instance. The appellant is not asking for her initial action for annulment to be reconsidered but is expressly criticising the contested judgment. As regards the portion of the judgment against which the appeal is directed, contrary to the Council's contention, it is clear from the appeal that it relates to paragraphs 61 to 64 of the judgment, which are reproduced in the appeal. The Council's contention that the appeal is too ill-defined for the Court to give a decision thereon is therefore unfounded.

79 Contrary to a further assertion of the Council, the plea made in the alternative limb of the second ground of appeal, by which the appellant challenges the legality of the second sentence of Article 115(4) of Regulation No 40/94, is not the same as the first ground of appeal, which was confined to challenging the interpretation given by the Court of First Instance to that provision.

80 Finally, with regard to the argument relating to the inadmissibility of the alternative limb of that ground of appeal based on the appellant's failure to challenge paragraph 33 of the contested judgment, it is sufficient to refer to

paragraphs 39 and 40 of this judgment and to note that the plea is admissible in so far as the appellant is challenging the legal effects of the obligation under Article 115(3) of Regulation No 40/94 to indicate a second language when filing an application for a Community trade mark.

81 As far as the substance of the ground of appeal is concerned, it must be stated first of all that, in the light of what has been said in this judgment in respect of the first ground of appeal, the scope of this second ground is limited to an assessment of the legality of the language regime at the Office in requiring that a second language be chosen as a possible language of proceedings in opposition, revocation and invalidity proceedings and for 'written communications' within the meaning of the second sentence of Article 115(4) of Regulation No 40/94. It is necessary to determine whether that regime infringes a principle of equality of languages that is alleged to exist, as described by the appellant.

82 As the appellant points out, the Treaty contains several references to the use of languages in the European Union. None the less, those references cannot be regarded as evidencing a general principle of Community law that confers a right on every citizen to have a version of anything that might affect his interests drawn up in his language in all circumstances.

83 With regard to relations between citizens and the Community institutions and bodies, Article 8d of the Treaty, as amended by the Treaty of Amsterdam, requires, *inter alia*, that the institutions and certain bodies correspond with the citizens of the Union in one of the languages mentioned in Article 248 of the Treaty. That provision, which was not yet in force when the contested act was adopted, is not in any event generally applicable to all bodies in the Union. In

particular it does not apply to the Office, as the Court of First Instance correctly points out at paragraph 64 of the contested judgment.

84 Moreover, Article 217 of the Treaty authorises the Council to determine the rules governing the languages of the institutions of the Community, acting unanimously. It was in application of that provision that it adopted Regulation No 1, Article 1 of which lays down the official languages and working languages of the Community institutions. Those official languages are not, it will be observed, exactly the same as those identified in Articles 8d and 248 of the Treaty.

85 Further, Regulation No 1, in particular Article 4, requires that regulations and other documents of general application be drafted in the eleven official languages of the Union. It follows from that provision, and from Article 191 of the EC Treaty (now Article 254 EC) requiring publication in the *Official Journal of the European Union* of regulations, directives, and decisions adopted in accordance with the procedure referred to in Article 189b of the EC Treaty (now, after amendment, Article 251 EC), read in conjunction with Article 5 of Regulation No 1, which provides for the publication of the Official Journal in the official languages, that an individual decision need not necessarily be drawn up in all the official languages, even though it may affect the rights of a citizen of the Union other than the person to whom it is addressed, for example a competing economic operator.

86 For an institution to address a citizen in his language does not therefore resolve all the linguistic difficulties encountered by citizens in the context of the activities of the Union's institutions and bodies. Indeed it is a difficulty of that kind that is brought to the fore in this case since, with the exception of the 'written communications' referred to in the second sentence of Article 115(4) of Regulation No 40/94, which will be dealt with at paragraph 98 of this judgment, the Office's language regime cannot be challenged in regard to the way in which

the Office deals directly with the applicant, as the procedure must be conducted in the language used for filing the Community trade mark application. That regime is, on the other hand, subject to criticism for the way in which it regulates relations between several parties with possibly different languages, in the context of opposition, revocation and invalidity proceedings.

87 Nor can the second paragraph of Article 248 of the Treaty, as amended by the Treaty of Amsterdam, or the Court's case-law on the interpretation of Community law be relied on in support of a possible principle of equality of languages. Although equal account must be taken of all the authentic versions of a text when interpreting that text, that holds good only in so far as such versions exist and are authentic. Consequently, even if an individual decision is published in the *Official Journal of the European Union* and is therefore translated into all the languages for the information of citizens, only the language used in the relevant procedure will be authentic and will be used to interpret that decision.

88 Account must also be taken of the fact that the Community trade mark was created for the benefit not of all citizens, but of economic operators, and that economic operators are not under any obligation to make use of it.

89 Whilst the monopoly right to use a trade mark is recognised by a public authority, the trade mark right is essentially a tool used by economic operators in the context of their professional activities to produce profits. The legislature is

therefore free to require that they should bear, in whole or at least in part, the operating costs of a body created to register Community trade marks.

90 The fifth recital in the preamble to Regulation No 40/94 states as follows: 'the Community law relating to trade marks... does not replace the laws of the Member States on trade marks;... it would not in fact appear to be justified to require undertakings to apply for registration of their trade marks as Community trade marks;... national trade marks continue to be necessary for those undertakings which do not want protection of their trade marks at Community level'.

91 Economic operators none the less have an interest in an instrument such as the Community trade mark, made available to them by the Community legislature, which enables them to avoid filing multiple national trade mark applications, with all the translation costs that that entails (see on this point, by way of analogy, the arguments put forward by BASF AG relating to the costs of translating European patent specifications set out at paragraph 12 of the judgment in Case C-44/98 *BASF* [1999] ECR I-6269). For persuasive evidence of that interest, it is sufficient to note the considerable number of Community trade mark applications which, surpassing initial predictions, have been filed since the Office was set up.

92 It follows from all of those facts that the language regime of a body such as the Office is the result of a difficult process which seeks to achieve the necessary balance between the interests of economic operators and the public interest in terms of the cost of proceedings, but also between the interests of applicants for Community trade marks and those of other economic operators in regard to access to translations of documents which confer rights, or proceedings involving more than one economic operator, such as opposition, revocation and invalidity proceedings.

93 The Court of First Instance was therefore right to find, at paragraph 62 of the contested judgment, that, in determining the official languages of the Community which may be used as languages of proceedings in opposition, revocation and invalidity proceedings, where the parties cannot agree on which language to use, the Council was pursuing the legitimate aim of seeking an appropriate linguistic solution to the difficulties arising from such a failure to agree.

94 Similarly, the Court of First Instance was right to hold, at paragraph 63 of the contested judgment, that, even if the Council did treat official languages of the Community differently, its choice to limit the languages to those which are most widely known in the European Community is appropriate and proportionate.

95 In those circumstances, the appellant's argument that it would be less discriminatory to choose a single language rather than five is not apposite.

96 Finally, as regards the written communications referred to in the second sentence of Article 115(4) of Regulation No 40/94, it must be pointed out that, as indicated at paragraphs 45 and 47 of this judgment, that term must be interpreted strictly and can only relate to communications which, from their content, cannot be regarded as amounting to procedural documents. Since the use of the second language in this context cannot adversely affect the legal interests of an applicant for a Community trade mark, it follows that any difference in treatment that might result from use of the second language would be negligible in scope and in any event justified by the operating needs of the Office.

97 It follows from all those considerations that the second ground of appeal must also be rejected as unfounded.

Objection of failure to state reasons

Arguments of the Hellenic Republic

98 The Hellenic Republic raises an objection to the contested judgment to the effect that the Court of First Instance erred in law because it failed to take account of the plea of failure to state reasons for the provision alleged to be unlawful, namely Article 115 of Regulation No 40/94, or in any event because it failed to raise the issue of its own motion.

99 The Hellenic Republic observes that, when it intervened before the Court of First Instance, it pointed out that insufficient reasons were given for the limitation on the use of languages in the context of Regulation No 40/94 and that it was impossible to ascertain the criteria which informed that limitation or to explain why certain languages were given precedence over others. The Court of First Instance did not take account of the objections raised by the Hellenic Republic, or raise the issue of the statement of reasons for Regulation No 40/94 of its own motion, notwithstanding the fact that this is a matter of public policy which the Community judicature may, or is indeed bound to, consider of its own motion.

100 On the contrary, by setting out, at paragraphs 62 and 63 of the contested judgment, considerations based on the objectives of the legislature, the Court of First Instance did not examine the reasons given for the regulation alleged to be unlawful but rather added a reason where none was given, which is something that the Court of Justice has penalised in the past (Case C-164/98 P *DIR International Film and Others* v *Commission* [2000] ECR I-447).

Findings of the Court

101 It is true that the Court of First Instance did not respond expressly to the submission that no reasons were given for the provision in the regulation alleged to be unlawful. It must however be noted that that argument was advanced as part of a plea which could be construed as alleging infringement of the principle of proportionality. In any event, since this is a plea that is purely a matter of law, the Court may remedy the omission of the Court of First Instance.

102 It should be observed in that connection that the Court has consistently held that the scope of the obligation to state reasons depends on the nature of the measure in question and that, in the case of measures of general application, the statement of reasons may be confined to indicating the general situation which led to its adoption, on the one hand, and the general objectives which it is intended to achieve, on the other. If the contested measure clearly discloses the essential objective pursued by the institution, it would be excessive to require a specific statement of reasons for the various technical choices made (Case C-150/94 *United Kingdom* v *Council* [1998] ECR I-7235, paragraphs 25 and 26, and Case C-168/98 *Luxembourg* v *Parliament and Council* [2000] ECR I-9131, paragraph 62).

103 In this case the provisions in Regulation No 40/94 on the Office's language regime are sufficient to indicate the underlying justifications and to enable those justifications to be reviewed.

104 In paragraphs 62 and 63 of the contested judgment there was no attempt on the part of the Court of First Instance to remedy the alleged lack of a statement of reasons for the contested provision, but rather it was examining the proportionality of that provision, which necessarily involved a consideration of the Community legislature's presumed objective.

105 It follows from all of these factors that the objection raised by the Hellenic Republic is unfounded.

Costs

106 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Office has applied for costs, and the appellant has been unsuccessful, the latter must be ordered to pay the costs.

107 Pursuant to the first paragraph of Article 69(4) of the Rules of Procedure, the Hellenic Republic, the Kingdom of Spain, the Council and the Commission shall bear their own costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the appeal;**

2. **Orders Ms Kik to pay the costs;**

3. **Orders the Hellenic Republic, the Kingdom of Spain, the Council of the European Union and the Commission of the European Communities to bear their own costs.**

Rodríguez Iglesias	Puissochet	Wathelet
Schintgen	Timmermans	Gulmann
Edward	La Pergola	Jann
Skouris	Macken	Colneric
von Bahr	Cunha Rodrigues	Rosas

Delivered in open court in Luxembourg on 9 September 2003.

R. Grass

Registrar

C.G. Rodríguez

President of the Fifth Chamber