result of a later express decision doing no more than rejecting the request.

3. Articles 90 and 91 of the Staff Regulations govern generally the administrative procedure which must precede an application to the Court challenging a decision of the appointing authority. The time-limits prescribed by these articles are mandatory in nature and are not subject to the discretion of the parties or of the Court.

4. The principle of equal treatment of both sexes, which forms part of the fundamental rights the observance of which the Court has a duty to ensure, must be applied to men and women employed by the Community itself within the framework of the Staff Regulations. In relations between the Community institutions, on the one hand, and their employees and the dependants of employees, on the other, the requirements imposed by the principle of equal treatment are in no way limited to those resulting from Article 119 of the EEC Treaty or from the Community directives adopted in this field.

5. Article 79 of the Staff Regulations and Article 23 of Annex VIII thereto provide for two completely different survivor's pension schemes according to whether the deceased official was male or female. Those provisions are contrary to a fundamental right and therefore inapplicable in so far as they treat surviving spouses of officials differently according to the sex of the persons concerned.

In Joined Cases 75 and 117/82

C. RAZZOUK AND A. BEYDOUN, assisted and represented by Dieter Rogalla, Rechtsanwalt, of Münster and Steinfort, with an address for service in Luxembourg at the Chambers of Tony Biever, 83 Boulevard Grande-Duchesse-Charlotte,

applicants,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by John Forman, a member of its Legal Department, acting as Agent, assisted by Robert Andersen of the Brussels Bar, with an address for service in Luxembourg at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATIONS for:

(i) the annulment of the Commission's decisions of 25 November 1981 and 9 March 1982 refusing to grant the applicants widower's pensions; and

(ii) an order directing the Commission to grant them widower's pensions, with interest for late payment, or in the alternative, a sum equivalent to the pension contributions paid by Mrs Razzouk and Mrs Beydoun,

THE COURT

composed of: J. Mertens de Wilmars, President, T. Koopmans, K. Bahlmann and Y. Galmot, Presidents of Chambers, P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco and U. Everling, Judges,

Advocate General: Sir Gordon Slynn
Registrar: P. Heim

gives the following

JUDGMENT

Facts and issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Facts and written procedure

1. Mr Razzouk and Mr Beydoun are both widowers. Mr Razzouk is a researcher at UCL, Brussels, while Mr Beydoun, in retirement since 1 August 1979, was a specialist in the American primary commodities futures market. Their wives were both officials of the European Communities, Mrs Razzouk at the European Parliament from February 1971 and at the Commission from March 1971, and Mrs Beydoun, first at the ECSC and then at the Commission from 1 August 1966. Their respective grades

were LA 6, Step 4, and B 5, Step 4. They died on 29 January 1981 and 21 June 1980 respectively.

2. On 3 April 1981 Mr Razzouk wrote to the President of the Commission seeking, as a result of the death of his wife, the survivor's pension that Article 79 of the Staff Regulations grants to the widows of officials.

On 3 July 1981 the head of the Financial and Administrative Rights Division replied that "after careful examination ... the administration cannot see its way to granting your request given the current provisions of the Staff Regulations relating to pensions".

On 24 July 1981 the applicant submitted a complaint to the Commission pursuant to Article 90 (2) of the Staff Regulations, seeking the annulment of the aforementioned decision of the Commission's administration.

By a registered letter of 25 November 1981, received by the applicant on 2 December 1981, Mr O'Kennedy, a Member of the Commission, informed the applicant that the Commission could not uphold his complaint and, consequently, that it confirmed the decision of 3 July 1981.

The essential grounds for the Commission's decision were stated as follows:

"The provisions of the Staff Regulations relating to pensions only grant a pension to the widower of a female official on the conditions laid down in Article 23 of Annex VIII to those regulations. Those conditions are not met in your case.

The Commission has no choice but to apply the provisions in question: they were adopted by the Council in the exercise of its powers as the competent institution, were properly brought into force and are binding on all the institutions. That is particularly true of the Commission, which would be exceeding its powers by granting you a widower's pension which did not meet the conditions laid down in the Staff Regulations, since it has a duty to ensure that the measures taken by the institutions are applied (see in particular Article 155 of the EEC Treaty).

It is true that the Commission submitted a proposal to the Council in 1974 to amend the Staff Regulations which would, as regards survivor's pensions, grant equal rights to both widows and widowers of officials. So far, that proposal has not been accepted and the Commission cannot ignore its non-acceptance, as it would have to do if it were to accept your claim.

Finally, as regards your comments concerning the practice of various international organizations with regard to equal pensions for widows and widowers, it should be noted that, in each case, only express statutory provisions permit such practices where they exist. On the other hand, the conditions under which those pensions are granted are very different from those dealing with widow's pensions in the Staff Regulations of Officials of the European Communities."

On 16 July 1980 Mr Beydoun wrote to the head of the relevant division seeking a survivor's pension pursuant to the Staff Regulations. He pointed out in particular his own limited resources (below subsistence level) and referred to health

problems which prevented him from engaging in gainful employment.

On 12 August 1981 the deputy head of the relevant division rejected Mr Beydoun's request and expressed the Commission's opinion that Article 23 of Annex VIII of the Staff Regulations was not applicable in his case.

On 9 September 1981 the applicant submitted a complaint to the Commission, pursuant to Article 90 (2) of the Staff Regulations, seeking the annulment of the aforementioned decision of the Commission's administration.

By a letter dated 9 March 1982, Mr O'Kennedy, a Member of the Commission, informed the applicant that the Commission could not accept his complaint either on the basis of Article 23 of Annex VIII to the Staff Regulations or on the wider basis that he was entitled to a pension by virtue of the principle of non-discrimination between men and women. That letter thus expressly confirmed the aforementioned decision of 12 August 1981.

The essential grounds for the Commission's decision were stated as follows:

"The provisions of the Staff Regulations relating to pensions only grant a pension to the widower of a female official on the conditions laid down in Article 23 of Annex VIII to those regulations. Those conditions are not met in your case.

On the one hand, at the time of your wife's death in June 1980, it cannot be said that you did not have an income of your own, because you have in fact received, since you attained the age of 65 on 1 August 1979, a Belgian retirement pension as a result of having worked in that country.

On the other hand, the health problems to which you refer have not been medically certified as constituting an invalidity or serious illness which, at your wife's death, caused you to be permanently incapacitated from engaging in gainful employment. In particular, it would appear from Dr Reubens certificate of 8 July 1980 that you have been treated for a frozen left shoulder *for several years*; however, that illness was not so serious as to prevent you from engaging in all gainful employment before your retirement. In fact, you earned money in both 1978 and 1979.

The Commission has no choice but to apply the provisions in question: they were adopted by the Council in the exercise of its powers as the competent institution, were properly brought into force and are binding on all the institutions. That is particularly true of the Commission, which would be exceeding its powers by granting you a widower's pension which did not meet the conditions laid down in the Staff Regulations, since it has a duty to ensure that the measures taken by the institutions are applied (see in particular Article 155 of the EEC Treaty).

It is true that the Commission submitted a proposal to the Council during 1974 to amend the Staff Regulations which would, as regards survivor's pensions grant equal rights to both widows and widowers of officials. So far that proposal has not been accepted and the Commission cannot ignore its non-acceptance, as it would have to do if it were to accept your claim."

4. As a consequence of the Commission's refusal to accede to the requests submitted by Mr Razzouk and Mr Beydoun, the present applications were lodged at the Court Registry on 22 February and 2 April 1982 respectively.

5. By an order of 3 December 1982, the Court (Second Chamber) joined the two cases for the purposes of the oral procedure and the judgment. By an order of 14 July 1983, the Chamber referred the cases to the full court.

6. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, the Court invited the parties to inform it in writing about the administrative proceedings which followed upon Mr Beydoun's request of 16 July 1980 and, in particular, about the correspondence and interviews to which that request gave rise before the express rejection of 12 August 1981.

II — Conclusions of the parties

The *applicants* claim that the Court should:

A — In giving judgment on the application brought by Mr Razzouk (Case 75/82), declare that the Commission is obliged to:

Annul its decision of 25 November 1981, sent to the applicant by registered post and received by him on 2 December 1981, rejecting his claim to a widower's pension; grant the applicant a widower's pension as a result of the death on 29 January 1981 of his wife Christiane Razzouk, née van Campenhout, an official of the Commission, and grant their son, Michel, the right to an orphan's pension as from 1 May 1981;

Award the applicant interest at the rate of 9% as from 1 May 1981;

in the alternative, pay the applicant a sum equivalent to the pension contributions paid by Mrs Razzouk under Article 83 of the Staff Regulations of Officials of the European Communities during her employment with the European Institutions; and

Pay the applicant's costs;

B — In giving judgment on the application brought by Mr Beydoun (Case 117/82), declare that the Commission is obliged to:

Annul its decision of 9 March 1982, received by the applicant on 15 March 1982, refusing to grant him a widower's pension, together with the decision adopted by the Commission's administration on 12 August 1981;

Grant the applicant a widower's pension as a result of the death on 21 June 1980 of his wife Marie Pauline Beydoun, neé Langen, an official of the Commission, such pension to be payable as from 1 October 1980;

Award the applicant interest at the rate of 9% as from 1 October 1980;

in the alternative, grant the applicant a pension under Article 23 of Annex VIII to the Staff Regulations as from the same date;

In the further alternative, pay to the applicant a sum equivalent to the pension contributions paid by Mrs Beydoun under Article 83 of the Staff Regulations of Officials of the European Communities during her employment with the European Institutions; and

pay the applicant's costs.

The *Commission* contends that the Court should:

A — In giving judgment on the application brought by Mr Razzouk:

As regards admissibility, declare that the claim for an orphan's pension on behalf of Michel Razzouk, son of the applicant, is pointless; declare the alternative claim for the reimbursement of Mrs Razzouk's pension contributions inadmissible and take note of the fact that the defendant submits the rest of the case to the wisdom of the Court;

As regards the substance of the principal claim for a survivor's pension, dismiss the submission based on the breach of Article 119 of the EEC Treaty and, as regards the submission based on the principle of equality of treatment between men and women, give the competent Community institutions, if the Court in its wisdom considers that the individual decisions at issue are without legal foundation, a reasonable period in which to take the necessary measures to eliminate all discrimination according to sex to be found in the provisions of the Staff Regulations concerning pensions for the survivors of officials and other servants of the European Communities;

Dismiss the applicant's claim for interest, which in any event could only be due from the date of the complaint submitted pursuant to Article 90 (2) of the Staff Regulations;

Declare the alternative claim for the reimbursement of Mrs Razzouk's pension contributions to be without foundation, if indeed it is considered admissible; and

Make an appropriate order as to costs;

B — In giving judgment on the application brought by Mr Beydoun:

Declare the application completely inadmissible;

In the alternative, as regards the substance of the principle claim for a survivor's pension identical to that which would have been granted to the widow of an

official, dismiss the submission based on the breach of Article 119 of the EEC Treaty and, as regards the submission based on the principle of equality of treatment between men and women, give the competent Community institutions, if the Court in its wisdom considers that the individual decisions at issue are without legal foundation, a reasonable period in which to take the necessary measures to eliminate all discrimination according to sex to be found in the provisions of the Staff Regulations concerning pensions for the survivors of officials and other servants of the European Communities;

In the further alternative, dismiss the alternative claim for a survivor's pension pursuant to Article 23 of Annex VIII to the Staff Regulations;

In the still further alternative, declare the alternative claim for reimbursement of the deceased wife's pension contributions to be without foundation, if indeed that claim is considered admissible;

In any event, dismiss the applicant's claim for interest, which in any case can only be due from the date of the complaint submitted pursuant to Article 90 of the Staff Regulations;

Make an appropriate order as to costs.

III — Submissions and arguments of the parties

A — Admissibility

1. Case 75/82

As regards the claim for an orphan's pension on behalf of Michel Razzouk, the *Commission* contends, in its defence, that it is pointless because such a pension was granted as from 1 May 1981. In its rejoinder, the Commission points out that the applicant has not contested its initial observation on that subject.

The Commission is of the opinion that in contesting the decision of 25 November 1981, which expressly rejected the complaint lodged by the applicant pursuant to Article 90 (2) of the Staff Regulations against the decision of 3 July 1981 rejecting his claim of 3 April 1981 for a survivor's pension as a result of the death of his wife, the applicant has contested an act which cannot in itself be contested. The Commission cites on this point the judgments of the Court of 28 May 1980 (Joined Cases 33 and 75/79 *Kuhner* v *Commission* [1980] ECR 1677) and of 9 December 1982 (Case 191/81 *Plug* v *Commission* [1982] ECR 4229).

The Commission points out however that on other occasions the Court has been more liberal, taking the view that the essential element was that the complaint and the application had been lodged within the prescribed time-limits, as is the case here. That being so, the Court was prepared to interpret the application directed formally against the rejection of the complaint as being also directed against the decision which gave rise to the complaint. The Commission cites in this connection the judgment of the Court of 21 May 1981 (Case 156/80,

Morbelli v *Commission* [1981] ECR 1357) and the opinions of the Advocates General in Case 806/79 (*Gérin* v *Commission*, [1980] ECR 3531) and Case 186/80 (*Suss* v *Commission*, [1981] ECR 2058).

The Commission does not draw any definitive conclusions from the foregoing observations on admissibility, but it observes that it would be inclined to interpret the application as being implicitly directed against its initial decision.

Finally, the Commission observes that the alternative claim for reimbursement of the pension contributions paid by the applicant's wife during her working life is in fact a new claim which had not been the subject of a complaint before the lodging of the application. The Commission cites the judgments of 9 March 1978 (Case 54/77, *Herpels* v *Commission* [1978] ECR 585) and of 20 November 1980 (Case 806/79, *Gérin* v *Commission*, [1980] ECR 3515), in which the Court was particularly liberal, and, while being favourably disposed towards the admissibility of Mr Razzouk's application, it leaves this point to the wisdom of the Court.

The *applicant* contends that his claim for the annulment of the Commission's decision of 25 November 1981 implies the annulment of the decision of 3 July 1981 because the former expressly confirmed the latter.

As regards the claim for reimbursement of the pension contributions, this is not, in the applicant's view, a new claim because the pension contributions constitute the consideration for the pension rights which form the subject-matter of the principal claim. If the Court does not grant him a widower's pension, the Commission will have unjustly enriched itself and it is thus perfectly normal to seek compensation for this as an alternative to the pension.

2. Case 117/82 (Mr Beydoun)

The *Commission* considers that this application is inadmissible because the applicant should have submitted a complaint to the appointing authority against the implied rejection of his claim for a survivor's pension of 16 July 1980 before 17 February 1981, the implied decision being presumed to have been taken on 16 November 1980. However, the applicant did not submit his complaint until 9 September 1981, following the express rejection of his claim on 12 August 1981. The express rejection was merely confirmation of the implied rejection of 16 November 1980 and could not cause time to start running again in favour of the applicant, all the more so as the time-limits are a matter of public policy (see judgment of the Court of 8 May 1973, Case 33/72, *Gunnella* v *Commission*, [1973] ECR 475).

The inadmissibility of the main claim automatically entails the inadmissibility of the alternative claim for reimbursement of the pension contributions paid by the applicant's wife during her lifetime.

The *applicant* does not accept that the application is inadmissible and points out, in his reply, that his claim of 16 July 1980 was followed by a long exchange of correspondence and by several interviews with officials of the Commission. Furthermore, discussions with a view to finding an appropriate solution to his claim took place between officials of the commission and of other institutions in the framework of the Preparatory Committee for Meetings of Heads of Administrative services. The general atmosphere of these discussions was fairly positive and constructive and showed a willingness to help him. In reply to a question which the Court put to the parties, Mr Beydoun also points out that, in spite of the many interviews

which took place between November 1980 and June 1981, those responsible at the Commission never informed him of the implied rejection of his claim, as the Commission contends in its rejoinder.

On that basis, the applicant's claim should be regarded as coming within the first paragraph of Article 25 of the Statt Regulations. Even though, taken literally, that provision applies only to officials, it should be interpreted by analogy as also covering his case. The Commission's reply of 12 August 1981 would therefore constitute the sole basis of the application, which would then meet the requirements of Article 91 (2).

The *Commission* states in its rejoinder that the Preparatory Committee for Meetings of Heads of Administrative Services, and later the heads of administrative services, dealt, at its initiative, with the general question of the interpretation of the first paragraph of Article 23 of Annex VIII to the Staff Regulations and, in particular, with the interpretation of the expression "provided that he has no income of his own" and with the concept of invalidity. The Committee considered that the provision in question did not apply to the widower of an official who, being 66 years old at the time of his wife's death, was suffering from invalidity and had only a small income, because the term "invalidity", as used in that article, referred to an invalidity incapacitating the person concerned from engaging in gainful employment, and not an invalidity due to age, and because, at the age of 66, the person concerned was no longer available for employment.

As regards the rest of the application, the Commission does not understand why the applicant wishes to have his claim for a pension of 16 July 1980 treated as a request under the first paragraph of Article 25 of the Staff Regulations. It considers that, even if this classification were correct, there would be no difference as far as admissibility is concerned. Such a classification would not change the procedural rules and it would not alter the fact that the applicant should have submitted a complaint to the appointing authority before 17 February 1981. The Commission therefore continues to maintain that Mr Beydoun's application is inadmissible.

B — Substance

1. Submissions pleaded by both applicants

The *applicants' first submission* is based on Article 119 of the EEC Treaty, Article 79 of the Staff Regulations and on the principle of equality of treatment. According to the applicants, Article 79 of the Staff Regulations, which grants a survivor's pension to the widow of an official or a former official under the conditions set out in Chapter 4 of Annex VIII to the Staff Regulations, must be interpreted in conformity both with the principles laid down in Article 119 of the EEC Treaty and confirmed in judgments of the Court, and with the general principle of non-discrimination. In accordance with those principles, all persons to whom the Staff Regulations apply, be they officials or otherwise, must be treated in the same way when they are in the same situation, and a difference of sex should not imply a difference of treatment.

It is for the Commission to ensure that the Community rules are applied in conformity with the principles set out above. That is all the more reason why it should apply the provisions at issue in the present case in conformity with those principles, adopting, if necessary, a liberal interpretation or an interpretation by analogy. If Article 79 of the Staff

Regulations cannot be interpreted liberally or by analogy, the limitation for which it provides is invalid and, as such, cannot be relied on against the applicants.

Moreover, an application of Article 79 confining the right to a survivor's pension to widows would introduce an element of discrimination against female officials. The latter would in effect be making much higher contributions, in relation to the benefits received, than would male officials. This practice of equal contributions for different benefits constitutes discrimination, irrespective of whether the pension scheme is contributory or operates on the principle of capitalization.

Finally, the applicants point out that the survivor's pension is not a benefit designed to guarantee a source of income to persons who have no other, but derives from a right to which the survivors are entitled and which is justified by the professional activity of the official in the service of the Communities. Not only are the Staff Regulations silent as regards the alleged purpose of this pension as a form of assistance but the fact that the pension is provided for regardless of the financial, social or professional situation of the recipient excludes such a purpose.

The *Commission* observes, in its defence, that the applicants are wrong to claim that Article 119 of the EEC Treaty, which enshrines the principle that men and women should receive equal pay for equal work also applies to survivor's pensions for the dependants of deceased officials.

It refers in this context to the judgment of 15 June 1978 and 25 May 1971 (Case 149/77, *Defrenne* v *Sabena*, [1978] ECR 1365, and Case 18/70, *Defrenne* v *Belgium*, [1971] ECR 445) and it emphasizes that social security is amongst the matters mentioned in Article 118 of the Treaty. With regard to those matters, and in particular with regard to retirement and survivor's pension schemes, the elimination of discrimination based on the worker's sex is presented as a goal to be achieved. Furthermore, the Commission states that survivor's benefits are also not covered by the Council Directive of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

The Commission refutes the applicant's reference to the Court's judgment of 9 February 1982 (Case 12/81, *Garland* v *British Rail Engineering*, [1982] ECR 359), because the Advocate General's opinion in that case demonstrates that the judgment does not depart from the Court's earlier decisions in this field. In particular, that judgment in no way contradicts that of 25 May 1971 (*Defrenne*), which held that retirement pensions are not included in the concept of pay within the meaning of Article 119.

In the present case, moreover, the pensions paid by the European Communities to their officials and dependants derive from the Staff Regulations. They are paid solely on the basis that the officials meet the conditions laid down in those regulations. On that basis, the lack of proportionality between pensions and contributions cannot be regarded as discrimination. The Com-

mission refers in this connection to the Advocate General's opinion in the *Grogan, De Pascale* and *Curtis* cases ([1982] ECR 886).

Finally, the survivor's pension scheme in the Staff Regulations was set up with certain social considerations in mind, namely to ensure a decent standard of living for the spouse of the deceased official. Whereas a surviving wife is presumed not to have sufficient resources for this purpose, a surviving husband must prove that he does not have such resources.

The *applicants* contend, in their reply, that the Commission is wrong to assume that the applicants seek to have Article 119 applied to their case and they point out that the application uses the words "in conformity with the principles laid down in Article 119 of the EEC Treaty . . .". Those principles are designed to ensure equality of treatment for both men and women and the application seeks neither more nor less than that. It is perfectly possible that the principles referred to, as regards the factors mentioned and other related factors, can be made more concrete. The Court can thus use them as a suitable basis to regulate the equality of male and female officials of the European Economic Community in regard to pension rights. That would also constitute a useful contribution to the law governing the European civil service.

The *Commission*, in its rejoinder, notes that the applicants do not rely on Article 119 in support of their claims and also that they did not dispute its argument that the said article was not applicable.

The *applicant's second submission* is based on an interpretation of the principle of equal treatment for men and women. In their view, the Commission has not followed the guidelines laid down by the Court to help the institutions to interpret the Staff Regulations when it is a question of adapting them to factual, legal or economic situations which do not appear to correspond to the carefully thought-out objectives of the legislature. The applicants refer in this connection to the judgment of 31 May 1979 (Case 156/78, *Newth* v *Commission*, [1979] ECR 1941), in which the Court held that, where the application of an article is likely to result in a breach of a superior rule of law, as in the present case, the Commission is obliged, in order to avoid such a result, not to apply the article in question.

The aforementioned guidelines are favourable to the applicants' case, particularly in view of the Commission's own proposal of 13 June 1974 (Official Journal 1974, C 88, p. 25), seeking to insert an express right to a widower's pension in the Staff Regulations. It is this fact which justifies the claim for interest at 9% from 1 May 1981, the date at which the pension rights of Mr Razzouk and his son Michel should have arisen, and from 1 October 1980 in the case of Mr Beydoun.

The applicants then refer to the *Garland* judgment (paragraph 11), concerning equal pay for men and women, which, in their view, reinforces the arguments presented above.

Finally, the applicants point out that the Court held in that judgment, referring to the judgment of 31 March 1981 (Case 96/80, *Jenkins* v *Kingsgate*, [1981] ECR 911, paragraph 17), that Article 119 of the Treaty applies directly to all forms of discrimination which may be identified solely with the aid of the criteria of equal work and equal pay. These considerations should of themselves ensure *mutatis mutandis*, the applicants' rights to a pension.

Furthermore, the traditional concept of the family and of the women's place within it and within society is in the process of changing, so that any legislative discrimination based on sex is considered unjustified, which means, in the present case, that the survivor's pension scheme is discriminatory because it does not grant the same advantages to both widows and widowers of officials of the European Communities.

The *Commission* states, in its defence, that the application of the general principle of equality between the sexes is an extremely delicate question. The objective difference between the factual situations in which a widow and a widower find themselves can be advanced to justify the present provisions of the Staff Regulations on this point. It is still true that the major part of a household's resources come from the husband's work, such that, upon his death, the widow is likely to find herself in a difficult financial situation.

Against that, it could be argued that since the amendment of the Staff Regulations in 1972 the widow of an official can combine the benefit of a survivor's pension with a salary paid by the European institutions. The survivor's pension is therefore of a hybrid nature in the sense that it is not only intended to provide maintenance (which would entail its forfeiture on remarriage) but is also a pecuniary advantage, linked to the public office held by the deceased spouse and independent of the survivor's means. In its present form, the Staff Regulations suffer from an internal contradiction.

It was that strictly egalitarian concept which caused the Commission to propose, on 13 June 1974, that the Council should insert, in Title V of the Staff Regulations, after Article 79, an Article 79a making the provisions of Article 79 applicable *mutatis mutandis* to the widower of an official or former official. That proposal was approved by the European Parliament (Official Journal 1974, C 140, p. 20). In two later resolutions the Parliament reiterated its opinion of 13 November 1974 (see the resolution of 18 January 1980 relating to the social security scheme applicable to temporary staff, Official Journal 1980, C 34, p. 56, and the resolution of 10 April 1981 on the special and temporary measures taken in consequence of the accession of Greece, Official Journal 1981, C 101, p. 104). Finally, when the 1982 budget was being adopted, the Parliament, at the second reading on 17 December 1981, passed Amendment No 77 which sought to allow the appropriation to cover the survivor's pensions of widows of officials to be used also for widower's pensions (Official Journal 1982, C 11, pp. 56 and 121).

The Council's position on the Commission proposal was less explicit. While

declaring itself anxious to respect the principle of equal treatment for men and women in the area covered by the Staff Regulations, it considers that that aspiration poses complex problems in relation to survivor's pensions and that, in the present social context, it is doubtful whether the provisions applicable to widows could be extended without amendment to widowers.

The general principle of non-discrimination between men and women has developed, in the social legislation of the Member States, under the influence of Community law. However, in the present state of development, discrimination between the sexes in the Member States' legislative provisions dealing with survivor's benefits would not be an infringement of Article 119 and would not be contrary to Community law, as is clear from the *Defrenne* judgment (Case 149/77, cited above).

The Commission wonders, however, if the fact that discrimination based on sex in relation to survivor's pensions, which continues to exist in the internal law of the Member States, cannot at the moment be regarded as being contrary to Community law necessarily means that the same discrimination in the Staff Regulations and the rules applicable to other servants cannot be regarded as a breach, not of the social provisions of the Treaty, but of the fundamental rights which the Court has repeatedly held to be part of the general principles of Community law whose observance it must ensure. In support of this theory, the Commission cites the judgments of 7 June 1972 (Case 20/71, *Sabbatini, née Bertoni*, v *European Parliament*, [1972] ECR 345) and of 20 February 1975 (Case 21/74, *Airola* v *Commission*, [1975] ECR 221).

It wonders, on the other hand, whether this discrimination should be gradually eliminated, according to the same timetable, under the terms of the directives adopted on the points set out in Article 118 of the Treaty. Doubts on this subject are not unreasonable.

The Commission states that in the present situation, while aware that, in the view of the Court, the Staff Regulations must be interpreted so as to conform to a superior rule of law, as is clear from the *Airola* and *Newth* judgments, cited above, and from the judgment of 20 February 1975 (Case 37/74, *Van den Broeck* v *Commission*, [1975] ECR 235), it feels obliged to apply the provisions as they stand. Such a course of conduct is all the more justified because the provisions are sufficiently clear as not to require further interpretation and, in any event, they have not been declared illegal by the Court.

Finally, if the Court finds that the present system is without legal foundation, the Commission suggests that it should invite the competent institutions to take the measures which they consider necessary, within a time-limit to be fixed by the Court, to eliminate all discrimination between the sexes in the provisions of the Staff Regulations dealing with pensions for the survivors of officials and other servants of the European Communities.

The *applicants*, in their reply, present a synopsis of the evolution of the law in the Member States and elsewhere. Thus, in *Belgium* provisions meeting the requirements of equality between men and women have existed for Senators

since 1976. In *Italy* a judgment of the Constitutional Court of 25 January 1980 declared unconstitutional a provisions stipulating that the widower of an official is entitled to a pension only under conditions resembling those in Article 23 of Annex VIII to the Staff Regulations. In *Ireland* the Labour Court ruled on 7 May 1979 that male and female Senators had an equal right to a survivor's pension. The *United Kingdom* pension scheme has provided for absolute equality of treatment for men and women since 1975. In the *United States* a Supreme Court decision of 29 April 1980 declared unconstitutional a provision resembling Article 23 of Annex VIII of the Staff Regulations.

The *Commission* answers, in its rejoinder, that, as regards *Belgium* the equality relied on by the applicants is based not on a law or a royal decree but on a rule of the Senator's pension fund. In *Italy* equality with regard to survivor's pensions is regulated by Law No 908 of 9 December 1977. As regards *Ireland,* the Commission notes that the Department of the Public Service has decided to extend the existing survivor's pension scheme so as to apply the same conditions to widows and widowers of officials.

In addition, the Commission appended a table to its rejoinder summarizing the position in the Member States on 1 September 1982. It can be seen from that table that in four Member States there is complete equality between widows and widowers of officials. In two Member States the widower of an official is not at present entitled to a survivor's pension. Two other Member States grant such a right to widowers, but under certain restrictive conditions, particularly as regards the beneficiary's means. In one Member State there is no public-law scheme of survivor's pensions for the dependants of officials. Finally, in yet another Member State the widower of an official has a right to an ordinary widow's pension. This right is however suspended as long as there is a dependent child entitled to a pension and it is deferred until the normal age of entitlement to a pension (60 years), unless the person concerned is unable to work.

As for the rest, the Commission merely repeats that the question must, in its view, be dealt with by legislation. For it, the most serious doubts are due to the contradiction which, in its opinion, would arise from the immediate application of a single scheme of widow's and widower's pensions in the institutions while the absence of similar schemes in the Member States continues not to be contrary to Community law.

2. Submission pleaded only by Mr Beydoun

Mr Beydoun pleads an alleged wrongful interpretation of Article 23 of Annex VIII to the Staff Regulations. He contends that the condition that the applicant should have no income of his own must be interpreted as meaning that he must have no adequate income of his own, which is manifestly true of someone who has only a Belgian pension, presently worth BFR 9 187 and a German widower's pension, presently

worth DM 299.80. The interpretation of Article 23 on this point should be in conformity with the rules on own income applicable in other areas, especially in relation to family allowances. As regards the invalidity or serious illness from which the applicant must suffer if he is to comply with the second condition, the Commission has wrongly evaluated the situation and there is no legal basis for its theory that the applicant's serious illness, recognized as such by the Commission itself, is of no importance because the applicant retired on 1 August 1979, that is to say before the death of his wife.

The *Commission* rejects the applicant's submission regarding his own income, which, according to it, is approximately BFR 15 000 per month. Furthermore, the applicant has not proved that he was suffering, "at his wife's death", from a serious illness making it permanently impossible for him to engage in gainful employment. As regards Mr Beydoun's retirement, this took place before his wife's death solely because of his age (he had reached the age of 65) and not because of his illness (frozen shoulder), from which he had suffered, according to the Commission, for several years without having been prevented from working before his retirement.

3. The claim for interest

In its defence, the *Commission* rejects the claim for interest at 9 % *per annum*, pointing out that such interest would be a form of damages which could only be granted in the case of culpable delay in the payment of sums undeniably due. Furthermore, the Commission's good faith in regard to a question as delicate as the one raised by the present application saves it from being ordered to pay damages (see the *Airola* judgment, cited above).

As regards the interest claimed by the applicants, the Commission points out, referring to the Advocate General's opinion in the *Garganese* case (Case 185/80, [1981] ECR 1803 and 1804), that save in exceptional cases, interest in compensation for delay in payment can only be granted from the day on which the complaint under Article 90 (2) of the Staff Regulations was submitted, where the failure to pay a sum due results purely from a mistake in the application of the Staff Regulations. In the present case, interest can only be due, even in the hypothesis most unfavourable to the Commission, from 1 October 1980 in the case of Mr Beydoun and from 24 July 1981 in Mr Razzouk's case.

In its rejoinder, the Commission states that the applicants, when invited to justify the rate of interest claimed, presented no argument justifying the fixing of this rate at 9 % and that, furthermore, in their reply, they merely asked the Court to fix the appropriate rate of interest for the periods in question.

4. The applicants' alternative claim for a sum equivalent to the pension contributions paid by their late spouses under Article 83 of the Staff Regulations during their employment with the European Institutions

In its defence, the *Commission* contests first of all the admissibility of this claim.

It contends that the contributions were made by the officials and not by their dependants. It does not see on what basis therefore the latter purport to claim reimbursement of contributions which they did not make themselves.

In the alternative, the Commission submits that this claim is unfounded.

The pensions paid by the Communities are not of a contributory nature but derive from the Staff Regulations, so that the lack of proportion between the pensions and the contributions cannot be regarded as discrimination (see the above-mentioned opinion of the Advocate General in *Grogan* v *Commission*). This means, among other things, that if the conditions laid down in the Staff Regulations are not met the contributions are lost and cannot be recovered either by the official or by his dependants. Furthermore, the contributions have not been lost in the present case because Mr Razzouk's son is receiving an orphan's pension, which would incidentally, be considerably reduced if a survivor's pension were granted to Mr Razzouk, in application of the third paragraph of Article 80 of the Staff Regulations rather than of the first paragraph of the same article.

In their reply, the *applicants* contest the Commission's view on this point. They stress in particular that the pension contributions are part of the official's remuneration and they ought to be and can be recovered by the dependants when no pension is payable.

The *Commission* counters, in its reply, that the official's contributions are merely part of the total financing of the common pension scheme. It would be wrong to imagine that each official's contributions are placed in a separate account for his or her benefit. An official's contribution to the total financing of the pension scheme does not give him an automatic right to a pension, still less to a pension equal, at least, to the amount of his contributions.

Finally, the Commission emphasizes that in a system based on social solidarity, there is no necessary correlation between the contributions paid in and the benefits received. It adds that, in accordance with the provisions of Article 38 of Annex VIII to the Staff Regulations, contributions properly deducted cannot be refunded.

IV — Oral procedure

At the sitting on 10 January 1984 oral argument was presented by D. Rogalla, for the applicants and by R. Andersen, assisted by A. Pincherle, for the Commission.

At the hearing the Commission's agent indicated that, at present, about ten female officials in the service of the Commission die each year leaving a surviving husband. There are probably about 50 widowers of officials in all.

The Advocate General delivered his opinion at the sitting on 14 February 1984.

Decision

1 By applications lodged at the Court Registry on 22 February 1982 and 2 April 1982 respectively, Mr Razzouk and Mr Beydoun, both widowers of officials who had been in the service of the Commission of the European Communities, brought actions seeking, first, the annulment of the decisions of 25 November 1981 and 9 March 1982, by which the Commission rejected the complaints that they had submitted against the decisions refusing to recognize their right to a survivor's pension and, secondly, an order requiring the Commission to grant them a widower's pension or, in the alternative, to pay them a sum equivalent to the pension contributions paid by their respective wives.

2 As regards Mr Razzouk, the Court has been told that he wrote to the President of the Commission on 3 April 1981 seeking, as a result of the death of his wife, the survivor's pension which Article 79 of the Staff Regulations grants to the widows of officials. By a letter dated 3 July 1981 the head of the Financial and Administrative Rights Division replied that, having regard to the existing provisions of the Staff Regulations dealing with the pension scheme, the administration did not feel able to grant his request. On 24 July 1981 the applicant submitted a complaint to the Commission pursuant to Article 90 (2) of the Staff Regulations. That complaint was rejected by a letter of 25 November 1981, in which the Commission stated that the provisions of the Staff Regulations entitled widowers to a pension only on the conditions laid down in Article 23 of Annex VIII to those regulations and that those conditions were not met in the applicant's case. The Commission added that, although it had submitted to the Council in 1974 a proposal to amend the Staff Regulations so as to accord widows and widowers of officials the same rights, it had no choice but to apply the Staff Regulations as they stood.

3 Mr Beydoun, for his part, applied to the Commission on 16 July 1980 for a survivor's pension under the terms of Article 23 of Annex VIII to the Staff Regulations, pointing out in particular his own limited resources and his health problems, which incapacitated him from engaging in gainful employment. By a letter of 12 August 1981 the deputy head of the relevant division informed the applicant that Article 23 did not apply to his case. On 9 September 1981 the applicant submitted a complaint to the Commission

pursuant to Article 90 (2) of the Staff Regulations. That complaint was rejected by a letter of 9 March 1982, which, apart from the explanation as to why the applicant did not satisfy the conditions laid down in Article 23, was identical to the one sent to Mr Razzouk on 25 November 1981.

4 Both applicants seek the annulment of the decisions rejecting their complaints. They also claim that the Commission should be ordered to grant them a widower's pension on the same conditions as those applicable to widows and to pay them interest in compensation for delay in payment. In the alternative, they claim reimbursement of a sum equivalent to the pension contributions paid by their wives under Article 83 of the Staff Regulations during their employment with the European institutions. Mr Razzouk also wishes to obtain an orphan's pension for his son, born of his marriage with the deceased official, while Mr Beydoun claims, in the alternative, a right to a pension pursuant to Article 23 of Annex VIII of the Staff Regulations.

Admissibility

Mr Razzouk's application

5 As regards the claim for an ophan's pension, the Commission has produced a copy of a decision granting such a pension from the date indicated by the applicant. This claim has thus become pointless and the Court is dispensed from adjudicating on it.

6 As regards the claim for annulment, the Commission points out that it is directed solely against the decision of 25 November 1981 whereby the Commission rejected the complaint submitted by the applicant pursuant to Article 90 (2) of the Staff Regulations against the decision of 3 July 1981. In the Commission's view, the claim should have been directed against the latter decision, which is the act adversely affecting the applicant, the decision of 25 November 1981 being purely confirmatory.

7 While it is true that the rejection of the complaint, because of its purely confirmatory nature, is not of itself an act capable of being contested, it must also be recognized that the application, which was lodged within the time-limits laid down in Articles 90 and 91 of the Staff Regulations, is clearly

seeking the annulment of the refusal to grant a pension under Article 79 of the Staff Regulations. There is thus no doubt about the real subject-matter of the dispute and, hence, about the admissibility of the application, in this regard.

8 Finally, the Commission expresses doubt about the admissibility of the alternative claim for reimbursement of the pension contributions paid by the applicant's wife during her working life. The Commission considers that this is a new claim which has not been the subject of a complaint.

9 It must be pointed out in this connection, as the Court did in its judgment of 1 July 1976 (Case 58/75, *Sergy* v *Commission*, [1976] ECR 1139), that, although a complaint through administrative channels is an indispensable preliminary to bringing an action against an act adversely affecting a person to whom the Staff Regulations apply, it is not the function of that complaint to bind strictly and absolutely the judicial stage of the proceedings, provided that the claims submitted at this latter stage change neither the cause nor the object of the complaint. Granted that the pension contributions are fixed at the same percentage of basic salary for both male and female officials, a claim for reimbursement of a part of those contributions is no more than the logical consequence of the Commission's refusal to grant a widower's pension on the same conditions as it grants widow's pensions. This claim is therefore admissible because it is embodied in the principal claim.

Mr Beydoun's application

10 In *limine* the Commission objects that Mr Beydoun's complaint is out of time, having regard to the time-limits laid down by Articles 90 and 91 of the Staff Regulations. The request was submitted on 16 July 1980 and must be deemed to have been implicitly rejected on 16 November 1980, since no express decision had been given before that date. Mr Beydoun ought therefore to have lodged his complaint within the following three months, that is to say before 17 February 1981. However, the complaint was not lodged until 9 September 1981, following the express rejection.

11 The applicant contends that Article 90 of the Staff Regulations is not applicable in the present case and that the express decision of 12 August 1981 set in motion the period for lodging a complaint. He refers in particular to the opening sentence of that decision, which speaks of an exchange of

correspondence and of interviews which he had on several occasions with officials of the Commission. He submits that in those circumstances an implied rejection cannot be presumed.

12 According to Article 91 (2) of the Staff Regulations, an application is only admissible if the appointing authority has previously had a complaint submitted to it pursuant to Article 90 (2) within the period prescribed therein. Article 90 (1) provides that, if no reply has been received to a request within four months, this should be deemed to constitute an implied decision rejecting it and, pursuant to paragraph 2 of the same article, that decision sets in motion a period of three months for lodging a complaint. That period is not extended by the sole fact that the request is followed by interviews or correspondence which do not provide a reply to the request, unless it is shown that the failure to comply with the time-limit can be imputed to the Commission, which is not so in this case. Nor does time start to run again as a result of a later express decision doing no more than rejecting the request.

13 Articles 90 and 91 of the Staff Regulations govern generally the administrative procedure which must precede an application to the Court challenging a decision of the appointing authority and they are thus applicable in the present case also. As the Court has held on many occasions, *inter alia* in the judgment of 19 February 1981 (Joined Cases 122 and 123/79, *Schiavo* v *Council*, [1981] ECR 473), the time-limits prescribed by these articles are mandatory in nature and are not subject to the discretion of the parties or of the Court.

14 Consequently, Mr Beydoun's application is inadmissible and the substance of the case will be examined solely in the context of Mr Razzouk's application.

The substance

15 According to Article 79 of the Staff Regulations, the widow of an official or of a former official is, in general, entitled to a survivor's pension equal to 60 % of the retirement or invalidity pension which was paid to her husband or which, irrespective of length of service, would have been payable to him if he had qualified for it at the time of his death. This right is independent of the widow's own resources and the survivor's pension can even be combined

with any salary she may have as a Community official. On the other hand, Article 23 of Annex VIII to the Staff Regulations provides that the husband of a deceased female official may only receive a survivor's pension if he has no income of his own and is permanently incapacitated by invalidity or serious illness from engaging in gainful employment. Furthermore, this survivor's pension is payable at a rate of 50% rather than the 60% paid to a widow. Finally, although both types of pension cease to be paid if the survivor remarries, a widow who remarries can obtain the immediate payment of a capital sum equal to twice the annual amount of her survivor's pension. The provisions of the Staff Regulations thus provide for two fundamentally different survivor's pension schemes, according to whether the deceased official was male or female.

16 The applicant is therefore justified in his submission that these provisions are contrary to the principle of equal treatment of both sexes, a principle which, as the Court held in its judgment of 15 June 1978 (Case 149/77, *Defrenne* v *Sabena*, [1978] ECR 1365), forms part of the fundamental rights the observance of which the Court has a duty to ensure.

17 In that judgment, as in the judgments of 7 June 1972 (Case 20/71 *Sabbatini, née Bertoni*, v *European Parliament*, [1972] ECR 345) and of 20 February 1975 (Case 21/74, *Airola* v *Commission*, [1975] ECR 221), the Court recognized the need to ensure equal treatment of men and women employed by the Community itself within the framework of the Staff Regulations. Consequently, in relations between the Community institutions, on the one hand, and their employees and the dependants of employees, on the other, the requirements imposed by the principle of equal treatment are in no way limited to those resulting from Article 119 of the EEC Treaty or from the Community directives adopted in this field.

18 The Commission's decision of 3 July 1981 must therefore be annulled on the ground that it is based on provisions of the Staff Regulations which are contrary to a fundamental right and therefore inapplicable in so far as they treat surviving spouses of officials unequally according to the sex of the persons concerned.

19 Following upon that annulment, it is for the Community legislature to accept the consequences of the present judgment and to take the necessary measures

to establish equality between the sexes as regards the Community pension scheme. In the meantime, the Commission must re-examine the applicant's request, applying to it the provisions of the Staff Regulations dealing with widows' pensions, which remain, for the moment, the only valid frame of reference. Any sums which may ultimately be payable to the applicant should bear interest at 6% from 27 July 1981, the date on which the Commission received the applicant's complaint under Article 90 (2) of the Staff Regulations, or from the date on which the pension became payable, if that date is later.

Costs

20 Under the terms of Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, pursuant to Article 70 of the Rules of Procedure, the costs incurred by the institutions in cases brought by officials of the Communities are to be borne by the former. That provision is also applicable to actions brought by dependants of officials seeking to assert a right under the Staff Regulations.

21 Since the Commission has failed in its submissions, as regards Mr Razzouk's application, it must be ordered to pay the costs in Case 75/82. On the other hand, in Case 117/82 the parties must bear their own cost.

On those grounds,

THE COURT

hereby makes the following order:

1. *As regards Case 75/82:*

   (a) **The Commission's decision of 3 July 1981 refusing to grant a widower's pension is annulled;**

   (b) **The Commission shall re-examine the applicant's claim for a survivor's pension, applying to it the provisions of the Staff Regulations dealing with widows' pensions. Any sums which may be**

payable to the applicant shall bear interest at 6% from 27 July 1981 or from the date on which the pension became payable, if that date is later;

(c) It is not necessary to adjudicate on the claim for an orphan's pension;

(d) The Commission shall pay the costs.

2. *As regards Case 117/82:*

(a) The application is dismissed as inadmissible;

(b) The parties shall bear their own costs.

Mertens de Wilmars Koopmans Bahlmann Galmot

Pescatore Mackenzie Stuart O'Keeffe Bosco Everling

Delivered in open court in Luxembourg on 20 March 1984.

For the Registrar

H. A. Rühl

Principal Administrator

J. Mertens de Wilmars

President

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 14 FEBRUARY 1984

My Lords,

The widow of an official or a former official of the European Communities is normally entitled to a survivor's pension equal to 60 % of the retirement or invalidity pension which was or would have been paid to her husband. The survivor's pension is payable irrespective of the degree of dependence of the