JUDGMENT OF THE COURT (Third Chamber)
22 September 1988 *

In Case 159/86

Michele Canters, an employee of the Commission of the European Communities assigned to the Ispra Joint Research Centre, represented by Giuseppe Marchesini, avvocato with the right of audience before the Corte di Cassazione of the Italian Republic, with an address for service in Luxembourg at the Chambers of Victor Biel, 18 A, rue des Glacis,

applicant,

v

Commission of the European Communities, represented by Marie Wolfcarius, a member of its Legal Department, acting as Agent, assisted by Aloyse May, of the Luxembourg Bar, of 31 Grand-Rue, with an address for service at the office of Georgios Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of the refusal to pay the applicant the foreign residence allowance as from 4 May 1978,

THE COURT (Third Chamber)

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

Advocate General: Marco Darmon
Registrar: H. A. Rühl, Principal Administrator

* Language of the Case: Italian.

having regard to the Report for the Hearing and further to the hearing on 20 April 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 31 May 1988,

gives the following

Judgment

1 By application lodged at the Court Registry on 1 July 1986, Michele Canters, an employee of the Commission of the European Communities, brought an action for the annulment of the Commission decision of 1 April 1986 rejecting the complaint in which he sought the grant of a foreign residence allowance with effect from 4 May 1978.

2 Mr Canters is a German national who has worked at the Ispra Joint Research Centre since 27 October 1975. On 12 March 1985 he applied for the foreign residence allowance provided for in Article 4 of Annex VII to the Staff Regulations, with effect from 4 May 1978, the date of entry into force of Regulation No 912/78 (Official Journal 1978, L 119, p. 1) which introduced that allowance. The Commission granted the allowance but only with effect from 1 March 1985, the month in which he submitted the application.

3 By decision of 1 April 1986, the Commission rejected the complaint which Mr Canters had submitted under Article 90 (2) of the Staff Regulations.

4 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Admissibility

5 The Commission pleads that the application is inadmissible on the ground that the complaint was submitted outside the time-limit laid down in Article 90 (2) of the Staff Regulations. It contends that the salary statements for May 1978 to February 1985, which did not mention the foreign residence allowance, are to be regarded as acts adversely affecting the applicant and that its rejection of the complaint merely confirmed the previous decisions refusing to pay the allowance, contained in the salary statements. It adds that the applicant cannot at this stage invoke an irregularity which, in his case, is merely the direct consequence of his inaction.

6 The Court has consistently held, in particular in its judgment of 15 June 1976 in Case 1/76 (*Wack* v *Commission* [1976] ECR 1017), that notification of the monthly salary statement has the effect of setting time running for the purpose of the time-limit for an action against an administrative decision where the existence of such a decision is clearly apparent from the statement.

7 That condition is not fulfilled in this case. The omission of the foreign residence allowance from the applicant's monthly salary statements did not necessarily imply that the Commission denied his entitlement to it. As the Commission in fact conceded in its defence, it did not learn that the applicant satisfied the conditions for the allowance to be granted until he applied for it.

8 It is apparent from the foregoing considerations that the Commission's refusal, on 1 April 1986, to grant the applicant's request constitutes the act adversely affecting him. The complaint against that decision was submitted within the period prescribed in Article 90 (2) of the Staff Regulations and therefore the Commission's objection of inadmissibility must be rejected.

Substance

9 The applicant claims that, in view of his nationality and his place of employment, he fulfils the objective conditions laid down in Article 4 (2) of Annex VII to the Staff Regulations for the grant of the foreign residence allowance. The

Commission, aware that those conditions were satisfied in this case, should automatically have paid the allowance as soon as it was introduced, without the applicant's having to apply for it. The Commission's refusal of 1 April 1986 therefore constitutes an infringement of Article 62 of the Staff Regulations and of Article 16 of Annex VII thereto since the allowance in question, being an integral part of the remuneration entitlement to which officials cannot waive, is in the nature of a right which cannot be extinguished through lapse of time or failure to exercise it.

10 The Commission contends that, when the Staff Regulations were amended in 1978, it drew the attention of all its officials to the introduction of the foreign residence allowance on two occasions and that it was therefore the responsibility of the applicant to give notice of his entitlement to the allowance. In support of that argument, it refers to an earlier decision in which the Court held that, where an administration responsible for ensuring the payment of thousands of payments and allowances has committed an error, the situation of that administration cannot be compared to that of an official who has a personal interest in checking his monthly salary. Moreover, the foreign residence allowance cannot, in its view, be regarded as constituting an inextinguishable right since, in the same way as other allowances, it can be withdrawn from any official who ceases to fulfil the requisite conditions.

11 By virtue of Article 4 (2) of Annex VII to the Staff Regulations, an official who is not and never has been a national of the Member State in whose territory he is employed and who does not fulfil the conditions laid down for entitlement to the expatriation allowance is entitled to a foreign residence allowance equal to one quarter of the expatriation allowance. It is undisputed that the applicant, who is a German national but lived in Italy when he took up his duties, could claim entitlement to the foreign residence allowance.

12 Moreover, no provision of the Staff Regulations requires the persons concerned to submit an application in order to obtain entitlement to the foreign residence allowance since that entitlement arises as soon as the conditions laid down in the abovementioned provision are fulfilled.

13 Finally, the Staff Regulations do not prescribe any period within which the payment of such a benefit must be claimed.

14 It follows that the contested decision, refusing payment of the foreign residence allowance to which the applicant has been entitled since May 1978, infringed Article 4 (2) of Annex VII to the Staff Regulations and must therefore be annulled.

Costs

15 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the Commission has failed in its submissions it must be ordered to pay the costs.

On those grounds,

THE COURT (Third Chamber)

hereby

(1) Annuls the Commission's decision of 1 April 1986 withholding the foreign residence allowance from the applicant for the period from 4 May 1978 to 30 April 1985;

(2) Orders the Commission to pay the costs.

Moitinho de Almeida Everling Galmot

Delivered in open court in Luxembourg on 22 September 1988.

J.-G. Giraud
Registrar

J. C. Moitinho de Almeida
President of the Third Chamber