ORDER OF THE COURT (Second Chamber)
3 March 1999 *

In Case C-315/97 P,

Diego Echauz Brigaldi, César Montoliu García, María Jesús Ruíz Monroy, Carmen Ochoa de Michelena, Maria Carmen Labrador Rubio and **Leopoldo Fabra Utray,** officials of the Commission of the European Communities, represented by Ramón García-Gallardo Gil-Fournier, of the Burgos Bar, with an address for service in Brussels at the Chambers of J. and B. Cremades and Associates, 391 Avenue Louise,

appellants,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fourth Chamber) of 9 July 1997 in Case T-156/95 *Echauz Brigaldi and Others* v *Commission* [1997] ECR-SC II-509, seeking to have that judgment set aside,

the other parties to the proceedings being:

Commission of the European Communities, represented by Julian Curral, Legal Adviser, acting as Agent, assisted by José Rivas Andrés, of the Madrid Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant at first instance,

* Language of the case: Spanish.

José Luis Buendía Sierra, Victoria Pagadigorria Wicke, Miguel Abellán López, Immaculada Gil Tardón, Antonio García Velázquez, Carmen Casado Salinas, Diego González Marín, Eva María Rasines Martín and **Julio Vizcarra Soriano**, officials of the Commission of the European Communities,

applicants at first instance,

THE COURT (Second Chamber),

composed of: G. Hirsch (Rapporteur), President of the Chamber, G. F. Mancini and R. Schintgen, Judges,

Advocate General: J. Mischo,
Registrar: R. Grass,

after hearing the views of the Advocate General,

makes the following

Order

1 By application lodged at the Registry of the Court of Justice on 12 September 1997, Echauz Brigaldi, Montoliu García, Fabra Utray, Ruíz Monroy, Ochoa de Michelena and Labrador Rubio brought an appeal pursuant to Article 49 of the EC Statute and the corresponding provisions of the ECSC and Euratom Statutes of the Court

of Justice against the judgment of 9 July 1997 in Case T-156/95 *Echauz Brigaldi and Others* v *Commission* [1997] ECR-SC II-509 (hereinafter the 'judgment under appeal'), in so far as it dismissed their action for annulment of the Commission decisions of 2 May 1995 refusing special leave for elections and travelling time in order to enable them to exercise their right to vote in Spain, where they were still officially resident and had gone to vote in the European Parliament elections in June 1994.

2 It follows from the judgment under appeal that the appellants, all of whom are Commission officials of Spanish nationality, applied for special leave and travelling time in order to travel to Spain to vote in the elections to the European Parliament on 12 June 1994. On learning at the end of September 1994 that the days used to vote in Spain had not been taken into account as special leave for an election or as travelling time, they lodged complaints under Article 90(2) of the Staff Regulations of Officials of the European Communities (hereinafter 'the Staff Regulations').

3 By letter of 8 May 1995 the Commission rejected those complaints. It stated *inter alia* that, according to information received from the Consular Section of the Spanish Embassy in Belgium, Spanish citizens living abroad (in this case in Belgium) are entitled to a postal vote if they enter their names on the register of 'absent resident' voters kept by the Consulate (the 'Censo Electoral de Residentes Ausentes'; hereinafter 'the CERA'). Once entered on that register, a name is removed from the electoral registers of residents in Spain and the person concerned is entitled to receive a ballot paper directly for all elections held in Spain, apart from municipal elections, to which special rules apply. It follows, according to the Commission, that a voter wishing to do so may vote by post from his place of residence outside Spain. The Commission therefore refused to grant the appellants additional leave by way of special leave and/or travelling time.

4 In that context, the Commission also pointed out that under Article 20 of the Staff Regulations a Commission official's place of residence is the place where he is employed. Special leave to travel to the State of origin is granted to allow an official to exercise his right to vote in so far as it cannot be exercised at the place of employment. However, an official may always apply for annual leave to take part in the elections in his State of origin if he so desires.

5 The Commission also rejected the appellants' plea that the requirement that they be registered at the consulate of their place of residence in Belgium runs counter to Article 12(b) of the Protocol on the Privileges and Immunities of the European Communities (hereinafter 'the Protocol'). According to the Commission, Article 12(b) refers to provisions which restrict immigration and freedom of establishment and does not concern questions relating to registration at a consulate and the consequences thereof.

6 Lastly, the Commission stated that the fact that Opinion No 201/92 of the Board of Heads of Administration on special leave for elections (hereinafter 'Opinion No 201/92') may be applied differently by other institutions — their staff being granted special leave to go to their place of origin to vote, as the appellants maintain — is not such as to call in question the Commission's strict interpretation of that decision, which it applies without discrimination to all its staff.

7 Since the Commission rejected their complaints, the appellants brought an action before the Court of First Instance, in support of which they put forward four pleas in law, two of which are material to the present appeal, namely the plea alleging a manifest error of assessment of the elements of fact and law and the plea alleging a breach of the principle of non-discrimination.

8 As regards the first plea, the Court of First Instance took the view that the argument that, by virtue of Article 12(b) of the Protocol, which allows officials of the Communities to retain their official residence in their State of origin, an official cannot be required to establish residence in Belgium in order to be eligible for a postal vote is based on a misinterpretation of the provisions of the Protocol (paragraph 35 of the judgment under appeal). It is precisely because officials are required, pursuant to Article 20 of the Staff Regulations, to reside at the place where they are employed or at no great distance therefrom that Article 12(b) of the Protocol provides that they are not to be subject to immigration restrictions or to formalities for the registration of aliens, in order to facilitate their installation in any Member State. Article 12(b) of the Protocol essentially concerns relations between officials and the State in which they are employed, not their relations with their State of origin. The Court therefore concluded that the appellants had failed to establish that the obligation to complete the requisite formalities at the competent Spanish Consulate in order to be able to vote by post has, as regards the Belgian authorities, any bearing on the exemption from formalities guaranteed by Article 12(b) of the Protocol.

9 The Court of First Instance then observed that the appellants had provided no evidence of the pecuniary and non-material damage purportedly suffered because of having to register at the Spanish Consulate to vote by post (paragraph 36).

10 The Court of First Instance further pointed out that none of the appellants had met with the practical difficulties which Spanish nationals allegedly encounter in exercising their right to vote in Brussels, since they had freely chosen not to be registered on the CERA (paragraph 37).

11 As regards the second plea, alleging discriminatory treatment owing to the absence of a uniform Community interinstitutional criterion for the interpretation of Opinion No 201/92, the Court of First Instance pointed out that the leave granted in the present case was special leave which the institution had granted as a favour, not under a legal obligation laid down in the Staff Regulations (paragraph 48). The

Court referred to Joined Cases C-193/87 and C-194/87 *Maurissen and European Public Service Union* v *Court of Auditors* [1990] ECR I-95, paragraphs 26 and 27, and observed that, in the present case at least, the Commission was under no obligation to ensure that its officials and other servants received the same treatment as officials of the Council or the Economic and Social Committee. The fact that officials of other institutions had been granted such leave did not therefore constitute a breach of the principle of non-discrimination.

12 The Court of First Instance further observed that the appellants had not been able to show that special leave and travelling time had been granted to officials of States whose rules were comparable with those in force in Spain to enable them to travel to their State to vote. Thus, the Commission had not treated comparable situations differently without objective justification (paragraph 49).

13 The Court of First Instance therefore dismissed the application.

14 In their appeal, the appellants request the Court to set aside the contested judgment and order the Commission to pay the costs.

15 In support of their appeal, they rely on two pleas in law. They allege, first, infringement of Community law, in that the Court of First Instance manifestly misinterpreted and misapplied the applicable Community rules; and, second, breach of the principle of non-discrimination.

16 As regards the first plea, the appellants maintain that pursuant to Article 20 of the Staff Regulations, read in conjunction with Article 12(b) of the Protocol, an official of the Communities must be able to transfer his residence to the State in which he

is employed while maintaining his legal or official residence in his State of origin. The concept of 'residence' referred to in the Staff Regulations must therefore be taken to mean habitual or actual residence, not necessarily legal residence. Officials who maintain their legal residence in Spain and who legitimately wish to exercise their right to vote must choose between two options, each of which adversely affects their interests: they must either travel to Spain, taking several days' leave, which, according to the criteria employed by the Commission pursuant to Opinion No 201/92, does not entitle them to special leave; or they must have their names entered on the CERA, by first registering as residents abroad with the competent Spanish Consulate in the State in which they are employed, thereby forfeiting legal residence in Spain. On that point, the appellants maintain that neither the change of legal residence nor registration on the CERA is a requirement laid down in Spanish law or Community law: they are the consequence of a practice adopted by the Commission but not followed by other institutions such as the Council or the Economic and Social Committee, which actually grant officials wishing to exercise their right to vote in their State of origin special leave to enable them to do so.

17 As regards the second plea, the appellants first allege discrimination as between the officials of the various institutions. Even though each of the Community institutions unquestionably has the power to organise its own affairs, on the basis of which it grants or refuses its officials leave for various reasons, there is none the less a single set of Staff Regulations which define in a uniform manner the legal rules governing Community officials. The fact that there is no express reference to election leave in the provision on special leave cannot be relied upon to deny that the Staff Regulations as a body, as well as each specific provision therein (in particular Article 5(3), which provides that identical conditions of service career are to apply to all officials belonging to the same category) require compliance with the principle of non-discrimination as between officials.

18 The appellants maintain that this principle has actually been applied in the case-law in a considerable number of cases where officials have relied on unequal treatment for reasons to do with, *inter alia*, language (Case T-109/92 *Lacruz Bassols* v *Court of Justice* [1994] ECR-SC II-105), capacity for a post (Case T-211/95 *Petit-Laurent* v *Commission* [1997] ECR-SC II-57) and eligibility to submit a nomination (Case

T-146/95 *Bernardi* v *Parliament* [1996] ECR II-769). In none of these cases was the fact that the person concerned belonged to the staff of a particular institution considered relevant. In the present case the different treatment of Spanish officials as between one institution and another seems wholly incomprehensible.

19 The appellants also observe that there is discrimination within the Commission between officials of different nationalities. Although the situation in Spain is a *sui generis* case which cannot be transposed to another electoral system, the Spanish system of voting through the consulate — owing to the difficulties entailed, and like the systems existing in Portugal, France and Italy — impairs exercise of that civic right by restricting it, not only in the case of officials of the Community but also in that of all Spanish nationals registered on the CERA.

20 The Commission claims that the Court should dismiss the appeal and order the appellants to pay the costs.

21 As regards the first plea, the Commission contends that the alleged distinction which the appellants make between 'habitual and actual residence' and 'legal residence' has no legal basis in Community law. Those expressions mean one and the same thing. A person cannot be legally or officially resident in a place without being actually resident there. Under Community law the concept of residence is a legal concept based on fact.

22 As regards the second plea, the Commission is unable to see how, in relation to discrimination between the institutions, the judgments in *Lacruz Bassols* v *Court of Justice*, *Petit-Laurent* v *Commission* or *Bernardi* v *Parliament* can avail the

appellants' arguments, since they do not concern the application of the principle of equal treatment to officials of different institutions but to officials within the same institution. Nor does case-law contradict or invalidate the judgment in *Maurissen and European Public Service Union* v *Court of Auditors*, to which the Court of First Instance referred. The Commission concludes that it is under no obligation to ensure that its officials are treated in the same way as officials of the Council or the Economic and Social Committee.

23 As regards discrimination as between the institutions, the Commission merely points out that the appellants have provided no evidence to contradict the finding of the Court of First Instance that the Commission did not treat comparable situations differently without objective justification.

24 Pursuant to Article 119 of the Rules of Procedure, where an appeal is clearly inadmissible or clearly unfounded, the Court may at any time by reasoned order dismiss the appeal.

The first plea in law

25 By their first plea, the appellants maintain that the Court of First Instance infringed Community law in that it failed to take account of the scope of Article 20 of the Staff Regulations and Article 12(b) of the Protocol in its interpretation of Opinion No 201/92.

26 Under Article 57 of the Staff Regulations an official may, exceptionally and upon application, be granted special leave. Annex V to the Staff Regulations lays down the detailed rules on leave. Those rules make no reference to special leave for elections.

27 On 18 December 1991 the Board of Heads of Administration adopted Opinion No 201/92. The first paragraph of this provides that one day's special leave is to be granted to officials and other servants who travel to a place where European Parliament elections are being held, provided that it is no less than 200 km from the place of employment. Under the second paragraph, travelling time is to be determined according to the distance between the place of employment and the place of voting. The third paragraph states, however, that special leave and, where appropriate, travelling time are not to be granted where it is possible to vote by post or at the diplomatic or consulate representation without prejudice to the right to vote in other elections.

28 In a circular dated 24 January 1992, the Commission stated that Opinion No 201/92 was to take effect from 1 January 1992.

29 It follows from those provisions that the Staff Regulations do not grant officials and other servants any right to special leave in order to participate in elections. On the basis of Opinion No 201/92, however, the institutions grant special leave to officials and other servants to travel to the place of elections, provided that voting by post or voting at the diplomatic or consular representation is not possible without compromising the right to vote in other elections.

30 The Court of First Instance observed that the Kingdom of Spain makes provision for Spanish citizens living abroad to register with their consulate and subsequently to vote by post, without compromising their right to vote in other elections (paragraphs 1 and 58 of the judgment under appeal). The Court also pointed out that

the appellants had failed to show the practical difficulties which, they maintain, Spanish nationals encounter when exercising their right to vote by post (paragraph 37). It must be concluded, therefore, that the appellants were not entitled to the special leave requested.

31 Since the appellants' request thus lacked any legal basis, the arguments based on Article 20 of the Staff Regulations and Article 12(b) of the Protocol are irrelevant.

32 The first plea must therefore be rejected.

The second plea in law

33 By their second plea the appellants maintain that the Court of First Instance breached the principle of non-discrimination, since, wrongly, it refused to recognise the existence of discrimination between Spanish officials in the various Community institutions and discrimination between officials of different nationalities within the Commission.

34 In that regard, although the purpose of Opinion No 201/92 was to specify in greater detail the conditions in which special leave for elections would be granted and, subject to its adoption, to harmonise the practices of the various institutions in that respect, the appellants cannot rely on the mere fact that some institutions may grant special leave for elections over and above the leave provided for in that

Opinion. As the Court of Justice has consistently held (see *Maurissen and European Public Service Union* v *Court of Auditors*, paragraphs 26 and 27), in the absence of any legal obligation, measures adopted on the initiative of the institutions cannot be relied on in support of a plea that the principle of equal treatment has been contravened.

35 As regards the alleged discrimination by the Commission between officials of different nationalities, it is sufficient to observe that the appellants themselves acknowledge that the Spanish electoral system is not comparable with that of any other Member State and that, as the Court of First Instance found, they did not meet with the practical difficulties allegedly associated with voting by post.

36 The second plea must therefore be rejected.

37 Consequently, the appeal must be dismissed in accordance with Article 119 of the Rules of Procedure.

Costs

38 Under Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if these have been applied for in the successful party's pleadings. Although Article 70 of those Rules provides that in proceedings between the Communities and their servants the institutions are to bear their own costs, under Article 122 that provision is not to apply to appeals brought by officials or other servants of the institutions. Since the appellants have been unsuccessful in their appeal they must be ordered jointly and severally to pay the costs of these proceedings.

On those grounds,

THE COURT (Second Chamber)

hereby orders:

1. **The appeal is dismissed.**

2. **The appellants are ordered, jointly and severally, to pay the costs of these proceedings.**

Luxembourg, 3 March 1999.

R. Grass — Registrar

G. Hirsch — President of the Second Chamber