OPINION OF ADVOCATE GENERAL TESAURO

delivered on 27 January 1998 *

1. By application of 12 February 1997, the Commission appealed against the judgment of 12 December 1996 in Case T-33/95 *Lozano Palacios* v *Commission*. [1]

By its appeal, the Commission seeks to have that judgment partially set aside. In its submission, the Court of First Instance erred in that it annulled the decision of 12 April 1994 in so far as that decision refused to grant Mrs Lozano Palacios, an official in DG XXI, the installation allowance provided for in Article 5 of Annex VII to the Staff Regulations of Officials of the European Communities (hereinafter 'the Staff Regulations').

2. Mrs Lozano Palacios, who is of Spanish nationality and was an official with the Spanish Ministry of Social Affairs, worked in Brussels for a period of two years and nine months (from 1 May 1991 to 15 February 1994) as a national expert on detachment to the Commission. On 10 March 1994, following her success in an open competition, she was appointed as a probationary official at the Commission and posted to Brussels.

3. By decision of 12 April 1994, the Commission determined her place of recruitment and place of origin as Brussels, refusing to pay her the installation allowance, removal expenses or the daily subsistence allowance. It did, however, grant her the expatriation allowance. Mrs Lozano Palacios submitted a complaint, which was rejected by decision of 11 November 1994; however, her place of origin was subsequently determined as being Albacete, in Spain. On 8 December 1994 she was made an established official with effect from 16 November 1994.

4. By application lodged on 16 February 1995, Mrs Lozano Palacios contested the Commission's decision of 12 April 1994 before the Court of First Instance. She specifically sought annulment of the decision in so far as it refused to grant her the installation allowance, reimbursement of removal expenses and the daily subsistence allowance; she also claimed that the Court of First Instance should order the Commission to make the payments due.

5. By judgment of 12 December 1996, the Court of First Instance annulled the Commission's decision in so far as it refused to grant Mrs Lozano Palacios the installation allowance. Accordingly, the Commission was ordered to pay that allowance, together with default interest at the rate of 8% per annum. The remainder of the application was

* Original language: Italian.

1 — [1996] ECR-SC II-1535.

dismissed. The Commission is appealing, therefore, against the part of the judgment which upholds the pleas and arguments put forward by Mrs Lozano Palacios.

6. The Court of First Instance based its partial annulment of the Commission's decision on the wording and purpose of Article 5 of Annex VII to the Staff Regulations (hereinafter 'Annex VII'), which provides for the installation allowance.

7. Article 5(1) of Annex VII provides that 'an installation allowance equal to two months' basic salary in the case of an official who is entitled to the household allowance or to one month's basic salary in other cases shall be paid to an established official who qualifies for expatriation allowance or who furnishes evidence of having been obliged to change his place of residence in order to comply with Article 20 of the Staff Regulations'.

The second paragraph of Article 5(3) adds that 'the installation allowance shall be paid on production of documents establishing the fact that the official, together with his family if he is entitled to the household allowance, has settled at the place where he is employed'.

8. The Court of First Instance pointed out that Article 5(1) of Annex VII provides that, to be entitled to the installation allowance, an official must meet one of two conditions, that is to say, he must qualify for the expatriation allowance, or he must furnish evidence of having been obliged to change his place of residence in order to comply with Article 20 of the Staff Regulations.

The expatriation allowance referred to in Article 5 of Annex VII is granted, pursuant to Article 4(1)(a) thereof, to 'officials ... who are not and have never been nationals of the State in whose territory the place where they are employed is situated, and ... who during the five years ending six months before they entered the service did not habitually reside or carry on their main occupation within the European territory of that State'. For the purposes of that provision, 'circumstances arising from work done for another State or for an international organisation shall not be taken into account'.

According to the case-law of the Court of First Instance, the purpose of the expatriation allowance is to compensate for the inconvenience suffered by an official who is presumed not to have established, before his appointment, any lasting ties with the State in which he takes up his duties. [2] Pursuant to

2 — Case T-43/93 *Lo Giudice* v *Parliament* [1995] ECR-SC II-189, paragraph 36.

Article 4(1)(a) of Annex VII, therefore, the Commission granted Mrs Lozano Palacios the expatriation allowance.

9. In the view of the Court of First Instance, it is clear from the very wording of Article 5(1) of Annex VII that Mrs Lozano Palacios is also entitled to the installation allowance. Pursuant to that provision, any official who qualifies for the expatriation allowance is entitled *ipso iure* to the installation allowance, and need not demonstrate that he has been obliged to change his place of residence. Nor, according to the Court of First Instance, given the flat-rate nature of the installation allowance, need the official in question prove that he has had to meet actual expense. [3]

10. In the judgment under appeal, the Court of First Instance bases its annulment of the decision also on consideration of the purpose of the installation allowance. After observing that the installation allowance is granted to established officials, not to probationary officials — so that, in the majority of cases, officials in receipt of the installation allowance have already settled at their place of employment — the Court of First Instance states that the installation allowance is specifically designed to offset the inevitable expenses entailed for officials who, on duly becoming established, pass in consequence from a precarious status to a stable situation and, accordingly, must become integrated in their place of employment in a permanent and lasting manner for an indeterminate but substantial period of time. [4] It is logical to assume, therefore, that an official who is required to establish a stable residence must bear additional expense in order to set up a suitable home with a view to long-term occupation, whereas no such financial outlay was necessary while the length of his stay remained uncertain.

11. In its appeal to the Court of Justice, the Commission challenges the interpretation of Annex VII espoused by the Court of First Instance. In the Commission's view, the legislative context in which Article 5 of Annex VII was introduced suggests the need for a different approach. Article 71 of the Staff Regulations, which refers to Annex VII thereto, provides that an official is to be entitled to 'reimbursement of expenses incurred by him on taking up appointment'. Moreover, Section 3 of Annex VII — which contains the provisions governing the installation allowance — is headed 'Reimbursement of expenses'. According to the Commission, this wording confirms that, on a proper construction, Article 5 can only mean that the installation allowance may be granted solely where a financial outlay has in fact been made or, at the very least, is likely to be made. In the present case, since Mrs Lozano Palacios had been resident in Brussels for some time, there is no reason to suppose that she would have had to bear any expense as a consequence of settling in the place of employment.

3 — See, to that effect, Case T-42/89 *Yorck von Wartenburg* v *Parliament* [1990] ECR II-31, paragraphs 21 to 23.

4 — See Case 140/77 *Verhaaf* v *Commission* [1978] ECR 2117, paragraph 18.

In the Commission's submission, therefore, entitlement to the installation allowance should not be attributed automatically to officials who qualify for the expatriation allowance. Officials wishing to obtain the installation allowance must show that they have had to bear expense. That is the only interpretation of the Annex which is consistent with the rationale underlying this body of rules and with the principle of the sound management of public resources, and which does not run counter to the prohibition of unjust enrichment.

12. Before proceeding further, I must make it clear that the arguments put forward by the Commission to justify the partial annulment of the judgment under appeal are, to my mind, less than convincing. In my view, the Court of First Instance gave correct and cogent grounds for its decision, both by reference to the wording of the provision at issue, and to the rationale underlying this body of rules.

13. First of all, I cannot but point out that Article 5(1) of Annex VII is framed in extremely clear terms. It provides that the installation allowance *shall be paid* to an established official who qualifies for the expatriation allowance. Since the Commission has acknowledged that Mrs Lozano Palacios meets the requirements for payment of the expatriation allowance, it goes without saying that she must also be granted the installation allowance. Nor, it seems to me, can that conclusion be invalidated by Article 5(3), which merely lays down the rules governing the award of that allowance in practice. On the contrary, that provision confirms that the installation allowance is to be paid automatically, 'on production of documents establishing the fact that the official ... has settled at the place where he is employed'. The clarity of that wording leaves no room for doubt as to the scope of Article 5(1).

14. Secondly, I applaud the reasoning of the Court of First Instance to the effect that the passage from a status which was precarious — as was that of Mrs Lozano Palacios, by definition, in that she was a national expert on detachment to the Commission — to one which is stable and potentially definitive, following establishment as a Community official, must inevitably have given rise to additional expenses in connection with setting up a suitable home for a long-term stay. It is clear from the combined provisions of Articles 4 and 5 of Annex VII that the installation allowance is designed to cover those additional expenses even in cases where the official's settlement does not necessarily entail a change of residence. [5]

5 — The expatriation allowance — qualification for which gives rise *ipso iure* to the right to the installation allowance — is in fact also granted to officials who have lived for less than five years in the territory of the State in which they enter into service; and also to officials who have lived there for a longer period, but in the service of another State or an international organisation.

15. Lastly, it should be noted that the conclusion reached by the Court of First Instance appears consistent with the case-law of the Court of Justice in this area, according to which the purpose of the installation allowance is to enable the official to bear the expenses inevitably entailed by his integration in new surroundings for an indeterminate but substantial period of time. [6] With regard to the present case, it is obvious that it was only on establishment that Mrs Lozano Palacios was faced with the prospect of remaining in the place of employment for an indeterminate period of time.

16. In the light of the foregoing observations, I propose that the Court dismiss the appeal brought by the Commission against the judgment of the Court of First Instance of 12 December 1996 in Case T-33/95. I also suggest that the appellant be ordered to bear the costs, including those incurred by Mrs Lozano Palacios.

6 — See *Verhaaf* v *Commission* (cited in footnote 4 above), paragraph 18.