JUDGMENT OF THE COURT
18 March 1986 *

In Case 85/85

Commission of the European Communities, represented by Claire Durand, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Georges Kremlis, Jean Monnet Building, Kirchberg,

applicant,

v

Kingdom of Belgium, represented by its Minister for Foreign Relations, with Robert Hoebaer, Director at the Ministry for Foreign Relations, Foreign Trade and Cooperation with Developing Countries, acting as Agent, and an address for service in Luxembourg at the Belgian Embassy, 4 rue des Girondins, Résidence Champagne,

defendant,

APPLICATION for a declaration that the Kingdom of Belgium has failed to fulfil its obligations under Article 12 (b) of the Protocol on the Privileges and Immunities of the European Communities and Articles 5 and 7 of the EEC Treaty by failing to take the measures necessary to exempt from the tax on secondary residences persons who, by virtue of the said Protocol, are not subject to the requirement of being registered in the population registers and who have their principal residence in the municipality, by levying through its local authorities the said taxes from the above-mentioned persons and by failing to reimburse the sums levied, together with interest,

THE COURT

composed of: Lord Mackenzie Stuart, President, T. Koopmans, U. Everling and R. Joliet (Presidents of Chambers), G. Bosco, Y. Galmot and C. Kakouris, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: H. A. Rühl, Principal Administrator

* Language of the Case: French.

after hearing the Opinion of the Advocate General delivered at the sitting on 11 December 1985,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By application lodged at the Court Registry on 3 April 1985, the Commission of the European Communities brought an action pursuant to Article 169 of the EEC Treaty for a declaration that the Kingdom of Belgium had failed to fulfil its obligations under Article 12 (b) of the Protocol on the Privileges and Immunities of the European Communities (hereinafter referred to as 'the Protocol') and Articles 5 and 7 of the EEC Treaty (a) by not taking the necessary measures to ensure that the by-laws of certain municipalities exempt from the tax on secondary residences officials and other servants of the European Communities, and members of their families, who have their principal residence in the municipality concerned and who are not subject to the requirement of being registered in the population registers, (b) by levying through its local authorities the said taxes from the above-mentioned persons and (c) by not reimbursing the sums levied, together with interest.

2 It is apparent from the documents before the Court that in 1983 and 1984 five municipalities in the Brussels agglomeration adopted by-laws imposing a tax on secondary residences amounting to BFR 10 000 per year. The by-laws of four municipalities, Etterbeek, Uccle, Jette and Evere, are drafted in similar terms and impose the tax on 'persons who are not registered in the population registers' of the municipality and who 'are owners or tenants of accommodation used as a secondary residence or who use it without payment'. According to the by-laws of the municipality of Woluwé-Saint-Pierre 'the tax is payable by any person who has at his disposal a secondary residence' which is defined as 'any residence . . . in respect of which the occupier is not registered as a resident in the population registers'.

3 Under the relevant national legislation, the population registers include, in particular, (a) the population register itself, and (b) a special register of aliens. Those required to register in either of those registers must do so in the municipality in which their principal residence is situated. Registration in the population registers of a municipality is evidence that the principal residence of the person concerned is situated within that municipality. Since the adoption of the Royal Decree of 18 March 1981, a person who has a number of residences within Belgium must be registered in the municipality in which his principal residence is situated.

4 According to a circular issued by the Minister of the Interior on 19 March 1981, officials and other servants of the European Communities who are not Belgian nationals, and their spouses and dependent members of their families, are exempt from the registration requirement. The Belgian Minister for Foreign Relations issues them with a special residence permit valid for four years which bears the following stamp: 'Exempt from registration in the aliens register by virtue of the Law of 13 May 1966 concerning the Protocol on the Privileges and Immunities of the European Communities.' The residence permit contains a space for the insertion of the holder's address. The private addresses of permit holders are notified to the Protocol Department of the Belgian Ministry for Foreign Relations which automatically forwards them to the various municipalities concerned.

5 The Commission considered that the aforementioned by-laws placed the officials concerned in a difficult position since, as they were not registered in the population register, they were presumed to have a secondary residence in the municipality in which their principal residence was situated.

6 When the existence of those by-laws came to its notice, the Commission took the view that they were incompatible with the Protocol and, on several occasions from May 1984 onwards, made representations to the Belgian Government. The Commission suggested, in particular, that the application of those by-laws should be suspended until a comprehensive solution was found in conformity with the Protocol.

7 Those representations were unsuccessful and since, towards the end of 1984, certain Community officials received notices of assessment demanding payment of the tax, the Commission decided to initiate the procedure under Article 169 as a

matter of urgency. By letter of 12 February 1985 the Commission formally requested the Belgian Government to submit its observations within 15 days. Since that letter remained unanswered, the Commission notified its reasoned opinion to the Belgian Government on 8 March 1985 and again gave it 15 days within which to comply with the terms of that opinion. The Commission refused a request from the Belgian Government for more time. As its reasoned opinion failed to evoke a response, the Commission brought this action before the Court on 3 April 1985 against Belgium's alleged failure to fulfil its obligations. In order to expedite the procedure, the Commission did not lodge a reply.

Admissibility

8 The Belgian Government has raised two objections of inadmissibility against the Commission's application.

9 In its first objection, the Belgian Government contends that, by allowing altogether less than two months to elapse between the formal notification of the infringement (12 February 1985), the reasoned opinion (8 March 1985) and the submission of the application (3 April 1985), the Commission contravened the principle that every Member State is entitled to be allowed a reasonable period of time by the Commission. In its view, the Commission's conduct is contrary to both the spirit and the letter of Article 169 of the Treaty. The pre-litigation procedure provided for by Article 169 should not be a means of exerting pressure on national governments but a procedure designed to establish a dialogue between the parties and to enable the dispute to be resolved if possible. The Belgian Government maintains that it was impossible to comply with the reasoned opinion within such a short period, in view of the considerable autonomy that Belgian municipalities enjoy in this area.

10 The Commission maintains that the objection of inadmissibility is unfounded. In its view, the periods prescribed were reasonable and sufficient to enable Belgium to put into effect the measures needed to terminate the infringement. It contends that the Belgian Government is not being confronted with this problem for the first time since it is aware of the numerous representations that the Commission has been making for over a year. The municipal councils could have adopted appropriate decisions and the complaints lodged by the officials concerned against the notices of assessment demanding payment of the tax could have been adjudicated upon within the prescribed period. Moreover, such measures were envisaged in a letter of 24 January 1985 sent to the Commission by Belgium's Permanent Representative to the European Communities.

11 In that regard, it must be borne in mind that the purpose of the pre-litigation procedure provided for by Article 169 of the Treaty, which forms part of the general supervisory tasks entrusted to the Commission by the first indent of Article 155, is to give the Member State concerned an opportunity either to justify its position or, if it so wishes, to comply of its own accord with the requirements of the Treaty. If that attempt to reach a settlement proves unsuccessful, the Member State concerned is requested to comply with its obligations as set out in the reasoned opinion within the period prescribed therein.

12 With regard to the period prescribed by the letter giving formal notice of the infringement, the Belgian Government does not deny that it was aware of the Commission's point of view long before proceedings were brought against it for failing to fulfil its obligations. The first letter from the Commission's Director General for Personnel and Administration to Belgium's Permanent Representative to the Communities, calling for joint consideration of the problem and for suspension of the application of the contested tax by-laws, is dated 24 May 1984. That letter was followed by further representations in the same year. In his letter of 24 January 1985, Belgium's Permanent Representative refers to the steps contemplated by the Belgian Government in relation to the municipalities concerned. Discussions with the Commission continued until the dispatch of the letter giving formal notice of the infringement. In those circumstances it must be held that the Belgian Government was in a position to submit its observations even within the limited period of 15 days prescribed in the letter giving formal notice of the infringement.

13 With regard to the period prescribed in the reasoned opinion, it is clear that the Belgian Government was aware of the Commission's point of view long before the pre-litigation procedure was initiated. It must also be pointed out that the Belgian Government did not challenge the Commission's point of view in the course of any of the numerous exchanges of views which preceded the initiation of the pre-litigation procedure. Furthermore, the Belgian Government does not even maintain that it subsequently set in motion appropriate procedures in order to comply with the Commission's wishes or at least to suspend the application of the contested by-laws pending a definitive solution. In those specific circumstances, the Belgian Government's contention that the period prescribed in the reasoned opinion was too short is unjustified.

14 In its second objection, the Belgian Government maintains that the application is inadmissible on the ground that the problem raised does not concern either the interpretation or the application of Community law. In its view, Article 12 (b) of the Protocol has been complied with since the dispute is concerned exclusively with the definition of a secondary residence, which is a matter for Belgian law and for the Belgian courts. Hence it argues that the officials concerned must avail themselves of the means of redress available under national law in order to challenge the measures affecting them.

15 The second objection of inadmissibility must also be rejected. At this stage of the procedure, which is concerned with the question of admissibility, it is sufficient for the Commission to rely expressly on an infringement of the provisions of Community law in support of its application. The question whether Community law has actually been infringed falls to be examined in connection with the substance of the case.

Substance

16 The Commission contends that, by adopting as the criterion for determining whether a residence is a secondary residence the fact that the occupier is not registered in the population registers of the municipality, the municipal by-laws in question have the effect of requiring Community officials either to pay the tax or to register in the population registers of the municipality in order to rebut the presumption that they have a secondary residence there. Accordingly, it maintains that those by-laws are incompatible with Article 12 (b) of the Protocol because of the tax implications inherent in their application in so far as they did not provide for the exemption of persons not subject to the registration requirement. The Commission emphasizes that it is impossible for Community officials to apply for registration in the population registers since they may not waive the privilege provided for by Article 12 (b) which, according to Article 18 of the Protocol, is conferred upon them in the interests of the Communities. It considers that, by adopting and applying the by-laws at issue, the Belgian Government has failed to fulfil its obligations under Article 5 of the EEC Treaty and Article 12 (b) of the Protocol.

17 Furthermore, the Commission considers that since Community officials of Belgian nationality are registered in the population registers and are therefore exempt from the tax, it is only officials who are nationals of other Member States who are subject to the tax; that constitutes discrimination on grounds of nationality, which is prohibited by Article 7 of the Treaty. Those officials are not even accorded the

same treatment as that given to workers who are nationals of other Member States and are established in Belgium. In that regard, the Commission refers to the judgment of the Court of 13 July 1983 in Case 152/82 (*Forcheri* [1983] ECR 2323).

18 The Belgian Government considers that a distinction must be drawn between the two categories of municipal by-laws in question. Those in the first category, which lay down two conditions for the imposition of the tax, namely not being registered in the population register and having the status of owner or tenant of a secondary residence, do not adversely affect Community officials since such officials can prove that, although they are not registered, their residence in the municipality is their principal residence. With regard to the second category, examples of which are the by-laws of the municipality of Woluwé-Saint-Pierre where the sole criterion applied is whether the person is registered in the register, the Community officials concerned can avoid the application of those by-laws by availing themselves of national means of redress. In that regard, the Belgian Government relies on a judgment of the competent regional administrative tribunal, which was given on a complaint by an official and which declared unlawful the exclusive criterion of non-registration.

19 Nor, according to the Belgian Government, is there any discrimination on grounds of nationality, within the meaning of Article 7 of the Treaty. The municipal by-laws concerned apply without distinction to all secondary residences and the Commission does not challenge the municipalities' right to impose a tax on Community officials' secondary residences.

20 During the oral procedure, moreover, the Belgian Government explained that a circular published in the *Moniteur Belge* of 17 October 1985 was sent by the supervisory authority to the municipalities requesting them to amend their by-laws so as to ensure that officials exempt from the registration requirement were treated in the same way as registered persons. The municipalities were therefore informed of the Belgian Government's official interpretation of the concept of secondary residence and, consequently, were aware that any proceedings brought against tax demands under the by-laws in question would lead to the annulment of those demands. In its view, that circular was the only measure which the executive could adopt at that stage, since a law would have to be enacted so that officials who are exempt from the requirement of registration would no longer be presumed to have a secondary residence in the municipality, when their principal residence is situated there.

21 It is necessary to determine in the first place what obligations Article 12 (b) of the Protocol imposes on the Member States. It provides that: 'In the territory of each Member State and whatever their nationality, officials and other servants of the Communities shall: (a) . . . , (b) together with their spouses and dependent members of their families, not be subject to . . . formalities for the registration of aliens.' It follows from that provision that the officials and other servants of the Community are exempt from any requirement to register in the population registers in the Member States in which the places of employment of the Community institutions are situated. That interpretation is supported by Article 16 of the Protocol which provides that the names and addresses of officials and other servants are to be communicated periodically to the governments of the Member States. That is how the authorities of the Member States in which the places of employment of the institutions are situated are informed of the addresses of officials and other servants of the Communities.

22 According to Article 5 of the EEC Treaty, Member States are to take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty, to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty. It follows from that obligation that the Member States must refrain from adopting any measure which is incompatible with the provisions of Community law and, consequently, any measure which, contrary to Article 12 (b) of the Protocol, would have the effect of compelling officials and other servants of the Community, whether directly or indirectly, to apply for registration in the population registers. An indirect constraint of that kind is operative in particular where a Member State attaches unfavourable consequences to non-registration by officials and other servants of the Communities.

23 In this case, the two categories of municipal by-laws in question had the effect of subjecting officials and other servants of the Communities residing within the territory of the municipalities concerned to an indirect constraint to register in the population registers. Those by-laws are therefore contrary to Article 5 of the Treaty in conjunction with Article 12 (b) of the Protocol.

24 That finding is not altered by the fact that the officials and other servants affected by the municipal by-laws may avail themselves, in order to challenge their tax demands, of the judicial means of redress available to taxpayers under Belgian law. As the Court held in its judgment of 17 February 1970 in Case 31/69 (*Commission*

v *Italy* [1970] ECR 25), the existence of remedies available through the national courts cannot in any way prejudice the making of the application referred to in Article 169 since the two procedures have different objectives and effects.

25 There remains to be considered the Commission's complaint that the municipal by-laws in question lead to discrimination on grounds of nationality and are therefore contrary to Article 7 of the Treaty.

26 It must be pointed out that such discrimination does not necessarily follow from the findings already made by the Court. A direct or indirect obligation to register in the population registers can apply only to officials and other servants who are not so registered for whatever reason. The Commission has failed to establish that the distinction between officials who are registered and those who are not constitutes discrimination on grounds of nationality. Accordingly, the complaint based on Article 7 of the Treaty must be rejected.

27 It must be held, in the light of the foregoing considerations, that by imposing, through the tax by-laws of the municipalities of Etterbeek, Uccle, Jette, Evere and Woluwé-Saint-Pierre, an indirect constraint to register in the population registers on officials and other servants of the European Communities, together with their spouses and dependent members of their families, who are exempt from the requirement of registration in those registers and who have their principal residence in those municipalities, the Kingdom of Belgium has failed to fulfil its obligations under Article 5 of the EEC Treaty and Article 12 (b) of the Protocol.

28 With regard to the Commission's application for a declaration that the Kingdom of Belgium has also failed to fulfil its obligations (a) by levying through its local authorities taxes on secondary residences from certain officials who do not have a secondary residence in the municipality and (b) by not reimbursing the sums levied, together with interest, it is sufficient to hold that those allegations relate to the implementation of the contested by-laws and cannot, therefore, be regarded as separate complaints. Accordingly, they do not call for a separate decision.

Costs

29 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. As the Kingdom of Belgium has been unsuccessful in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Declares that by imposing, through the tax by-laws of the municipalities of Etterbeek, Uccle, Jette, Evere and Woluwé-Saint-Pierre, an indirect constraint to register in the population registers on officials and other servants of the European Communities, together with their spouses and dependent members of their families, who are exempt from the requirement of registration in those registers and who have their principal residence in those municipalities, the Kingdom of Belgium has failed to fulfil its obligations under Article 5 of the EEC Treaty and Article 12 (b) of the Protocol on the Privileges and Immunities of the European Communities.

(2) Order the Kingdom of Belgium to pay the costs.

Mackenzie Stuart Koopmans Everling

Joliet Bosco Galmot Kakouris

Delivered in open court in Luxembourg on 18 March 1986.

P. Heim
Registrar

A. J. Mackenzie Stuart
President