JUDGMENT OF THE COURT (SECOND CHAMBER)
7 JUNE 1972[1]

# Monique Chollet, née Bauduin, v Commission of the European Communities[2]

Case 32/71

## Summary

*Officials — Expatriation allowance — Marriage of the recipient — Retention of the allowance — Conditions — Status of 'head of household' — Different treatment of male and female officials — Not permissible*

*(Staff Regulations of Officials of the European Communities, Annex VII)*

The withdrawal of the expatriation allowance following the marriage of the recipient, which might be justified in cases in which this change in the family situation is such as to bring to an end the state of 'expatriation', must however be dependent on uniform criteria, irrespective of sex.

Consequently, by rendering the retention of the allowance subject to the acquisition of the status of 'head of household'—as it is defined in Article 1(3) of Annex VII—the Staff Regulations have created an arbitrary difference of treatment between officials.

In Case 32/71

MONIQUE CHOLLET, NÉE BAUDUIN, an official of the Commission of the European Communities, residing in Overijse (Belgium), represented by Marcel Grégoire, Advocate at the cour d'appel, Brussels, with an address for service in Luxembourg at the Chambers of Tony Biever, 83 boulevard Grande-Duchesse-Charlotte,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Pierre Lamoureux, acting as Agent, with an address for service in Luxembourg at the office of its Legal Adviser, Emile Reuter, 4 boulevard Royal,

defendant,

Application for the annulment of two decisions of the Commission depriving the applicant of the benefit of an expatriation allowance,

1 — Language of the Case: French.
2 — CMLR.

THE COURT (Second Chamber),

composed of: H. Kutscher, President of Chamber, A. Trabucchi and P. Pescatore (Rapporteur), Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

## JUDGMENT

## Issues of fact and of law

### I — Facts

Miss Monique Bauduin, who is of French nationality, entered the service of the Commission of the European Communities in Brussels on 2 July 1962.

On her appointment she was awarded an expatriation allowance as prescribed by Article 69 of the Staff Regulations, which, under Article 4(1)(a) of Annex VII to the said Staff Regulations, is granted in particular to officials

— who are not and have never been nationals of the State in whose European 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.

On 31 October 1970 Miss Bauduin married José Abel Chollet, a Belgian national, who is not an official of the Communities.
The monthly salary slip sent to Mrs Chollet in February 1971 indicated that she would have to repay the sum of Bfrs 9240 received as expatriation allowance.

On 2 March 1971, in accordance with Article 90 of the Staff Regulations, Mrs Chollet submitted to the President of the Commission, through official channels, a complaint against the withdrawal of her expatriation allowance.
By memorandum of 12 March 1971 an official of the Salary, Pensions and Allowances Branch of the Financial Administration Directorate at the Directorate-General for Personnel and Administration of the Commission informed Mrs Chollet that following the withdrawal of the expatriation allowance recalculation of her salary for the period from 1 November 1970 to 31 January 1971 showed that she had been overpaid a matter of Bfrs 9240 and that this sum would be deducted by monthly instalments from her salary for the months of March to July 1971.
Since no reply was sent to her complaint of 2 March 1971 Mrs Chollet instituted these proceedings before the Court.

### II — Procedure

The application instituting the proceedings was lodged at the Registry of the Court on 18 June 1971.
The written procedure followed the normal course.
By Order of 24 November 1971, the Court, varying its Decision of 7 October 1970 relating to the allocation of cases brought by officials of the European Communities

(OJ C 128, p. 13), decided to assign this case to the Second Chamber.
Having heard the report of the Judge-Rapporteur and the views of the Advocate-General, the Court (Second Chamber) decided to open the oral procedure without any preparatory inquiry.
By Order of 3 December 1971, the Court (Second Chamber) joined the present Case to Case 20/71 (*Luisa Sabbatini* (née *Bertoni*) v *European Parliament*) for the purposes of the oral procedure.
By Order of 13 January 1972 the President of the Court designated Mr Karl Roemer as Advocate-General in Joined Cases 20/71 and 32/71, in place of Mr A. Dutheillet de Lamothe, deceased.
The parties presented oral argument at the hearing on 20 January 1972.
The Advocate-General delivered his opinion at the hearing on 24 February 1972.

## III — Conclusions of the parties

The *applicant*, having withdrawn one of the heads of her conclusions, claims that the Court should:

(a) annul the decision of the Commission depriving her of the expatriation allowance as from 1 November 1970;

(b) annul the implied decision of the Commission rejecting the complaint which she had made on 2 March 1971 against the first decision;

(c) rule that notwithstanding her marriage she has and has always had the right to the expatriation allowance by virtue of Article 4 of Annex VII to the Staff Regulations;

(d) order the defendant to bear the costs.

The *defendant* contends that the Court should:

(a) dismiss the application in its totality as unfounded;

(b) order the applicant to bear the costs.

## IV — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

### A — *Illegality of Article 4(3) of Annex VII to the Staff Regulations*

The *applicant* points out that the contested decisions are apparently based on Article 4(3) of Annex VII to the Staff Regulations, which reads as follows:

> An official who marries a person who at the date of marriage does not qualify for the allowance shall forfeit the right to expatriation allowance unless that official thereby becomes a head of household.

That provision is illegal because it is contrary, first, to the general principle of law prohibiting any discrimination based on sex and providing for equal pay for men and women, and, secondly, to Article 119 of the EEC Treaty which sanctions the principle of equal pay for male and female workers.

(a) The Court of Justice has the special task of ensuring the observance of the general principles of law, even though these are not necessarily embodied in any written text. General legal principles can be relied upon against measures adopted by the Community institutions. They derive not solely from the written or unwritten law of the Community but also from international law and from references to principles enshrined in the legal systems of the Member States.
There can be no doubting the existence in Community law of the general principle of law sanctioning the equality of the sexes as regards the remuneration, in the widest sense, of workers.

(b) This principle is further sanctioned by several written texts, such as Convention No 100 (1951) of the International Labour Organization (ILO), the Resolution of the Conference of Member States of the Community of 30 December 1961 and Article

119 of the EEC Treaty.
In particular, Article 119 proclaims the principle of equal pay for male and female workers, the concept of pay meaning not only 'the ordinary ... wage or salary' but also 'any other consideration ... which the worker receives, directly or indirectly, in respect of his employment from his employer'. It is incontestable that the expatriation allowance constitutes a part of the worker's pay, within the meaning of this provision.

(c) By providing that 'An official who marries a person who at the date of marriage does not qualify for the allowance shall forfeit the right to expatriation allowance unless that official thereby becomes a head of household', Article 4(3) of Annex VII to the Staff Regulations creates a flagrant inequality between male and female officials placed in the same position. The link between the retention of the right to the allowance and the status of head of household leads to different results according to the sex of the official concerned; in fact, a married male official is automatically considered by the Staff Regulations to be a head of household (Article 1(3)(a) of Annex VII), whereas a married female official is so regarded only on a very exceptional basis. This link is entirely artificial, since the expatriation allowance is justified by changes in the living conditions of officials and is intended to compensate for the additional expenditure which officials incur in maintaining family, financial and other ties with their country of origin —which do not come to an end upon marriage. The status of head of household —a concept which is in fact no longer recognized by the civil law of four of the Member States of the Communities—is irrelevant as regards the material, family, psychological and emotional consequences of expatriation. Article 4(3) of Annex VII to the Staff Regulations therefore renders the grant of the expatriation allowance subject to a criterion which is extraneous to that allowance and leads to flagrant inequality between male and female officials. The Commission, in reply to a parliamentary question, has itself recognized that the link established between the right to the expatriation allowance and the status of head of household leads in fact, as regards the grant of that allowance, to different results according to sex. According to the principle of equality, a difference in treatment is legally admissible only where there is a well-founded relationship between the criteria adopted and the difference between the rules; that is not the case here.
Since the Community institutions have the task of eradicating any discrimination as to pay which still exists between male and female workers at the level of domestic legislative systems, those same institutions cannot be allowed to apply to their own officials a legal provision which clearly sanctions the same discrimination.
The *defendant* observes that the submission of illegality advanced by the applicant challenges the legality not only of Article 4(3) of Annex VII to the Staff Regulations but also of several other provisions of the Staff Regulations which also render the grant or the amount of an allowance conditional upon the status of head of household (installation and reinstallation allowances; travel expenses to the place of origin).
This submission is however unfounded.

(a) The applicant has established neither the existence nor, still less, the direct applicability and generality of the 'superior principle of law' prohibiting any discrimination based on sex which it claims to find in the legal systems of Member States and in Community law.
On the contrary, the manner in which the laws of the Member States govern, in many spheres, the respective legal position of men and women is far from reflecting a strict and rigorous equality; in many respects, there is a difference between the treatment under the law of men and women. This disparity, as displayed in the rules of substantive law, is the expression of a certain state of the economic, social and moral structures of our society and of a certain conception of the family and of marriage; these rules must be accepted as such in the context of substantive law.
In this case, the legality of Article 4(3) of Annex VII to the Staff Regulations can be judged only in the light of Article 119 of the Treaty, in other words, in relation to

the remuneration of men and women in general, without regard to particular factors which alter the legal positions to be taken into account and, in particular, the legal status of a married person.

(b) Article 4(3) of Annex VII to the Staff Regulations does not lay down different conditions according to sex for the acquisition or retention of the right to the expatriation allowance. Male and female officials have exactly the same right to the allowance. The contested provision subjects the retention of this right by the newly married official—where the spouse (whether male or female without distinction) does not satisfy the conditions for the grant of the allowance—to the sole condition of acquisition on marriage of the status of head of household.
Female officials may, just like male officials, have the status of head of household; it is not a masculinè attribute.
The criticisms of the applicant are directed not so much against Article 4(3) of Annex VII as against Article 1(3) and against the fact that in marriage the female official acquires less often than her husband the status of head of household. The problem raised is, therefore, less that of the expatriation allowance than of the legal status of the married woman. As for this point, the Staff Regulations do no more than reflect, without creating it, a differentiation between the legal position of the husband and that of his wife which derives from national laws governing the legal position and status of married women.
It must, in this connexion, be remembered that discrimination is a difference in treatment which is contrary to law and is effected with regard to subjects placed in a similar position and that, in most of the national legislative systems, a married woman and a married man are not in all cases in exactly similar situations.
Furthermore, it was with good reason that the authors of the Staff Regulations considered that the establishment by the official through marriage of a new household whose head does not satisfy the requirements for the grant of the expatriation allowance, removes all entitlement to that allowance, and that, in consequence, they stipulated that the retention of the allowance is dependent on the acquisition of the status of head of household. By marriage, the spouse who is not the head of household is, in a certain way, connected to the country to which the head of household is connected. Inasmuch as this connexion precludes the retention or the grant of the right to the expatriation allowance it is logical to conclude that the spouse who does not have the status of head of household cannot, in this case, claim the benefit of that allowance.
The link between the retention of the right to the allowance and the acquisition of the status of head of household is therefore based on reality. In the present state of economics and sociology, the institution of the family and that of marriage are, save for rare exceptions, closely linked to the head of household, whose fate and movements, in particular in relation to place of work and residence, are normally followed by the family.
Consequently, the link established between the retention of the expatriation allowance and the status of head of household is neither discriminatory nor artificial.

(c) It must moreover be borne in mind that the grant of the expatriation allowance depends primarily on nationality. The argument of the applicant, which is bolstered by the fact that the Commission has admitted that the link established by the Staff Regulations between the right to the expatriation allowance and the status of head of household leads to different results according to the sex of the official concerned, implies necessarily that Article 4 of Annex VII is illegal in that that provision links the right to the expatriation allowance to nationality and leads also in this respect to different results according to sex, since certain national laws cause the wife to acquire the nationality of the husband, but not *vice versa*. The criterion of nationality for the grant of the expatriation allowance is perfectly reasonable and justified.

B — *Infringement of Article 4(3) of Annex VII to the Staff Regulations*

The *applicant*, as an alternative submission,

complains that the contested decisions misinterpreted Article 4(3) of Annex VII to the Staff Regulations and consequently wrongly applied it. That provision relates only to the case of marriage of a Community official to another Community official who does not, at the date of marriage, satisfy the requirements for entitlement to the expatriation allowance.

(a) The question whether, at a given date, a person satisfies the requirements for entitlement to the expatriation allowance can relate, by definition, only to officials of the Community institutions. The terminology of Article 4(3) of Annex VII is by no means decisive. The first requirement for the grant of the allowance is that the person concerned should be in the service of the Communities; the other conditions are unascertainable with regard to a person who is not in the service of the Communities unless the provisions are to be distorted and interpreted in an arbitrary manner.

(b) In Article 4(2) and (3) of Annex VII, the Staff Regulations intended to examine and regulate two different cases: paragraph (2) relates to the marriage of two Community officials who are both entitled to the expatriation allowance, whereas paragraph (3) relates to the marriage of two officials, one of whom is not entitled to that allowance.

(c) Since Article 4(3) is a provision which derogates from a general rule it must be interpreted restrictively; such an interpretation, furthermore, would limit the consequences of this provision with respect to female officials, which are, to say the least, extremely unjust.

The *defendant* asserts that the applicant's argument has only the appearance of logic.

(a) The very wording of Article 4(2) and (3) of Annex VII to the Staff Regulations is at variance with the parallelism which the applicant claims to discern between these two provisions: first, by its use of the term 'person', which is unusual in the Staff Regulations, Article 4(3) indicates that it does not relate solely to officials or servants of the Communities but also to all other persons: secondly, the reference to the date of marriage would have no purpose if it applied solely to officials.
In addition, there is nothing to prevent an examination as to whether a person who is not in the service of the Communities but who, let it be supposed, enters the service of the Communities at the date of marriage, satisfies the requirements (as to nationality, residence, occupation or performance of duties) laid down by Article 4(1) of Annex VII for the grant of the expatriation allowance.

(b) The basic purpose of the expatriation allowance dictated the solution set out in Article 4(3) of Annex VII; there can therefore be no question of unjust consequences deriving from the application of this provision.

(c) The applicant's argument would itself create real discrimination; it would have the effect of depriving a female official of her expatriation allowance by reason of her marriage to an official who is not himself entitled to the allowance, but of entitling her to retain it if she marries a person who is not in the service of the Communities.

## Grounds of judgment

1 The application seeks the annulment of the decisions by which the administration of the Commission of the European Communities withdrew, with effect from 1 November 1970, the expatriation allowance which the applicant had previously received.

2 In support of her application, the applicant has advanced two submissions, based on the illegality of Article 4(3) of Annex VII to the Staff Regulations and, alternatively, on an infringement of that provision.

3 As her principal submission the applicant claims that Article 4(3) of Annex VII to the Staff Regulations, on which the contested decisions appear to be founded, is illegal because it is contrary to a general principle of law prohibiting any discrimination on grounds of sex and, more particularly, because it is contrary to Article 119 of the EEC Treaty relating to the principle of equal pay for male and female workers.

4 Under Article 4(3) of Annex VII an official 'who marries a person who at the date of marriage does not qualify for the allowance shall forfeit the right to expatriation allowance unless that official thereby becomes a head of household'.

5 Although this provision does not of itself create any difference of treatment as between the sexes, it must however be examined in conjunction with Article 1(3) of the same Annex, which provides that the term 'head of household' normally refers to a married male official, whereas a married female official is considered to be head of household only in exceptional circumstances, in particular in cases of invalidity or serious illness of the husband.

6 It is thus clear that the provision the validity of which is contested does in fact create a difference of treatment as between male and female officials inasmuch as it renders the retention of the expatriation allowance conditional upon the acquisition of the status of head of household within the meaning of the Staff Regulations.

7 It is therefore necessary to examine whether this difference of treatment is such as to affect the validity of the contested provision of the Staff Regulations.

8 The purpose of the expatriation allowance is to compensate for the special expenses and disadvantages resulting from entry into the service of the Communities for those officials who — in the conditions more fully set out in Article 4(1) of Annex VII — are thereby obliged to change their place of residence.

9 Article 4, taken as a whole, indicates that the expatriation allowance is paid to married officials not only in consideration of the personal situation of the recipient, but also of the family situation created by the marriage.

10 Thus Article 4(3) takes into account the new family situation entered upon by the official when he or she marries a person who does not satisfy the conditions for the grant of the expatriation allowance.

11 The withdrawal of the allowance following the marriage of the recipient might be justified in cases in which this change in the family situation is such as to bring to an end the state of 'expatriation' which is the justification for the benefit in question.

12 In this respect, the Staff Regulations cannot however treat officials differently according to whether they are male or female, since the termination of the status of expatriate must be dependent for both male and female officials on uniform criteria, irrespective of sex.

13 Consequently, by rendering the retention of the allowance subject to the acquisition of the status of 'head of household' — as it is defined in Article 1(3) — the Staff Regulations have created an arbitrary difference of treatment between officials.

14 Consequently, the decisions taken with regard to the applicant are devoid of any legal basis and must be annulled in pursuance of Article 184 of the EEC Treaty.

15 In these circumstances, there is no need to give a decision on the alternative submission.

## Costs

16 Under the first subparagraph of Article 69(2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

17 Since the defendant has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 119 and 184;
Having regard to the Staff Regulations of Officials, especially Annex VII;
Having regard to the Protocols on the Statute of the Court of Justice;
Having regard to the Rules of Procedure,

THE COURT (Second Chamber)

hereby:

1. **Annuls the decisions by which the Commission of the European Communities withdrew the applicant's expatriation allowance;**

2. **Orders the Commission to bear the costs of the proceedings.**

Kutscher Trabucchi Pescatore

Delivered in open court in Luxembourg on 7 June 1972.

A. Van Houtte H. Kutscher

Registrar President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER

(See Case 20/71, p. 352)