JUDGMENT OF THE COURT (FIRST CHAMBER)
13 OCTOBER 1977 [1]

Gerarda Emer (née van den Branden)
v Commission of the European Communities

Case 14/77

1. *Officials — Remuneration — Family allowances — Overlapping — Application of Article 67 (2) of the Staff Regulations — Conditions*

2. *Officials — Remuneration — Monthly salary — Calculation — Errors and rectifications — Interest on account of delay — Not due*

1. The provision against overlapping benefits contained in Article 67 (2) of the Staff Regulations of Officials applies only to regular allowances which virtually constitute a part of the remuneration and are intended to meet the requirements of employed persons but not to an *ex gratia* payment granted on extraordinary grounds. Although the procedures for paying a family holiday allowance are substantially the same as those for paying the regular family allowance this *ex gratia* payment cannot on that ground be considered as a mere increase in the regular family allowance.
2. Errors and current rectifications in the calculation of salaries do not provide a basis for claiming interest on account of delay. Unless there are exceptional circumstances this also applies to rectifications effected as a result of a complaint or an application to the Court.

In Case 14/77

GERARDA EMER (NÉE VAN DEN BRANDEN), an official of the Commission of the European Communities, represented by Marcel Grégoire and Edmond Lebrun, of the Brussels Bar, 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 Giorgio Pincherle, assisted by Alain van Solinge, a member of its Legal

1 — Language of the Case: French.

Department, with an address for service in Luxembourg at the office of Mario Cervino, Legal Adviser to the Commission, Jean Monnet Building, Kirchberg,

defendant,

Application for the annulment of the decision to the effect that the family holiday allowance and the special family allowance paid in Belgium were to be deducted from the dependent child allowance for which provision is made in the Staff Regulations and in pursuance of which deductions were in fact made from the applicant's salary for June, July and August 1976, and for the annulment of the decision rejecting the complaint submitted by the applicant in this respect,

THE COURT (First Chamber)

composed of: G. Bosco, President of Chamber, A. M. Donner and A. O'Keeffe, Judges,

Advocate-General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and issues

The facts of the case, the course of the procedure, the conclusions and submissions and arguments of the parties may be summarized as follows:

I — Facts and procedure

The applicant is an official in the Legal Department of the Commission of the European Communities.

By a note of 14 May 1976 sent by the Salaries, Pensions, Missions and Miscellaneous Allowances Division, the applicant was notified that a sum of BF 11 040 was payable by her 'in settlement of family allowances overpaid betweeen 1 January 1975 and 30 April 1976'. This note stated that pursuant to Article 85 of the Staff Regulations the said sum would be recovered from her salary for June, July and August 1976.

The sum recovered comprised an amount which, according to the Commission, was to be reimbursed on account of the Belgian family holiday allowance and special family allowance paid in April and August 1975 to the applicant's husband. The Commission considers that those Belgian allowances were to be deducted from the dependent child allowance paid by the Community pursuant to Article 67 (2) of the Staff Regulations which provides:

'Officials in receipt of family allowances specified in this article shall declare such allowances of like nature paid from other sources; such latter allowances shall be deducted from those paid under Articles 1, 2 and 3 of Annex VII'.

In August 1976 the Commission also retained BF 3 276 from the applicant's salary, BF 2 558 constituting the amount repayable as the family holiday allowance received by her husband in April 1976. The applicant submitted a complaint within the meaning of Article 90 (2) of the Staff Regulations, which was recorded by the Commission on 9 July 1976, against the decision to deduct from the dependent child allowance provided for by the Staff Regulations the family holiday allowance and the special family allowance paid in Belgium and against the decision to recover from her the repayable amounts received as allowances by her husband in April and August 1975. A further complaint relating to the deduction from her salary for August 1976 was submitted by a document registered on 8 November 1976.

The Commission failed to reply within the prescribed period and the applicant therefore submitted the present application which was recorded at the Court Registry on 26 January 1977.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court (First Chamber) decided to open the oral procedure without a preparatory inquiry.

II — Conclusions of the parties

The *applicant* claims that the Court should:

1. Primarily:

Rule that the family holiday allowance and the special family allowance paid in Belgium are not of like nature, within the meaning of and for the purposes of the application of Article 67 (2) of the Staff Regulations of Officials, to the dependent child allowance provided for by Article 67 (1) (b) of the Staff Regulations;

Rule that at least the deduction of the family holiday allowance and the special family allowance paid in Belgium from the dependent child allowance under the Staff Regulations could not, or could no longer, be lawfully undertaken in the circumstances of the case;

Consequently annul:

(a) The decision whereby it was decided that the family holiday allowance and the special family allowance paid in Belgium were to be deducted from the dependent child allowance under the Staff Regulations;

(b) The decision of the defendant whereby it was decided to recover from the applicant the amounts of BF 4 743 and BF 2 558, as allowances of like nature paid from other sources in 1975 and in April 1976 and which was carried out by corresponding deductions from the remuneration of the applicant for June, July and August 1976;

(c) The decision rejecting the complaint lodged by the applicant on 9 July 1976 which was supplemented by a document lodged on 8 November 1976 and registered under No 4474;

Order the defendant to pay to the applicant the amounts of BF 4 743 and BF 2 558, which sums the applicant reserves the right to amend in the course of the proceedings, together with interest

on account of delay at the rate of 8 % per annum calculated from 1 August 1976 until the date of actual payment;

Order the defendant to bear the costs.

2. Alternatively:

Rule that there are no grounds for the recovery from the applicant of the excess amount paid in 1975 of BF 4 743;

Consequently annul:

(a) The decision of the defendant whereby it was decided to recover from the applicant the amount of BF 4 743 as an allowance of like nature paid from other sources in 1975 and in May 1976 and which was in fact carried out by corresponding deductions from the remuneration of the applicant for June, July and August 1976;

(b) The implied decision rejecting the complaint lodged by the applicant on 9 July 1976 and registered under No 4474;

Order the defendant to pay to the applicant the sum of BF 4 743 which sum the applicant reserves the right to amend in the course of the proceedings, together with interest on account of delay at the rate of 8 % per annum calculated from 1 August 1976 until the date of actual payment;

Order the defendant to bear the costs.

The *defendant* contends that the Court should:

— Dismiss the application as unfounded;

— Order the applicant to bear the costs.

III — Submissions and arguments of the parties

Facts

The defendant states that the applicant has regularly declared to the administration the amounts of the family allowances, which she received in Belgium in respect of her husband's employment, with the occasional exception of the special family allowance.

It must be emphasized that in *Informations Administratives* No 63 of 13 October 1975 the Commission reminded officials that the provisions of Article 67 (2) of the Staff Regulations must be observed and that the heads of administration of the institutions had on 5 February 1976 decided that the provisions against overlapping benefits laid down in Article 67 (2) of the Staff Regulations were applicable to the Belgian family allowances in question.

The *applicant* considers that although a declaration was made for all purposes with regard to the family holiday allowance nevertheless the allowance was not deducted from the Community dependent child allowance, which shows that there is no causal connexion between the failure to declare the special family allowance and the failure to deduct it.

With regard to the *Informations Administratives* the applicant observes that it is clear from the general nature of that reminder and from the fact that no reference was made to the allowances in dispute that at the time the matter was governed by the decision not to deduct the allowances. The fact that it was necessary to hold a meeting of the heads of administration of the institutions to decide to apply the provisions against overlapping benefits to the allowances in question provides a further confirmation that previously the decision was that those provisions were not applicable.

Finally, the said decision of the heads of administration which, contrary to the second paragraph of Article 110 of the Staff Regulations, was not brought to the attention of the staff, does not stipulate that the decision should be applied with

retroactive effect. At the very least it can thus have effect only with regard to the future.

The *defendant* observes on the latter point that, unlike decisions for which provision is made in the second paragraph of Article 110 of the Staff Regulations, decisions taken during meetings of the heads of administration do not require to be published but that the only requirement is that 'the administrative departments of the institutions shall consult each other regularly ...'.

Law

The *applicant* relies upon the following submissions:

- Infringement of Article 67 of the Staff Regulations, in particular of paragraph (1) (b) and of paragraph (2) thereof; infringement of Article 2 of Annex VII to the Staff Regulations; *ultra vires* acts.
- Alternatively: infringement of the principle that vested rights must be respected, of the principle of equality of treatment and of proper administration and, as a further alternative, infringement of Article 85 of the Staff Regulations.

1. First submission

The applicant states that the consolidated Belgian laws relating to family allowances for employed persons make provision for four types of benefits: family allowances, child-birth allowances, family holiday allowances and the socio-educational allowance (Chapter V, Section I, Section 4 bis, ter and quater). With regard to the family holiday allowance Article 73 quater of the said laws, as modified by Article 5 of the Law of 25 July 1962, provides:

'The compensation funds for family allowances and the public authorities and institutions referred to in Article 18 shall grant a family holiday allowance. This allowance shall be paid each year during May in respect of children for whom family allowances were payable (for the month of April in the year for which the allowance is granted).

The conditions of payment of the family holiday allowance shall be the same as those laid down for the payment of family allowances.

His Majesty shall determine the amount of the family holiday allowance'.

Article 1 of the Royal Decree of 1 February 1968 on family holiday allowances, as amended by Article 6 of the Royal Decree of 5 October 1973, provides that the amount of the family holiday allowance shall be equal to the amount of the family allowance.

Furthermore for a given year the Management Committee of the Office National d'Allocations Familiales pour Travailleurs Salariés (The National Office for Family Allowances for Employed Persons, hereinafter referred to as 'the ONAFTS') decides to grant special family allowances paid from the reserves of the ONAFTS. In 1975 an allowance of the latter type was granted of an amount roughly equal to the family allowance.

Until 1976 the Commission had never deducted from the dependent child allowance, paid pursuant to Article 67 (1) (b) of the Staff Regulations, the family holiday allowance and the special family allowance paid in Belgium since it rightly considered that the said Belgian allowances and the dependent child allowance were not of like nature.

In fact the dependent child allowance is an ordinary family allowance which is not intended to affect specific expenses incurred in respect of children. The Staff Regulations themselves distinguish in principle between allowances not intended for a special purpose (dependent child allowance) and allowances intended for a special purpose (education

allowance). This means that family allowances intended for a special purpose which are paid from other sources and the dependent child allowance under the Staff Regulations cannot be of like nature. This also applies to the family holiday allowance and the special family allowance paid in Belgium.

The special family allowance is not provided for by law (except in the case of civil servants), is not general (it is not paid to self-employed persons) and is paid intermittently: future rights to the special family allowance cannot be established. Furthermore it constitutes to some degree an *ex gratia* payment. The Management Committee of the ONAFTS decides after consulting the two sides of industry to use its reserves for granting a special family allowance.

Accordingly the Commission, by deducting the two abovementioned Belgian allowances from the allowance under the Staff Regulations, has infringed the Staff Regulations.

The *defendant* recalls first of all that the heads of administration of the institutions decided on 5 February 1976 that the provisions against overlapping benefits laid down in Article 67 (2) of the Staff Regulations should apply to the two Belgian family allowances in question.

With regard to the various systems of family allowances in the Member States of the Community the defendant considers that under the relevant national legislation and the Staff Regulation of Officials it is intended that the allowances should at present cover the expenses relating not only to the feeding, clothing and accommodation of children but also to their education and leisure as well as their holidays.

Whilst the Staff Regulations of Officials indeed do not make provision for the grant of a family holiday allowance it none the less remains a fact that the objective pursued by the Belgian legislature is also attained through the provisions of the Staff Regulations on the dependent child allowance. In fact the dependent child allowance is more than the ordinary Belgian family allowances and covers all the expenses, including holidays, which form part of the normal upbringing of a child. Furthermore the details of the Belgian family holiday allowance are, except for the frequency of payment, fully identical with the ordinary family allowance.

The special family allowance originated in negotiations in 1970 between the employers' organizations, the trade unions and the government regarding the use of the reserve fund of the ONAFTS. This reserve fund, 'which was principally intended to meet any lack of income', may nevertheless be applied to other purposes if authority therefor is obtained in advance from the competent minister.

The said allowance has been granted each year since 1970 in respect of all children entitled to ordinary family allowances whether or not they are of school age. The amount of this allowance is equal to the ordinary family allowance for the month of August and is paid at the same time as the latter allowance. Whether the allowance is for a specific purpose, namely to contribute to the expenses of returning to school, or whether it simply constitutes an additional month's family allowance, the special family allowance cannot be considered as differing in its nature from the allowances provided for in the Staff Regulations (education allowances or dependent child allowances).

The *applicant* replies that the finding that the Staff Regulations do not in fact provide for the grant of a family holiday allowance is sufficient to establish that the relevant Belgian allowance and the allowance under the Staff Regulations are not of like nature.

She concedes that the purpose of the allowance under the Staff Regulations is

to provide, without any distinction, for all the expenses of bringing up a child but it may be considered that an ordinary allowance of this kind is concerned particularly with expenses of upbringing which take precedence over holiday expenses. In addition to ordinary family allowances provision is made in both the Staff Regulations and Belgian legislation for allowances with specific objectives in which certain expenses arising from the upkeep of a child are distinguished from general expenses and a special payment is made in respect of them. If the defendant's argument were well founded there would be no reason for the education allowance provided for in the Staff Regulations since the dependent child allowance would also cover the costs of education. Such reasoning would moreover produce anti-social results.

Social developments led to the granting of family allowances for specific objectives since ordinary allowances were in fact earmarked for priority requirements (food, housing, health care) and many children for example could not have holidays or continue their schooling beyond the minimum requirements laid down by law.

To decide, as the defendant does, that the family holiday allowance and the allowance under the Staff Regulations are of like nature is to deny and oppose these social developments.

The defendant's line of argument, based on detailed points concerning the Belgian allowances, is quite irrelevant. In fact those points do not concern the essence of the allowances. They constitute extrinsic and intermittent characteristics which most often correspond to a desire to facilitate and rationalize administration and are foreign to the objectives of the institution.

As a secondary matter it should be pointed out that on an important point, namely the frequency of the payments, the details of the relevant Belgian allowances differ from the ordinary allowances.

The *defendant* observes that if it were necessary to adopt the applicant's argument the application of the provisions of the Staff Regulations against overlapping benefits would depend solely oupon the description applied by national law to benefits paid pursuant thereto. Thus any deduction would be ruled out if a State were to grant a specific benefit for each wide category of requirements (education, clothing, food, holidays, leisure and so on) since such 'particular and specific' allowances and the 'general' dependent child allowance cannot be of like nature.

It must further be emphasized that the provision in the Staff Regulations reads 'allowances of like nature paid from other sources' and not 'Family allowances' of like nature paid from other sources. The phrase 'of like nature' is thus clearly intended to emphasize that such allowances are in the nature of family allowances without requiring that they shall be identical with those in the Staff Regulations.

With regard to the education allowance provided for under the Staff Regulations the defendant recalls that under the Staff Regulations, as under national legislation, the intention is to contribute to the charges involved in the normal upbringing of a child. The Staff Regulations have created a homogeneous system based on the grant for general purposes of a relatively high family allowance and, where appropriate, upon the payment of a specific allowance if it is justified by a precise factual situation (the child's attendance at school).

Far from running contrary to social developments the provisions of the Staff Regulations against overlapping benefits are solely concerned to prevent a couple from receiving family allowances twice in respect of the same children. Articles 60 and 64 of the consolidated laws show

clearly that the Belgian legislature shares this concern of the authors of the Staff Regulations.

Finally the defendant observes that it never intended to confuse the 'essence' of the two Belgian allowances with the detailed conditions for their grant. On the other hand, it believes that consideration of the details of the allowances may be helpful in clarifying their nature: in particular the fact that the relevant allowances are frequently described as thirteenth and fourteenth months of family allowances emphasizes that the nature of those various allowances does not differ appreciably.

2. Second submission

The *applicant* considers that even if the Court were to decide that the Belgian family allowance and special family allowance were of like nature to the allowance provided under the Staff Regulations and in principle were to be deducted from the latter, the deduction could no longer and cannot be deducted in the present case, or at least could not be deducted with retroactive effect.

It may be inferred from the judgment of the Court (First Chamber) of 24 June 1976 (Case 56/75, *Elz* v *Commission* [1976] ECR 1097) that a benefit which may be contrary to the relevant legislation may not be withdrawn *ex nunc*, and *a fortiori ex tunc*, unless such benefit did not result from an express or implied decision of the institution concerned (paragraphs 18 to 20).

If a decision has been adopted which creates a right for the beneficiary, withdrawal of the benefit, even for the future, infringes the principle that vested rights must be respected.

In the present case the relevant Belgian allowances were not deducted pursuant to a decision adopted at the appropriate time by the Commission. In this connexion the applicant refers to a memorandum fom the Legal Department of 8 September 1965 to the Directorate General for Administration establishing general criteria with which allowances paid from other sources must comply if they were to be deducted from the allowances provided for in the Staff Regulations. Since the Legal Department was consulted on the meaning of the words 'of like nature the fact that, over a period of ten years, the Belgian allowances in question were not deducted was not the result of tolerance or a failure to act on the part of the competent departments of the Commission but of a decision creating rights in favour of the persons concerned, which cannot be withdrawn even as regards the future.

The decision to deduct the allowances in question is illegal if only because it violates the principle of vested rights. In addition the decision violates the principle of the equal treatment of officials in that it is not the consequence of a detailed study of the social laws of all the Member States on family allowances and/or dependent child allowances and/or the various benefits granted in respect of expenses in general or certain specific expenses incurred in respect of dependent children.

Although the extreme complexity and diversity of such laws make it impossible to establish general criteria for determining which allowances are of like nature to the dependent child allowance provided for by the Staff Regulations the principles of equality of treatment, of distributive justice and of proper administration required that nothing should be deducted from the said allowance under the Staff Regulations other than the ordinary family allowance which is not intended for any special purpose and which is paid regularly and more frequently than once a year.

As a further alternative point, within the framework of this alternative submission the applicant claims that the defendant's

decision could only have taken effect *ex nunc* and could not have been applied retroactively without infringing Article 85 of the Staff Regulations.

Under that provision any sum overpaid is to be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it.

Since the conditions laid down by Article 85 were not fulfilled in this case the defendant's decision that the applicant must effect repayment in the form of amounts withheld from her salary for June, July and August 1976 of the sums alleged to have been overpaid in 1975 owing to the failure to effect the deduction in question was contrary to that provision.

The *defendant* disputes the interpretation which the applicant places upon the judgment in the case of *Elz* v *Commission*.

It is clear from that judgment that the principle of vested interests cannot be relied upon to prevent the recovery for the future of a benefit, the grant of which infringed the Staff Regulations. When the Court of Justice considered the case in point it found that because of the factual circumstances (failure to act or toleration by the administration) and the legal position (infringement of the Staff Regulations) the continuation of the benefit in dispute did not imply any decision on the part of the institution which might create rights in favour of the person concerned. Thus, regardless of matters of form — mere failure to act or toleration, an implied or express decision — the official could not claim to have acquired rights the continuation of which he could insist on for the future since the acquisition of those alleged rights was contrary to a provision of the Staff Regulations.

In any event, the failure to effect a deduction from the allowances in dispute cannot be described as a decision creating a right. In particular it was not the consequence of a decision taken at the appropriate time by the departments of the Commission but must be regarded as the application of a provision of the Staff Regulations which remained incomplete because the applicant never declared to the administration the payment of one at least of the allowances in question. Since no such declaration was made the Commission was thus not in a position to take a decision concerning the applicant to the effect that the provisions against overlapping benefits should not apply to one at least of those two Belgian family allowances.

With regard to the memorandum from the Legal Department cited by the applicant the defendant observes that an opinion of the Legal Department, which does not bind the Commission, cannot constitute a decision creating a right, even with regard to one of its officials.

If the Court, however, were to consider that the failure to effect a deduction was based upon a decision, such a decision, based upon an erroneous interpretation of the Staff Regulations, would not create a right in favour of the applicant and accordingly could be withdrawn for the future.

The defendant then disputes that the contested deduction was based upon Article 85 of the Staff Regulations. It was based solely upon the application of Article 67 (2) of the Staff Regulations which makes express provision for the deduction of allowances of like nature paid from other sources. However, even if the argument concerning the application of Article 85 were well founded it must be admitted that that article was observed in the present case. In this connexion the defendant refers to the opinion of the Advocate General in Case 71/72, *Kuhl* v *Council* (judgment of 27 June 1973 [1973] ECR 705). It is established either that the applicant caused the error of the administration, by her failure to declare

the special family allowance, or that she could not be unaware that the payments of the allowances under the Staff Regulations were improper unless the special family allowance were deducted.

The family holiday allowance, like the ordinary family allowances, was declared by the applicant. Since the deduction of the ordinary family allowances has not been disputed the defendant is astonished that the deduction of the family holiday allowance should be called in question within the framework of this submission.

The *applicant* replies that an analysis of the judgment in the case of *Elz* v *Commission* shows that withdrawal *ex nunc* of a benefit is possible only if two conditions are fulfilled: on the one hand that the benefit was improper and on the other that it was not based on a decision. In the said judgment the Court was at pains to emphasize that the grant of the benefit originated either in a failure to act or in administrative tolerance (paragraph 19) and it further emphasized the point that no decision, even an implied decision, was entailed which might create rights in favour of the person concerned (paragraph 20).

It is thus necessary to determine in fact whether or not a decision was taken in this case.

The defendant's argument is first of all unfounded in fact since there is a complete absence of any causal connexion between the failure by the applicant to declare one of the allowances and the failure to deduct two allowances. Since the family holiday allowance was not deducted, although it had been declared, it necessarily follows that the failure to effect the deduction until 1976 did not originate in the failure to make the declaration.

Finally, with regard to the opinion of the Legal Department which undoubtedly did not, by itself, constitute a decision creating rights, the applicant sets out her argument as follows: since the defendant for ten years refrained from deducting the relevant Belgian allowances from the allowance provided for under the Staff Regulations on the basis of an opinion given by the Legal Department it may be properly inferred from this that the failure to effect a deduction was based upon a decision, albeit implied, creating a right in favour of the persons concerned and that accordingly it may not be withdrawn even for the future. A well-defined policy, which has been followed over a very long period after mature consideration from the legal point of view cannot be regarded as an instance of tolerance or failure to act on the part of the administration.

As a further subsidiary point, the applicant states that if the Court were to hold that no decision was taken it would further be necessary to inquire into the nature of the alleged irregularity. In this connexion the applicant observes that the application of Article 67 (2) of the Staff Regulations presupposes an interpretation of the words 'of like nature' and thus it cannot be claimed that the failure to effect the deduction would be directly at variance with the wording of the said provision. When an interpretation by the administration of a legal provision does not disregard the wording and is reasonable it binds the administration, being incorporated to some extent in the legal provision on the lines of the measures adopted for its implementation.

Finally with regard to the application of Article 85 of the Staff Regulations it must be remarked that the administration itself considered that the recovery of the amounts overpaid though failure to deduct the Belgian allowances in dispute was based on the said article as is clear from the note of 14 May 1976 addressed to the applicant (Annex 1 to the reply).

The applicant disputes that the defendant has complied with that

provision: there is no causal connexion between the failure to make the declaration and the failure to effect the deduction for the reasons indicated above. In those circumstances it is clear that the applicant cannot have caused the alleged error on the part of the administration. Likewise there can be no patent irregularity since the defendant was in possession of the facts and refrained for ten years from deducting the said Belgian allowances.

The *defendant* recalls that it disputes the interpretation placed by the applicant upon the judgment in the case of *Elz* v *Commission*. It examines the case-law of the Court in this field, in particular the judgment of 12 July 1957 in Joined Cases 7/56 and 7/57, *Algera* (Rec. 1957, p. 81) and the judgment of 1 June 1961 in Case 15/60, *Simon* (Rec. 1961, p. 223). That case-law clearly established the principle that unlawful individual measures may be revoked in very general terms and that the exercise of such a power need not be made subject to any condition or, in particular, to any time-limit. That principle was confirmed by the judgment in the *Elz* case which shows clearly that the principle that vested rights must be respected cannot be relied upon against the withdrawal of a benefit the granting of which infringes the Staff Regulations.

It is clear from the relevant case-law as a whole that no 'vested right' in the sense of a definitively vested right or intangible right can arise from an unlawful act; accordingly the need to re-establish legality is restricted only by the requirements of legal certainty which apply only in regard to withdrawal with retroactive effect; this is authorized only within a reasonable period. On the other hand the need for legal certainty in no way prevents the revocation for the future of unlawful decisions without any condition with regard to time-limits.

It must further be emphasized that the applicant's argument would in practice render Article 85 of the Staff Regulations a cipher: how would it be possible to apply that provision if withdrawal *ex nunc* of an unlawful decision were prohibited? The applicant's argument would thus not only lead to disregard of the principles underlying proper administration and the perpetuation of unlawful situations but would further bring about a tacit revision of the Staff Regulations by rendering inapplicable one of their provisions.

In any case the failure to deduct the allowances in question was not based upon a decision. Whilst it is true that the applicant declared the payment of the holiday allowance at the appropriate time, failure to effect the deduction on the basis of that single declaration cannot be classified as a decision of the institution. In any event it must be emphasized that that declaration relates only to the family holiday allowance.

The applicant is wrong in maintaining that the interpretation of a legal provision by the administration binds the administration and becomes incorporated in the provision. It is impossible to concede that an official may claim that the interpretation of a provision should be maintained in perpetuity. Such a view would rule out not only a dynamic conception of the law, by crystallizing it in supposedly definitive interpretations, but also by the very existence of case-law.

Finally the defendant persists in its argument concerning the alleged infringement of Article 5 of the Staff Regulations. Although the administration in certain cases for administrative reasons considered that it must have recourse to the *procedures* of Article 85 it none the less remains the fact that the deductions in dispute originate in Article 67 (2) of the Staff Regulations the general plan of which necessarily implies that the deductions must be effected a little later than the payment of the national family allowances and this situation cannot be confused with that of retroactive effect.

IV – Oral procedure

The parties presented oral argument at the hearing on 14 July 1977.

The Advocate General delivered his opinion at the hearing on 28 September 1977.

Decision

1 By an application dated 24 January 1977 the applicant instituted proceedings for the annulment of the decisions to the effect that the family holiday allowance and the special family allowance paid in Belgium were to be deducted from the dependent child allowance for which provision is made in the Staff Regulations and in pursuance of which deductions were in fact made from her salary for June, July and August 1976, and against the decision rejecting her complaint in this respect.

2 Under Article 67 (2) of the Staff Regulations of Officials, 'Officials in receipt of family allowances specified in this article shall declare allowances of like nature paid from other sources; such latter allowances shall be deducted from those paid under Articles 1, 2 and 3 of Annex VII'.

3 Article 67 (1) provides that family allowances shall comprise a household allowance, a dependent child allowance and an education allowance.

4 The applicant's husband, a person employed in Belgium, is entitled as such to family allowances, in particular the so-called ordinary family allowance paid under Belgian legislation, and it is common ground that the payment of the ordinary family allowance was duly declared to the administration by the applicant and, in accordance with Article 67 (2), was deducted from the dependent child allowance to which she was entitled under the provisions of the Staff Regulations.

5 On the other hand the applicant considers that the holiday allowance and the special family allowance paid to her husband by the Belgian authorities are not 'of like nature' to the allowances referred to in Article 67 (1); she maintains that the deduction of those allowances, which was effected for the first time in 1976, is not justified by the wording of Article 67 and requests that the deduction be annulled.

6 For its part the Commission, the defendant, contends that the Belgian allowances in dispute should be considered as intended to cover the specific expenses entailed in caring for a child, which are thereby of like nature to the dependent child allowance and the education allowance provided for by Article 67 (1).

7 In particular the defendant claims that the dependent child allowance is intended to cover the expenses involved not merely in feeding, clothing and housing children but also in their education, leisure and holidays.

8 The defendant states that whilst it is correct that the allowances were not deducted in the past, the heads of administration of the institutions decided at a meeting on 5 February 1976 that the provisions against overlapping benefits in Article 67 (2) of the Staff Regulations were applicable to the Belgian allowances in question.

9 It is thus necessary to examine whether the Belgian allowances in question must be considered as being of like nature to the allowances referred to in Article 67 (1).

10 With regard to the Belgian family holiday allowance it is clear from the file that the consolidated laws relating to family allowances for employed persons (Royal Decree of 19 December 1939 effecting the consolidation, as subsequently amended) make provision for four types of benefits: family allowances, child-birth allowances, holiday allowances and socio-educational allowances (Chapter V, Section 1, Section 4^{bis}, 4^{ter} and 4 ^{quater}).

11 With regard to the family holiday allowance Article 73 ^{quater} of the said laws reads as follows in its present form:

'The compensation funds for family allowances and the public authorities and institutions ... shall grant a family holiday allowance. This allowance shall be paid each year during May in respect of children for whom family allowances were payable for the month of April in the year for which the allowance is granted'.

12 The procedures for paying the family holiday allowances are thus substantially the same as those for paying the monthly family allowance.

13 Nevertheless the family holiday allowance cannot on this ground be considered as a mere increase in the monthly family allowance.

14 The former is a special allowance paid annually in order to cover expenses arising from holidays and to permit the persons responsible for the child to enable it to enjoy the appropriate leisure so as to promote its health and cultural development.

15 Since the manifest objective of Article 67 (2) is to prevent a couple from receiving family allowances twice in respect of the same children it is to be inferred that only allowances which are comparable and which have the same purpose can be taken into consideration as being 'of like nature'.

16 Whilst the Belgian family allowance, which is paid monthly, is indeed entirely comparable to the dependent child allowance referred to in the Staff Regulations, this is not the case as regards the family holiday allowance which is quite distinct from the former and has a specific purpose.

17 The defendant accordingly was not justified in applying Article 67 (2) and the submission is thus well founded in this respect.

18 With regard to the Belgian special family allowance it appears from the file that this constitutes an allowance paid in the course of the years 1972, 1974, 1975 and 1976 pursuant to special laws or royal decrees enacted for one year.

19 This fact alone means that those allowances, although indeed calculated on the basis of the monthly amounts of the 'ordinary' family allowance and paid in respect of children for whom that latter allowance was payable, must not be confused with the 'ordinary' family allowances which are of the same nature as the dependent child allowance provided for under the Staff Regulation.

20 In fact they are not regular allowances which virtually constitute a part of the remuneration and are intended to meet the special requirements of employed persons, but constitute an *ex gratia* payment granted on extraordinary grounds.

21 It is thus impossible to conclude that this special allowance is of like nature to the allowances referred to in Article 67 (1) of the Staff Regulations.

22 Accordingly the submission is also well founded in this respect.

23 It follows that the contested decisions must be annulled.

24 The applicant has also requested that the Commission should be ordered to pay her the sums wrongly deducted under Article 67 (2) of the Staff Regulations together with interest on account of delay at the rate of 8 % per annum.

25 The error committed in applying the said provision does not go beyond the framework of errors and rectifications which frequently occur in calculating monthly salaries.

26 It is usual for such errors, the commission of which either benefits or prejudices the official concerned, to be rectified as soon as they are discovered without the matter of claiming interest on account of delay being raised by either party.

27 Rectifications effected as a result of a complaint or an application to the Court do not differ from current rectifications unless there are exceptional circumstances.

28 The error of interpretation committed in the present case cannot be considered as grave.

29 The claim for interest on account of delay accordingly cannot be upheld.

30 It is likewise unnecessary to order the Commission to pay the applicant the sums claimed since the annulment of the contested decisions will in itself cause the Commission to take a new decision in accordance with the judgment given.

Costs

31 Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to bear the costs.

32 Since the defendant has failed in its submission it must be ordered to bear the costs.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Annuls the decisions whereby sums paid in Belgium as family holiday allowance and special family allowance were deducted from the salary of the applicant for June, July and August 1976;**

2. **Orders the defendant to bear the costs.**

Bosco Donner O'Keeffe

Delivered in open court in Luxembourg on 13 October 1977.

A. Van Houtte
Registrar

G. Bosco
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL MAYRAS
(see case 106/76, p. 1637)