JUDGMENT OF THE COURT (SECOND CHAMBER)
20 FEBRUARY 1975 [1]

Chantal Van den Broeck
v Commission of the European Communities

Case 37/74

Summary

Officials — Expatriation allowance — Male and female officials — Comparable situation — Nationality imposed by law on a female official upon her marriage — Difference of treatment — Inadmissibility
(Staff Regulations of officials, Annex VII, Article 4)

The concept of 'nationals' contained in Article 4 (a) of Annex VII of the Staff Regulations of officials must be interpreted in such a way as to avoid any unwarranted difference of treatment as between male and female officials who are in fact, placed in comparable situations. It is, therefore, necessary to exclude nationality imposed by law on a female official upon her marriage with a national of another State and which she was unable to renounce.

In Case 37/74

CHANTAL VAN DEN BROECK, official of the Commission of the European Communities, represented by Rita Dieudonné, of the Brussels Bar, with an address for service in Luxembourg at the chambers of Jacques Loesch, 2 rue Goethe,

applicant

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Robert Fischer and Joseph Griesmar, its legal advisers, with an address for service in Luxembourg at the office of its legal adviser Pierre Lamoureux, 4, bd. Royal,

defendant

1 — Language of the Case: Dutch.

Application, principally, for payment of expatriation allowance to the applicant with effect from 1 July 1972,

THE COURT (Second Chamber)

composed of: A. J. Mackenzie Stuart, President of Chamber (Rapporteur), H. Kutscher and M. Sørensen, Judges,

Advocate-General: A. Trabucchi
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts and arguments developed by the parties in the course of the written procedure may be summarized as follows:

I — Facts

The applicant was born in France on 29 May 1937. She has lived in Belgium since September 1961.

When, on 28 October 1961, she married a Belgian national, she simultaneously acquired Belgian nationality and lost her French nationality acquired by birth, not having made a declaration within six months of the marriage that she wished to retain French nationality. She acquired Belgian nationality by virtue of the Franco-Belgian agreement of 9 January 1947 in conjunction with the Belgian law of 24 December 1932.

The applicant entered the service of the Commission on 11 May 1965. She was not, on taking up her duties, granted the benefit of the expatriation allowance provided for under Article 69 of the Staff Regulations and Article 4 of Annex VII thereof.

Following the judgments of the Court in *Bertoni v European Parliament* and *Bauduin v Commission* (Cases 20/71 and 32/71, Rec. 1972 pp. 345 and 363) in which two decisions in individual cases refusing an expatriation allowance pursuant to Article 4 (3) of Annex VII were annulled as being without legal foundation, the defendant took the appropriate steps in consequence of these judgments by rendering nugatory in practice, on a general basis, with effect from 1 July 1972, the provision criticized by the Court, and at the same time initiating the procedure which led to abrogation of Article 4 (3) in February 1973.

In the summer of 1972 the individual position of certain female officials was systematically regularized and they were paid the expatriation allowance for the period since 1 July 1972. The applicant was not among their number.

On 6 May 1973 the applicant submitted a request to the appointing authority for payment of an expatriation allowance in accordance with the new Article 4 of Annex VII of the Staff Regulations, with effect from 1 July 1972. In support of this request she drew attention to the fact that Regulation No 558/73 had, with effect from 1 July 1972, abolished paragraphs 2 and 3 of Article 4 of Annex VII of the Staff Regulations.

As this request was followed by an implied decision rejecting it, the applicant, on 6 November 1973, submitted a complaint under Article 90 (2) of the Staff Regulations reiterating the claims set out in her request of May 1973.

On 27 May 1974, the applicant submitted the present appeal.

The written procedure followed the normal course. Having heard the report of the Judge Rapporteur and the opinion of the Advocate-General, the Court (Second Chamber) decided to open the oral procedure without preparatory inquiry.

II — Conclusions of the parties

In the words of the application originating proceedings, the applicant claims that the Court should:

1. Annul the decision rejecting the complaint implied by absence of reply to the complaint lodged by the applicant on 4 November 1973.
2. Rule that the defendant has wrongfully declined to pay an expatriation allowance to the applicant since 1 July 1972.
3. Order the defendant to pay the expatriation allowance with effect from 1 July 1972 as well as legal interest on arrears of the expatriation allowance calculated from the date each instalment fell due up to the date of payment.
4. Order the defendant to pay the costs.

In its statement of defence, the Commission contended that the Court should:

1. Dismiss the appeal as without foundation.
2. Order the applicant to pay the costs.

III — Submissions and arguments of the parties

The applicant relies on two submissions: first, the illegality of Article 4 of Annex VII of the Staff Regulations and, second, infringement of Articles 1 and 4 of Annex VII, as amended by Regulation No 558/73, and misuse of powers.

1. Legality of Article 4

(a) Applicant's arguments

According to the *applicant,* as marriage is no longer inconsistent with the state of expatriation, the cessation of this state should, for one and all, be governed by uniform considerations regardless of sex — *Bertoni* and *Bauduin* (already cited).

Expatriation is a *de facto* state which cannot be identified solely on the basis of nationality. This is apparent from the new Article 4 of the Staff Regulations because, under it, nationality counts only in relation to various conditions connected with length of stay.

Change of nationality consequent on marriage is not the deciding factor. It is not acquired nationality but original nationality which is the deciding factor in assessing the meaning and effect of expatriation.

Because Article 4 (1) of Annex VII of the Staff Regulations makes grant of the expatriation allowance to a female official who acquired her husband's nationality on marriage subject to the same residential conditions as the official who acquired the nationality of the country in which he works by birth or by naturalization, the article represents a

departure from the principles recognized by the Court.

As no national legislation in fact provides that the husband acquires another nationality by marriage, the Article results in different treatment of officials according to whether they are male or female.

Secondly, the applicant makes the plea that to apply the nationality test when nationality has been acquired by marriage disregards national provisions concerning nationality. The applicant explains that a woman who acquires Belgian nationality by marriage is not in the same position as a woman who acquires it by birth. The former does not have full and unconditional nationality. She does not possess all civil rights, for instance, the right to vote, until she has stayed in Belgium for ten years; she can be deprived of Belgian nationality; and, finally, she ceases to be a Belgian upon marrying a national of another country.

The fact that a woman has not made a declaration renouncing Belgian nationality within six months of the marriage does not have the effect of making involuntary acquisition of nationality into a voluntary one.

By way of contrast, the applicant quotes the position of a woman who marries an Italian. She concludes from it that, under national law, nationality acquired through marriage is not on all fours with nationality by birth.

The Regulations must be uniformly applied and it is not reasonable to take national legislation into account on some occasions and not on others: vide the opinion of Mr Advocate-General Roemer in *Meinhardt v Commission* (Case 24/71, Rec. 1972 p. 283).

Since the constitutions of the various Member States all recognize the principle of equality of the sexes before the law and prohibit all discrimination based on sex, the principle of equality can be regarded as part of the general principles of law. The Court should ignore national rules which are incompatible with the principles of Community law.

The applicant refers to the Charter of the United Nations and the Universal Declaration of Human Rights and concludes therefrom that equal rights for men and women are enshrined in international law. Thus Article 1 of the international convention on the nationality of the married woman provides that 'each contracting State agrees that neither the conclusion nor the dissolution of the marriage between foreign subjects, nor the husband's change of nationality during the marriage, shall *ipso facto* affect the nationality of the wife'. As this convention was signed by five Member States of the EEC and ratified by four of them, the Community, too, should be animated by the universal principle of law and by the spirit of the times.

(b) Arguments of the Commission

In the *Commission's* view, the applicant's first submission is intended to demonstrate the illegality, in that it gives rise to discrimination, of an interpretation and of an application of the provision of the Regulations concerned which takes the nationality acquired by law through marriage into account. The Commission does not deny that, in view of the fact that women can acquire a second nationality through marriage, they alone, therefore, are liable to suffer loss of their right under the Staff Regulations to an expatriation allowance and that there can, accordingly, be *de facto* discrimination between male and female officials.

But though the more or less avoidable acquisition by the wife of her husband's nationality is something which tends to create discrimination between officals, this is not the fault of the Staff Regulations, which did not introduce any discrimination whatever in law between officials, certainly not on grounds of sex or of the legislation applicable on the subject of acquisition of a new nationality through marriage.

The Staff Regulations did no more than draw a uniform conclusion from situations which were not created by the Staff Regulations but by the various national laws governing the way in which different nationalities can be acquired. In the Commission's view, it is impossible in this connexion to talk of discrimination in law created by the Staff Regulations themselves and deserving to be declared illegal by the Court.

On this point the Commission explains that it applies the rules in Article 4 (1) (b) uniformly in the case of an official who has acquired the nationality of the country where he is employed before or after taking up his duties.

In fact, the Staff Regulations go no further than to give the official's present or subsequent nationality the status of a legal presumption of expatriation or of non-expatriation: see the opinion of the Advocate-General in the *Gunnella case,* (33/72, [1973] ECR 483).

The principle of non-discrimination has never had the effect of preventing *de facto* discrimination between officials. The Commission quotes several examples of provisions in the Staff Regulations which, taken in conjunction with national law, may depend upon *de facto* discrimination, for example:

the allowance for a person treated as if he were a dependent child under Article 2 (4) of Annex VII;

— military service: Article 42 of the Staff Regulations;

— transfer of pension rights: Article 11 of Annex VIII;

— the disadvantage at which an official is in certain circumstances placed when he transfers currency to his country of origin shortly after the currency of that country has been revalued: on this point the Commission cites the judgment of the Court in *Bode v Commission* (Case 63-75/70, Rec. 1971 p. 556);

— rights of succession: Article 73 (2) (a) of the Staff Regulations.

The Commission concludes that, although the Staff Regulations must be uniformly applied, in matters where the definition of rights under the Staff Regulations is itself conditioned by the law applicable to the person concerned, this principle does not mean that the personal rights and obligations of the individual concerned are ignored. The national law to which the official is subject cannot be ignored in defining rights under the Staff Regulations. If proof of the existence of a right granted under a provision of the Staff Regulations is governed by the national law to which the person concerned is subject, the Community administrative authorities must, to apply the provision correctly, decide whether the requirements of national law are satisfied: *Meinhardt v Commission* (Case 24/71, already cited).

The Commission stresses that, for reasons which are personal to her, the applicant freely chose not to exercise her option not to acquire Belgian nationality and to remain French.

As far as the general law in the various Member States is concerned, the Commission points out that there is no legislation in the Member States under which marriage automatically confers his wife's nationality on the husband. It observes that by an exceptional kind of naturalization, the husband can often acquire nationality at the time of his marriage. Similarly, the Commission points out that in Belgian law there are provisions favouring the foreigner who marries a Belgian subject by birth by enabling him to acquire naturalization more easily. The object of this provision is to encourage the assimilation of foreign spouses living in Belgium.

As the applicant, for reasons arising from her freedom of choice, did not see fit to retain her French nationality and refuse Belgian nationality, Article 15 of the Universal Declaration of Human Rights has no relevance. In view of the option secured for the applicant under the Franco-Belgian Convention, it does

not see how the convention can be criticized for having made it possible for the applicant, to her cost, to be deprived of her nationality arbitrarily and against her will.

The Commission is also unable to accept the reference to the UNO Convention on the nationality of the married woman. In so far as it retains an option for the wife, the Franco-Belgian Convention of 1947 does not conflict with the underlying objective of the UNO Convention.

2. Interpretation of Article 4

(a) Applicant's arguments

The applicant maintains that the Commission's interpretation of Article 4 infringed Articles 1 and 4 of Annex VII, as amended by Regulation No 558/73, and was a misuse of power.

The defendant, in breach of the rules of law, withholds the benefit of the expatriation allowance from officials of female sex who, when they take up their duties, are already married to a subject of the country where they work. The applicant believes that she has suffered loss through application of these provisions relating to expatriation in that they are discriminatory and entail a difference in her emoluments, a situation which, in her view, is incompatible with the spirit of the treaties, the uniform application of the Staff Regulations, and the arrangements provided for under Article 4 of Annex VII of the Staff Regulations.

In order to avoid having to continue to apply the 'head of household' test, which the Court has held to be discriminatory, the state of expatriation should be determined on the basis of the nationality of a female official before her marriage and not on the basis of the nationality acquired by marriage.

When the Commission determines the state of expatriation on the basis of nationality acquired by marriage, not on the basis of the previous nationality, a different standard of assessment is being applied and, by means of a device, the legal test of 'head of household' is being reintroduced or kept in force. In these circumstances expatriation is being exclusively assessed on the basis of the husband's position and not on the basis of the relationship between the wife's position and the concept of expatriation. In this case, therefore, the difference in emoluments is the result of a change in domestic circumstances.

Subsidiarily, the applicant alleges that there is a difference in emoluments according to the nationality of the official, because the change in domestic circumstances has consequences only when the marriage is between subjects of certain countries where legislation requires the woman to take the husband's nationality.

Since Regulation No 558/73 came into force there have been two conditions for grant of the expatriation allowance: nationality, and a period of stay or its absence in the country where the place of employment is situated.

These two factors cannot be affected by changes in family circumstances. The applicant accordingly claims the benefit of the expatriation allowance by virtue of Article 4 (1) (a).

For a definition of nationality the applicant quotes the judgment delivered by the International Court of Justice in the *Nottebohm* case:

'Nationality is a legal bond having as its basis a social fact of attachment, a genuine connexion of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State'.

The condition of *de facto* nationality is also provided for under the United Nations Charter: when an official has

more than one nationality, the Secretary-General must establish the effective or *de facto* nationality of the individual concerned. Again, the condition of *de facto* nationality is also clearly referred to in the decision adopted by the Commission of the European Communities on 27 July 1968 concerning the review of place of origin. The applicant sees no reason why there should be reference to *de facto* nationality in assessing a situation concerned with nationality whereas the idea is rejected when it is a question of determining expatriation.

The applicant concludes that regard must be paid to her *de facto* nationality which, she says, has always been French. At the time the applicant took up her duties, the Commission was aware of her links with France:

1. A preliminary inquiry was made in France in order to confirm her French nationality.
2. The applicant held a certificate of secondary education and a University degree, both of which she obtained as a French subject and not as an alien.
3. Her French University degree was recognized in Belgium.
4. The applicant was engaged as a member of the auxiliary staff, whose main working language was French.
5. Her personal file contains the following information relating to her nationality: nationality at birth: French; present nationality: Belgian.

The applicant goes on to explain the reasons why, at the time when she married in 1961, she saw fit not to renounce Belgian nationality.

After she took up her duties the Commission acknowledged her links with France. This is evidenced by a request for review of her place of origin. Under the decision taken, her place of origin was established as being in France and no longer in Belgium as it was when she took up her duties.

Following the denunciation of the Franco-Belgian convention of 9 January 1947, the applicant regained her French nationality on 24 January 1974 under Article 17 (4) of the Code of 9 January 1973 concerning French nationality. She further points out that she was born in France of French parents and that she stayed in France for an uninterrupted period of 24 years.

The applicant quotes the opinion of Mr Advocate-General Roemer in *Bertoni* (Case 20/71, already cited) that 'the setting up of a home, that is to say definite integration into the community of the State in question, has the effect of removing or mitigating the factor of expatriation, and with it the physical and psychological inconveniences of such expatriation'.

The applicant does not deny that marriage with a subject of the State undoubtedly makes it easier for a person to adapt to life in that State, but though marriage makes adaptation easier it does not extinguish the state of expatriation.

The applicant does not understand why the consequences of marriage are taken into account only in the case of a woman official. From the psychological point of view expatriation is exactly the same for a woman as for a man.

(b) Arguments of the Commission

The *Commission* denies that, on entry into the service, the applicant fulfilled the general conditions for grant of the expatriation allowance as set out in Article 4 (1) of Annex VII.

As regards the official who is not and never has been a national of the State in whose territory the place where he is employed is situated, Article 4 (1) (a) provides that the allowance shall be paid to officials who, during the five years ending six months before they enter the service, did not habitually reside or carry on their main occupation within the European territory of that State.

In the case of officials who are or have been nationals of the State in whose

territory the place where they are employed is situated, Article 4 (1) (b) provides that the allowance shall be granted to officials who, during the ten years ending at the date of their entering the service, habitually resided outside the territory of that State.

The applicant cannot reasonably claim that she is not and never been a national of the State in whose territory the place where she is employed is situated. The conditions provided for under Article 4 (1) (b) must be taken into account in determining the position.

In the Commission's view it is impossible to say that she has habitually resided outside Belgium in view of the fact that she has lived in Belgium since September 1961. During the material period of 10 years, from 11 May 1955 to 11 May 1965, the applicant lived 6 years, 4 months, and 20 days outside Belgium and 3 years, 7 months, and 10 days in Belgium.

Though she had lived for most of the time outside Belgium the relative length of her residence in Belgium seems to make it impossible to regard her habitual residence during these ten years as having been outside Belgium. In the Commission's view the applicant does not appear to satisfy the conditions laid down in Article 4 (1) (b) of Annex VII of the Staff Regulations for grant of an expatriation allowance. As Article 4 (1) makes no distinction or exception as regards the way in which nationality is acquired, there is no justification for treating nationality acquired by marriage differently from nationality acquired through parentage or place of birth.

In support of this contention the Commission cites the opinion of Mr Advocate-General Mayras in *Gunnella v Commission* (Case 33/72, [1973] ECR 483).

In making no distinction between the methods by which nationality is acquired, those who drew up the Staff Regulations clearly indicated that they regarded nationality as substantial evidence of connexion with a given State.

On the basis of the principle that, subject to the qualification of habitual residence, one is not an expatriate in the State of which one is a national, those who drew up the Staff Regulations intended that, as a general rule, the expatriation allowance should not be paid to nationals of the country in whose territory the place where they are employed is situated.

As those responsible for the Staff Regulations did not wish to introduce any exception, differentiation or variation in the application of the general terms they used, no one interpreting it is entitled to make distinctions or variations where none is made by the law and in this way to limit the application of a law couched in general terms.

In the Commission's view, the concept of effective nationality has no relevance in the interpretation of Article 4 of Annex VII; see Mr Advocate-General Mayras in *Gunnella v Commission* (Case 33/72, [1973] ECR 483).

Moreover, the Commission points out that, according to the decisions of international and national courts, effective nationality is far from being synonymous with nationality of origin.

Effective nationality is a question of fact which generally includes factors such as the individual's habitual residence, his place of business, the language he speaks and also any preference, expressed or implied, he has shown in this respect.

Though French nationality is the applicant's nationality of origin it does not follow that this nationality can without further ado be regarded as her effective nationality. The applicant has lived in Belgium for thirteen years. She was married there a long time ago to a Belgian subject, enjoys civil rights there, pursued a professional career there for several years in the private sector, has attended university courses there sufficient for her French degree to be

recognized and, by not exercising the right to retain her French nationality, has implicitly indicated that she intended to acquire Belgian nationality and to lose her French nationality.

In the event that the concept of effective nationality could be taken into account in applying the Staff Regulations, the defendant would deny that French nationality is the applicant's effective nationality at this time.

3. Application for legal interest

The Commission takes the view that the absence of any provision in Community law concerning the possibility, the admissibility or the rate of accrued interest is sufficient reason for setting aside the application.

In support of this contention the Commission cites the Judgment of the Court in *Capolongo* (Case 27/59 and 39/59, Rec. 1960 p. 826).

IV — Oral procedure

The oral observations of the applicant, represented by Rita Dieudonné, and of the Commission, represented by Robert Fischer, were made at the hearing on 14 November 1974.

The Advocate-General delivered his opinion at the same hearing.

Law

1 The applicant seeks annulment of the decision rejecting her complaint lodged on 4 November 1973 in which she asked to be granted the expatriation allowance provided for under the Staff Regulations of Officials.

2 She also seeks an order for the Commission to pay her the expatriation allowance with effect from 1 July 1972.

3 She contends that the condition laid down in Article 4 (a) of Annex VII of the Staff Regulations, whereby an expatriation allowance shall be paid to officials who, in the words of the article, 'are not and have never been nationals of the State in whose European territory the place where they are employed is situated' does not apply when the individual concerned acquired the nationality of her husband by marriage.

4 In the case of a female official who is granted the nationality of her husband as a result of her marriage with a national of another State, the application of that condition results in discrimination, since under no national legislation does the male official acquire the nationality of his wife.

5 On the question of nationality, the provisions of national legislation are not uniform; some laws, particularly those of recent date, provide that a foreign wife does not automatically acquire the nationality of her husband, whereas under other legislations it is still provided that, as was once the common rule, the nationality of a married woman depends upon that of her husband.

6 In accordance with the general pattern of Article 4 of Annex VII this provision adopts the official's habitual residence before he entered the service as the paramount consideration in determining entitlement to an expatriation allowance.

7 The official's nationality is regarded as being only a subsidiary consideration, i.e. as serving to define the effect of the length of such residence outside the territory in which the place where he is employed is situated.

8 The object of the expatriation allowance is to compensate officials for the extra expense and inconvenience of taking up employment with the Communities and being thereby obliged to change their residence.

9 Though 'expatriation' is a subjective state conditioned by the official's assimilation into new surroundings, the Staff Regulations of Officials cannot treat officials differently in this respect according to whether they are of the male or of the female sex since, in either case, payment of the expatriation allowance must be determined by considerations which are uniform and disregard the difference in sex.

10 The concept of 'nationals' contained in Article 4 (a) must therefore be interpreted in such a way as to avoid any unwarranted difference of treatment as between male and female officials who are, in fact, placed in comparable situations.

11 Such unwarranted difference of treatment between female officials and officials of the male sex would result from an interpretation of the concept of 'nationals' referred to above as also embracing the nationality which was imposed by law on an official of the female sex by virtue of her marriage, and which she was unable to renounce.

12 It is therefore necessary to define the concept of an official's present or previous nationality under Article 4 (a) of Annex VII as excluding nationality imposed by law on a female official upon her marriage with a national of another State.

13 Although, on her marriage, the Belgian nationality of her husband had been conferred upon her, the applicant could have renounced it and thus retained her nationality of origin.

14 As the applicant chose not to avail herself of this right, there are no reasons associated with equal treatment why her Belgian nationality should not be taken into account in applying the provision concerned.

15 As she is a national of the State on whose territory the place where she is employed is situated, the applicant's position falls to be considered in the light of the conditions provided for under Article 4 (b) of Annex VII of the Staff Regulations.

16 As the applicant did not habitually reside outside Belgian territory during the ten years ending at the date of her entering the service she does not fulfil the conditions laid down under Article 4 (b) for payment of an expatriation allowance.

17 Her application must, accordingly, be dismissed.

Costs

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

19 The applicant has failed in her pleas.

20 Nevertheless, under Article 70 of the Rules of Procedure, in actions by staff of the Communities the institutions shall bear their own costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders each party to bear its own cost.**

Mackenzie Stuart Kutscher Sørensen

Delivered in open court in Luxembourg on 20 February 1975.

A. Van Houtte
Registrar

A. J. Mackenzie Stuart
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL TRABUCCHI

(See case 21/74, p. 231)