ORDER OF THE COURT (Fourth Chamber)
28 November 1996 *

In Case C-277/95 P,

Erika Lenz, formerly an official of the Commission of the European Communities, and **Volker Lenz**, her son, both residing at Osnabrück (Germany), represented by Jürgen Schacht, Rechtsanwalt, Hamburg, 22 III Schlüterstraße,

appellants,

APPEAL against the order of the Court of First Instance of the European Communities (Fourth Chamber) of 14 June 1995 in Cases T-462/93, T-464/93 and T-470/93 *Lenz* v *Commission*, not published in the European Court Reports, seeking to have that order set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by Julian Currall, of its Legal Service, acting as Agent, assisted by Bertrand Wägenbaur, of the Hamburg Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

* Language of the case: German.

THE COURT (Fourth Chamber),

composed of: J. L. Murray (Rapporteur), President of the Chamber, C. N. Kakouris and P. J. G. Kapteyn, Judges,

Advocate General: A. La Pergola,
Registrar: R. Grass,

after hearing the Advocate General,

makes the following

Order

1 By application lodged at the Registry of the Court of Justice on 14 August 1995, Erika Lenz and Volker Lenz brought an appeal against the order of the Court of First Instance of the European Communities of 14 June 1995 in Cases T-462/93, T-464/93 and T-470/93 *Lenz* v *Commission* (not published in the European Court Reports, hereinafter 'the contested order'), in so far as it did not rule on their objection to one of the judges and rejected their action for damages as inadmissible. In the alternative, the appellants asked the Court to deliver judgment by default.

2 Erika Lenz is a former official of the Commission. Because her husband, Manfred Lenz, a Commission official, is insured under the sickness insurance scheme common to the institutions of the European Communities ('the joint scheme'), she is covered also.

3 Volker Lenz is the son of Erika and Manfred Lenz. He is also insured under the joint scheme by virtue of Article 72 of the Staff Regulations of Officials of the European Communities ('the Staff Regulations').

4 It is apparent from the contested order that between October 1977 and August 1980 Erika Lenz followed a course of gynaecological treatment in Brussels in order to have a second child (paragraph 3). At her husband's request, the settlements office reimbursed the medical expenses in their entirety, on account of the existence of a serious illness within the meaning of section IV.1 of Annex I to the Rules on Sickness Insurance for Officials of the European Communities ('the insurance rules') (paragraph 4). Between 1984 and 1991 Erika Lenz had several gynaecological experts' reports drawn up which concluded that the treatment she had undergone had damaged her health and, in particular, had made her sterile (paragraph 5). On 18 August 1988 Erika and Manfred Lenz laid a complaint before the Tribunal Correctionnel (Criminal Court), Brussels, against two doctors alleging that they had caused bodily harm, on the ground that the treatment given by those doctors had caused Erika Lenz to become sterile. On 6 October 1990 the Brussels Public Prosecutor asked for the prosecution to be discontinued since the action had been time-barred since 1 August 1983. By order of 19 April 1991, the Tribunal Correctionnel, Brussels, granted that request (paragraph 6).

5 According to the contested order, between October 1977 and November 1983 Volker Lenz was given immune system treatment by a doctor for inflammation of the respiratory tract (paragraph 7). At his father's request, the settlements office reimbursed all the costs occasioned by that treatment between 1977 and 1982 on account of the existence of a serious illness within the meaning of section IV.1 of Annex I to the insurance rules (paragraph 8).

6 In February 1985 Manfred Lenz informed the Commission that he suspected the doctor of fraud and unlawful medical practices (paragraph 9). By letters of 21 and 26 February 1985 the Commission replied that the matter was private and that it

was for him, if he so wished, to bring proceedings against the doctor (paragraph 10). On 28 February 1986 Volker Lenz's parents lodged complaints against three doctors alleging bodily harm, forgery and other offences. The Brussels Public Prosecutor then brought criminal proceedings in which Volker Lenz's parents joined as parties claiming damages (paragraph 11). By decision of 1 August 1989, the Commission decided to intervene in the prosecution as the person subrogated to the rights of the insured in order to obtain reimbursement of sickness insurance benefits, in accordance with Article 85a of the Staff Regulations. Nothing came of that decision because differences of opinion arose between Manfred Lenz and the Commission's staff in assessing the evidence in the case. The Commission then withdrew its intervention. The reasons for that decision were set out in two letters from the Commission to Manfred Lenz of 29 April and 27 May 1991 (paragraph 12). On 26 October 1990, the Brussels Public Prosecutor applied for the prosecution for bodily harm to be abandoned as being time-barred, and for proceedings on the other charges to be terminated before trial. By order of 19 April 1991, the Tribunal Correctionnel granted the prosecution's applications (paragraph 13).

7 By letter of 6 May 1991, Manfred Lenz requested the Commission to bring an appeal against that decision, which it refused to do by letter of 27 May 1991 (paragraph 14). Then, by letter of 17 June 1991, the two appellants and Manfred Lenz sent the Commission a request for assistance under Article 24 of the Staff Regulations, a request for reimbursement of the costs incurred in bringing proceedings before the Belgian courts as well as a request for compensation for the damage suffered by Erika and Volker Lenz as a result of the medical treatment at issue and all the consequential damage (paragraph 15).

8 In the words of Article 24 of the Staff Regulations:

'The Communities shall assist any official, in particular in proceedings against any person perpetrating threats, insulting or defamatory acts or utterances, or any attack to person or property to which he or a member of his family is subjected by reason of his position or duties.

They shall jointly and severally compensate the official for damage suffered in such cases, in so far as the official did not either intentionally or through grave negligence cause the damage and has been unable to obtain compensation from the person who did cause it.

(...)'

9 In the same letter of 17 June 1991, the appellants stated that the part played by the Commission in the proceedings to obtain recognition of their right to compensation and damages was insufficient in Volker Lenz's case and wholly non-existent in Erika Lenz's case. They also claimed that the settlements office had not checked the disputed treatments and, furthermore, had reimbursed invoices which did not meet the legal criteria for authorization in respect of the services in question (paragraph 17).

10 By decision of 30 July 1991, the Commission rejected the appellants' requests (paragraph 19).

11 On 7 October 1991, the appellants lodged a complaint against that decision (paragraph 20). The complaint was rejected by letter of 23 March 1992 (paragraph 21).

12 By application lodged at the Court Registry on 17 June 1992, the appellants and Manfred Lenz brought an action for annulment of the Commission's decisions rejecting their request and complaint and an order for the Commission to pay

them damages. That application was sent by the Court Registry to the Registry of the Court of First Instance where it was registered under Number T-47/92 (paragraph 23).

13 On 18 August 1992 the President of the Court of First Instance decided to assign the case to the Fifth Chamber, composed of three judges.

14 On 5 October 1992 the appellants applied under Article 114 of the Rules of Procedure of the Court of First Instance for Case T-47/92 to be referred to the competent Chamber in accordance with Article 14 of those Rules. They claimed that in view of the importance of the case and the fact that Erika and Volker Lenz were not officials the case ought to have been assigned to a Chamber of five Judges and an Advocate General ought to have been designated.

15 By order of 14 December 1992 (T-47/92 *Lenz* v *Commission* [1992] ECR II-2523), the Court of First Instance dismissed those applications. In paragraphs 29 and 30, it found that the action concerned a dispute between the Community and one of its servants as stated in Article 12(1) of the Rules of Procedure; Erika Lenz and Volker Lenz were members of Manfred Lenz's family, with respect to whom the Commission had no obligations, other than indirectly through Manfred Lenz's status as an official. In any event, if the action did not concern a dispute between the Community and one of its servants, it would have had to be declared inadmissible on the ground that the Court of First Instance had no jurisdiction.

16 By application lodged at the Registry of the Court of Justice on 29 December 1992, Erika Lenz brought an action against the Commission for compensation under the second paragraph of Article 215 in conjunction with Article 178 of the EEC Treaty on the ground that the Commission was jointly liable for the bodily

harm allegedly caused by the doctors because its staff reimbursed the costs of treatment without ascertaining whether those treatments were medically appropriate (paragraph 26).

17 By application lodged at the Registry of the Court of Justice on 8 January 1993, Erika Lenz brought another action against the Commission under the second paragraph of Article 215 in conjunction with Article 178 of the Treaty for compensation for 'vexatious conduct, calumny, defamation, threats, failure to prevent the perversion of justice, loss of joy in living' and for 'discrimination against a non-Belgian national of the Community', and also for failure to provide remuneration for the work she carried out between 1985 and 1991 'to throw light on fraud in the fees charged and deception as to medical treatment' (paragraph 27).

18 By application lodged at the Court Registry on 20 March 1993, Volker Lenz brought an action against the Commission for compensation under the second paragraph of Article 215 in conjunction with Article 178 of the EEC Treaty on the ground that the Commission was jointly liable for the bodily harm he had suffered, since its staff had failed to fulfil their obligations by reimbursing the costs of treatment without checking whether the diagnoses and treatments were medically justified (paragraph 28).

19 By letter received at the Registry of the Court of First Instance on 15 June 1993 the appellants informed the Court that they were discontinuing their action in Case T-47/92. As a result of that withdrawal, the case was removed from the Register of the Court of First Instance by order of the President of the Fifth Chamber of 5 July 1993 (paragraph 29).

20 The three actions, registered at the Court of Justice under numbers C-436/92, C-6/93 and C-79/93, were referred to the Court of First Instance by order of the Court of 27 September 1993, pursuant to Council Decision 93/350/ECSC, EEC, Euratom of 8 June 1993 amending Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities (OJ 1993 L 144,

p. 21), and registered at the Registry of the Court of First Instance under numbers T-462/93, T-464/93 and T-470/93 (paragraph 30). They were joined by the contested order (paragraph 38) and referred to the Fourth Chamber.

21 By letter of 2 February 1995, the appellants made a request under Article 16 of the EC Statute of the Court of Justice to have Judge Lenaerts, President of the Fourth Chamber of the Court of First Instance, removed from the proceedings (paragraph 39).

The contested order

22 In the contested order, made under Article 111 of its Rules of Procedure, the Court of First Instance decided that there was no need to give a decision on the appellants' request for the removal of Judge Lenaerts, President of the Fourth Chamber of the Court of First Instance (paragraph 45). Although the President of the Court considered that there was nothing which might, under the second sentence of the second paragraph of Article 16 of the EC Statute of the Court of Justice, preclude Judge Lenaerts from sitting in the cases before the Court of First Instance (paragraph 42), the judge asked to be discharged from his duties in those cases (paragraph 43). By letter of 24 February 1995, the President of the Court of First Instance responded to that request by replacing him in his duties as President of the Fourth Chamber by Judge Schintgen, as the most senior judge of the Fourth Chamber within the meaning of Article 6 of the Rules of Procedure of the Court of First Instance (paragraph 44).

23 As regards the admissibility of the action, the Court noted first that, according to the settled case-law of the Court of Justice, where a dispute between an official and the institution by which he is employed concerning compensation for damage originates in the relationship of employment between that person and the institution, it falls under Article 179 of the Treaty and Articles 90 and 91 of the Staff Regulations and accordingly not under Articles 178 and 215 of the Treaty (paragraph 55). That employment relationship also governs the situation of persons who, through an official's membership of the scheme, are entitled to cover under

the joint scheme as members of an official's family (paragraph 56). The Court therefore considered that the appellants' personal situation was covered by the Staff Regulations since Erika and Volker Lenz were both indirectly insured under the joint scheme through their status as the spouse and child respectively of Manfred Lenz, an official of the Commission and a member of the scheme (paragraph 57).

24 Second, the Court found that in her application in Case T-462/93, Erika Lenz had herself acknowledged that the conduct in issue fell within the context of the right to assistance laid down in the Staff Regulations and that she had alleged that the Commission had infringed Articles 14, 85 and 85a of the Staff Regulations. Similarly, in her application in Case T-464/93 she had in addition referred both to the first paragraph of Article 215 and to Article 179 of the Treaty (paragraph 58).

25 In those circumstances, the Court held that the appellants' claims for compensation could not be considered except in the light of the Staff Regulations and that the fact that they had invoked Articles 178 and 215 of the Treaty could not prevent the provisions of the Staff Regulations concerning staff actions from applying to the proceedings (paragraph 59).

26 Accordingly, since the actions fell under Article 179 of the Treaty, the Court considered that in each case the appellants should have complied with Articles 90 and 91 of the Staff Regulations, which establish a prior administrative procedure for disputes concerning the employment of Community officials (paragraph 60). Furthermore, it pointed out that since compliance with time-limits for bringing actions is a matter of public policy, it was for the Court to consider of its own motion whether those time-limits had been observed (paragraph 61).

27 The Court found, first, that the claims made by the appellants in the three cases had been the subject of a letter of 17 June 1991 to the Commission containing a request for assistance under Article 24 of the Staff Regulations together with a

request for reimbursement of various expenses and compensation for damage which they considered they had suffered, a letter from the Commission of 30 July 1991 refusing to grant that request, a complaint made by the plaintiffs on 7 October 1991 and a Commission decision of 23 March 1992 rejecting that complaint. Those claims formed the subject-matter of Case T-47/92 (paragraph 62).

28 The Court went on to observe that the actions in the present cases turned on the same facts and had the same subject-matter (paragraph 63).

29 Finally, it noted that the appellants' pleadings referred systematically to the administrative procedure which preceded Case T-47/92 (paragraph 64).

30 Accordingly, the Court held that the time-limit for bringing the appellants' claims before the Court of First Instance had started to run on 23 March 1992, the date on which the Commission rejected their complaint (paragraph 65), notwithstanding the fact that the appellants and various departments of the Commission exchanged letters after 23 March 1992 (paragraph 66) or the fact that the Commission had addressed the substance of that claim made out of time (paragraph 67). Only the existence of new material facts could justify submitting an application for review of a decision which had become final, and such was not the case (paragraph 68).

31 Moreover, the Court held that discontinuing Case T-47/92 had not obliterated the effects of the administrative procedure which preceded the bringing of that action. It stated that although a second action was in principle admissible after the first had been discontinued, it must comply with the time-limits set in motion by the administrative procedure prior to the commencement of the first action. It was contrary to the principle of legal certainty for a party to discontinue an action in order to contrive the opening of a new pre-litigation procedure (paragraph 69).

32 Since the applications in the three cases were made after the expiry of the time-limit prescribed by Articles 90 and 91 of the Rules of Procedure (paragraph 70), the Court dismissed them as inadmissible (paragraph 71).

Pleas in law put forward by the parties

33 In support of their claims for annulment of the contested order, the appellants maintain, first, that the Court of First Instance made a mistake of law in refusing their request for the removal of Judge Lenaerts and, second, that the proceedings in the main action should be considered not in the light of Article 179 of the Treaty, on which the Court relied, but in the light of Article 178 and the second paragraph of Article 215.

34 As regards the first plea, the appellants claim that in the Court of First Instance Judge Lenaerts played a significant part in the action which gave rise to the contested order. In addition, they consider that since Article 16 of the EC Statute of the Court of Justice makes provision for the removal of judges, the Court of First Instance ought to have given a decision on their request in the contested order and that the Court's failure to take account of the fact that Judge Lenaerts stood down is contrary to the Rules of Procedure. In the alternative, they maintain that inasmuch as the Court took into consideration only the argument concerning Judge Lenaerts' nationality, it ignored one of the facts relied upon by the appellants.

35 With regard to the second plea, the appellants consider that it was wrong to assimilate them to Community officials and that they were not required to follow the prior administrative procedure under Articles 90 and 91 of the Staff Regulations. They state that if for the purposes of this case they are to be accorded a legal status similar to that of officials, it must be assumed that they possess in general a

status similar to that of officials, with all the legal consequences that that entails, for which there is no basis in the case-law of the Court of Justice. Moreover, it cannot be inferred from that case-law that the existence in law of a 'contract for the benefit of third parties' means that the appellants are in all respects subject to Article 179 of the Treaty and to Articles 90 and 91 of the Staff Regulations.

36 The appellants add that, in any event, the administrative procedure before the Commission which was in issue in Case T-47/92 concerned neither the breaches of administrative duty nor the omissions of the respondent itself which were the subject of the procedure before the Court of First Instance. In their view, there was therefore no prior administrative procedure covering the entire subject-matter of the dispute. Furthermore, they claim that the fact that the duty to provide protection and to have regard for the welfare of officials arises from the provisions applicable to Community officials does not constitute a criterion for assessing the Commission's obligations.

37 In its reply, the Commission contended that the appeal should be dismissed.

38 As a preliminary point, it considers that this appeal is an abuse of process. It claims that, in the application lodged under Article 114 of the Rules of Procedure of the Court of First Instance on 5 October 1992 in Case T-47/92, the appellants and Manfred Lenz challenged only the jurisdiction of the Fifth Chamber hearing the action and asked for the case to be referred to the Second Chamber. The Court of First Instance rejected that request on the ground that the action concerned a dispute between the Community and one of its servants and also members of his family with respect to whom the Commission had obligations indirectly through the Staff Regulations. The Commission observes that neither Manfred Lenz nor the

appellants lodged an appeal against that order. Subsequently, the appellants brought three actions based on Article 178 in conjunction with the second paragraph of Article 215 of the Treaty, which had the same subject-matter as the action in Case T-47/92. The Commission regards that as an attempt by the appellants to circumvent the binding force of the order of 14 December 1992 confirming the jurisdiction of the Court of First Instance, an attempt repeated in this appeal.

39 The Commission then states that the first plea is inadmissible because the appellants have no legal interest in bringing proceedings. The allegation that Judge Lenaerts was involved in adopting the contested order is wholly unfounded: the judges who were involved are those whose names appear in the introduction to the contested order. It points out in addition that in the preliminary request made on 5 October 1992 in Case T-47/92 the appellants had already sought the disqualification of Judge Lenaerts on the ground of alleged bias. They brought no appeal against that order.

40 The Commission considers that the second plea is also inadmissible because it is inconsistent: when discussing the existence and extent of their alleged rights to compensation, the appellants rely on their status as members of an official's family, co-insured under the joint scheme as a result of which they are entitled to the Commission's special protection and assistance, whereas when they come to the question of legal remedies, they regard themselves as third parties *vis-à-vis* the Commission.

41 The Commission also claims that the appeal is manifestly unfounded.

42 With regard to the first plea, it considers that the request for disqualification has become without purpose following the decision of the President of the Court of First Instance to replace Judge Lenaerts with Judge Schintgen. In any event, there is no basis for the request, since Judge Lenaerts played no part in the adoption of the contested order.

43 It claims that the second plea is equally unfounded. The Commission observes that it is apparent from the various applications made to the Court of First Instance that the appellants acted in their capacity as persons insured under the joint sickness scheme through the affiliated member and that they base their claims for compensation on the fact that the Commission and its staff, as well as the sickness insurance fund, infringed the Staff Regulations or the insurance rules governing sickness insurance cover for the members of an official's family insured through the official. According to settled case-law, to which the Court of First Instance referred, Article 179 of the Treaty is applicable where members of an official's family bring actions for compensation against the appointing authority concerning provisions of the Staff Regulations or the implementing regulations which grant those family members certain rights in relation to that authority. As the Court of First Instance held, the actions were therefore inadmissible because the pre-litigation procedure was not followed within the time-limits fixed by Article 90(2) of the Staff Regulations.

Findings of the Court

44 Article 119 of the Rules of Procedure provides that where an appeal is clearly inadmissible or clearly unfounded the Court may at any time dismiss it by reasoned order.

The first plea

45 It is apparent from the contested order that even though the President of the Court of First Instance considered that there was no reason for Judge Lenaerts not to sit in the cases before the Court, the latter asked to be discharged from his duties in those cases. The President responded to that request by letter of 24 February 1995 by replacing him with Judge Schintgen in the performance of his duties as President of the Fourth Chamber. Accordingly, Judge Lenaerts' name does not appear in the introduction to the contested order.

46 Since Judge Lenaerts played no part in the adoption of the contested order, the applicants have no legal interest as regards the first plea. That plea must therefore be dismissed as clearly inadmissible.

The second plea

47 The second plea in fact raises the matter of the capacity in which the appellants acted before the Court of First Instance.

48 In the order of 14 December 1992, the Court of First Instance found that Case T-47/92 concerned a dispute between the Community and one of its servants as stated in Article 12(1) of the Rules of Procedure, and that the appellants were members of Manfred Lenz's family with respect to whom the Commission had no obligations otherwise than indirectly through his status as an official.

49 The question is therefore whether in the actions which gave rise to the contested order the appellants were bound by the order of the Court of First Instance of 14 December 1992.

50 The principle of *res judicata* extends only to the matters of fact and law actually or necessarily settled by the judicial decision in question (Case C-281/89 *Italy* v *Commission* [1991] ECR I-347, paragraph 14).

51 It should be noted, first, that since the appellants asked the Court of First Instance to establish whether it had jurisdiction in connection with the application made on 5 October 1992 on the basis of Article 114 of the Rules of Procedure of the Court of First Instance in Case T-47/92, that court was bound to rule in its order of 14 December 1992 on the question of the capacity in which they acted.

52 Second, neither Manfred Lenz nor the appellants appealed against that order. The three actions to which the contested order relates were in fact commenced before Case T-47/92 was discontinued.

53 Third, the three actions all seek an order for the Commission to pay damages. Even though one of them concerns sums which were not claimed in Case T-47/92, the three actions concern the same parties, are based on the same facts and relate to the same matters as those at issue in Case T-47/92.

54 It follows that in this case the appellants were bound by the findings made by the Court of First Instance in the order of 14 December 1992 concerning their capacity to bring proceedings before that court.

55 It must also be noted that the Court of First Instance was in any event correct in finding that the employment relationship between an official and an institution also governs the situation of persons who, through an official's membership of the scheme, are entitled to cover under the joint scheme as members of an official's family, and in finding that the applications made by the appellants could only be considered in the light of the Staff Regulations, and in particular Articles 90 and 91.

56 The second plea must therefore likewise be dismissed as clearly inadmissible.

57 Accordingly, the appeal must be dismissed in its entirety as clearly inadmissible pursuant to Article 119 of the Rules of Procedure.

Costs

58 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Article 70 of those Rules provides that in proceedings between the institutions and their servants the institutions are to bear their own costs. However, by virtue of Article 122 of those Rules, Article 70 is not to apply to appeals brought by officials or other servants of the institutions. Since the appeal has been unsuccessful, the appellants must be ordered to pay the costs.

On those grounds,

THE COURT (Fourth Chamber)

hereby:

1. Dismisses the appeal;

2. Orders Erika Lenz and Volker Lenz to pay the costs.

Luxembourg, 28 November 1996.

R. Grass

Registrar

J. L. Murray

President of the Fourth Chamber