OPINION OF MR ADVOCATE GENERAL DA CRUZ VILAÇA
delivered on 31 May 1988 *

Mr President,
Members of the Court,

1. On 21 March 1986 the Personnel Division of the Court of Justice informed one of its officials, Vassili Christianos, a lawyer-reviser in the Greek Division of the Translation Directorate, that pursuant to the new provisions of Articles 67 and 68 of the Staff Regulations and Articles 1, 2 and 3 of Annex VII thereto, the family allowances payable to him would thereafter be paid direct to his ex-wife, who resides in Greece with their son, of whom she has custody.

2. Under those provisions the calculation of the allowances in question (household allowance, dependent child allowance and education allowance) would also involve the application of a geographical weighting corresponding to the country of residence of the person entitled to custody.

3. Consequently, and in accordance with instructions from the Head of the Personnel Division, the applicant's remuneration was reduced as from May 1986 by LFR 15 822 in respect of all the family allowances payable. That sum was equivalent, at the official exchange rate, to DR 48 680, but the applicant's ex-wife's account was credited with only DR 32 520 as a result of the application of the weighting for Greece.

4. The applicant submitted a complaint, seeking annulment of the decision of the administration of the Court in so far as it applied the weighting. He also requested that the administration should be instructed to send the family allowances to his wife without the application of any weighting, or alternatively that they should be paid to the applicant, who would undertake to transfer them to his ex-wife at the normal exchange rate applied by banks.

5. The complaint was expressly rejected by the committee of the Court responsible for dealing with complaints; it is against that rejection that the present action has been brought.

6. The Commission of the European Communities was given leave to intervene in support of the defendant.

7. The applicant asks the Court, essentially, to

(a) annul the decision rejecting his complaint;

(b) direct that the family allowances to be paid to the person having custody of the child are to be calculated at the actual exchange rate for Luxembourg francs and drachmas, without the application of any weighting;

* Translated from the Portuguese.

(c) order an adjustment of the applicant's account;

(d) order the defendant to pay the differences between the amounts deducted from his salary and those paid to the recipient of the allowances as from 15 May 1986;

(e) order the defendant to pay default interest and also the costs ofthe proceedings.

1. The admissibility of the application

8. The action is intended to secure, in the first place, annulment of the decision rejecting the applicant's complaint.

9. That decision is a purely confirmatory measure which, taken in isolation, cannot be challenged.

10. But, as the Court has acknowledged in similar circumstances,[1] it must be recognized that the subject-matter of an action extends also to the measure against which a complaint was submitted and whose implementation adversely affects the applicant.

11. No inadmissibility thus arises in that respect, as indeed the defendant stated in its defence.

12. However, the defendant also raised an objection of inadmissibility regarding the applicant's second, third and fourth heads of claim.

1 — Judgment of 20 March 1984 in Joined Cases 75 and 117/82 *Razzouk and Beydoun* [1984] ECR 1509, at p. 1527, paragraph 7.

13. It contends that the Court could not order the measures sought by the applicant: the applicant does not complain of misapplication of the Staff Regulations but challenges the application of a provision which he objects to as illegal.

14. However, it is for the Community legislature alone to adopt the necessary measures to bring to an end any discrimination deriving from the contested legislation (judgment in *Razzouk and Beydoun* [1984] ECR 1509, at p. 1530, paragraph 19) and the administrations of the institutions are, until then, under an obligation to apply the provisions of the Staff Regulations for the time being in force.

15. In my view, this problem may be resolved into two issues:

(1) whether or not an objection of illegality has been raised by the applicant;

(2) whether or not the Court is competent to order the measures sought by the applicant.

16. As regards the first part of the problem, the terms used by the applicant — both in his complaint and in his application — indicate, albeit ambiguously, that he wished to avoid directly challenging the legality of the applicable provisions of the Staff Regulations, preferring to direct his action against the legality of the administration's decision, having regard to the manner in which the latter interpreted and applied those provisions.

17. Thus, all his arguments purport to challenge the 'strict' or 'literal' application of the amendment to the Staff Regulations

which, far from adversely affecting dependent children, was designed to ensure their effective protection. He claimed, therefore, that such literal application gave rise to 'results which were not *foreseen* and *ran counter* to the interests of the persons which it (the provision of the Staff Regulations) ought to protect', creating an irregular and unfair situation, leading, in this particular case, to an infringement of general principles, above all the principle of equality.

18. There may be doubts as to the admissibility of a merely implicit 'objection of illegality' in the applicant's arguments.[2]

19. It is clear, however, that the real problem raised in this action is in fact whether Article 67 (4), in so far as it requires a geographical weighting to be applied to family allowances paid to a person other than the official concerned, is to be considered inapplicable to the applicant's situation, for fear that its application might result in the infringement of a superior rule of law. In fact, it is impossible to call in question the legality of a decision of the administration regarding the applicant's family allowances without challenging the propriety of the clear provision of the Staff Regulations on which it is based.

20. Moreover, at the hearing, Counsel for the applicant, when pressed by the Court, finally conceded that the object of the application was to challenge, by way of objection, the propriety of the provision concerned. It is appropriate to dispel any doubts regarding this matter,[3] which I shall analyse in the second part of this Opinion.

21. Let us first look at the second part of the problem of admissibility. The applicant points to a parallel with *Newth*,[4] which concerned the application of Article 50 (5) of the Staff Regulations, in relation to the geographical weightings to be applied in the case of retirement in the interests of the service. The claims made in that case were wholly similar to those at issue here.

22. Without discussing the admissibility of the claims — which was not challenged by the Commission, the defendant in that case — the Court considered that the application of Article 50 (5) of the Staff Regulations to a situation like that of the applicant would have disturbing consequences, infringing the principle of equality, and therefore that the administration was under a duty to interpret the provision in question so as to avoid such a consequence, and accordingly ought to apply weightings different from those prescribed by that provision.

23. Pursuant to Article 91 of the Staff Regulations, which gives it unlimited jurisdiction in proceedings of a financial character, the Court then held that the Commission should determine the applicant's rights with all due precision.

24. It does not however seem to me that the issue in that case is liable to influence the decision to be given in this one.

25. It is incontestable that, in cases where the administration enjoys discretion in

2 — Judgment of 17 December 1959 in Case 14/59 *Fonderies de Pont-à-Mousson* [1959] ECR 215, at p. 230.

3 — *Idem.*

4 — Judgment of 31 May 1979 in Case 156/78 *Newth* v *Commission* [1979] ECR 1941, at p. 1952, paragraph 13.

deciding whether and in what terms to adopt a particular decision, the Court cannot take its place by adopting the decision for it or determining which of a number of existing possibilities is to be chosen. [5]

26. Accordingly, the Court has always taken care to avoid encroaching upon the discretion of the administration by means of the orders or injunctions available to it.

27. Any claim to that effect must therefore be regarded as manifestly inadmissible.

28. And even where the administration's powers are circumscribed, there is no reason necessarily to reach a very different conclusion.

29. In fact, the exercise of such powers then stems from the obligation to give effect to the judgment, and it becomes unnecessary for the Court to address any order to the defendant institution to adopt a particular measure or decision.

30. As was stated, in general terms, by the Court in *De Compte*, [6] 'Article 176 of the Treaty provides that an institution whose act has been declared void is required to take the necessary measures to comply with the judgment of the Court of Justice. The Court cannot, without exceeding its jurisdiction, address orders to the Community institutions regarding the implementation of its judgments. [7] Accordingly, this claim is inadmissible.' [8]

31. However, the situation is not so clear where the annulment of the administration's measure is sought because it was based on provisions of the Staff Regulations which contravene a superior rule of law and are therefore inoperative.

32. Following such annulment, it is incumbent on the Community legislature, on the one hand, to comply with the judgment by taking the measures necessary to restore observance of the principle in questions; [9] but, on the other hand, it is incumbent upon the administration to re-examine the applicant's position immediately and adopt, in the mean time, the measures necessary to bring to an end the prejudical or discriminatory situation of which he was the victim. [10]

33. Once the contested provision has been declared inoperative, it may become necessary — so that the administration is in a position to 'determine the rights of the applicant with all due precision' [11] — for the Court to provide it with valid points of reference or parameters for its decision.

34. That is what the Court did in *Razzouk and Beydoun* when it directed that the provisions of the Staff Regulations

5 — Judgment of 16 December 1960 in Case 44/59 *Fiddelaar* v *Commission* [1960] ECR 535, at p. 542; judgment of 19 March 1975 in Case 189/73 *Van Reenen* v *Commission* [1975] ECR 445, at p. 454.

6 — Judgment of 20 June 1985 in Case 141/84 *De Compte* v *Parliament* [1985] ECR 1951, at p. 1967, paragraph 22.

7 — Seeking retroactive restoration of the applicant's full entitlement.

8 — See also judgment of 23 February 1961 in Case 30/59 *De Gezamenlijke Steenkolenmijnen* [1961] ECR 1, at p. 36; judgments of 1 July 1964 in Case 26/63 *Pistoj* v *Commission* [1964] ECR 341 and Case 78/63 *Huber* v *Commission* [1964] ECR 367. This trend in the case-law prevailed over that followed in earlier cases, such as the judgment of 19 March 1964 in Case 18/63 *Schmitz-Wollast* v *European Economic Community* [1964] ECR 85 and the judgment of 7 July 1964 in Case 70/63 *Collotti* v *Court of Justice* [1964] ECR 435.

9 — Razzouk and Beydoun, cited above, paragraph 19.

10 — *Ibidem.*

11 — Newth, cited above, paragraph 14.

concerning widow's pensions should be applied to one of the applicants; that is also what the Court did in *Newth*, when it directed that the weighting for Belgium should be applied to the payment, calculated in Belgian francs, to which the applicant was entitled under Article 50 (5) of the Staff Regulations and that the applicant's account should be adjusted and the arrears due be paid to him.

35. However, for all practical purposes, that problem does not arise in the case under review here.

36. The applicant has made a number of claims but has not set out specific grounds for each of them. On the contrary, the grounds relied upon are common to all the claims.

37. If, as will be seen shortly, the grounds of the application must be regarded as wholly unfounded, that would immediately imply dismissal not only of the main claim (annulment of the contested decision) but also of the ancillary claims and of those seeking orders to be addressed to the administration with a view to enforcement of the judgment.

38. Since, in either case, it is necessary to consider the merits of the grounds relied on, in so far as a number of the claims escape the objection of inadmissibility, if it should be concluded that the action is entirely unfounded it will be unnecessary to express a specific view on the admissibility or well-foundedness of the claims alleged by the defendant to be inadmissible.

39. It may in fact be stated at this point that none of the grounds adduced is capable of providing the least support for the action.

2. Analysis of the merits

40. The applicant alleges that a number of general principles of law have been contravened:

(a) *The principle of equity*: the strict application of Article 67 (4) led in the applicant's case to an iniquitous situation, entailing unforeseen results totally opposed to the interests of the persons who should have been protected, in so far as the latter were prevented from receiving the full amount of the family allowances;

(b) *The principle of protection of legitimate expectations, the duty to have regard for the interests of officials and the principle of sound administration*: the administration of the Court applied abstract rules without taking account of the interests of the official and his minor child and without informing him of the consequences of the application of those rules;

(c) *The principle of equality of treatment*: the system at issue, although having the *objective* of according equal treatment to persons residing in different countries, has as its *result* discrimination between officials whose families reside in Greece and those whose families reside in another Member State, depriving the former of part of the family allowances to which they are entitled;

(d) *The prohibition of 'unjust enrichment'*: although conceding in his reply that there can be no real 'unjust enrichment' of the administration, the applicant alleges that the latter's action regarding the transfer of family allowances means that the recipient thereof is ultimately paid less than she would receive if (as under the previous system) the official himself made the transfer at the prevailing rate of exchange or if she resided not in Greece but in Luxembourg.

41. The applicant's arguments do not stand up to analysis.

42. As far as the principles of *equity* and *equal treatment* are concerned, what the applicant is in fact challenging is the application of the geographical weightings to the family allowances paid to a person other than the official, in accordance with Article 67 (4) of the Staff Regulations.

43. However, as the Court has emphasized on more than one occasion in relation to Articles 64 and 65 of the Staff Regulations, the purpose of the geographical weightings is 'to guarantee, in accordance with the principle of equal treatment, the maintenance of equal purchasing power for all officials, regardless of their place of employment'. [12]

44. The principles adopted in the Staff Regulations is that of parity of purchasing power of the remuneration of officials, regardless of the place where they perform their duties.

45. Remuneration comprises, by virtue of Article 62, a 'basic salary, family allowances and other allowances' and all of them are subject to the geographical weightings referred to in Articles 64 and 65. That practice is confirmed by the judgment in *Jacquemart* of 13 July 1978, [13] which makes it clear (paragraph 14) that 'the weightings do not constitute an additional element of remuneration but are a means of calculating the amounts of the various elements making up that remuneration'. The application of the weightings will involve an increase or a decrease, as the case may be, of the remuneration expressed in Belgian francs.

46. Article 67 (4) does no more than clarify the fact that the weighting applied to family allowances paid to a person having custody of the children (where that person is not the official) is the weighting applicable to the country of residence of that person.

47. And in fact it would not be equitable to pay the allowances in the currency of the country in which the official performs his duties, subjecting them to the weighting applicable to that country, when the official does not have custody of the child and the child resides in another country with the person who looks after him.

48. The result of the system adopted is thus that the persons having custody of the children of officials receive the same amount, calculated according to the cost of living, wherever they reside: the application of this rule makes certain that *equity* is wholly ensured.

12 — Judgment of 6 October 1982 in Case 59/81 *Commission* v *Council* [1982] ECR 3329, at p. 3358, paragraph 33; judgment of 15 December 1982 in Case 158/79 *Roumengous Carpentier* v *Commission* [1982] ECR 4379, at p. 4402, paragraph 28.

13 — Case 114/77 *Jacquemart* v *Commission* [1978] ECR 1697, at p. 1706.

49. In the applicant's case, the general rule was observed, without any unforeseen or undesirable consequences.

50. It has not been shown that the applicant's situation is in any way exceptional so as to justify, in regard to him, a departure from or a change in the application of the rule in question.

51. On the contrary, the rule is applied to a general category of persons, defined in abstract terms according to their circumstances, and the applicant simply comes within that general category. Moreover, it has been explained to us that, in the Court of Justice alone, the system is applied to about 15 to 20 people. The Commission has also given a number of examples of the application of the same provision to the family allowances payable to its officials, resulting in some cases in a decrease and in others in an increase of the nominal amounts in Belgian francs, depending on the places of residence of the persons with custody of the children.

52. In the same way it is not possible to speak of breach of the principle of *equality* where a provision is applied which is intended precisely to ensure that different treatment is accorded to people who are in different situations, so as to offset the differences and make certain that, as a result of the adjustment envisaged in the provision, they are placed in equivalent circumstances.

53. There is no doubt that the application of the weighting in force for Greece has resulted in the amount transferred by the administration being lower than that previously transferred by the applicant himself; this is because the cost of living is lower in Athens than in Brussels and Luxembourg. In other cases, the situation will be, and is, the reverse and, for the same reasons of relative fairness, the weighting to be applied in those cases will be higher.

54. The applicant's son thus enjoys the same purchasing power as the son of any other official entrusted to that official or to a third party and residing in any Member State, which would not be the case if the weightings were not applied.

55. Furthermore, there is no doubt that the applicant's son will receive, by way of family allowances, the same amount in Greek currency, and therefore will enjoy the same purchasing power, as the son of any other official entrusted to the care of the official's spouse and residing with the latter in Greece.

56. No better fate awaits the allegation of breach of the principle of the *protection of legitimate expectations*: it is not legitimate for an official to expect that a provision of the Staff Regulations will be applied incorrectly or will be flagrantly infringed — as would happen if, as the applicant requests, the family allowances were sent to his ex-wife without the application of any weighting or if they were paid direct to the applicant in a currency other than that of the country of residence of the person having custody of the child.

57. Article 67 (4), which was added to the Staff Regulations by Article 5 of Council Regulation (EEC/Euratom/ECSC) No 2074/83 of 21 July 1983,[14] originates from

14 — OJ L 203, 27.7.1983, p. 1.

the competent authority, has the same value as the amended legislation, is not subject to any formal defect and was well known to the applicant (particularly since the administration drew attention to the changes to the Staff Regulations in a note which it circulated on 21 March 1986); the applicant cannot therefore claim to be surprised, or to have any subjective expectation or acquired right under the previous rules, in order to escape the application of Article 67 (4) — which, moreover, is not retroactive.

58. As the Court has emphasized,[15] the relationship between officials and institutions is based upon the Staff Regulations and no commitment given by the administration can be relied on in such circumstances to suspend the the effects of a properly introduced amendment to the Staff Regulations.

59. That being the case, it is not clear how the Community's *duty to have regard for the interests of its officials* or the *principle of sound administration* could be at issue, since all that occurred was the straightforward application of a provision of the Staff Regulations inspired by the concern (stemming from complaints previously made to the institutions) to ensure the prompt and effective payment of family allowances to the persons having custody of children, to enable them to enjoy the same treatment regardless of their place of residence.

60. Furthermore, as we have seen, the administration informed the applicant well in advance that, having regard to the information provided by him, it was going to apply the relevant provisions of the Staff Regulations, calling upon him, moreover, to take the measures necessary to ensure correct application of the rules and prevent any undue loss.

61. In other words, not only can the applicant not consider himself the victim of any provisions of the Staff Regulations which have, as far as he is concerned, discriminatory consequences; he also cannot complain that the administration, by applying those provisions, has acted in relation to him in an improper, unfair or even careless manner. There may indeed have been a delay in applying the new provisions which, it appears, was due to administrative difficulties; however, the applicant suffered no loss as a result.

62. Finally, when confronted by the defendant's defence, the applicant abandoned, in his reply, the submission as to the alleged *unjust enrichment* of the institution, but he continued to maintain that he and his son had suffered, as a result of the application of the contested provisions, 'unjust impoverishment'.

63. The defendant has shown sufficiently that the submission made in the application was based on a profound misunderstanding. Pursuant to Article 62 *et seq.* of the Staff Regulations, the remuneration of officials (including family allowances) — always *expressed* in Belgian francs — is subject to a weighting above, equal to or below 100%, depending on the differing living conditions in the various places of employment. However, it is *paid* in the currency of the country in which the official performs his duties or, where it is appropriate to apply

15 — Judgment of 19 March 1975 in Case 28/74 *Gillet* v *Commission* [1975] ECR 463, at p. 472, paragraph 4.

Article 67 (4), in the currency of the country of residence of the person responsible for the official's children, in which case there is applied, if necessary, the rate of exchange used for the implementation of the general budget of the Communities, in accordance with the second subparagraph of Article 63 (2).

64. This applies to all the elements making up the remuneration and, as far as family allowances are concerned, it applies whether the children are in the custody of the official or of a third party, whether they reside at the official's place of employment or in another Member State and whether the official works in Brussels or Luxembourg or in another Member State.

65. Depending on the circumstances, the appropriate weighting will be applied, calculated so as to guarantee equality of the purchasing power of remuneration.

66. Since all that is involved is a method of calculating remuneration, there is no trace of any enrichment of the institutions at the expense of their officials; still less of unjust enrichment, when it is clear that the system applied derives from the Staff Regulations.

67. Since, despite everything, the applicant has continued to claim to have suffered 'unjust impoverishment', one of two alternatives must prevail: either this is a *new submission* made in the reply, which cannot be taken into consideration in view of Article 42 (2) of the Rules of Procedure; or else it is merely *another aspect of the same submission* and must therefore be governed by the same considerations.

3. Conclusion

68. Since the applicant has failed in all his submissions, the application must be dismissed and the costs be borne by the parties in accordance with the combined provisions of Articles 69 (2) and 70 of the Rules of Procedure.