JUDGMENT OF THE COURT (FIRST CHAMBER)
OF 16 JULY 1981 [1]

Stephen Biller and Others
v European Parliament

"Officials — Rates of exchange for the calculation of pensions"

Case 154/79

Officials — Applications to the Court — Application directed against a regulation — Absence of act adversely affecting the official — Inadmissibility
(EEC Treaty, Art. 173; Staff Regulations of Officials, Arts 90 and 91; Council Regulations Nos 3085 and 3086/78 amending the Staff Regulations of Officials)

Regulations Nos 3085 and 3086/78 are of general application and hence officials may not claim that they constitute decisions which are of direct and individual concern to them in order to call their validity in question in proceedings under Article 173 of the Treaty.

The mere submission of a complaint pursuant to Article 90 of the Staff Regulations is not sufficient to create a judicial remedy against a measure which is in the nature of a regulation. The procedure provided for in Article 90 (2) applies only where the appointing authority has taken a decision or has refrained from adopting a measure prescribed by the Staff Regulations and where such conduct constitutes an act adversely affecting the official.

In Case 154/79

STEPHEN BILLER AND OTHERS, officials of the European Parliament, represented by Francis Jacobs, of the Middle Temple, Barrister, with an address for service in Luxembourg at the residence of G. W. Clarke, 3 Rue Dante,

applicants,

v

EUROPEAN PARLIAMENT, represented by Francesco Pasetti-Bombardella, Director General of Administration, Personnel and Finance, acting as Agent,

1 — Language of the Case: English.

assisted by Sir Derek Walker-Smith, Queen's Counsel, with an address for service in Luxembourg at the office of Mr Pasetti-Bombardella, European Parliament,

defendant,

APPLICATION for the annulment of the defendant's decision rejecting the applicants' complaints pursuant to Article 90 (2) of the Staff Regulations concerning the application to them of Council Regulations (Euratom, ECSC, EEC) Nos 3085/78 and 3086/78 of 21 December 1978,

THE COURT (First Chamber)

composed of: T. Koopmans, President of Chamber, A. O'Keeffe and G. Bosco, Judges,

Advocate General: F. Capotorti
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

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

I — Facts and procedure

Under the Staff Regulations (Article 82 (1) and Annex VIII, Article 45 (3)) beneficiaries are entitled to have their pensions paid in Belgian francs adjusted by a weighting which varies according to the country of residence of the pensioner. Article 5 (2) of Council Regulation (Euratom, ECSC, EEC) No 3084/78 (Official Journal 1978, L 369, p. 1) fixed the weighting for the United

Kingdom at 144.1%. A pensioner residing in the United Kingdom with a pension entitlement of A received A × 1.441 Belgian francs. Converted into pounds sterling, at the prevailing rate of exchange this gave a pension (P) of

$$\frac{A \times 1.441}{60} \text{ pounds sterling.}$$

If, on the other hand, the pensioner decided to have his pension paid in sterling, it would be converted into sterling in accordance with Article 63 (3) of the Staff Regulations "on the basis of the par accepted by the International Monetary Fund and in force on 1 January 1965, that is at the rate of 140 Belgian francs to the pound", giving the pensioner a pension of

$$\frac{A \times 1.441}{140} \text{ pounds sterling.}$$

Therefore, as a result of the failure of the Community authorities to take into account changes in the exchange rate of the currencies of Member States, a person resident in the United Kingdom who elected to have his pension paid in Belgian francs obtained a substantially higher pension than the beneficiary who chose to have his pension paid in sterling.

In order to rectify this anomaly the Council, in December 1978, adopted Regulations Nos 3085 and 3086/78 (Official Journal 1978, L 369, pp. 6 and 8) which amended the Staff Regulations relating to the calculation of pensions.

Article 1 of Regulation No 3085/78 reads:

"Article 63 of the Staff Regulations is replaced by the following:

Officials' remuneration shall be expressed in Belgian francs. It shall be paid in the currency of the country in which the official performs his duties.

Remuneration paid in a currency other than Belgian francs shall be calculated on the basis of the exchange rates used for the implementation of the general budget of the European Communities on 1 July 1978.

This date shall be changed, at the time of the annual review of remuneration provided for in Article 65, by the Council acting by a qualified majority upon a proposal from the Commission as provided in the first indent of the second subparagraph of Articles 148 (2) of the EEC Treaty and of 118 (2) of the Euratom Treaty.

Without prejudice to the application of Articles 64 and 65, the weightings fixed pursuant to these articles shall, whenever the above date is changed, be adjusted by the Council, which, acting in accordance with the procedure mentioned in the third paragraph, shall correct the effect of the variation in the Belgian franc with respect to the rates referred to in the second paragraph".

Regulation No 3086/78 adjusted the weightings applicable to the remuneration and pensions of officials of the European Communities. Article 1 (2) provides:

"With effect from 1 April 1979 the weightings applicable to pensions in accordance with the second paragraph of Article 82 (1) of the Staff Regulations shall be that given below for the Community country which the persons entitled to the pension declare their home to be:

...

United Kingdom: 62.5
...".

The applicants allege that the combined effect of these regulations is to reduce by more than 50% the pension of a beneficiary resident in the United Kingdom who has elected to have his pension paid in Belgian francs. As from 1 April 1979 the pension was calculated as $P = A \times 0.625$ Belgian francs instead of $P = A \times 1.441$ Belgian francs.

The written procedure followed the normal course.

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 any preparatory inquiry.

II — Conclusions of the parties

The *applicants* claim that the Court should:

(1) Declare Regulations Nos 3085 and 3086/78 inapplicable;

(2) Annul the defendant's decision rejecting the applicants' complaints concerning the application to them of those regulations;

(3) Order the defendant to pay the costs.

The *defendant* contends that the Court should:

(1) Dismiss the application as inadmissible;

(2) Alternatively, reject it as unfounded in substance;

(3) Order the applicants to pay their own costs.

III — Submissions and arguments of the parties

The *applicants* submit that Regulations Nos 3085 and 3086/78 are illegal. They were, it is alleged, adopted in violation of essential procedural requirements.

The Council failed to consult the European Parliament as required by the Treaty (Merger Treaty, Article 24 (1)). Regulation No 3085/78 refers in its preamble to the opinion of the Parliament published in Official Journal 1977, C 183. However, that opinion was concerned with a proposal of the Commission of 2 March 1977 (Official Journal 1977, C 99) on the introduction of the European unit of account into the Staff Regulations. Since Regulation No 3085/78 has nothing to do with the European unit of account, it can be concluded that there was no proper consultation of Parliament.

Indeed the Parliament in its resolution notes "the Commission's assurance that its proposal will in no way affect the real value of the payments made to officials in the form of remuneration, pensions and allowances".

The applicants point out that the absence of proper consultation with the Parliament on Regulations Nos 3085 and 3086/78 is confirmed by the fact that it was not until after their adoption that there was any awareness of their effect on existing rights.

The preamble to Regulation No 3085/78 refers to the opinion of the Court of Justice. The applicants, in the absence of any knowledge of any consultation with the Court of Justice, assume that this opinion, like that of the Parliament, was given on the Commission's proposal to

introduce the European unit of account into the Staff Regulations. The applicants conclude that the procedure for consultation required by Article 24 (1) of the Merger Treaty has not been followed and this renders Regulations Nos 3085 and 3086/78 illegal.

The applicants argue that the above-mentioned regulations offend against Article 190 of the Treaty in so far as they do not state the reasons on which they are based.

The applicants further submit that Regulations Nos 3085 and 3086/78 constitute a *violation of vested rights.* They point out that it is well established in the case-law of the Court that the Council has no power to amend the Staff Regulations in violation of vested or acquired rights (droits acquis). The terms of Annex VIII to the Staff Regulations recognize that since pension rights accrue by virtue of years of pensionable service they vest not only in those already retired and already receiving a pension, but in anyone who has completed a period of service qualifying for a pension. Moreover many officials, in pursuance of Article 11 (2) of Annex VIII, upon entry into the service of the Commission, transferred the actuarial equivalent of retirement pension rights acquired in the expectation that they would benefit from the provisions in force at the time they made the transfer.

The applicants argue that it is a fundamental principle of law that legislation may not deprive an individual retroactively of vested rights. Legislation which operates retrospectively in such a way as to deprive either pensioners or those in service of pension entitlements, violates this general principle of law and is contrary to the practice of Member States in the matter of public service pension schemes.

Consequently vested rights which have accrued in respect of periods of service completed, and rights transferred to the Community pension scheme, must be governed by the provisions in force at the time when those rights accrued.

The applicants draw a distinction between variable factors in pension formulae such as weightings for the cost of living, and provisions which define these factors. The former can be varied, the latter cannot since any change necessarily affects the basis for the determination of pension rights.

The *defendant* submits that the application is inadmissible. The conditions set out in Article 90 (2) which must be satisfied in order to found a complaint have not been fulfilled. Article 90 (2) requires a decision constituting an act adversely affecting the applicant to have been made and a failure to adopt a measure prescribed by the Staff Regulations, such failure constituting an act adversely affecting the applicant.

The defendant, the appointing authority, has not taken a decision regarding the applicants. A decision implies a choice. In the instant case there is no choice or discretion and therefore no decision. The only administrative act required of the defendant is to give effect to the clear provisions of a regulation.

The applicants, in their complaints, required the appointing authority to "take a decision which will provide that

Regulation No 3086/78 is not applied to me in a manner which will adversely affect my pension . . . ". The defendant has no power to take such a decision. The regulation in question is a general act and applies *erga omnes*. The defendant cannot restrict or vary its application.

The applicants rely on Article 184 of the EEC Treaty to challenge Regulations Nos 3085/78 and 3086/78. Article 184 cannot be used to attack a regulation directly. The Court in Joined Cases 31 and 33/62 *Lütticke* v *Commission* has held:

"It is clear from the wording and the general scheme of this article that a declaration of the inapplicability of a regulation is only contemplated in proceedings brought before the Court of Justice itself under some other provision of the Treaty and then only incidentally and with limited effect".

The applicants cannot directly attack Regulations Nos 3085/78 and 3086/78 unless their application is admissible either under Article 173 or Article 179 of the EEC Treaty. It does not seem possible under Article 173 to attack the above-mentioned regulations which are acts of the Council by lodging an application against the European Parliament. Even if it were possible the application does not comply with the second paragraph of Article 173, according to which proceedings can only be instituted by a retired person in respect of "a decision addressed to that person" or "a decision which although in the form of a regulation is of direct and individual concern to him". The object of the present dispute is a regulation, which is applicable to all officials of the Community and thus has legal effect for a category of individuals defined in a general rather than a direct and individual way. Consequently neither of the conditions referred to in the second paragraph of Article 173 is fulfilled. The validity of this proposition is borne out by the order made by the Court in Case 48/79 *Ooms and Others* v *Commission* [1979] ECR 3121.

Furthermore the case-law of the Court of Justice clearly demonstrates that the procedure laid down in Article 173 is not available to officials in their disputes with the Community. These are governed by Article 179 which specifically defines the jurisdiction regarding disputes as being "within the limits and under the conditions laid down in the Staff Regulations or the Conditions of Employment", these, in the instant case being Articles 90 and 91.

The second condition of Article 90 (2) requires a failure "to adopt a measure prescribed by the Staff Regulations". In the present case there has been no such failure on the part of the defendant. On the contrary the defendant fulfilled its legal and constitutional duty by giving effect to a regulation.

In the light of the above considerations relating to Article 90 (2) the defendant submits that the present case is not admissible.

Turning to Article 90 (1) the defendant finds that even had the applicants favoured the procedure laid down in that provision the present action would still be inadmissible. The requests of the applicants having as their only object that the appointing authority should apply a provision laid down in the Staff Regulations in such a manner as to violate the said provisions both in wording and substance, cannot be

admissible under Article 90 (1) of the Staff Regulations. The function of appeals under Articles 90 and 91 is the review by the Court of acts and omissions by the "appointing authority". Since the subject-matter of this present case is inadmissible under Article 90 (1), a formal appeal to the Court cannot cure that admissibility where none exists in the regulations.

The defendant submits, in respect of the substance of the case, that the facts and applicable law show no valid grounds for complaint.

The applicants allege that the absence of consultation must lead to the illegality of the measures in dispute. This is a challenge to the validity of the regulations. Such a challenge can only be made under Article 173. Yet, the application does not refer to Article 173 or rely on it in an attempt to show compliance with its provisions, including the conditions for the time-limit in respect of the institution of proceedings.

The defendant also submits that Treaty requirements in respect of consultation were satisfied. Article 24 (1) of the Merger Treaty provides:

"The Council shall, acting by a qualified majority on a proposal from the Commission and after consulting the other institutions concerned, lay down the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of those Communities".

The Treaty, the defendant submits, does not specify in detail what form this consultation is to take nor does it impose any duty of consultation in respect of amendments to the Staff Regulations. The defendant argues that there was sufficient consultation of the Community institutions on Regulations Nos 3085/78 and 3086/78. As early as 1972 the Commission proposed to the Council that the IMF parities be abandoned. It was originally envisaged that the currency equivalents to the European unit of account would be used in calculating pensions and salaries. This proposal was approved by the European Parliament in a resolution which stated that

"Whereas following the introduction of the European unit of account, weightings will no longer be required to correct exchange parities and will henceforth be used principally to take account of increases in the cost of living as originally intended".

The preamble referred to the Commission's assurances that its proposal would in no way affect the real value of the payments made to officials. This means, the defendant argues, that payments to officials would be freed from the impact of currency fluctuations and based on the principle of non-discrimination.

The Council used its powers under Article 149 of the Treaty and voted unanimously to amend the Commission's initial proposal. Article 149 does not prescribe any further consultation in the case of an amendment to a Commission proposal.

The defendant concludes from an examination of the process of consultation leading to the adoption of Regulation No 3085/78 that the Council complied with the requirements of consultation.

With respect to the applicants' arguments on vested rights and legitimate

expectations, the defendant draws attention to the opinion of Mr Advocate General Mayras in *Gillet* v *Commission* (Case 28/74 [1975] ECR 463)in which he stated that the legal relationship between officials and the Community institutions was based on the Staff Regulations. These can be amended by the Council in any way which it considers to be in the interests of the service on condition that such amendments do not have a retroactive effect and do not involve a misuse of powers.

The applicants allege that Regulation No 3086/78, in adjusting weightings, was a misuse of power. The defendant doubts that this is in fact the case. The defendant points out that the objective of the Staff Regulations is to ensure equal treatment for all Community officials and servants so that they have equal purchasing power. This objective was sought to be achieved by Article 82 of the Staff Regulations which provides for weighting in accordance with Articles 64 and 65 which in turn make weightings dependent upon "living conditions in the various places of employment" (Article 64) and the cost of living (Article 65). The divergence of actual exchange rates and IMF rates at 1 January 1965 combined with the unexpected operation of the option provisions contained in Article 45 of Annex VIII resulted in the system defeating instead of realizing the clear objective of the Staff Regulations. Pensioners in weak currency Member States who opted to have their pensions paid in the currency of the country in which the employing institution was situated, that is normally in Belgian francs, could more than double their pension and in some cases receive more than their last basic salary. This resulted in discrimination between pensioners, exactly what the provisions of the Staff Regulations intended to avoid.

The defendant argues that there can be no question of a misuse of power in producing amendments designed to restore the intention and objective of the Staff Regulations and to correct an anomaly, which arose from circumstances outside the control and beyond the expectations of the Community institutions. Similarly the rectification of an anomaly so as to eliminate the element of privilege as between categories of Community servants and restore parity of treatment is not an infringement of acquired rights.

The defendant rejects the applicants' allegation as to infringement of their legitimate expectations. The applicants are not suffering a loss in that they will not receive less than they were intended to receive under the Staff Regulations: they are simply being deprived of a windfall profit arising from fluctuations in exchange rates as to which there could be no guarantee of continuance.

The defendant argues that there the applicants cannot complain that they have been retroactively deprived of vested rights. The prohibition on retrospective operation of legislation is not an absolute principle but is dependent upon the wording of the legislation and on its content and subject-matter. If the language or dominant intention of a piece of legislation demands that it be given retrospective effect, then the act in question must be construed accordingly. Conversely, if the enactment is expressed in language which is ambiguous and could be construed as either requiring retrospective or prospective effect then it ought to be construed as taking effect prospectively.

The regulations in question clearly provide that calculation of pension rights will be based on the weightings specified in Regulation No 3086/78.

There is, therefore, no necessity to construe the regulations so as to exclude a retroactive effect.

The *applicants* in their reply to the defendant's objection as to the inadmissibility of the application argue that a decision does not necessarily imply a choice. An administrative act which gives effect to the clear provisions of regulations is none the less a decision. It is subject to review by the Court, and, in challenging it, the applicant is entitled to challenge also, under Article 184 of the EEC Treaty, the regulation on which the decision is based.

The Parliament, the applicants point out, has made decisions in the past restricting or varying regulations concerning the remuneration of Community officials. For example, the Parliament in 1979 decided unilaterally not to apply current regulations relating to the remuneration and allowances of staff attending sessions of the Parliament in Strasbourg and committee and other meetings in Brussels. Having taken such a decision with respect to remuneration it cannot now argue that it has no power to take a similar decision on pensions.

The applicants accept that they cannot challenge the regulations under Article 184 unless their application is admissible under Article 173. In their estimation the application is admissible under Article 179.

As to the statement by the defendant that regulations can only be challenged under Article 173, the applicants reject this, pointing to *Sabbatini* v *European Parliament*, Case 20/71 [1972] ECR 345 where, in proceedings brought under the Staff Regulations, the Court decided pursuant to Article 184 that Article 4 (3) of Annex VII to the Staff Regulations was illegal.

The applicants reject the defendant's allegation that "the principle arising in the instant case is basically the principle which the Court had to consider in Case 48/79 *Ooms* v *Commission* [1979] ECR 3121. The cases are quite different, they say. In *Ooms* the applicants sought to attack the regulations directly, in the present case the applicants are challenging a decision of the defendant.

As to the substance of the case, the applicants do not accept that the defendant has a duty to give effect to regulations without having regard to their consequences. The defendant must act as a fair employer.

The applicants refute the defendant's contention that the Treaty requirements in respect of consultation were complied with, pointing out that even where Parliament has been consulted on a proposal from the Commission, further consultation may be necessary in the case of amendment. Citing the Jozeau-Marigné Report to the Legal Committee of the European Parliament (European Parliament Doc. 110, 1967/68, paragraph 21) they contend that consultation with the European Parliament must cover all essential issues of the provisions proposed by the Commission or accepted by the Council.

The applicants contend that the opinion of Mr Advocate General Mayras in *Gillet* v *Commission* (Case 28/74 [1975] ECR 463), far from supporting the defendant's case actually lends support to their own. They argue that Mr Advocate General Mayras in effect says that the Council does not have the power to amend the Staff Regulations where such amendments have retroactive effect to the detriment of officials.

The applicants point out that the appropriate remedy in respect of windfall cases is legislation having prospective effect which will not deprive individuals of their vested rights.

The defendant's submissions on the question of interpretation of legislation are, the applicants say, irrelevant since the issue in the present cause is not on the interpretation, but the legality of the regulations.

The applicants conclude their reply to the defence by stating that they maintain the submissions set out in their application.

The *defendant* in the rejoinder states that the application is inadmissible since it does not comply with the requirements prescribed in Articles 90 and 91 of the Staff Regulations. The regulations in question apply to the applicants as they apply to all officials because they have been adopted by the Council and not because the appointing authority has rejected the applicants' complaints as inadmissible. Therefore if there is an act adversely affecting the applicants, it is the legal act promulgated by the Council when adopting the regulations and not the decision of the appointing authority to reject their complaints. Since the Council regulations in question cannot be the subject of a complaint within Article 90 (2) because they are not acts adversely affecting the applicants within the definition of Article 90 (2), it follows that they cannot be the subject of challenge by way of application under Article 91.

The defendant states that they have a duty to give effect to regulations unless and until their validity is called in question by the Court. In complying with the regulations the defendant is acting as a good and fair employer since it is treating its employees equally.

The defendant states that there was adequate consultation of the European Parliament since the material effects of the regulations and the draft proposed presented to the European Parliament would be the same.

The defendant submits that there is in Community law no general principle, express or otherwise, guaranteeing rights. The parities and weightings applicable before the enactment of the regulations in dispute do not represent an acquired right. Since action to alter them represents the correction of an anomaly, such action cannot be a misuse of power. There is, the defendant argues, no element of retroactivity in that the operation of the regulations takes effect from a date later than that of their enactment.

The defendant respectfully asks the Court to dismiss the application as inadmissible or alternatively to reject it as unfounded in substance.

IV — Oral procedure

The parties presented oral argument at the sittings on 19 and 20 February 1981.

The Advocate General delivered his opinion at the sitting on 14 May 1981.

Decision

1 By application lodged at the Court Registry on 3 October 1979 the applicants, who are twelve officials of the European Parliament and one former member of its temporary staff, brought an action seeking the annulment of the defendant's decision rejecting the applicants' complaints pursuant to Article 90 (2) of the Staff Regulations of Officials concerning the application to them of Council Regulations No 3085/78 and No 3086/78 of 21 December 1978 (Official Journal 1978, L 369, pp. 6 and 8).

2 In the version in force until the end of 1978, Articles 63 and 64 of the Staff Regulations of Officials provided that:

"An official's remuneration shall be expressed in Belgian francs.

It shall be paid in the currency of the country in which the official performs his duties.

Remuneration paid in a currency other than Belgian francs shall be calculated on the basis of the par values accepted by the International Monetary Fund . . . on 1 January 1965.

An official's remuneration expressed in Belgian francs shall . . . be weighted at a rate above, below or equal to 100%, depending on living conditions in the various places of employment.

The weighting applicable to the remuneration of officials employed at the provisional seats of the Communities shall be equal to 100% as at 1 January 1962".

3 Article 82 of the Staff Regulations provides that:

"The pensions (of former officials) shall be calculated by reference to salary scales in force on the first day of the month in which entitlement commences.

They shall be weighted in the manner provided for in Article 64 and Article 65 (2) for the country of the Communities where the person entitled to the pension declares his home to be".

4 The third paragraph of Article 45 of Annex VIII (Pension scheme) provides that:

"Beneficiaries may elect to have their pensions paid in the currency either of their country of origin or of their country of residence or of the country where the institution to which the official belonged has its seat: their choice shall remain operative for at least two years".

5 On 21 December 1978 the Council adopted Regulation (Euratom, ECSC, EEC) No 3085/78 (Official Journal 1978, L 369, p. 6), Article 1 of which states that Article 63 of the Staff Regulations is replaced by the following:

"Officials' remuneration shall be expressed in Belgian francs. It shall be paid in the currency of the country in which the official performs his duties.

Remuneration paid in a currency other than Belgian francs shall be calculated on the basis of the exchange rates used for the implementation of the general budget of the European Communities on 1 July 1978.

This date shall be changed, at the time of the annual review of remuneration provided for in Article 65, by the Council acting by a qualified majority upon a proposal from the Commission as provided in the first indent of the second subparagraph of Articles 148 (2) of the EEC Treaty and of 118 (2) of the Euratom Treaty.

Without prejudice to the application of Articles 64 and 65, the weightings fixed pursuant to these articles shall, whenever the above date is changed, be adjusted by the Council, which, acting in accordance with the procedure mentioned in the third paragraph, shall correct the effect of the variation in the Belgian franc with respect to the rates referred to in the second paragraph."

6 According to the provisions of Article 4 of the regulation it was to enter into force on 1 January 1979 and was to apply from 1 April 1979. However, for pensions and allowances of which the net amount became less than that under the existing arrangements, the regulation was only to apply from 1 October 1979. From that date the difference between the net amounts resulting from the implementation of that regulation and those received in September 1979 was to be reduced by $^1/_{10}$ per month.

7 On 21 December 1978 the Council also adopted Regulation (Euratom, ECSC, EEC) No 3086/78 adjusting the weightings applicable to the remuneration and pensions of officials and other servants of the European Communities following the amendment of the provisions of the Staff Regu-

lations concerning the monetary parities to be used in implementing the Staff Regulations. Article 1 (2) of the regulation fixes *inter alia* the weighting applicable to pensions in accordance with the second subparagraph of Article 82 (1) of the Staff Regulations at 62.5 for the United Kingdom.

8 In March 1979 the applicants (except for Mr Curtis), who are officials in the employment of the Parliament, submitted to the Parliament complaints pursuant to Article 90 (2) of the Staff Regulations of Officials which were directed against Council Regulation No 3086/78. The applicants maintained that the alteration which that regulation made to the weighting brought about a reduction in the amount of the pension which they would have received if, on retirement, they had chosen to reside in the United Kingdom and they requested that the appointing authority decide that the amount of their pension would be calculated in accordance with the provisions of Article 45 of Annex VIII to the Staff Regulations and employing the weightings applicable before their amendment by Regulation No 3086/78. On 30 June 1979 Mr Curtis, a former member of the temporary staff of the Parliament who is now retired and resident in the United Kingdom, submitted a similar complaint to the Parliament.

9 In July 1979 the Parliament informed the applicants, apart from Mr Curtis, that their complaints were not admissible inasmuch as they were directed against a Council regulation the application or non-application of which could not be regarded as falling within the discretionary powers of the Parliament.

10 In the action which they brought following that decision the applicants contend that Regulations No 3086/78 and No 3085/78 are unlawful on a series of grounds, namely infringement of an essential procedural requirement, violation of vested rights, infringement of the principle of the protection of legitimate expectation, lack of competence, infringement of the Staff Regulations and misuse of powers.

11 In addition to disputing the soundness of the substance of the action, the Parliament has put forward in its defence an objection of inadmissibility. It is appropriate first to consider that objection.

12 The Parliament maintains that the applicants' complaints do not constitute complaints within the meaning of Article 90 (2) of the Staff Regulations.

According to the Parliament, before a complaint may be made pursuant to that article it is necessary that there be an act of the appointing authority adversely affecting the official, the act being either a decision taken by the authority or a failure by it to adopt a measure prescribed by the Staff Regulations. In the present case the Parliament has not taken any decision relating to the applicants or in regard to their entitlement to pension. It is not open to the Parliament to take a decision to the effect sought by the applicants, that is to say, a decision not to apply in their case the regulations adopted by the Council. The Parliament has not failed to adopt in relation to the applicants any measure prescribed by the Staff Regulations.

13 The Parliament submits that Article 184 of the Treaty, on which the applicants rely, does not in fact provide an independent form of action but is confined to dealing with issues of legality which are raised incidentally, that is to say those arising in proceedings which have the legality of other acts as their principal subject-matter and which have been properly instituted.

14 It is further maintained that the case-law of the Court demonstrates that an official may not avail himself of other remedies than those provided for by Article 179 of the Treaty and Articles 91 and 92 of the Staff Regulations in order to bring before the Court a question which must be settled according to the conditions applicable to officials and that consequently the judicial remedy provided for in Article 173 of the Treaty is not open to him.

15 The applicants submit that the decision requested of the Parliament does not constitute a general decision not to apply the regulations but a decision not to apply them to a limited group of persons. The applicants maintain that, pursuant to Article 179 of the Treaty, they are entitled to bring before the Court the question whether or not the regulations, on a proper construction, are applicable to them and to rely on Article 184 of the Treaty in those proceedings.

16 The argument advanced by the Parliament must be upheld. The regulations in question are of general application and the applicants may not claim that they constitute decisions which are of direct and individual concern to them in order to call their validity in question in proceedings under Article 173 of the Treaty. The mere submission of a complaint pursuant to Article 90 of the Staff Regulations of Officials is not sufficient to create a judicial remedy

against a measure which is in the nature of a regulation. Moreover, the procedure provided for in Article 90 (2) applies only where the appointing authority has taken a decision or has refrained from adopting a measure prescribed by the Staff Regulations and where such conduct by the appointing authority constitutes an act adversely affecting the official. That has not occurred in the present case. Consequently it was not possible for the applicants' complaints to be based on Article 90 (2) of the Staff Regulations. The action is therefore inadmissible and must be dismissed without its being necessary to consider the substance.

Costs

17 Under Article 70 of the Rules of Procedure institutions are to bear their own costs in staff cases.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Dismisses the application as inadmissible;**

2. **Orders the parties to bear their own costs.**

Koopmans O'Keeffe Bosco

Delivered in open court in Luxembourg on 16 July 1981.

A. Van Houtte
Registrar

T. Koopmans
President of the First Chamber