JUDGMENT OF THE COURT (Second Chamber)

28 June 2007 *

In Case C-331/05 P,

APPEAL under Article 56 of the Statute of the Court of Justice, lodged on 2 September 2005

Internationaler Hilfsfonds eV, established in Rosbach (Germany), represented by H. Kaltenecker and S. Krüger, Rechtsanwälte,

appellant,

the other party to the proceedings being:

Commission of the European Communities, represented by M.-J. Jonczy and S. Fries, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: German.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, P. Kūris, K. Schiemann (Rapporteur), L. Bay Larsen and J.-C. Bonichot, Judges,

Advocate General: V. Trstenjak,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 16 November 2006,

after hearing the Opinion of the Advocate General at the sitting on 28 March 2007,

gives the following

Judgment

1 By its appeal, Internationaler Hilfsfonds eV ('IH') requests the court to set aside the order of the Court of First Instance of the European Communities of 11 July 2005 in Case T-294/04 *Internationaler Hilsfonds* v *Commission* [2005] ECR II-2719 ('the contested order'), by which the Court of First Instance dismissed as manifestly unfounded its application under the second paragraph of Article 288 EC for an order that the Commission of the European Communities make good the damage allegedly suffered comprising the lawyers' fees incurred in three sets of complaint proceedings before the European Ombudsman.

Legal context

2 On 9 March 1994, the European Parliament adopted Decision 94/262/ECSC, EC, Euratom on the regulations and general conditions governing the performance of the Ombudsman's duties (OJ 1994 L 113, p. 15).

3 Under Article 1(3) of Decision 94/262, the Ombudsman may not intervene in cases before courts or question the soundness of a court's ruling.

4 In accordance with Article 2(6) of that decision, complaints submitted to the Ombudsman are not to affect time-limits for appeals in administrative or judicial proceedings.

5 Furthermore, under Article 2(7) of that decision, when the Ombudsman, because of legal proceedings in progress or concluded concerning the facts which have been put forward, has to declare a complaint inadmissible or terminate consideration of it, the outcome of any enquiries he has carried out up to that point are to be filed without further action.

Background to the dispute

6 The facts giving rise to the dispute were set out in the contested order as follows:

'6 The applicant is a non-governmental organisation (NGO) governed by German law which provides support to refugees and to victims of war and catastrophe. Between 1993 and 1997 it submitted six applications for the co-financing of projects to the Commission.

7 When the Commission services considered the initial applications, they concluded that the applicant was not eligible for aid granted to NGOs as it did not satisfy the general conditions for the co-financing of projects. The applicant was informed of that decision by letter of 12 October 1993. By letter of 29 July 1996, the Commission set out the principal reasons which had led it to determine that the applicant could not be regarded as an eligible NGO.

8 On 5 December 1996, the applicant submitted a new project to the Commission. An amended version of that project was submitted to the Commission under a fresh application in September 1997. The Commission did not take a decision on those new applications for co-financing since it considered that the decision of 12 October 1993 that the applicant was ineligible remained valid.

9 The applicant then lodged three successive complaints with the Ombudsman, one in 1998 [Complaint No 338/98/VK] and the other two in 2000 [Complaints Nos 1160/2000/GG and 1613/2000/GG]. Those complaints essentially related to two questions, namely access by the applicant to the file and whether the Commission had considered the applicant's requests fairly and objectively.

10 As regards access to the file, in a decision of 30 November 2001, the Ombudsman found that the list of documents which the Commission had provided to the applicant was incomplete, that the Commission had held back certain documents without cause and that, consequently, the Commission's

conduct could constitute maladministration. He proposed that the Commission authorise suitable access to the file. That access was provided in the Commission's offices on 26 October 2001. The Ombudsman also found an instance of maladministration in the fact that the applicant had not been given a formal hearing on the information received by the Commission from third parties which had been used in taking a decision against the applicant.

11 As regards fair and objective consideration of the applications, in a further decision also delivered on 30 November 2001, the Ombudsman concluded in connection with the Commission's consideration of information received from third parties, that the Commission had failed to deal with the matter fairly and objectively. Further, in his decision of 11 July 2000, the Ombudsman criticised the fact that the Commission had allowed an excessively long period of time to elapse before providing in writing the reasons which had led it in 1993 to conclude that the applicant was ineligible. Lastly, with regard to the fact that the Commission had failed to take a formal decision on the applications submitted by the applicant in December 1996 and September 1997, in his decision of 19 July 2001 the Ombudsman recommended that the Commission should come to a formal decision on those applications before 31 October 2001.

12 In order to comply with the Ombudsman's recommendation, on 16 October 2001 the Commission sent the applicant a letter rejecting the two projects submitted in December 1996 and September 1997 on the ground that the applicant was ineligible for co-financing.

13 By application lodged on 15 December 2001, the applicant brought an action against the letter of 16 October 2001. In its judgment in Case T-321/01 *Internationaler Hilfsfonds* v *Commission* [2003] ECR II-3225, the Court of First Instance annulled the Commission's decision of 16 October 2001 refusing the applications for co-financing made by the applicant in December 1996 and September 1997 and ordered the defendant to pay the costs.

14 In its application, the applicant had also claimed that the defendant should reimburse the costs it had incurred in the proceedings before the Ombudsman. In its judgment, the Court of First Instance held that the costs relating to proceedings before the Ombudsman could not be regarded as expenses necessarily incurred within the meaning of Article 91(b) of the Rules of Procedure of the Court of First Instance and were therefore not recoverable.'

Procedure before the Court of First Instance and the contested order

7 By application lodged at the Registry of the Court of First Instance on 23 July 2004, IH brought an action for an order that the Commission pay it the sum of EUR 54 037 on account of material damage suffered comprising the lawyers' fees incurred in three sets of complaint proceedings before the Ombudsman.

8 By the contested order, the Court of First Instance dismissed IH's action as manifestly unfounded.

9 The ground given by the Court was essentially that there was no causal link between the conduct of the institution and the damage complained of because, first, IH was free to choose to bring the matter before the Ombudsman before instituting proceedings before the Court of First Instance and, second, the services of a lawyer were unnecessary in proceedings before the Ombudsman.

10 In the contested order, the Court of First Instance began its reasoning by stating that, in the institution of the Ombudsman, the EC Treaty has given citizens of the Union an alternative remedy to that of an action before the Community Court in order to protect their interests. That alternative non-judicial remedy meets specific

criteria and does not necessarily have the same objective as judicial proceedings. Moreover, the two remedies cannot be pursued at the same time. Indeed, although complaints submitted to the Ombudsman do not affect time-limits for appeals to the Community Court, the Ombudsman must nonetheless terminate consideration of a complaint and declare it inadmissible if the citizen concerned simultaneously brings an appeal before the Community Court based on the same facts. It is therefore for the citizen to decide which of the two available remedies is likely to serve his interests best.

11 Next, the Court of First Instance pointed out that costs relating to proceedings before the Ombudsman cannot be regarded as expenses necessarily incurred within the meaning of Article 91(b) of the Rules of Procedure of the Court of First Instance and are therefore not recoverable under that provision. It considered that, in the present case, IH was seeking to recover by means of a claim for damages the very same lawyers' fees it incurred in the proceedings before the Ombudsman and that to admit such expenditure as allowable by way of damages would be contrary to the case-law of the Court of First Instance that such expenditure is not recoverable by way of costs.

12 In that context, the Court of First Instance considered that, unlike proceedings before the Community courts, proceedings before the Ombudsman are designed in such a way as to make recourse to legal advice unnecessary. It suffices to set out the facts in the complaint and there is no need to set out any legal arguments. Accordingly, it is implicit in the individual's freedom to choose to be legally represented in the proceedings before the Ombudsman that he must bear such costs personally.

13 Moreover, the Court of First Instance held on the basis of the judgment in Case 54/77 *Herpels* v *Commission* [1978] ECR 585, paragraphs 45 to 50, that where the parties concerned decide to engage a lawyer before bringing proceedings before the Community courts, that is their own decision and the defending institutions cannot in any circumstances be held liable for the consequences. In such circumstances, there is no causal link in law between the alleged damage, namely the lawyers' fees incurred, and the action of the Community.

14 The Court pointed out, in addition, that IH was free to choose to apply to the Ombudsman prior to initiating proceedings before the Court of First Instance.

15 The Court of First Instance accordingly held that lawyers' fees incurred in proceedings before the Ombudsman are not recoverable by way of an action for damages and decided to dismiss the action as manifestly unfounded.

The request to reopen the oral procedure

16 By letter received at the Court of Justice on 12 April 2007, IH requested the reopening of the oral procedure pursuant to Articles 61 and 118 of the Rules of Procedure of the Court of Justice. The basis of that request is the alleged lack of consistency in the Opinion of the Advocate General.

17 The Court may, of its own motion, on a proposal from the Advocate General or at the request of the parties, order the reopening of the oral procedure under Article 61 of its Rules of Procedure, if it considers that it lacks sufficient information or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see the order of 4 February 2000 in Case C-17/98 *Emesa Sugar* [2000] ECR I-665, paragraph 18, and Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 25).

18 That is not the case here, however. First, IH essentially confines itself to commenting on the Opinion of the Advocate General, without referring to any facts or legal provisions on which she relied and which have not been debated

between the parties. Second, the Court considers that in the present case it is in possession of all the information necessary for its decision. Consequently, there is no need to order the reopening of the oral procedure.

The appeal

19 In its appeal, IH asks the Court to set aside the contested order and to refer the case back to the Court of First Instance or to order the Commission to pay IH EUR 54 037. IH also asks that the Commission be ordered to pay the costs.

20 The Commission contends that the Court should dismiss the appeal and order IH to pay the costs.

21 IH relies on three pleas in law which, as they are closely linked, should be considered together. In essence, according to IH, when ascertaining whether there was the necessary causal link to give rise to non-contractual liability on the part of the Community, the Court of First Instance set the bench mark too high. The Court therefore failed to examine whether the arguments put forward by the applicant to explain the material and legal reasons which had obliged it to seek the assistance of a lawyer in the complaint proceedings that it brought were well founded.

22 It is true, as IH rightly submitted, that the fact that costs relating to proceedings before the Ombudsman are not recoverable under Article 91(b) of the Rules of Procedure of the Court of First Instance is in principle irrelevant for the purposes of determining whether such costs may give rise to a claim for compensation under the

second paragraph of Article 288 EC. As the Court of First Instance itself held in the contested order, that article is applicable only to costs incurred in proceedings before the Court of First Instance, to the exclusion of any prior stage. The right to recover the costs of proceedings and the right to damages are, in principle, subject to different rules and are independent of each other.

23 With regard to the causal link required, it is, moreover, not disputed that both the Rules of Procedure of the Court of Justice and those of the Court of First Instance provide that the costs of proceedings incurred by the parties are recoverable only if they were necessary for the purposes of the proceedings. On the other hand, the causal link required under the second paragraph of Article 288 EC is established where the damage is the direct consequence of the wrongful act in question (see, to that effect, Joined Cases 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79 *Dumortier Frères and Others* v *Council* [1979] ECR 3091, paragraph 21, and Joined Cases C-363/88 and C-364/88 *Finsider and Others* v *Commission* [1992] ECR I-359, paragraph 25).

24 With regard a claim for compensation for material damage which an applicant alleges to have suffered on account of the costs incurred in seeking legal advice at the pre-litigation stage of the procedure governed by Article 90 of the Staff Regulations, the Court of Justice held that, since in particular the contents of administrative complaints lodged under that provision must be interpreted and understood by the administration with all the care that a large and well-equipped institution owes to those having dealings with it, including members of its staff, although it is not possible to prohibit those concerned from seeking legal advice even at that stage, it is their own decision and the institution concerned cannot be held liable for the consequences. Thus, there is no causal link between the damage alleged, namely the lawyers' fees, and the act of the institution concerned (see, to that effect, *Herpels* v *Commission*, paragraphs 47 to 49).

25 Similarly, the costs incurred in submitting complaints to the Ombudsman must be distinguished from those incurred in contentious proceedings.

26 Complaints to the Ombudsman, on the one hand, make it possible to identify and to seek to eliminate instances of maladministration on behalf of the public interest and, on the other hand, may make it possible to avoid judicial proceedings if the Ombudsman succeeds in resolving the differences between the complainant and the institution concerned.

27 Those concerned are free to choose to have recourse to the Ombudsman. The costs thus freely incurred by the complainant cannot therefore be regarded as damage caused by the institution in question.

28 The same does not apply to costs incurred by an applicant who has decided to institute legal proceedings which may result in a binding decision to recognise the applicant's rights and to oblige the institution concerned to give effect to them.

29 There is therefore no causal link in law between the damage allegedly suffered by IH and the actions of the Commission.

30 Consequently, the Court of First Instance was entitled on that ground and without committing any error of law to dismiss IH's action by way of an order, which, moreover, was sufficiently reasoned.

31 That conclusion cannot be affected simply by the fact, which was raised by IH, that the contested order was made notwithstanding a recent judgment of the Court of First Instance ordering the Commission to pay compensation for damage consisting, inter alia, of the costs incurred by the other party in complaint proceedings before the Ombudsman (Case T-160/03 *AFCon Management Consultants and Others* v *Commission* [2005] ECR II-981, paragraphs 104 to 107).

32 It follows that the appeal should be dismissed.

Costs

33 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against IH and the latter has been unsuccessful, IH must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. Dismisses the appeal;

2. Orders Internationaler Hilsfonds eV to pay the costs.

[Signatures]