JUDGMENT OF THE COURT (First Chamber)
11 August 1995 *

In Case C-43/94 P,

European Parliament, represented by Ezio Perillo, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the Secretariat of the European Parliament, Kirchberg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fourth Chamber) of 30 November 1993 in Case T-15/93 *Vienne* v *European Parliament* [1993] ECR II-1327, seeking to have that judgment set aside,

the other party to the proceedings being:

Philippe Vienne, an official of the European Parliament, represented by Jean-Noël Louis, of the Brussels Bar, with an address for service in Luxembourg at the office of SARL Fiduciaire Myson, 1 Rue Glesener,

THE COURT (First Chamber),

composed of: P. Jann (Rapporteur), President of the Chamber, D. A. O. Edward and L. Sevón, Judges,

* Language of the case: French.

Advocate General: P. Léger,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 15 June 1995,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 1 February 1994, the European Parliament (hereinafter 'the Parliament') brought an appeal pursuant to Article 49 of the Protocol on the Statute of the Court of Justice of the EC and the corresponding provisions of the Protocols on the Statute of the Court of Justice of the ECSC and of the EAEC against the judgment of the Court of First Instance of 30 November 1993 in Case T-15/93 *Vienne* v *Parliament* [1993] ECR II-1327, in so far as it (a) annulled the decision of the Parliament of 2 February 1993 rejecting the applicant's complaint seeking the award, for the whole of his probationary period, plus one month, of the daily subsistence allowances provided for in Article 10 of Annex VII to the Staff Regulations of Officials of the European Communities, and (b) ordered the Parliament to pay the applicant the sum of BFR 170 239, plus default interest.

2 According to the contested judgment, the facts of the case are as follows.

'1 On 1 November 1990, the applicant, then residing in Anderlecht, Brussels, was recruited by the European Parliament ... as a member of the auxiliary staff under a contract of indefinite duration, and was assigned to Luxembourg. By virtue of Article 69 of the Conditions of Employment of Other

Servants of the European Communities (hereinafter "the Conditions of Employment of Other Servants"), he received the daily subsistence allowance provided for by Article 10 of Annex VII to the Staff Regulations. On being recruited, the applicant established his residence in Messancy, near the Belgium-Luxembourg frontier, in order to comply with the residence requirement laid down in Article 54 of the Conditions of Employment of Other Servants and Article 20 of the Staff Regulations, whilst his wife and children remained in Anderlecht.

2 On 1 January 1991, the applicant was recruited by the Parliament as a member of the temporary staff under a contract of indefinite duration which provided for a probationary period of six months. On the basis of Article 25 of the Conditions of Employment of Other Servants, he continued to receive the abovementioned daily subsistence allowance, which was maintained from that date throughout his probationary period, that is to say for a period of six months.

3 On 16 December 1991 the applicant was recruited by the Parliament as a probationary official in Grade B 5, still in Luxembourg. After he was established in October 1992, the applicant made arrangements to give up his family home in Anderlecht.

4 On 16 December 1991, the applicant's entitlement to the daily subsistence allowance was renewed, in view of his status as a probationary official, for a period of 128 days, that is to say until 21 April 1992. The administration thus limited to twelve months (or 365 days) the aggregate period of his enjoyment of that allowance, pursuant to the following calculation:

— aggregate period of payment of the allowance before the applicant's appointment

— as a member of the auxiliary staff from 5 November 1990 to 31 December 1990 (two months or 57 days),

— as a member of the temporary staff from 1 January 1991 to 30 June 1991 (six months or 180 days),

totalling eight months or 237 days

— balance required to make up the maximum of twelve months (or 365 days):

365 days — 237 days = 128 days.

5 The applicant's salary statement for June 1992 showed for the first time that the payment of the daily subsistence allowance had been stopped retroactively from 22 April 1992. The applicant asked the salary department for an oral explanation and was told that, according to the administrative practice followed in the Parliament Secretariat, the Parliament aggregated the various periods served by the recipient of the allowance as a member of the auxiliary staff, a member of the temporary staff and a probationary official; accordingly, the administration paid the daily subsistence allowance only for a maximum period of twelve months.

6 By memorandum of 7 July 1992, received at the Parliament Secretariat on 13 July 1992, the applicant lodged a complaint against his salary statement for June 1992 and claimed the daily subsistence allowance up to 15 October 1992 (his probationary period plus one month). In so doing, he argued, on the basis of the wording of Article 10 of Annex VII to the Staff Regulations, that the Parliament's practice of limiting to one year the aggregate period for which the daily subsistence allowance was payable, thereby taking account of each previous employment status of the official, was not in harmony with either the letter or the spirit of the Staff Regulations. He also claimed that the daily sub-

sistence allowance was granted in order to enable officials to meet the exceptional costs involved in maintaining two residences at the same time. He added that the contested limitation was not applied by other Community institutions and therefore the practice of the Secretariat in that regard discriminated against officials of the Parliament.

7 By letter of 3 December 1992, the Secretary-General of the Parliament informed the applicant that his complaint was being examined and that the problem raised had been brought to the attention of the Committee of Heads of Administration with a view to arriving at a uniform solution, since he had found different responses in the various institutions concerned.

8 The applicant sent a reminder to the Secretary-General of the Parliament on 28 January 1993 and on 2 February 1993 received a decision expressly rejecting his complaint. In it, the Secretary-General, having stated that he had not yet received the views sought from the other institutions with a view to arriving at a common solution, observed that Article 10 of Annex VII to the Staff Regulations also applied, by virtue of Article 25 of the Conditions of Employment of Other Servants, to employees covered by the Conditions of Employment of Other Servants and that the rules on the grant of the daily subsistence allowance had therefore to be interpreted and applied in a unitary and consistent manner. A maximum period of one year's entitlement to the daily subsistence allowance was laid down both by Article 25 of the Conditions of Employment of Other Servants for temporary staff and by Article 65 of the Conditions of Employment of Other Servants for auxiliary staff, in other words, for those Community employment relationships which were, both legally and in practice, the most precarious. It was clear from all those provisions that the benefit of the daily subsistence allowance had been designed as a first step in providing assistance, being properly of a temporary nature and granted, moreover, on a notional basis, since the person concerned was not required to furnish proof of expenditure incurred. Nor was the sum thus made available paid by reference to the recipient's employment status; consequently, it could not be paid for more than the most favourable period provided for by the rules, merely because of a change in the nature of the employment relationship between the recipient and the institution.'

3 On 9 February 1993, following the Parliament's rejection of his complaint, Mr Vienne brought an action before the Court of First Instance for annulment of the Parliament's decision of 2 February 1993 and an order that the Parliament pay him BFR 170 239 and default interest thereon.

4 In the judgment under appeal the Court of First Instance upheld his application.

5 In support of its appeal, the Parliament advances several pleas in law alleging infringements of Community law by the Court of First Instance. First, it considers that the contested judgment contains an error of law concerning the interpretation of Article 71 of the Staff Regulations and, secondly, it alleges several errors of law concerning the application of Article 10 of Annex VII to the Staff Regulations.

The allegedly incorrect interpretation of Article 71 of the Staff Regulations

6 Article 71 of the Staff Regulations provides:

'An official shall be entitled, as provided for in Annex VII, to reimbursement of expenses incurred by him on taking up appointment ...'.

7 The Parliament contends that the Court of First Instance committed an error of law by interpreting the term 'taking up appointment' in Article 71 of the Staff Regulations 'as referring only to the taking up of an appointment following a formal appointment to a post as an official' (paragraph 32 of the judgment).

8 It maintains that not only officials, following formal appointment, but also members of the temporary and auxiliary staff 'take up an appointment' and that the grant of the daily subsistence allowance must therefore be limited by reference to the first time an employee takes up an appointment with the Communities, to ensure that the same allowance is not paid twice to the same person for the same reason.

9 In paragraph 32 of its judgment, the Court of First Instance held:

' ... Article 71 of the Staff Regulations provides that an official shall be entitled, as provided for in Annex VII, to reimbursement of expenses incurred by him on "taking up appointment" However, the duties performed by an official can be distinguished, from the legal point of view, from those performed by a member of the auxiliary or temporary staff since the employment status of the persons concerned is different (see *Sperber* v *Court of Justice*, cited above, paragraph 8). The term "taking up appointment" can therefore be interpreted as referring only to the taking up of an appointment following a formal appointment to a post as an official'.

10 The reimbursement of expenses to officials, to members of the temporary staff and, finally, to members of the auxiliary staff is governed by different provisions in each case. Thus, Article 71 of the Staff Regulations governs the reimbursement of expenses only to officials. The Conditions of Employment of Other Servants governs the reimbursement of expenses to temporary and auxiliary staff. Article 22 of the Conditions of Employment of Other Servants provides expressly that a member of the temporary staff is entitled to 'reimbursement of expenses incurred by him on taking up appointment' and states in particular that Article 10 of Annex VII to the Staff Regulations is to apply. Article 69 of the Conditions of Employment of Other Servants also grants to members of the auxiliary staff entitlement to the daily subsistence allowance to which it refers. Each instance of taking up appointment thus gives rise to entitlement to the daily subsistence allowance under the conditions laid down by each of those provisions. The Court of First Instance was therefore right to consider that the taking up of appointments referred to in Article 71 of the Staff Regulations relates only to appointments of officials.

11 The Parliament cannot rely on the judgment of the Court of Justice in Joined Cases 27/59 and 39/59 *Campolongo* v *High Authority* [1960] ECR 391. The principle of the operational unity of the Communities laid down in that case cannot apply to successive employment relationships within the same institution. In *Campolongo*, the Court of Justice refused to uphold a claim for a resettlement allowance on the ground that such resettlement coincided with installation at another institution, which had already paid the person concerned an allowance to cover the expenses of the same event. By contrast, in this case the appointments were taken up successively and reimbursement of expenses was justified in each case.

12 That plea in law is hence unfounded.

The pleas as to errors of law in the application of Article 10 of Annex VII to the Staff Regulations

13 Article 10 of Annex VII to the Staff Regulations provides:

'Where an official furnishes evidence that he must change his place of residence in order to satisfy the requirements of Article 20 of the Staff Regulations, he shall be entitled for a period specified in paragraph 2 to a daily subsistence allowance ...'.

14 First, the Parliament considers that the Court of First Instance committed an error of law by treating as a precondition for the grant of a daily subsistence allowance the fact of no installation allowance having been paid, or else by failing to apply that condition. According to the Parliament, either the Court of First Instance properly took the view that that condition was to be inferred from Article 10 of Annex VII to the Staff Regulations, in which case it failed to apply it to the case of Mr Vienne, who, contrary to the statement in the judgment and as evidenced by

documents in the case, did receive an installation allowance; or else the Court of First Instance was wrong to take the view that that condition was to be inferred from Article 10 of Annex VII to the Staff Regulations. The Parliament refers in that connection to paragraph 27 of the contested judgment.

15 In paragraph 27 of its judgment the Court of First Instance held:

'It must be stated as a preliminary point that the subject-matter of this dispute is confined to the question whether the applicant, as a probationary official who had not yet transferred his residence or received an installation allowance, is entitled for the last part of his probationary period, plus one month, to payment of the daily subsistence allowance provided for in Article 10(2)(b) of Annex VII to the Staff Regulations. Articles 25 and 69 of the Conditions of Employment of Other Servants — in particular the time-limits which they impose — are not applicable to this case; those articles governed the payment of the daily subsistence allowance for the periods preceding the period at issue in this case ...'.

16 The meaning which the Parliament purports to attribute to paragraph 27 of the judgment is incorrect, since the Court of First Instance does not lay down in that paragraph any precondition for the grant of the daily subsistence allowance. The part of the sentence which mentions the installation allowance, containing only findings of fact which cannot be challenged in an appeal, is purely narrative. The only legal issue in paragraph 27 is the question of which provision applies to the grant of the daily subsistence allowance to probationary officials.

17 That plea must therefore be rejected.

18 Secondly, the Parliament argues that the Court of First Instance committed an error of law in rejecting the view that Mr Vienne was not entitled to the daily subsistence allowance because he did not fulfill the condition in Article 10 of

Annex VII to the Staff Regulations, which requires evidence to be furnished of the obligation to change place of residence. It contends that Mr Vienne had already changed his place of residence when he took up his first appointment.

19 In paragraph 31 of the contested judgment, the Court of First Instance held:

'... that view disregards the continuous and enduring nature of the obligation to pay allowances imposed by that provision on institutions with respect to their officials'.

20 That finding cannot be disputed.

21 The place of residence to be taken into account for the purposes of Article 10 of Annex VII to the Staff Regulations is the one where the person concerned has his centre of interests. To be entitled to the daily subsistence allowance, it is sufficient that he should be unable to continue to live at that former place of residence. That interpretation must be correct since the purpose of the daily subsistence allowance is to make up for the inconvenience resulting from the precarious nature of the employment relationship of the person concerned. As the Court of First Instance rightly pointed out, that precariousness continues throughout each of the three periods distinguished by the Staff Regulations and the Conditions of Employment of Other Servants.

22 The second plea concerning Article 10 must therefore be rejected.

23 Lastly, the Parliament, citing Article 9 of Annex VII to the Staff Regulations, contends that the Court of First Instance committed an error of law in its appraisal of the purpose of the daily subsistence allowance.

24 In paragraph 34 of the contested judgment, the Court of First Instance held:

'... it seems reasonable to encourage the person concerned to refrain from transferring his residence, a move which, in the event of his not being established, would be premature and would, in the event of termination of his service, give rise, pursuant to Article 9(1) and (2) of Annex VII to the Staff Regulations, to a double reimbursement of removal expenses ...'.

25 According to the Parliament, such a double reimbursement would be precluded by the following condition, laid down in the first subparagraph of Article 9(3) of Annex VII to the Staff Regulations:

'In the case of an established official, removal shall be effected within one year of the end of his probationary period'.

26 The Parliament interprets that provision as meaning that the official must wait to be established before becoming entitled to effect a removal in respect of which he could be reimbursed. The interpretation of Article 9 adopted by the Court of First Instance therefore, in the Parliament's view, attributes to Article 10 a purpose which it does not have.

27 The application of Article 9 of Annex VII to the Staff Regulations is not at issue in this case. Nevertheless, the proper interpretation of it must lead to a conclusion contrary to that which the Parliament seeks to draw. The first subparagraph

of Article 9(3) clearly implies that the employment relationship of the person concerned remains precarious until the end of the probationary period. The official's situation is not consolidated until he has been established.

28 The correct interpretation of Article 9(3) of Annex VII thus merely provides further argument for continuing to pay the daily subsistence allowance throughout that period of precarious employment.

29 Accordingly, that plea must also be rejected.

30 It follows from all the foregoing that the appeal must be dismissed.

Costs

31 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Parliament has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (First Chamber)

hereby:

1. Dismisses the appeal;

2. Orders the Parliament to pay the costs.

Jann Edward Sevón

Delivered in open court in Luxembourg on 11 August 1995.

R. Grass P. Jann

Registrar President of the First Chamber