JUDGMENT OF THE COURT (THIRD CHAMBER)
20 OCTOBER 1983 [1]

Max Gutmann
v Commission of the European Communities

(Official — Resettlement allowance — Recovery of undue payment)

Case 92/82

Officials — Recovery of undue payment — Conditions — Awareness of the official that there was no due reason for the payment
(Staff Regulations, Art. 85)

In Case 92/82

MAX GUTMANN, a former official of the Commission of the European Communities, who died on 22 March 1982 leaving as sole heirs his two daughters, Anne Gutmann, a student, residing at 95 Rue de la Faisanderie, Paris 75116, and Isabelle Gutmann, of no specified profession, residing at the same address, who are continuing the action brought by the deceased, assisted and represented by Victor Biel, of the Luxembourg Bar, with an address for service in Luxembourg at the latter's Chambers, 18 A Rue des Glacis,

applicants,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Hendrik van Lier, a member of its Legal Department, acting as Agent, assisted by Robert Andersen, of the Brussels Bar, 214 Avenue Montjoie, 1180 Brussels, with an address for service in Luxembourg at the office of Oreste Montalto, a member of the Commission's Legal Department, Jean Monnet Building, Plateau du Kirchberg,

defendant,

1 — Language of the Case: French.

APPLICATION for the annulment of the Commission's decision to recover, under Article 85 of the Staff Regulations, sums paid as a resettlement allowance,

THE COURT (Third Chamber)

composed of: Y. Galmot, President of Chamber, Lord Mackenzie Stuart and U. Everling, Judges,

Advocate General: G. F. Mancini
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

I — Facts and written procedure

Mr Gutmann was an adviser at the Office for Official Publications of the European Communities in Luxembourg. On 3 December 1977, at the age of 65, he retired from service and, by decision of 10 April 1978, with retroactive effect to 1 January 1978, he was granted a retirement pension.

In reply to a request by Mr Gutmann, the Commission informed him by letter of 29 April 1980 that he was entitled to a resettlement allowance of BFR 340 720, with the appropriate weighting, provided that he furnished evidence that he and his family had resettled within three years of the date of termination of his service at a place situated not less than 70 kilometres from the place where he had been employed.

On 27 October 1980, Mr Gutmann informed the Commission that as a result of his wife's state of health, he could not effect his removal from Luxembourg and his resettlement in France within the prescribed periods and, consequently, asked for those periods to be extended.

By letter of 30 October 1980, the Commission granted him an extension of the period for removal until 31 December 1981 but refused his request for an extension of the period for resettlement.

By letter of 17 November 1980, Mr Gutmann applied for payment of the resettlement allowance on the ground that he had left his permanent residence in Luxembourg and resettled in Paris. That application was accompanied by a certificate of permanent residence ("domicile") issued by the municipal authorities of Paris. Shortly afterwards Mr Gutmann submitted a telephone bill which was intended to establish that he had resettled in Paris. At the same time, he stated that the removal would take place in accordance with the Commission's letter of 30 October 1980, in other words at a later date.

In consequence, the resettlement allowance was paid to him on 23 March 1981. In addition, as from February 1981, the Luxembourg weighting for the calculation of his pension was replaced by that fixed for France, with retroactive effect to December 1980 and January 1981.

Following the alteration of the weighting, Mr Gutmann wrote to the Commission on 4 March 1981 complaining about that last measure, which had detrimental effects for him. That letter stated *inter alia:*

"By your letter No 6755 of 30 November 1980 you granted me an extension of the period for removal.

On the other hand, you decided not to grant an extension for the payment of the resettlement allowance.

Nevertheless you could not have been unaware, in view of the medical certificate which I sent to you on 27 October 1980, that as a result of my wife's serious illness, it was impossible to effect either the removal or the resettlement within the prescribed periods; you therefore forced me to carry out a pretence of resettlement, which you must have recognized as such."

Accordingly, he requested that the note of 5 January 1981 altering his pension rights be annulled and that his correspondence be sent to him at his address in Luxembourg. Mr Gutmann confirmed the contents of that letter in writing on 13 March 1981.

By letter of 31 March 1981, the Commission replied that it was obliged to continue to apply the weighting fixed for France and that, in addition it could not extend the period allowed for resettlement.

On 21 May 1981, Mr Gutmann submitted a complaint under Article 90 of the Staff Regulations to the appointing authority, seeking the annulment of the Commission's decisions to apply retroactively the weighting fixed for France to his pension and to send him his correspondence at his Paris address.

By letter of 16 June 1981, the Commission agreed to those requests but stated that, at the same time, it considered that it was obliged to take the necessary steps, under Article 85 of the Staff Regulations and Article 46 of Annex VIII thereto, to recover the sum unduly paid to him as a resettlement allowance, BFR 340 720, since that payment had been obtained as a result of false declarations, it did not correspond to any real state of affairs and therefore constituted an unjustified enrichment of Mr Gutmann. The Commission stated in conclusion that the sum would be recovered over four months, by deductions from his monthly pension until the amount of BFR 340 720 was reached.

On 6 September 1981, Mr Gutmann submitted a complaint under Article 90

(2) of the Staff Regulations against that last decision. The complaint was rejected as unfounded by the appointing authority in a letter of 24 February 1982.

Mr Gutmann brought this action by application which was lodged at the Court Registry on 18 March 1982. Following his death, the action was continued by his two daughters. The written procedure followed the normal course.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court (Third 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 the application admissible;

2. With regard to the substance, grant the application, and consequently:

3. Declare that the Commission was wrong in deciding to withhold the sum of BFR 340 720 from Mr Gutmann's pension rights;

4. Order the Commission to reimburse, within one week from the delivery of the judgment, the sums unduly withheld;

5. Declare that the Commission owes interest at 12% on all sums retained, in each case from the day on which the sum was withheld;

6. As far as necessary, annul the implied and express rejection of their complaint;

7. In any event order the Commission to pay the costs.

The Commission contends that the Court should:

Dismiss the application;

Make an appropriate order as to costs.

III — Submissions and arguments of the parties

The *applicants* claim in their application that the disputed decision is based on Article 85 of the Staff Regulations and that it is therefore necessary to consider whether Mr Gutmann "was aware that there was no due reason for the payment or [whether] the fact of the overpayment was patently such that he could not have been unaware of it" (Article 85 of the Staff Regulations). They submit that the Commission has not indicated in what way Mr Gutmann made "false declarations", when and where such declarations were made and how he should have known that the sum that the Commission now seeks to recover was paid without due reason. Mr Gutmann made it sufficiently clear to the Commission's officers in Brussels that he was unable to resettle his whole family in Paris together, at the same time. It was, moreover, for that reason that the period for removal was extended by the administration, which was therefore aware that Mr Gutmann and his eldest daughter were established in the place of resettlement. Mr Gutmann has never denied that he had resettled.

The applicants cite the judgment in *Verhaaf* v *Commission* (Case 140/77 [1978] ECR 2117) which states that "the specific and characteristic purpose of an installation allowance is to enable an official to bear, in addition to removal expenses, the inevitable expenses in-

curred through integrating in new surroundings for an indeterminate but substantial period of time". The same reasoning applies to resettlement.

The statement of the grounds on which the Commission's decision is based is inadequate which is tantamount to lack of grounds (infringement of Article 25 of the Staff Regulations).

The judgment in *Meganck* (Case 36/72 [1973] ECR 527) in which Mr Meganck was alleged to have placed himself in an irregular situation by his own conduct and to be therefore precluded from relying on his good faith, cannot be applied in this instance. Not all the declarations made by Mr Meganck, unlike those made by Mr Gutmann, were in conformity with the obligations under the Staff Regulations.

The *Commission* does not dispute the admissibility of the action. As regards the substance, however, it cites the opinion of Mr Advocate General Mayras of 11 April 1973 in the *Kuhl* case (Case 71/72 [1973] ECR 705, at p. 714, in particular pp. 719 and 720) in which he states, *inter alia,* that an institution may take action to recover undue payment except "if the official remained unaware that there was no due resaon for the payment and if, under normal circumstances, he could not have been aware of it because it was in no way obvious to him".

In its view, in the first place, the resettlement allowance has clearly been paid unduly. Article 6 (4) of Annex VII to the Staff Regulations states that the payment of the resettlement allowance is conditional on the *actual* resettlement of the official and his family, and therefore the establishment of the *principal family residence,* at a place situated not less than 70 kilometres from the place where the official was employed, and that resettlement must take place within three years of the date of termination of his service.

In this case there was clearly no resettlement.

In the second place, it is necessary to consider whether Mr Gutmann was *actually* aware that there was no due reason for the payment (Article 85 of the Staff Regulations) or whether he himself brought about the administration's error by his own conduct (judgment in *Meganck,* cited above). It is that second possibility which is relevant to this case. Mr Gutmann declared by letter of 17 November 1980 that he had left his permanent residence in Luxembourg and resettled in Paris. But by letter of 4 March 1981, he admitted that he had carried out a "pretence of resettlement" and stated that the address in Paris was the flat where his elder daughter was studying while his wife, his younger daughter and he *himself* were still living in Luxembourg. It is, moreover, clear that Mr Gutmann could not claim the resettlement allowance while, at the same time, asking that his pension continue to be calculated on the basis of the weighting fixed for Luxembourg, without revealing the pretence.

In the alternative, the Commission contends that even if the applicant was not actually aware that there was no due reason for the payment, the overpayment in this instance was patently one which would not have escaped the notice of an official exercising ordinary care (judgment of 11 July 1979, Case 252/78 *Broe* v *Commission* [1979] ECR 2393).

Finally, when it becomes apparent, after an official has retired, that the Commission has paid to him in error sums which it is entitled to recover from him, those sums may be deducted at any moment from the payments in respect of his pension.

In their reply the *applicants* point out that Mr Gutmann never stated that "the removal has taken place". On the contrary he always made it clear that the removal had not yet taken place. Mr Gutmann at no time provided incorrect information such as might have caused an error to be made and he clearly explained that for family reasons he was unable to transfer his family to Paris or anywhere else. The Commission could not have been unaware that Mr Gutmann continued to reside in Luxembourg since he had requested and obtained an extension of the period for removal.

By the use of the word "simulacre" (pretence) of resettlement, Mr Gutmann simply wanted to show that he himself and his elder daughter had settled in France. That expression therefore means "the impossibility of resettling in Paris immediately with *all* his family" (as is required by the first subparagraph of Article 6 (4) of Annex VII to the Staff Regulations). No one would take up residence in Paris, have a telephone installed and register with the French electricity board merely for the purposes of a "semblance without reality".

The *Kuhl* case cited by the Commission concerns a completely different situation in which the applicant could hardly deny that she ought to have realized that there was no due reason for the payment.

Mr Gutmann merely slightly misunderstood certain provisions of the Staff Regulations and the annexes thereto and believed that he was entitled to the Luxembourg weighting, inasmuch as Luxembourg was the place where his expenses were highest, although the resettlement allowance (Paris) and the weighting requested (Luxembourg) are somewhat irreconcilable (that question remains open however).

In the applicant's view the Commission is attempting to establish Mr Gutmann's bad faith in respect of the weightings, although no one would wish to compromise a resettlement allowance in order to obtain a few extra francs on the weighting.

The *Commission* in its rejoinder points out that Mr Gutmann did not submit a complaint against the refusal to extend the prescribed period for resettlement, but, on the contrary, he claimed to have resettled in Paris. On 4 March 1981, however, he admitted that resettlement was "impossible" and that he was continuing "to live in Luxembourg".

It was stated in the *Verhaaf* judgment (cited above) that the installation or resettlement allowance is intended to cover "the inevitable expenses incurred through integrating in new surroundings". It follows that resettlement is linked to the concept of habitual residence. There must be a real and positive connection with some degree of continuity between the individual and his family, on the one hand, and the place indicated as being that of the family residence, on the other.

The Commission takes the view that while there is a certain connection between the resettlement allowance and the removal allowance, inasmuch as resettlement is generally accompanied by a removal, the two do not necessarily go together. The removal might precede the resettlement or it might also take place after it. Indeed, there may even not be a removal, for example, where the official has kept a furnished dwelling in his country of origin and lived in furnished lodgings at the place where he was employed.

It follows that even if it was impossible for Mr Gutmann to effect his removal within the prescribed period (and he obtained an extension of the time-limit on those grounds), there was absolutely nothing to compel him to carry out a pretence of resettlement.

The word "simulacre" (pretence) has, moreover, a precise meaning and the Commission cannot believe that Mr Gutmann, whose mother-tongue was French, used it without being aware of that meaning.

IV — Oral procedure

At the sitting on 22 September 1983, oral argument was presented by the applicants, represented by Victor Biel of the Luxembourg Bar, and the Commission of the European Communities represented by Hendrik van Lier, acting as Agent, assisted by Robert Andersen, of the Brussels Bar.

The Advocate General delivered his opinion at the sitting on 6 October 1983.

Decision

1 By application dated 18 March 1982, Mr Gutmann, a former adviser at the Office for Official Publications of the European Communities at Luxembourg, brought an action for the annulment of the Commission's decision of 16 June 1981 ordering the recovery, under Article 85 of the Staff Regulations of Officials, of sums paid as a resettlement allowance.

2 Mr Gutmann died on 22 March 1982 and the proceedings were continued by his two daughters.

3 Following his retirement, Mr Gutmann received, at his request, pursuant to Article 6 (4) of Annex VII to the Staff Regulations, an allowance of BFR 350 720 on the ground that he had left his permanent residence in

Luxembourg and resettled in Paris. The Luxembourg weighting for the calculation of the pension was at the same time replaced by that fixed for France.

4 By letter of 4 March 1981, Mr Gutmann protested against the alteration in the weighting. In that letter he complained that the Commission had "compelled him to carry out a pretence of resettlement". The Commission had refused to allow his application for the extension of the period he was allowed for resettlement although at the same time it granted him an extension of the period for removal. Mr Gutmann stated that in reality "it was impossible for him to effect either the removal or the resettlement" for family reasons and that he was continuing to live in Luxembourg with his wife and one of his two daughters.

5 By letter of 31 March 1981, the Commission replied that it was obliged to continue to apply the weighting fixed for France.

6 On 16 June 1981, after Mr Gutmann had submitted a complaint under Article 90 of the Staff Regulations, the Commission finally agreed to apply the weighting for Luxembourg. However, it considered that at the same time it was obliged to recover, under Article 85 of the Staff Regulations and Article 46 of Annex VII thereto, the sum which had been unduly paid as a resettlement allowance, on the grounds that that payment had been obtained as a result of false declarations, that it did not correspond to any real state of affairs and constituted an unjustified enrichment of Mr Gutmann.

7 It is for the annulment of that decision that Mr Gutmann has brought this action.

8 Pursuant to Article 85 of the Staff Regulations, "any sum overpaid shall be recovered if the recipient was aware that there was no due reason for the payment or if the fact of the overpayment was patently such that he could not have been unaware of it".

9 In his application, Mr Gutmann claims that the Commission failed to indicate in what way he had made "false declarations" or how he should have known that the payment of the resettlement allowance represented an undue payment. He made it sufficiently clear to the Commission that he was not able to resettle his whole family in Paris at the same time.

10 It should be noted that under Article 6 (4) of Annex VII to the Staff Regulations "the resettlement allowance shall be paid against evidence that the official and his family ... have resettled ...". Mr Gutmann has acknowledged on a number of occasions and in particular in his letter of 4 March 1981 that he has never resettled in Paris and that the alleged permanent residence in Paris is the flat where his elder daughter is living while a student whereas his wife, his younger daughter and he himself continue to live in Luxembourg.

11 In those circumstances, it is necessary to conclude that Mr Gutmann was or should have been aware of the fact that the payment of the resettlement allowance represented an undue payment within the meaning of Article 85 of the Staff Regulations and that, seen in that context, the statement of the grounds for the Commission's decision is sufficient.

12 The application must therefore be dismissed as unfounded.

Costs

13 Article 69 (2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs.

14 However, Article 70 of the Rules of Procedure provides that, in proceedings brought by servants of the Communities, the institutions are to bear their own costs.

On those grounds,

THE COURT (Third Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders each party to bear its own costs.**

Galmot Mackenzie Stuart Everling

Delivered in open court in Luxembourg on 20 October 1983.

J. A. Pompe
Deputy Registrar

Y. Galmot
President of the Third Chamber

OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 6 OCTOBER 1983 [1]

Mr President,
Members of the Court,

1. The application of 18 March 1982 initiating these proceedings consists of a number of claims made by Max Gutmann, a former official of the Commission of the European Communities, against that institution, seeking the annulment of a decision concerning the recovery of a resettlement allowance, and the repayment with interest of sums withheld.

1 — Translated from the Italian.