JUDGMENT OF THE COURT (THIRD CHAMBER)
18 MARCH 1982 [1]

Manfred Burg
v Court of Justice of the European Communities

(Official — Installation allowance)

Case 90/81

Officials — Action — Measures having adverse effect — Concept — Decision rejecting request for payment of installation allowance
(Staff Regulations of Officials, Arts. 90 and 91)

A measure capable of directly affecting the applicant's circumstances to his detriment such as a decision refusing a request for payment of the installation allowance constitutes a measure having adverse effect within the meaning of Article 90 (2) of the Staff Regulations.

In Case 90/81

MANFRED BURG, an official of the Court of Justice of the European Communities, residing in Schengen, Grand Duchy of Luxembourg, represented by Victor Biel of the Luxembourg Bar, with an address for service in Luxembourg at the latter's Chambers, 18A Rue des Glacis,

applicant,

v

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, represented by François-Xavier Zwickert, Director of Administration, acting as Agent, assisted by Alex Bonn of the Luxembourg Bar, with an address for service in Luxembourg at the latter's Chambers, 22 Côte d'Eich,

defendant,

1 — Language of the Case: French.

APPLICATION for annulment of the express decision of 21 January 1981 rejecting the applicant's complaint and of the decision of the Registrar of the Court of 6 November 1980 refusing to grant the applicant the installation allowance provided for in Article 5 of Annex VII to the Staff Regulations,

THE COURT (Third Chamber)

composed of: A. Touffait, President of Chamber, Lord Mackenzie Stuart and U. Everling, Judges,

Advocate General: Sir Gordon Slynn
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

I — Facts and procedure

The applicant, Manfred Burg, was recruited by the Court of Justice on 1 April 1977 as a member of the temporary staff. He was appointed as an official on 1 March 1978 and classified in Grade C 4.

The applicant, of German nationality, was residing in Perl (a German municipality on the banks of the Moselle, at the frontier with the Grand Duchy) and was granted the expatriation allowance.

On 8 November 1978 he requested the grant of the installation allowance and produced in support of his request an agreement which contained no provision for the payment of a rent for the letting of a room in Schengen, a Luxembourg municipality 2 kilometres from Perl.

On 20 December 1978 the Head of the Personnel Department rejected that request on the grounds that in order to obtain the said allowance the applicant had to show that he had in fact changed his place of residence and really was living in the Grand Duchy of Luxembourg.

On 4 July 1979 the applicant replied to the Head of the Personnel Department to the effect that he considered receipt of

the expatriation allowance as sufficient to create an entitlement to the installation allowance under the provisions of Article 5 (1) of Annex VII to the Staff Regulations, and that the relevant case-law did not apply to the applicant because it concerned the re-installation allowance and finally that the letting agreement showed that the applicant was resident in Luxembourg.

By a memorandum dated 7 November 1979 the Registrar of the Court of Justice rejected that argument. The Registrar cited the second paragraph of Article 5 (3) of Annex VII to the Staff Regulations which reads:

"The installation allowance shall be paid on production of documents establishing the fact that the official, together with his family if he is entitled to the household allowance, has settled at the place where he is employed".

He maintained that the fact of renting a room in Schengen, a border town of the Grand Duchy, two kilometres from Perl, which is itself only 30 kilometres from Luxembourg, did not amount to installation in the Grand Duchy. He supported his argument by citing the case-law of the Court which states in the judgment of 9 November 1978 in Case 140/77 *Verhaaf* v *Commission* [1978] ECR 2117 that the purpose of the installation allowance:

"is to enable an official to bear, in addition to removal expenses, the inevitable expenses incurred through integrating in new surroundings for an indeterminate but substantial period of time".

On 13 November 1979 the applicant once again challenged the argument put forward by the Registrar of the Court, claiming primarily that the second subparagraph of Article 5 (3) of Annex VII did not apply to him on the ground that it concerned persons required to change their place of residence in order to comply with Article 20 of the Staff Regulations and that the judgment in the *Verhaaf* case did not affect him. After lengthy argument relating to his problems of residence he requested the administration of the Court to state the minimum distance between a rented room and his house in Perl which would enable him to receive the installation allowance. At the end of that letter he expressed the desire to receive a prompt answer in order to be able to lodge a complaint pursuant to Article 90 of the Staff Regulations.

By memorandum dated 29 November 1979 the Registrar confirmed the position which he had previously adopted. He added that no proof of a genuine settlement in Luxembourg had been adduced and stressed in that respect that the tenancy agreement produced did not even mention the amount of the rent.

On 3 December 1979 the applicant acknowledged that answer but nevertheless regretted that there was no answer to his specific question concerning the distance of the rented room in Luxembourg from his house in Perl and asked once again for an answer to that question.

On 19 December 1979 the Registrar replied that the installation allowance was not granted on the basis of distance from the family home but on the basis of documents showing genuine settlement in the place of employment.

After that letter the applicant allowed eight-and-a-half months to pass and then on 3 September 1980 made a fresh request for the grant of the installation allowance supported this time by:

1. The tenancy agreement amended to provide for a rent of BFR 1 800 for two rooms;

2. Invoices purporting to show that he had bought furniture;

3. Photocopies of his passport and that of his wife showing that the two had registered at the new place of residence in the Grand Duchy.

On 6 November 1980 the Registrar rejected that request for the reasons which he had previously given.

On 10 November 1980 the applicant lodged a complaint under Article 90 (2) of the Staff Regulations against that decision challenging once again the arguments of the administration of the Court.

On 21 January 1981 the President of the Court adopted a decision rejecting the complaint, primarily on the ground that it was inadmissible in view of the fact that it was contesting a measure which confirmed a number of other decisions adopted in 1978 and 1979 and that even if it had been admissible it would be unfounded for the reasons put forward by the Registrar when rejecting the various requests.

On 14 April 1981, following that decision of rejection, the applicant brought this application which was registered at the Court Registry on the same day.

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 *applicant* claims that the Court should:

"1. Annul the express decision of 21 January 1981 rejecting the applicant's complaint;

2. Annul the decision adopted by the Registrar of the Court on 6 November 1980 in so far as it refuses the grant of the installation allowance;

3. Declare that the applicant is entitled to receive the installation allowance, together with interest at the legal rate calculated on the amount of the allowance from the date on which it became due until the date of actual payment;

4. Above all, declare that this application is admissible and is submitted in good time;

5. In any event, order the opposite party to pay the costs."

The *defendant* contends that the Court should:

"Declare the application inadmissible;

Alternatively, declare it unfounded;

Dismiss it;

Make an order for costs in accordance with the relevant provisions of the Staff Regulations."

III — Summary of the submissions and arguments of the parties

A — Admissibility

The *applicant* challenges the arguments of the President of the Court of Justice and maintains that although the

memorandum of the Registrar of 6 November 1980 may be construed as a decision the same cannot be said of "all the voluminous correspondence preceding it". Thus the answer of the Registrar in the memorandum of 29 November 1979 contemplated rejection only in "the present circumstances". Since the applicant had subsequently submitted fresh evidence of a change of residence only the answer of 6 November 1980 could be considered as a measure adversely affecting him and as a decision under Article 90 (1) of the Staff Regulations. In those circumstances to lodge a complaint before receipt of the letter of 6 November 1980 would in the applicant's view have been premature.

Therefore "it cannot be accepted that the Court may in those circumstances dismiss the present action on the ground that it is out of time, as the matter was still being discussed until the answer of the Registrar of 6 November 1980".

The *defendant* maintains that, as was stressed in the decision of the President of the Court of Justice of 19 January 1981, the applicant is barred because the decision of the Registrar of the Court of 6 November 1980 rejecting the application is only a decision confirming the previous rejections.

As for the applicant's argument to the effect that the letters from the Registrar prior to that of 6 November constitute only an exchange of correspondence, notes and memoranda and thus contain nothing in the nature of a decision, the defendant maintains that this contention of the applicant is contradicted by the content of those letters. The applicant's claim is rejected in all the letters. Moreover the applicant himself in his supplementary request of 13 November 1979 considered the Registrar's reply of 7 November 1979 as an actionable decision since he had asked for an answer within a period enabling him, if necessary, to lodge a complaint under Article 90 of the Staff Regulations. He had also recognized that the Registrar's reply of 29 November 1979 was "a rejection in the present circumstances" thus confirming that it was a decision, albeit in his view it was *"rebus sic stantibus"*.

As for the applicant's argument to the effect that in his request of 3 September 1980 he submitted "new evidence of a change which had in fact occurred" so that only the answer of 6 November 1980 could be considered as a decision under Article 90 (1) of the Staff Regulations, the defendant maintains that if that were true the question of the admissibility of that request might have been discussed. The applicant's claim however, cannot be accepted for he continued to live with his family in his house in Perl and the fact of having a bed delivered to Schengen is irrelevant as is the reference to a change of address in his passport and that of his wife by the German Embassy because that statement is obtained on the basis of the mere attestation that the person concerned is employed by the Communities.

In his reply the *applicant* returns first of all to the facts in order to stress that there was no decision before the Registrar's memorandum of 6 November 1980. It is true "that it would have been easy and in the interests of everybody had the Registrar's memorandum of 7 November 1979 constituted a clear, precise and unambiguous decision start-

ing time for bringing proceedings to run" but in the applicant's view this is "obviously not the case" for the memorandum constitutes no more than a discussion, as is apparent from the last two paragraphs which are concerned with the absence of evidence of an actual move from Perl to Schengen and the small distance between those two municipalities. The applicant in fact understood that those last two paragraphs as requesting him to provide additional evidence and that the discussion still remained open. That attitude is confirmed by the fact that in his memorandum of 3 September 1980 the applicant supplied further evidence in order to obtain the installation allowance.

Thus, "the doctrine of confirmatory measures" cannot apply in this case on the ground that there was no prior measure which constituted a decision since the first measure in the nature of a decision is the Registrar's memorandum of 6 November 1980.

In its rejoinder the *defendant* considers that the applicant, in referring to the last two paragraphs of the Registrar's memorandum of 7 November 1979, disregarded the passages in which the Registrar rejected the arguments of Mr Burg and his request. When he stated:

"I regret that I am unable to accept this line of reasoning...

Further, I cannot accept your view...",

the Registrar was adopting a position unfavourable to the applicant.

Regarding the applicant's claim that he supplied additional evidence in his memorandum of 3 September 1980 the defendant maintains that the memorandum requested once again the grant of the installation allowance on the basis of further submissions and evidence but the fact remains that this request had the same purpose as the previous one and its rejection was merely confirmation of the previous adverse decision.

B — Substance of the case

The *applicant* proposes to consider in turn the various submissions put forward both by the Registrar and by the President of the Court in rejecting his request.

First of all, as regards the *Verhaaf* judgment the applicant maintains that the situations and, consequently, the results are not comparable, since on the one hand Verhaaf did not have to settle in new surroundings since he returned to the same surroundings which he had left nine months previously at his own request and, on the other hand, whereas the applicant is claiming a first installation allowance Verhaaf was claiming the allowance by virtue of a "posting" to a "new place of employment". Those two situations have been distinguished in Article 5 of Annex VII to the Staff Regulations since the first installation allowance is governed by Article 5 (1) whereas that sought by Verhaaf falls under Article 5 (2). The applicant also repeats that in his view Article 5 (3) applies only to the cases referred to in the second part of the first sentence of Article 5 (1).

In support of that argument the applicant refers to the statement of the Court of Auditors on the installation allowance

(Official Journal, C 342, 31. 12. 1980, p. 168) and to the reply of the Commission (published in the same Official Journal, p. 294).

The Court of Auditors distinguished between two classes of persons entitled to the installation allowance:

Those entitled to the expatriation allowance do not have to produce any evidence but automatically receive the installation allowance;

Those who have to furnish evidence that they have had to change their place of residence in order to comply with the obligations arising from their employment under Article 20 of the Staff Regulations.

The Court of Auditors proposes moreover to retain the installation allowance only for the second category of staff.

The Commission stated that "the only way of achieving the result desired by the Court of Auditors would be to amend the Staff Regulations."

The applicant is of the opinion that the present system is justified in so far as it automatically confers upon staff in receipt of the expatriation allowance the right to the installation allowance as well, for the latter, which is not to be confused with the reimbursement of removal expenses, covers the so-called "incidental contingent expenses". Thus in distinguishing between the two allowances Article 5 is logical and it is clear that the second sentence of Article 5 (3) concerns only employees entitled to the expatriation allowance since in this regard there is a presumption that genuine expenses are incurred and that presumption does not exist in cases of change of residence.

Lastly, it follows from the *Verhaaf* judgment that an official must prove integration "in new surroundings for an indeterminate but substantial period of time". The term "new surroundings" is not defined by a comparison between Perl and Schengen, but with regard to the place of employment. Thus the applicant fully satisfies the condition laid down in the *Verhaaf* judgment since the surroundings of the Court of Justice in Luxembourg are quite new in relation to his previous place of employment, namely the Security Department at Frankfurt Airport. These, therefore are the circumstances in regard to which the Burg and Verhaaf cases are "fundamentally different" since on the one hand Verhaaf was returning to the surroundings of his previous employment whereas on the other hand as regards the applicant everything was new about his employment in Luxembourg.

The *defendant* deals with the substance of the case as a secondary consideration. It states that the Staff Regulations make the grant of the installation allowance dependent on two premises:

The official must be in receipt of the expatriation allowance, or must prove that he was required to change his residence in order to comply with the requirements of Article 20 of the Staff Regulations (Article 5 (1) of Annex VII to the Staff Regulations);

He must also produce documents as evidence that he has settled at the place where he is employed (Article 5 (3)).

The administrative decision therefore rightly recognized that the applicant fulfilled the first but not the second condition of the Staff Regulations since

the documents produced did not provide the evidence necessary to fulfil the second condition.

For that reason the applicant maintains that Article 5 (3) does not apply to him since he is in receipt of the expatriation allowance. However, as such an interpretation entails no longer considering the allowance in question as reimbursement of expenses but as additional income, it would be contrary to all the provisions in Section 3 (Reimbursement of expenses), and has not been accepted by the case-law. The interpretation was rejected by the Court in the *Verhaaf* judgment and by Mr Advocate General Roemer in his Opinion of 10 May 1960 in Joined Cases 27 and 39/59, *Campolongo* v *High Authority* [1960] ECR, paragraph 4 of the decision, p. 10 and by Mr Advocate General Reischl in his opinion in the *Verhaaf* case.

It follows from that case-law that only settling in new surroundings for reasons of employment involving expense creates a right to the installation allowance. Consequently the second subparagraph of Article 5 (3) applies to every official who fulfils the conditions for obtaining the installation allowance.

As to the statement of the Court of Auditors on the installation allowance and the Commission's reply, the defendant maintains that the Court of Auditors criticized and condemned the abusive practice of granting the installation allowance solely on condition of entitlement to the expatriation allowance and it considered that the grant of the installation allowance ought to be conditional upon the official's having incurred expense. The Commission also insisted that the officials must have incurred expense in connection with settlement.

In addition, consideration of the documents shows that the applicant has attempted by "pretended changes of residence" to obtain the grant of an allowance under the Regulations to which he is not entitled.

In his reply the applicant challenges the Court's statement that he attempted to obtain the grant of the installation allowance by pretended changes of residence and maintains that the insertion into the letting agreement of the amount of rent is not of a fraudulent nature. In fact the applicant was seeking only to answer the question put in the memorandum from the Head of the Personnel Department inquiring whether the applicant really did live in Luxembourg. By virtue of that urgency he was obliged to incur expenses in order to adduce the requisite evidence only ultimately to learn that "in any event a move from Perl to Schengen is of no account".

As regards the Commission's reply to the Court of Auditors regarding the installation allowance the applicant admits that "it is a question of expenses" but that it is apparent from the wording used by the Commission that installation expenses include those incurred "by persons who when taking up employment already live in the place of that employment". That consideration suffices to show that as regards the installation allowance the expenses are not automatically linked with a transfer of address or of main residence.

The installation allowance is of a flat-rate nature and cannot be compared with the reimbursement of removal expenses. It is based on "the well-founded assumption that whenever employment is taken up there this entails so-called incidental contingent expenses. No other evidence is necessary, at least assuming that the new official is in receipt of the expatriation allowance which is the case so far as Mr Burg is concerned.

In its rejoinder the *defendant* returns to what it had called the applicant's "pretended changes of residence". The applicant's argument that the letting agreement was completed at the request of the administration is open to debate. Mr Burg produced a tenancy agreement dated 12 November 1978 which did not show the amount of rent. When that was pointed out in the memorandum of 29 November 1979 he produced on 3 September 1980 a supplement to the tenancy agreement showing a rent of BFR 1 800 which related this time to two rooms.

The defendant also inquired how the applicant can reconcile his statement that he had established his home in Schengen "with his previous statement that he was not financially in a position to move from Perl to Schengen".

IV — Oral procedure

At the sitting on 10 December 1981 the applicant, represented by Victor Biel of the Luxembourg Bar, and the Court of Justice of the European Communities, represented by F. Zwickert, Director of Administration, acting as Agent, assisted by Alex Bonn of the Luxembourg Bar, presented oral argument and answered questions put to them by the Court.

The Advocate General delivered his opinion at the sitting on 11 February 1982.

Decision

1 By application lodged at the Court Registry on 14 April 1981 Mr Burg, an official in Grade C 4 at the Court of Justice, brought an action under Article 90 of the Staff Regulations for the annulment of the decision of the President of the Court dated 21 January 1981 rejecting the applicant's complaint, and for the annulment of the decision of the Registrar of the Court dated 6 November 1980 refusing to grant the applicant the installation allowance provided for in Article 5 of Annex VII to the Staff Regulations.

2 Article 5 of Annex VII to the Staff Regulations provides, in so far as is relevant to the present proceedings:

"(1) An installation allowance equal to two months' basic salary in the case of an official who is entitled to the household allowance or to one month's basic salary in other cases shall be paid to an established

official who qualifies for expatriation allowance or who furnishes evidence of having been obliged to change his place of residence in order to comply with Article 20 of the Staff Regulations."

"(3) The installation allowance shall be paid on production of documents establishing the fact that the official, together with his family if he is entitled to the household allowance, has settled at the place where he is employed."

3 It appears that the applicant satisfies the conditions for receiving the expatriation allowance. When recruited in 1977 he was living with his wife and daughter in Perl, a municipality situated on the German bank of the Moselle. In 1978 he requested the grant of the installation allowance and produced in support a rent-free agreement, dated 12 November 1978, for the letting of a room in Schengen, on the Luxembourg bank of the Moselle.

4 That request was first refused on 20 December 1978 by the Head of the Personnel Department of the Court and was subsequently the subject of an exchange of letters between the applicant and the Registrar.

Admissibility

5 The administration of the Court maintains that the application is inadmissible on the ground that it is directed against the decision of 6 November 1980 which merely confirms previous decisions of rejection and in particular that contained in the memorandum of the Registrar of 7 November 1979.

6 The applicant claims on the contrary that only the memorandum of 6 November 1980 may be considered "as capable of having adverse effect and as a decision within the meaning of Article 90 (1) of the Staff Regulations", since all the previous memoranda constituted nothing more than letters forming part of correspondence concerned with discussing the question of evidence of the applicant's move from Perl to Schengen. Thus, in his opinion, the letter from the Registrar of 7 November 1979 must be considered as a request to the applicant for additional evidence.

7 Having regard to those two conflicting views it is appropriate first of all to determine the legal nature of the memorandum of 7 November 1979.

8 The Registrar states in the second and third paragraphs of that document:

"I regret that I cannot accept your line of reasoning . . ."

". . . I cannot accept your view . . ."

and states in the last paragraph:

"I must inform you that on the one hand an agreement for the letting of a room two kilometres from your present residence cannot constitute evidence of your actual settlement in that room and that, further, even if you could show that you had moved from your place of residence, a distance of two kilometres cannot in any event be regarded as settlement in new surroundings as required by the Court in the circumstances."

9 Such a document cannot constitute a measure preparatory to the one having adverse effect since it is apparent from the last paragraph that not only did the Registrar reject the evidence put forward by the applicant but stressed that even if such evidence could be validly adduced the request made by the applicant would nevertheless have to be be rejected for reasons relating to the substance of the case.

10 It follows from all the expressions used and from the relationship between them that the document is a measure refusing the request for payment of the installation allowance and constitutes a measure capable of directly affecting the applicant's circumstances to his detriment, and is therefore a measure having adverse effect within the meaning of Article 90 (2) of the Staff Regulations. Even assuming that the applicant might still have had some doubt as to the legal nature of that memorandum, that uncertainty ought to have been dispelled once and for all by the memorandum from the Registrar dated 29 November 1979, which referred to that of 7 November as a decision not to grant the installation allowance.

11 In those circumstances the applicant is wrong in seeking to show, by maintaining that in his request of 3 September 1980 he adduced fresh evidence of his change of residence to Schengen, that only the memorandum of 6 November 1980 constitutes a measure having adverse effect. In so far as the decision of the Registrar of 7 November 1979 rejected the applicant's request of 4 July 1979 on the ground that a move involving a distance of two kilometres could not be considered as entailing settlement in new surroundings and that the applicant did not in his request of 3 September 1980 submit any new factors establishing the existence of a move different from that referred to in the previous requests it appears that the memorandum of the Registrar of 6 November 1980 is a measure which simply confirms the previous decisions adopted by the Registrar and in particular that of 7 November 1979.

12 Further it is of little importance that the latter decision was followed by correspondence between the applicant and the defendant concluding with a letter from the President of this Court dated 19 January 1981 indicating that not only was the complaint inadmissible but in any event unfounded.

13 In consequence, since the applicant did not within the prescribed period make a complaint against the measure adversely affecting him, namely the memorandum of 7 November 1979, his action, registered on 16 April 1981, directed against a purely confirmatory measure must be declared inadmissible.

Costs

14 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs.

15 However, under Article 70 of the Rules of Procedure, in proceedings by servants of the Communities, institutions are to bear their own costs.

On those grounds

THE COURT (Third Chamber)

hereby:

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

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

Touffait Mackenzie Stuart Everling

Delivered in open court in Luxembourg on 18 March 1982.

P. Heim
Registrar

A. Touffait
President of the Third Chamber

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 11 FEBRUARY 1982

My Lords,

The applicant in this case, Mr Manfred Burg, is an official of the Court. He was first employed as a temporary agent with effect from 1 April 1977 and became an established official on 1 March 1978. In this action he claims that he is entitled to be paid an installation allowance pursuant to Article 5 of Annex VII of the Staff Regulations and interest on the amount payable from the time when it fell due up to the date of payment; he accordingly asks the Court to annul an express rejection, on 21 January 1981 by the President of the Court, of a complaint made by him against a