

OPINION OF MR ADVOCATE GENERAL
DA CRUZ VILAÇA

delivered on 9 December 1986 *

*Mr President,
Members of the Court,*

1. The applicant, Mr Panayotis Mouzourakis, is an official of the European Parliament. In 1977 he obtained a doctorate in physics from the University of Geneva, and then worked until 1981 as a university researcher in his specialist field. In January 1982 he was engaged as a scientist and lecturer by the Translation and Interpretation Centre in Corfu, where he worked for six months. From 1 May to 30 September of the same year, he also attended an interpreting course at that institution. He then worked for a year as a free-lance interpreter for the European Parliament.

On 14 June 1983, after completing the procedure for Competition No PE/80/LA, in which Mr Mouzourakis took part, the administration of the European Parliament offered him a post as a probationary official in Grade L/A 7, Step 1. By a letter dated 26 July 1983, the applicant accepted that offer, while at the same time expressing his preference for a posting with the Parliament in Brussels because his wife already worked there as an official of the Council and his work as an interpreter would also require his presence there for a considerable part of the time.

Nevertheless, by decision of the Secretary-General of the Parliament dated 24 October 1983 which took effect on 1 October of that year the applicant was assigned to a post of interpreter as a probationary official in the Directorate-General for Administration,

Personnel and Finance in Luxembourg, in Grade L/A 7, Step 1; Brussels was determined as his place of recruitment and place of origin. That decision was notified to him by a letter from the Personnel Division dated 10 November 1983.

From October 1983 to June 1984, the applicant received the daily subsistence allowance to which he was entitled by virtue of Article 10 of Annex VII to the Staff Regulations.

At the end of his probationary period, the applicant was established as an official with effect from 1 July 1984 by decision of the appointing authority dated 24 September 1984. That decision was notified to him by letter dated 19 November 1984.

Meanwhile, by another decision of the Secretary-General of the European Parliament of 16 July 1984, which was superseded by a decision of 28 September 1984, the wish originally expressed by the applicant was acceded to and he was transferred to Brussels with effect from 1 October 1984.

On 12 February 1985, when he was already working in Brussels, the applicant submitted a complaint to the appointing authority under Article 90 (2) of the Staff Regulations, in which he asked to be granted 12 months' additional seniority in his grade pursuant to Article 32. By a letter of 25 June 1985, the Secretary-General of the

* Translated from the Portuguese.

Parliament rejected his complaint as out of time or alternatively as unfounded.

On the same date the applicant also submitted to the appointing authority another complaint with a view to obtaining payment of the daily subsistence allowance provided for in Article 10 of Annex VII to the Staff Regulations on account of his transfer to Brussels. On 19 June 1985, the Secretary-General of the Parliament replied that his complaint was to be regarded as a request under Article 90 (1) and asked him to provide evidence that his transfer had in fact made it necessary for him to change his residence in order to comply with Article 20 of the Staff Regulations.

On 16 September 1985 the present application was lodged at the Court Registry. In the first place, the applicant seeks the annulment of the appointing authority's decision refusing him additional seniority. In the second place, he claims that his letter of 12 February 1985 should be regarded as a complaint within the meaning of Article 90 (2) of the Staff Regulations, that his application should therefore be held admissible, and that the European Parliament should be ordered to pay the daily subsistence allowance due to him because of his transfer to Brussels. He also claims that the Parliament should be ordered to pay the costs.

2. Having summarized the facts, I shall now analyse the questions of law raised by this action.

A — The objection that the applicant's first claim is inadmissible

In its defence the European Parliament first raises by way of preliminary objection the question of the admissibility of the claim for the annulment of the appointing authority's

decision refusing to grant the applicant additional seniority. In the Parliament's view, the action is inadmissible because the complaint was not lodged within the period laid down in Article 90 (2) of the Staff Regulations.

It states that the measure adversely affecting the applicant, namely the decision appointing him a probationary official, was notified to him by letter dated 10 November 1983 and that the complaint which he submitted to the appointing authority is dated 12 February 1985. Under Article 90 (2) of the Staff Regulations, however, the period for lodging a complaint expired on 10 February 1984, that is, three months after the decision was notified to the applicant.

Nevertheless, the applicant states that the decision of 24 October 1983 appointing him a probationary official in Grade L/A 7, Step 1, was never notified to him. According to him it only came to his notice indirectly as a result of the decision of 24 September 1984 establishing him as an official, which was notified to him by letter dated 19 November 1984.

It should be noted that the applicant does not deny that the measure adversely affecting him was the decision appointing him a probationary official. But in order to justify his failure to lodge any form of complaint within the period of three months laid down by Article 90 (2) of the Staff Regulations he relies on the fact that it came to his notice only when he became an established official.

The applicant is not therefore claiming that he was prevented from challenging the terms of his appointment by any difficulty or restriction resulting from the fact that he was a probationary official; he merely seeks to show that, notwithstanding the time

which had elapsed, his complaint of 12 February 1985 challenging that measure was not out of time.

The situation as regards this claim is not exactly the same as the one which led to the judgment of the Third Chamber in *De Santis*,¹ and there is therefore no reason to approach the matter in the same way as Advocate General Sir Gordon Slynn did in his Opinion in that case.

Moreover, in its judgment in *De Santis*, the Court did not express its views on the question of admissibility. It did so expressly in a more recent decision in Case 191/84,² in which it held, as it had done previously in *Blasig*,³ that 'in the case of a request for reclassification the measure adversely affecting the applicant is the decision appointing him as a probationary official'. The Court went on: 'It is that decision which defines the duties for which the official has been appointed and definitively fixes the corresponding grade. The decision establishing the official merely confirms that decision.' The Court thereby confirmed unequivocally a principle which it had been developing in a number of previous judgments on individual cases.⁴

In these proceedings the Parliament has produced photocopies of the letter and the decision containing the applicant's appointment as a probationary official and showing his classification which, it states, were sent to him on 10 November 1983.

If the applicant's statement that he only learnt of the decision much later, on being notified of his establishment as an official, is to be accepted as true, it must be assumed that he did not receive those documents.

Let me say in passing that the fact that Community institutions do not use a system of personal notification or recorded delivery for documents of this nature makes it impossible or at least very difficult to prove that they came to the notice of the addressee, which is surely an undesirable consequence of a not very prudent practice.

In the case under consideration, however, it is quite implausible that the applicant did not discover his classification much earlier than he claims to have done.

A number of reasons lead me to this conclusion.

In the first place, the offer of employment as a probationary official sent to the applicant on 14 June 1983 contained an unequivocal reference to Grade L/A 7, Step 1. That offer was expressly accepted by the applicant by letter dated 26 July 1983 'under the conditions stated in your letter'. The only reservation related to the applicant's preference for a posting in Brussels, and in that regard the applicant went out of his way to repeat that he made it 'while fully accepting the conditions of your offer'.

When he actually took up his duties on 3 October 1983 it was clearly on the same terms.

Secondly, as the European Parliament emphasizes in its defence, the applicant could see from his salary statements at what

1 — Judgment of 6 June 1985 in Case 146/84 *De Santis v Court of Auditors* [1985] ECR 1723.

2 — Judgment of 7 May 1986 in Case 191/84 *Franco Rossi and Others v Commission* [1986] ECR 1541, especially at paragraph 11 of the Decision.

3 — Judgment of 18 June 1981 in Case 173/80 *Blasig v Commission* [1981] ECR 1649, especially at p. 1658.

4 — See judgment of 1 December 1983 in Case 190/82 *Blomefield v Commission* [1983] ECR 3981, especially at p. 3991, as well as the judgment in *Blasig*, cited above.

grade and step he was employed because the latter determined the amount of the salary and allowances paid to him. It was therefore within the power of an official in the applicant's category, and with his professional training and educational background, to resolve any doubts he might have with regard to his classification.

The Court has held:⁵ 'The sending of the monthly salary statement has the effect of starting the time for appeal running, where it clearly shows the decision taken.'

In this case the salary statements submitted by the applicant with his reply in support of his second claim (concerning the daily subsistence allowance), which in fact relate to his probationary period, contain not only all the necessary information about his basic salary, together with allowances and deductions, but also, at the top of the page and clearly in evidence, the reference L/A 7/1, which corresponds to the applicant's category, grade and step!

Thirdly, appointments are as a rule given adequate publicity, specifically by means of announcements posted on notice boards, and it is surprising that such publicity should not have attracted the applicant's attention.

Fourthly, the Parliament states in its defence that on 3 October 1983 the Head of the Individual Rights and Privileges Section forwarded to the applicant at his request a certificate recording the fact that he was a probationary official of the Communities as from 1 October 1983, and it is inconceivable that the applicant should not have taken due

notice of such a document showing his classification.

That being the case, if at the end of a nine-month probationary period and a further three-and-a-half months as an established official anyone in the applicant's position and endowed with average intelligence did not know how he had been classified on appointment it was because he did not care to know.

It is therefore my view that the applicant's first claim must be considered inadmissible because the complaint lodged under Article 90 (2) of the Staff Regulations was out of time.

B — The objection that the second claim is inadmissible

In its defence, the European Parliament also raises an objection of inadmissibility regarding the applicant's second claim.

According to the applicant, the mere fact that he was required by the Staff Regulations (Article 20) to change his residence from Luxembourg to Brussels as a result of his transfer to Brussels automatically entitled him to receive the daily subsistence allowance provided for by Article 10 of Annex VII to the Staff Regulations. In his view, there is 'a legal and logical presumption' that a change in place of employment entails a change of place of residence, and hence it is for the administration to rebut the presumption and not to require evidence of the move from the official.

In my opinion the applicant's view is unfounded.

Like the Parliament, I take the view that the allowance at issue should be paid only

⁵ — See for example the judgment of 21 February 1974, Joined Cases 15 to 33, 52, 53, 57 to 109, 116, 117, 123, 132 and 135 to 137/73 *Schots-Kortner and Others v Council, Commission and Parliament* [1974] ECR 177.

where an official furnishes evidence that he must change his place of residence in order to satisfy the requirement that he must reside in the place where he is employed.

This is made clear by the very terms of Article 10 of Annex VII to the Staff Regulations, which provides that entitlement to the daily subsistence allowance arises only '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'.

That evidence is not required in order to calculate the amount of the allowance (which is determined by the same article) but in order to establish that an official is entitled to the allowance, in other words, that he has actually changed his place of residence. Article 10 (1) cannot have a different meaning.

For that reason, the Community institutions are not only empowered but are also under a duty to require of their officials, in case of doubt, evidence that they were obliged to change residence.

It was with that in mind that the administration of the Parliament sent the applicant a letter on 24 January 1985 requesting him to show that he fulfilled the requirements for the grant of the daily subsistence allowance.

The Parliament's doubts arose from the fact that the applicant already had a residence at his new place of employment and also from the finding, which is recorded in a letter dated 22 April 1985, that a number of officials transferred to Brussels had in fact already moved there a long time before the date given in the transfer decision.

That being so, the grant of the allowance cannot be dissociated from the prior

requirement that the official must submit his claim to the administration and establish his entitlement to it. That was precisely what the Head of the Personnel Division told the applicant in his letter of 24 January 1985.

It was after receiving that letter that the applicant wrote to the Secretary-General of the Parliament on 12 February 1985, purporting to complain, under Article 90 (2) of the Staff Regulations, 'against the failure to adopt a decision' to grant the daily subsistence allowance due to him as a result of his posting to Brussels.

The Parliament treated that 'complaint' as a request under Article 90 (1) of the Staff Regulations in view of the absence of any previous request submitted by the applicant for the allowance or any refusal to pay on the part of the institution.

In my view the Parliament is right. The letter dated 12 February cannot be regarded as more than a request for a positive decision on the payment of the daily subsistence allowance, and not as a complaint against the failure to adopt a measure required by the Staff Regulations, which there clearly never was.

Once the request had been rejected as unfounded by the Secretary-General of the Parliament because of the absence of evidence that the applicant had actually changed his place of residence, the applicant should have either furnished that evidence or else submitted a complaint within the period of three months laid down in Article 90 (2) of the Staff Regulations.

Since he did not do so, the action brought before the Court is premature and hence inadmissible by virtue of Article 91 (2) of the Staff Regulations.

Nor is that conclusion affected by the applicant's statement that, at the same time as lodging his application with the Court, he

submitted to the Secretary-General of the Parliament a complaint against the latter's decision of 19 June 1985 in order thereby to 'remedy any possible inadmissibility'.

Even if that is the case the application is still premature. Quite apart from the question whether the complaint was submitted within the period laid down by Article 90 of the Staff Regulations, it is clear that under Article 91 (2) an action before the Court is admissible only if:

- (1) a complaint has previously been submitted pursuant to Article 90 (2) within the period prescribed therein, and
- (2) 'the complaint has been rejected by express decision or by implied decision'.

At the very least, the second condition was clearly not fulfilled at the time of the application and the latter must therefore be held inadmissible.

3. In view of the foregoing considerations, I shall do no more than examine briefly, and strictly in the alternative, the substance of the claims put forward by the applicant.

A — *The claim for reclassification*

The applicant claims that, under the second paragraph of Article 32 of the Staff Regulations, the appointing authority should have granted him 12 months' additional seniority in step in view of his professional training and experience.

The first paragraph of Article 32 provides: 'An official shall be recruited at the first step in his grade'. However, the second paragraph provides that 'the appointing authority may, taking account of the training and special experience for the post

of the person concerned, allow additional seniority in his grade' within the limits laid down in the same paragraph.

In support of his claim, the applicant refers to specifically relevant training obtained during an interpreting course in Corfu and training in high energy physics which, although not specifically relevant, is particularly useful for his work as an interpreter at scientific and technical meetings.

In the second place, he relies on his professional experience as a free-lance interpreter at the European Parliament, his work as a scientific assistant at the Translation and Interpretation Centre in Corfu and his experience as a researcher in the field of high energy physics.

In the applicant's view, the Parliament's failure to take into account his training and experience prior to his appointment constituted a manifest error and even a misuse of powers. In that regard he cites the Court's judgments in Case 190/82 *Blomefield v Commission* [1983] ECR 3981, and Case 17/83 *Angelidis v Commission* [1984] ECR 2907.

The applicant further takes the view that he has been subjected to unequal treatment by comparison with two of his colleagues in the Greek interpretation division, who were granted additional seniority corresponding to the period prior to their appointment during which they worked under contract as temporary staff after completing a course, like the applicant, at the Translation and Interpretation Centre in Corfu. The applicant, however, was not offered work on those terms and, despite having given a commitment at that time that he would work for the Parliament full-time for two years, and even though he was doing the same work as his colleagues, he had to accept the status of free-lance interpreter.

The Parliament disputes the applicant's arguments on the following grounds:

(i) Additional seniority may be granted under the second paragraph of Article 32 of the Staff Regulations by virtue of a *power* vested in the appointing authority, not a *duty*, and it cannot therefore be inferred that the official is entitled to such seniority as of right;

(ii) The applicant's classification is in keeping with the internal guidelines relating to the criteria applicable to classification on recruitment adopted on 1 April 1974 and brought into effect on a provisional basis by decision of 14 May 1974 of the Secretary-General of the Parliament. Title III of those guidelines, 'Classification in step', provides that 'subject to the maximum periods laid down in Article 32 of the Staff Regulations', 12 months' additional seniority is to be granted in Grades A 7 and L/A 7 where it is 'justified by professional experience specifically relevant to the duties attaching to the post to be filled' of at least two years.

Thus, although he had six years' previous experience, the applicant did not have — even taking into account his six-month period of employment at the Translation and Interpretation Centre in Corfu and, contrary to the Parliament's practice, his five-month training course — the necessary 24 months' *specifically relevant experience in the field of interpreting* in view of the fact that he worked for only one year as a free-lance interpreter.

(iii) The applicant has not suffered any discrimination by comparison with his colleagues, in so far as no evidence of such discrimination been produced.

My views on the Parliament's arguments are as follows:

In the first place, it is immediately clear from its wording that the second paragraph of Article 32 of the Staff Regulations does not impose a *duty* on the administration to grant any additional seniority in step in respect of an official's professional training and experience; it creates merely a *possibility* or *power* in that regard.

The exercise of that power is therefore left to the discretion of the institution. As the Court has emphasized before,⁶ the appointing authority has a wide discretion, for the purposes of the second paragraph of Article 32, in assessing the previous experience of persons admitted to the European public service, which will inevitably vary a great deal. That margin of discretion extends to 'all aspects of potential importance for the recognition of previous experience, both as regards the nature and duration of such experience and as regards the extent to which it matches the requirements of the post to be filled'.

Nevertheless, the power granted to the competent authority is obviously limited, both by the legislative provisions and by its duty to observe the principles governing the exercise of discretionary powers.

Accordingly, the second paragraph of Article 32 itself prohibits the appointing authority from taking into account professional experience which is not 'special experience for the post' to be filled. In other

6 — Judgment of 1 December 1983 in Case 190/82 *Blomefield v Commission* [1983] ECR 3981, especially at p. 3994, paragraph 26 of the Decision; judgment of 12 July 1984 in Case 17/83 *Angelidis v Commission* [1984] ECR 2907, especially at p. 2921, paragraph 16.

words, the experience to be established must be 'specifically related to the post to be filled' (judgment in *Blomefield*, cited above, at p. 3994).

Secondly, it is current practice for the Community institutions to adopt internal rules of a general nature which they impose upon themselves in order to regulate the exercise of that power and ensure that officials in the same career bracket and category enjoy identical conditions of recruitment and service career as regards their classification in grade and step upon recruitment.

In this instance, the Parliament has applied the internal guidelines which it adopted in a manner which cannot be criticized.

In view of the fact that the applicant did not have two full years' specific experience in the field of interpreting and that his previous experience as a physicist was not related to his present work, the Parliament as well as not exceeding the bounds of the discretion conferred on it by the second paragraph of Article 32 also did not depart from the general criteria laid down in its 1974 guidelines.

As far as this case is concerned, those guidelines too are perfectly in conformity with the terms of Article 32, under which the Parliament states that they were adopted.

Nothing, therefore, indicates that the Parliament committed a manifest error in refusing to grant Mr Mouzourakis the additional seniority in step which he requested.

Furthermore, the applicant has not furnished any evidence in these proceedings to prove that he was subjected to unequal or discriminatory treatment by comparison with other officials or that the Parliament has misused its powers.

B — *The claim concerning the grant of a daily subsistence allowance*

In its judgment in *Lowage*,⁷ the Court held that: 'The basis for daily subsistence allowance lies *inter alia* in the obligation on the part of the official to remove to a residence other than that which he occupied previously, without however being able to give up this latter'.

That objective, which was defined by the Court in relation to an earlier version of Article 10 of Annex VII to the Staff Regulations, continues to be reflected in the present version.

Thus, Article 10 (1) provides for the right to a daily subsistence allowance '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', while the last sentence of Article 10 (2) provides that 'in no case shall the daily subsistence allowance be granted beyond the date on which the official removes'.

The official then becomes entitled to reimbursement of the expenses incurred in the removal of his furniture and personal effects under Article 9 of Annex VII.

That means that the daily subsistence allowance is intended to compensate an official who, while being obliged to maintain his previous residence (for family reasons, reasons relating to his lease, reasons connected with the possibility that his new posting may be provisional or any other reasons), needs to establish a residence, though not yet a settled one, in

⁷ — Judgment of 30 January 1974 in Case 148/73 *Lowage v Commission* [1974] ECR 81, especially at p. 90, paragraph 25.

his new place of employment, and therefore is subjected to various kinds of expense and inconvenience.

That is not what happened in the applicant's case.

As is abundantly clear from what has been said in these proceedings, at the time of his recruitment the applicant resided in Brussels with his wife, an official of the Council, and he had for that reason expressed his preference for a Brussels posting.

Since it was not possible to meet that request at the time, he was assigned to Luxembourg from 1 October 1983 and received a daily subsistence allowance for 10 months, that is, until 1 July 1984.

During his period in Luxembourg, the applicant on his own admission stayed at the house of a friend and, it seems, regularly returned to his conjugal home in Brussels at weekends.

The applicant therefore never established himself in a permanent or lasting manner in Luxembourg, nor has it emerged in these proceedings that he applied for an installation allowance.

When he was transferred to Brussels, not only was his original request acceded to he was also not compelled to maintain temporarily any residence in Luxembourg or to make short-term accommodation arrangements in Brussels until it was possible to establish a permanent residence there. He merely left the friend's house where he had been staying and moved back permanently to the family home which he already had in Brussels.

To claim to be entitled to a daily subsistence allowance in such circumstances is at the very least excessive and is indicative of an attitude for which there is no apparent justification.

4. Accordingly, I propose that the Court should:

- (a) Dismiss the application as inadmissible;
- (b) Alternatively, declare it unfounded.

As regards the costs, by virtue of the combined provisions of Article 69 (2) and Article 70 of the Rules of Procedure each party must in principle bear its own costs.

The Parliament's conclusions state simply that the applicant should be ordered to pay the costs, and at the hearing the Parliament confirmed that it was willing to bear its own costs. That being the case, it seems to me unnecessary to consider the possibility of applying the second paragraph of Article 69 (3), which is specifically provided for by Article 70 of the Rules of Procedure.