JUDGMENT OF THE COURT (Fifth Chamber)

15 May 2003 (1)

(Appeal - Decision 93/731/EC - Access to Council documents - Decision 1999/284/EC - Access to documentation and archives of the European Central Bank - 'Basle/Nyborg' Agreement on the reinforcement of the European Monetary System - Refusal of access - Application out of time against that decision - Excusable error)

In Case C-193/01 P,

Athanasios Pitsiorlas, residing at Thessaloniki (Greece), represented by D. Papafilippou, lawyer,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (First Chamber) of 14 February 2001 in Case T-3/00 Pitsiorlas v Council and ECB [2001] ECR II-717, seeking to have that judgment set aside,

the other parties to the proceedings being:

Council of the European Union, represented by M. Bauer and D. Zachariou, acting as Agents,

and

European Central Bank

defendants at first instance,

THE COURT (Fifth Chamber),

composed of: M. Wathelet, President of the Chamber, C.W.A. Timmermans (Rapporteur), D.A.O. Edward, P. Jann and A. Rosas, Judges,

Advocate General: A. Tizzano,

Registrar: L. Hewlett, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 30 May 2002, at which Mr Pitsiorlas was represented by I. Mathioudakis, lawyer, and the Council by M. Bauer and D. Zachariou,

after hearing the Opinion of the Advocate General at the sitting on 26 September 2002,

gives the following

Judgment

1.
By application received at the Court Registry by fax on 3 May 2001 and lodged at the Court Registry on 7 May 2001, Mr Pitsiorlas brought an appeal under Article 49 of the EC Statute of the Court of Justice against the order of the Court of First Instance of 14 February 2001 in Case T-3/00 Pitsiorlas v Council and ECB [2001] ECR II-717 ('the contested order') by which the Court of First Instance dismissed as inadmissible his application for annulment of the decision of the Council of the European Union of 30 July 1999 refusing him access to a document ('the Council decision').

Legal context and facts of the case

2.
The legal context and facts of the case are set out in the contested order in the following terms:

'1 The applicant is preparing a doctoral thesis in law at the University of Thessaloniki in Greece.

2 By letter dated 6 April 1999, received at the General Secretariat of the Council on 9 April 1999, he asked to have access, pursuant to Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43), as amended by Council Decision 96/705/Euratom, ECSC, EC of 6 December 1996 (OJ 1996 L 325, p. 19), to the Basle/Nyborg Agreement on the reinforcement of the European Monetary System (EMS) endorsed by the Council of Economic and Finance Ministers at their informal meeting at Nyborg, Denmark, on 12 September 1987.

3 In its letter of 11 May 1999, communicated to the applicant on 15 May 1999, the General Secretariat of the Council responded in the following terms:

The Secretariat General has given careful consideration to your request, but as it has not been possible to find the document, we believe that it is most probably a [European Central Bank] document. Your request should therefore be addressed directly to that institution ...

4 By letter dated 8 June 1999, received at the General Secretariat of the Council on 10 June 1999, the applicant made a formal request pursuant to Article 7(1) of Decision 93/731.

5 By letter dated 5 July 1999 the General Secretariat of the Council notified the applicant that, because of the impossibility of taking a decision within the time-limit of one month under Article 7(3) of Decision 93/731, it had decided to extend this time-limit pursuant to Article 7(5), which provides:

Exceptionally, the Secretary-General, having notified the applicant in advance, may extend by one month the time-limits laid down in the first sentence of paragraph 1 and in paragraph 3.

6 At the same time, by letter dated 28 June 1999 addressed to the Public Relations department of the European Central Bank (ECB), the applicant asked to have access to the document in question pursuant to ECB Decision 1999/284/EC of 3 November 1998 concerning public access to documentation and the archives of the European Central Bank (OJ 1999 L 110, p. 30). This request was refused by letter dated 6 July 1999, and the applicant then asked, by letter dated 27 July 1999, that this decision be reconsidered on the basis of Article 23.3 of the Rules of Procedure of the European Central Bank, adoptedon 7 July 1998 (OJ 1998 L 338, p. 28), as amended on 22 April 1999 (OJ 1999 L 125, p. 34).

7 By letter dated 2 August 1999, notified to the applicant on 8 August 1999, the General Secretariat of the Council notified the applicant of the Council's decision of 30 July 1999 refusing the applicant's formal request ... This decision was drafted in the following terms:

Following a detailed search, we have established that the document referred to in your request is the 'Report of the Committee of Governors on the reinforcement of the EMS', which was published by the Committee of Governors of the Member States of the EEC at Nyborg on 8 September 1987.

Since the rules on the administrative functioning of the EMS have never formed part of Community law, the Council has never been called upon to take a decision of this nature.

Since the document requested in this case was produced by the governors of the central banks, we suggest you address your request directly to the governors of the central banks or to the ECB.

8 In the same letter, the General Secretariat referred the applicant to the provisions of Articles 195 EC and 230 EC, on, respectively, the conditions for addressing complaints to the Ombudsman, and the review by the Court of the legality of acts adopted by the Council.

9 By letter dated 8 November 1999, notified to the applicant on 13 November 1999, he was notified that the Governing Council of the ECB had decided not to give him access to the document in question (hereinafter the ECB decision).'

3.
It is apparent from the documents before the Court that whilst, by that decision, the ECB refused the appellant access to the archives of the Committee of Governors of the central banks of the Member States ('the Governing Council'), it did inform him that 'the Basle/Nyborg Agreement is not, strictly speaking, a single document, in the form of an agreement between the parties, but exists only in the form of reports and minutes prepared both by the Governing Council and the Monetary Committee'.

Procedure before the Court of First Instance

4.
In those circumstances, considering that he had been misled by the Council, which in particular, had concealed the existence of a report of the Monetary Committee established by Article 105(2) of the EEC Treaty, the status of which was determined by decision of the Council of 18 March 1958 (OJ, English Special Edition, 1952-1958(II), p. 60), Mr Pitsiorlas brought an action before the Court of First Instance on 20 January 2000 seeking annulment of both the Council decision and the ECB decision.

5.
Pursuant to Article 114(1) of the Rules of Procedure of the Court of First Instance, the Council, by separate document, raised an objection of inadmissibility against the action brought by Mr Pitsiorlas. It submitted in that regard that, in so far as it refers to the Council decision, that action must be dismissed because it had been brought after the time-limit of two months laid down by the fifth paragraph of Article 230 EC had expired and that the existence of an excusable error could not enable the appellant to overcome the time-bar resulting from such a delay. First, it was apparent from the express wording of that decision that it was not of such a nature as to give rise to pardonable confusion in the mind of the appellant since it was clear that it was a final decision amenable to review. Second, it was undeniable that, as a lawyer and a student preparing a doctorate in law, the appellant was clearly in a position to understand that the Council decision had to be challenged without waiting for that of the ECB.

6.
Without denying that his action against the Council decision was out of time, Mr Pitsiorlas submitted that that situation came about as a result of collusion between the Community institutions in question in that they induced him to await the ECB decision before challenging the Council decision. On that point, Mr Pitsiorlas submitted that it would not have been very judicious on his part to bring an action before the Court of First Instance when the Council had twice confirmed to him that it was not the author of the document sought and that it had never been called upon to adopt decisions in the context of the European Monetary System. According to the appellant, it was only from reading the ECB decision and then the defence, entered in the Court Register on 15 May 2000, that he became aware of the facts in their entirety and, in particular, of the existence, in addition to the report of the Governing Council, of a report of the Monetary Committee, the

consultative body of the Council, entitled 'The reinforcement of the EMS - Report of the President of the Monetary Committee at the informal meeting of Finance Ministers, Nyborg, 12 September 1987'.

The contested order

7.
By the contested order the Court of First Instance granted the form of order sought by the Council. It dismissed the application before it as inadmissible in so far as it referred to the Council decision and ordered Mr Pitsiorlas to bear his own costs and to pay those of the Council attributable to the plea of inadmissibility.

8.
The dismissal of the application was based on two grounds.

9.
First, in paragraphs 19 to 21 of the contested order, the Court of First Instance found that the application had been brought out of time because the Council decision had been notified to the applicant on 8 August 1999 and that his application was only lodged on 20 January 2000, more than three months after the expiry of the period laiddown by the fifth paragraph of Article 230 EC for bringing an action for annulment, as extended, on account of distance, by 10 days, since that period expired in the present case on Monday, 18 October 1999 at midnight.

10.
Second, whilst it acknowledged, at paragraph 22 of the contested order, that 'an excusable error may, it is true, in exceptional circumstances have the effect of not making the applicant out of time ... in particular, when the conduct of the institution concerned has been, either alone or to a decisive extent, such as to give rise to pardonable confusion in the mind of a party acting in good faith and exercising all the diligence required of a normally experienced person (see Joined Cases T-33/89 and T-74/89 Blackman v Parliament [1993] ECR II-249, paragraph 34, and Case C-195/91 P Bayer v Commission [1994] ECR I-5619, paragraph 26)', the Court of First Instance

considered, at paragraph 23 of that order, that in this case, the appellant had 'adduced no evidence in support of his assertion that the Council adopted such behaviour'.

11.
Pointing out, on the contrary that 'pursuant to Article 7(3) of Decision 93/731, the General Secretariat's letter notifying the applicant of the Council decision pointed out to him, furthermore, the content of Articles 195 EC and 230 EC which concern, respectively, the conditions for addressing complaints to the Ombudsman, and the review by the Court of the legality of acts adopted by the Council', the Court of First Instance held, also in paragraph 23, that 'a normally diligent individual could have been left in no doubt either as to the finality of this decision, nor as to the time-limit for bringing proceedings laid down by Article 230 EC'.

12.
Consequently, at paragraph 24 of the contested order, the Court of First Instance upheld the Council's plea and dismissed the action against that institution's decision as inadmissible on the ground that 'the circumstances put forward by the applicant [could not] be regarded as exceptional circumstances giving rise to an excusable error'.

The appeal

13.
By his appeal Mr Pitsiorlas claims that the Court should uphold his application and annul the contested order, grant in its entirety the relief sought by him at first instance or, in the alternative, refer the case back to the Court of First Instance and order the Council to pay the costs of the proceedings both at first instance and on appeal.

14.
In its defence the Council, without making an application by separate document under the first subparagraph of Article 91(1) of the Rules of Procedure of the Court, has confined itself to challenging the admissibility of the appeal on the ground that it was brought out of time. It submits on that point that the appeal was not lodged at the

Registry of the Court until 7 May 2001, four days after the time for the appellant to bring an appeal had expired, given that the contested order had been notified to the appellant on 23 February 2001.

The admissibility of the appeal

15.
It suffices to observe, on this point, that, following the amendments to the Rules of Procedure of the Court of Justice adopted by that institution on 28 November 2000 (OJ 2000 L 322, p. 1), which entered into force on 1 February 2001, the use of fax machines is expressly included in the methods permitted for the transmission of documents to the Court.

16.
Under Article 37(6) of the Rules of Procedure of the Court of Justice, applicable to appeals pursuant to the second subparagraph of Article 112(1) of those rules, 'the date on which a copy of the signed original of a pleading ... is received at the Registry by telefax or other technical means of communication available to the Court shall be deemed to be the date of lodgment for the purposes of compliance with the time-limits for taking steps in proceedings, provided that the signed original of the pleading, accompanied by the annexes and copies referred to in the second subparagraph of paragraph 1 [of Article 37], is lodged at the Registry no later than ten days thereafter'.

17.
In the present case it is not in dispute that that requirement is met since Mr Pitsiorlas' appeal was received at the Court Registry by fax on 3 May 2001, the last relevant day for the bringing of his appeal, and that the signed original of that appeal, accompanied by the annexes and the requisite copies, was lodged at the Registry on 7 May 2001.

18.
It follows that the appeal is admissible.

The substance of the appeal

19.
Mr Pitsiorlas puts forward five pleas in law in support of his appeal. He alleges, first, infringement of Article 114(4) of the Rules of Procedure of the Court of First Instance; second, breach of the principle of equality of arms; third, misinterpretation of the Council decision by the Court of First Instance; fourth, an error in the finding, and selective and, therefore, defective categorisation, of the facts and, finally, failure to apply or, in the alternative, excessively strict application of the case-law concerning excusable error.

The fifth plea in law

20.
By his fifth plea in law, which should be examined first, Mr Pitsiorlas submits that the Court of First Instance failed to have regard to the case-law concerning excusable error or, at least, applied that case-law in an excessively strict manner.

21.
It is necessary to reject forthwith the applicant's assertion that the Court of First Instance refused to have regard to the case-law on excusable error.

22.
It is clear from the very terms of the contested order that the Court of First Instance expressly based its decision on that case-law in considering what the response should be to the plea of inadmissibility raised by the Council and in concluding, at paragraph 24 of that order, that the action brought against the Council's decision should be rejected as inadmissible on the ground that the circumstances put forward by the applicant could not be regarded as exceptional circumstances giving rise to an excusable error.

23.
In that regard, the Court of First Instance relied, more particularly, on the fact that the General Secretariat's letter notifying the appellant of the Council decision pointed out to him, in addition, the content of Articles 195 EC and 230 EC which concern, respectively, the conditions under which complaints may be addressed to the Ombudsman and the legality of acts adopted by the Council may be reviewed by the Court of Justice. It concluded from this that a normally diligent individual could have been left in no doubt either as to the finality of that decision or as to the time-limit for bringing proceedings laid down by Article 230 EC.

24.
However, in arriving at that conclusion, the Court of First Instance interpreted the concept of excusable error, as it has been developed in the case-law of the Court of Justice, in an excessively restrictive manner. According to settled case-law (see, inter alia, Bayer v Commission, cited above, paragraph 26), full knowledge of the finality of a decision and of the time-limit for bringing an action under Article 230 EC does not, in itself, prevent an individual from pleading excusable error to justify his application being out of time since such an error may occur, in particular, when the conduct of the institution concerned has been, either alone or to a decisive extent, such as to give rise to pardonable confusion in the mind of a party acting in good faith and exercising all the diligence required of a normally well-informed person.

25.
It cannot, therefore, be ruled out in principle that the error may have a bearing on factors other than the finality or otherwise of the contested decision or the detailed rules and procedures for bringing the various types of action provided for in the EC Treaty, provided always that that error arises from confusion caused by the actual conduct of the institution concerned and that the applicant acted in good faith and exercised all the diligence required of a normally well-informed person. In that context, all the aspects of the particular case should be taken into consideration.

26.
In the present case, the contested order sets out precisely these factors put forward by the appellant to show that the above considerations were satisfied and that, therefore, his error was excusable.

27.
First, it is apparent from that order that Mr Pitsiorlas twice contacted the Council with a view to obtaining the document sought relating to the reinforcement of the EMS.

28.
Second, it is further apparent from the contested order that by its first letter of 11 May 1999, communicated to the appellant on 15 May 1999, the Council replied to the appellant that it had not found the document sought, whilst by its letter of 2 August1999, notified to the appellant on 8 August 1999, it informed him that that document concerned a report of the Committee of Governors published at Nyborg on 8 September 1987 and that the Council itself had never been called upon to adopt a decision in that regard.

29.
In the light of the foregoing, it must be held that the Court of First Instance misinterpreted the concept of excusable error in opting to construe it restrictively, as pointed out in paragraph 23 of the present judgment, and in holding, at paragraph 23 of the contested order, that the applicant had adduced no evidence to support his contention that the Council's conduct was such as to give rise to pardonable confusion in his mind.

30.
Consequently, the contested order must be set aside on that ground without there being any need to consider the other pleas raised by Mr Pitsiorlas.

The plea of inadmissibility and the substance of the application

31.
Pursuant to the first paragraph of Article 61 of the Statute of the Court of Justice, if the Court sets aside the decision of the Court of First Instance, it may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

32.
Whilst in the current state of the proceedings the Court is not in a position to give judgment on the substance of the application before the Court of First Instance, it does, however, possess all the information necessary for it to give final judgment on the plea of inadmissibility raised by the Council in the proceedings at first instance.

33.
Having regard to the factors set out at paragraphs 27 and 28 of the present judgment, the Council's plea in law alleging that the appellant failed to adduce evidence of conduct that was such, either alone or to a decisive extent, as to give rise in his mind to pardonable confusion within the meaning of the case-law of the Court on excusable error must be rejected.

34.
As the Advocate General pointed out at points 23 to 25 of his Opinion, in the light of the information provided by the Council, Mr Pitsiorlas had no reason to challenge a decision preventing him from having access to a document the very existence of which was essentially denied. It was only on 13 November 1999, almost four weeks after the expiry of the time-limit for bringing an action against the Council decision, that the ECB informed Mr Pitsiorlas that the 'Basle/Nyborg' Agreement consists of reports and minutes prepared both by the Governing Council of the Member States and the Monetary Committee.

35.
Since Mr Pitsiorlas brought his action against the Council decision on 20 January 2000, that is to say, within a reasonable time after he was apprised of that information provided by the ECB, delay in bringing it must be regarded as excusable.

36.
The plea of inadmissibility raised by the Council against the action brought by Mr Pitsiorlas before the Court of First Instance must therefore be rejected.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Sets aside the order of the Court of First Instance of the European Communities of 14 February 2001 in Case T-3/00 Pitsiorlas v Council and ECB ;

2. Rejects the plea of inadmissibility raised by the Council of the European Union before the Court of First Instance;

3. Refers the case back to the Court of First Instance for judgment on Mr Pitsiorlas' application for annulment of the decision of the Council of 30 July 1999 and the decision of the European Central Bank of 8 November 1999 refusing him access to a document;

4. Reserves the costs.

Wathelet
Timmermans
Edward

Jann

Rosas

Delivered in open court in Luxembourg on 15 May 2003.

R. Grass

M. Wathelet
Registrar

President of the Fifth Chamber