1. **Dismisses the application as regards both the principal and the alternative claims;**

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

Kutscher Trabucchi Pescatore

Delivered in open court in Luxembourg on 7 June 1972.

A. Van Houtte
Registrar

H. Kutscher
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 18 MAY 1972[1]

Mr President,
Members of the Court,

Under Article 2 of Annex VII to the Staff Regulations of Officials an official of the Communities receives a monthly allowance for each dependent child. Paragraph (2) of the Article contains a definition of 'dependent child'. Paragraph (3) lays down the age-limits to which grant of the allowance is subject. Finally, paragraph (4) provides (and this point has particular importance in this case) as follows: 'Any person whom the official has a legal responsibility to maintain and whose maintenance involves heavy expenditure may, exceptionally, be treated as if he were a dependent child by special reasoned decision of the appointing authority, based on supporting documents'. By decision of 2 April 1964, the Council adopted general provisions for its implementation by its administration department. I shall consider them in more detail later.

For the moment it need only be said that Mr Brandau, the applicant in the present case, married, with no children and living in Brussels, is an official, in Grade A 3/6, of the Secretariat-General of the Council, and wished to take advantage of these provisions. He is the only son of his widowed mother, who was 83 years of age when the application was lodged. Like the applicant, she is of German nationality but previously lived in an old people's home in Vienna. She receives an Austrian pension amounting to 1854 schillings (or Bfrs 3541). Owing to serious illness (cerebral haemorrhage), which occurred on 12 December 1970, Mrs Brandau had to stay until 2 January 1971 at the University Hospital in Vienna, and, since then, she has required constant attention. It was for this reason that, after she left the hospital, she was first put into a private sanatorium in Austria. On 6 March 1971, because of the attention which, on account of her state of health, his mother needed and in order to have her near him, Mr Brandau brought

1 — Translated from the French version.

her to Belgium and moved her into the Résidence Maria Assumpta at Dilbeek, which is managed by the Soeurs Hospitalières de St.-Joseph and approved by the Belgian Minister for Public Health, and where she also receives medical attention. In view of the financial burden which this involved (neither the Austrian sickness fund previously responsible nor any Belgian sickness fund pays any benefit in respect of his mother) Mr Brandau decided to request that, with effect from 1 December 1970, his mother should be treated as a dependent child. He wrote a request to this effect and sent it to the Secretary-General of the Council of Ministers on 26 March 1971. The request contains details of the expenditure incurred each month since December 1970. In addition, the applicant explains therein that in future he will probably have to pay Bfrs 20 000 each month in charges at the home and meet doctors' and chemists' bills. At the request of the administration, Mr Brandau supplied further information on 11 April 1971. However, no decision was communicated to him before expiry of the period provided under Article 91 of the Staff Regulations of Officials, namely, within two months from the date on which the request was lodged. It was only a short time before expiry of the period for lodging an application to the Court, namely on 19 July 1971, that Mr Brandau received an express decision of the Secretary-General of the Council of Ministers dated 16 July 1971. In that decision, the Secretary-General states that, under the implementing provisions adopted by the Council, to which I have already referred, 'in the absence of proof of heavier commitments' it is accepted that 'the cost per month of a person's maintenance amounts to Bfrs 6360. However, the amount obtained after taking into account the applicant's mother's own income is much lower than the 'proportion of 20% of the taxable amount' of his remuneration, which, under the above mentioned decision of the Council, is conclusive. Since, again according to the Secretary-General, it has not been proved that the amount which Mr Brandau of his own free will spends each month in maintaining his mother fully corresponds with his maintenance obligation in law, his request cannot be granted.

At this juncture, the applicant lodged an appeal, on 26 July 1971, and initiated the present proceedings. He asks the Court to:

— declare null and void the implied rejection of his request of 26 March 1971;

— find that the conditions for his mother to be treated as a dependent child have been fulfilled;

— declare that the Council is required to treat his mother as a dependent child with effect from 1 December 1970 or, at least, with effect 6 March 1971, and to grant him the consequential benefits;

— in the alternative and, as necessary, declare null and void the express decision of 16 July 1971 rejecting his request of 26 March 1971.

I must now describe the standpoint from which these claims, which the Council considers to be unfounded, should be viewed.

1. *Annulment of the implied rejection of the request of 26 March 1971*

(a) On this point the first comment to be made is that there can be no doubt about its admissibility. The fact, for example, that an express decision rejecting the request was adopted after expiry of the period laid down in Article 91 of the Staff Regulations of Officials has no bearing on admissibility. In fact, the express decision constitutes mere confirmation and cannot, therefore, affect an already existing right to initiate proceedings. The Court has long recognized this in its decisions (I refer for example to the judgment delivered in Joined Cases 7 and 9/54 (Rec. 1956, p. 55). There is, therefore, no point in dwelling on this aspect.

(b) As justification for the application for annulment of the implied decision rejecting his request, the applicant claims in the first place that there has been an infringe-

ment of an essential procedural requirement. He states that, under Article 2 of Annex VII to the Staff Regulations of Officials, the treatment of other persons as dependent children must be the subject of a 'special reasoned decision'. Since this provision was adopted for the protection of officials, its procedural requirements must, he suggests, also be observed in the case of a *rejection* of a request for assimilation. A reasoned decision is in any case an essential requirement in view of Article 25 of the Staff Regulations of Officials because it can be reviewed by the Court only if this is given.

With regard to this argument I must at once point out that Article 2 of Annex VII expressly provides for a reasoned decision only in the case of an affirmative decision. This provision does not seem to have been adopted for the benefit of the officials to which it applies but for reasons of internal control, concerning, in particular, the administration's financial control, in other words, in order to make it possible to check whether proper use has been made of a provision designed to cover exceptional cases. The Council rightly states, therefore, that it is, in any case, impossible to read into this provision a duty to give reasons in normal circumstances, namely, in a case where a person is not treated as a dependent child.

Moreover there is, I find, an even more weighty argument affecting the complaint made by the applicant of breach of a procedural requirement. Article 90(1) of the Staff Regulations expressly provides that if, at the end of a given period, no reply has been received this is deemed to constitute an implied decision of rejection. Its very nature makes it impossible for such a decision to be reasoned because it is not an express measure. With regard to these decisions it must, therefore, be recognized that, under the system laid down by the Staff Regulations for protection of legal rights by the Court, the complaint that procedural requirements have been infringed cannot arise. To come to the opposite conclusion would, in fact, be tantamount to removing from the system of the Staff Regulations of Officials the fiction of the implied decision of rejection because, in such cases, the decision would always have to be annulled for infringement of a procedural requirement and the rejection could never be examined as to its merits. This is certainly not the meaning of the provision of the Staff Regulations referred to and this appears also to have been recognized in legal discussion on the similar provision in Article 35 of the ECSC Treaty.

In accordance with the view of the Council it must therefore be stated that the complaint of infringement of an essential procedural requirement has no relevance in this case.

(c) Under a second head of complaint, the applicant contends that the rejection of his request for assimilation is illegal. He claims that once the conditions contained in Article 2(4) of Annex VII to the Staff Regulations of Officials are satisfied and the criteria laid down in the implementing decision of the Council have been met, the administration is *compelled* to grant assimilation. He declares that the conditions are satisfied in his case: under German law, he is *required* to pay a maintenance allowance to his mother (Article 1(1) of the Decision of the Council); his mother is over 55 years of age (Article 1(2) of the Decision of the Council); she is an invalid and cannot cater for her own needs (Article 1(2) of the Decision of the Council); his mother's own resources are less than 60% of the basic salary of an official in Grade D 4/1 (Article 1(3) of the Decision of the Council); and, finally, evidence has been given that, since December 1970, the applicant has been setting aside for his mother's maintenance a sum greater than 20% of his basic salary, which is Bfrs 83 750, and constitutes his sole income (Article 1(4) of the Decision of the Council). It follows that he is *entitled* to the assimilation.

In considering this ground of complaint, we must first go into its substance, in other words, we must see whether the provisions of the Staff Regulations and the provisions of the Decision of the Council really create an entitlement to the grant of similar treatment or whether, as the Council maintains, the administration has a margin

of discretion in the matter.

If we stick closely to the wording and the clear purpose of Article 2(4) of Annex VII to the Staff Regulations of Officials, the answer to this question does not seem to present any particular problem. In the first place, it is significant that the word '*may*' is used in the article. This is usually an indication of a discretion whereas, in a case placing the administration under an obligation, it is the imperative or at least the jussive form which is selected as, for instance, in Article 2(3) of Annex VII, which adopts the formula: 'The allowance *shall be* granted'. Another relevant factor is that Article 2(4) contains the expression 'heavy expenditure'. This also suggests that the administration is allowed a margin of discretion. It is further relevant that Article 2(4) makes the exceptional nature of the provision clear by use of the word '*exceptionally*'. The administration must, accordingly, appraise exceptional situations and, as the Council rightly points out, it must in this connexion take decisions similar to those on aids,[1] which are measures for which it is impossible to spell out an exhaustive list of conditions but which, on the contrary, require all sorts of personal and social considerations to be taken into account when they are adopted.

Though, in consequence, there are, in the main clauses of the Staff Regulations of Officials, which were based on the Treaty and adopted by a special procedure, a number of passages disclosing the existence of a discretion, it is difficult to imagine that an instrument, based on the Staff Regulations, which was adopted exclusively by an institution of the Community without any special procedure and which, under the Staff Regulations of Officials, was not even necessary, was intended to create an exception to the question of principle which I have just considered. In fact, closer examination confirms this view. As we know, the implementing regulations refer to a number of clear criteria, such as the existence of a maintenance obligation, the age, state of health and resources of the assisted person and, again, the ratio of maintenance expenditure to the applicant official's basic salary, in other words considerations of a markedly factual nature. Nevertheless, it requires no effort for us to regard them as merely minimum requirements or as pointers facilitating the application of Article 2(4) of Annex VII to the Staff Regulations of Officials and to accept that, even though they were introduced to ensure that all beneficiaries were treated alike, they do not necessarily exclude considerations involving an appraisal. The opening sentence of Article 1 of the Decision of the Council is not the only one which uses the word '*may*' to indicate a power of discretion on the part of the administration. Moreover, certain considerations involving Article 1(4) of the implementing Decision, which was the subject of particular attention during the proceedings, make it clear that there is in fact a margin of discretion in the sense contended for by the Council. As we know, this provision declares as follows:

> The official must produce evidence that he devotes to the maintenance of that person a sum equal to at least 20% of his taxable income increased, where applicable, by the net amount of the official's income from other sources. For the purposes of this provision, the cost of maintaining a person is, in the absence of evidence to the contrary, presumed to amount to 60% of the basic salary of an official in Grade D 4, first step. Where applicable, the other resources of the person concerned must be deducted from that sum. Account must also be taken of the extent to which other persons who are, in law, under a legal obligation to assist have assets available for the fulfilment of their obligations.

Judging by the provision quoted, taken together with the main provision governing the matter (Article 2(4) of Annex VII to the Staff Regulations of Officials), which refers to a legal responsibility to maintain which must, according to that article,

1 — For example in the sense of the German *Beihilfevorschriften* (assistance rules) of 28 October 1965.

involve heavy expenditure, it is, of course, impossible to regard *actual* payment of a particular amount as sufficient to justify application of the provision of the Council. Logically and in order to avoid any subjective consideration which might give rise to abuse, the implementing decision must rather be interpreted by answering the question whether the extent of the legal obligation to maintain involves heavy expenditure, in other words it is essential to ascertain what maintenance is necessary and appropriate. Seen from this point of view—and here I am in agreement with the Council—the purpose of the first subparagraph of Article 1(4) of the Decision of the Council is, accordingly, to lay down the principle that the applicant must prove that he is out of pocket. Paragraph (2) of figure 4 again specifies and lays down, in particular as regards certain minimum payments which fall below the minimum subsistence figure provided for under the Staff Regulations of Officials, the presumption that those payments must continue to be regarded as necessary maintenance payments. But, as is implied by the words 'in the absence of evidence to the contrary', in the case of anything beyond that, evidence must be adduced to show that they are fit and proper maintenance payments and, of course, it is by the *applicant* official that the evidence must be produced. One must not, of course, underestimate the uncertainty which this interpretation may create in connexion with the undoubtedly complicated subject of the application of national law governing maintenance allowances. Nevertheless, since Community law does not provide any guidelines on this point and since, moreover, the provision involved is a derogative one and must, in principle, be strictly interpreted, it does not really seem wrong to hold that the criterion in question is necessary to ensure that the provisions of the Staff Regulations are correctly applied. Consequently, with regard to the question of legal principle with which we are here concerned, I am of the opinion, in agreement with the Council, that under the Staff Regulations there is no duty to treat certain persons as dependent children once certain conditions have been satisfied; on the contrary, in my opinion, the administration enjoys a margin of discretion on this subject and it may, in particular, decide whether the payments made by an applicant really correspond to his maintenance responsibilities. To conclude, it is, in my opinion, impossible to read into Article 2 of the Decision of the Council, namely, the provision for a special procedure to cover derogations from the conditions laid down in Article 1, anything of any weight whatever to invalidate this contention. It is obviously necessary for the other institutions to be consulted in order to coordinate administrative practice on cases involving departure from the minimum conditions referred to. But it is impossible to prove thus, and in spite of the abovementioned arguments based on the wording, the meaning and the aim of the rules, that when the conditions in Article 1 are satisfied, those responsible for a decision are always bound to grant assimilation.

I have now made clear what reply should, in principle, be given to the second conclusion of the applicant. All that remains for me to do is to consider whether the objections which he raises against the rejection of his application can be sustained in the light of the conclusions I have reached.

The Court will be aware that the Council does not deny that the applicant is under an obligation to pay a maintenance allowance to his mother. But the Council contends that, in view of German and Belgian legislation on maintenance allowances, which require to know what are the appropriate means of subsistence in accordance with the beneficiary's standard of living, it has not been demonstrated that it was fit and proper for the applicant's mother to be found a place in the home which he chose. In support of this argument, the Council submitted during the proceedings a long list of Belgian homes from which it emerges that current charges in private homes in the province of Brabant are on average lower, in other words they range, for full board, from Bfrs 8000 to Bfrs 10 000. Moreover only in a few homes which can be described as being in the luxury class are the charges as high as those quoted by the applicant. But the

latter put forward essentially arguments solely in terms of legal principle and, during the proceedings, raised only the question whether, in Belgium, there in fact were any cheaper homes providing medical attention day and night.
In these circumstances there can, in my opinion, be no doubt that the applicant has failed to adduce the evidence required of him that his maintenance disbursements were appropriate. Moreover, as the case involves matters of judgment and discretion, in which the Court of Justice cannot put itself in the place of the administrative authorities and which, in consequence, cannot be the subject of further clarification in the course of the proceedings, the only conclusion which can be drawn concerning the applicant's second complaint is the following: the complaint which I have just considered does not enable the application to be allowed because the Council correctly interpreted the relevant instrument and because there has been no proof that its assessment of the factual position was at fault.

(d) Finally, in a third complaint set out in connexion with the main application, the applicant contends that there has been an infringement of the principle of equal treatment or, alternatively, that it is possible to ensure equal treatment for all officials only if it is recognized that, once the factual conditions are satisfied, there is a *duty* to grant assimilation in accordance with Article 2(4) of Annex VII to the Staff Regulations of Officials.
On this aspect, I must first of all point out that I have already considered a part of this complaint in the earlier part of my opinion, namely when I stated that, in the field with which we are at present concerned, the administrative authorities enjoy a margin of discretion and the right to appraise the situation even though certain minimal conditions have been laid down, namely in the implementing decision of the Council.
Again, with regard to the ground of complaint based on discrimination, the decisive factor is that the applicant did not, during the written procedure, claim that he had been a victim of *de facto* discrimination. It was only during the oral procedure that he quoted the case of an A 2 official and claimed that certain payments which he had made for his mother in Rome had been regarded as relevant to the application of Article 2(4) of Annex VII to the Staff Regulations of Officials. I would point out however that in the absence of full information of the case, it seems hardly possible to take a firm view. Moreover it is obviously quite impossible to refer to discrimination on the basis of a *single* exception.
The applicant's third ground of complaint must also, therefore, be dismissed as unfounded.

(e) I have thus shown that none of the grounds advanced to justify annulment of the implied decision of rejection is valid. It will be equally clear from what I have already said what reply I propose should be given to the applications for a declaration that the applicant fulfils the conditions in Article 2(4) of Annex VII to the Staff Regulations of Officials and that his mother must be treated as a dependent child. Such declarations appear in fact to be out of the question since they would impinge on the margin of discretion left to the administration. Moreover, insufficient information is available to determine what, in the case of the applicant, can be regarded as an appropriate maintenance allowance. The applications for a delcaration must, accordingly, also be dismissed as without foundation.

2. All that now remains is to consider briefly the applicant's alternative application for annulment of the *express* rejection. As I have said already, it could be maintained that this merely involves appraisal of a measure which does no more than confirm another; the application relating to it would, accordingly, be inadmissible. Nevertheless, if this is regarded as too severe, its validity could in any case be appraised in the light of what I have said earlier, since the applicant has made no specific submission concerning his alternative application. Without doubt, therefore, that application must also be dismisssd.

3. My opinion may be summarized as follows:

In so far as the action brought by Mr Brandau seeks annulment of the implied rejection of his request of 26 March 1971, a declaration that the applicant fulfils the conditions in Article 2(4) of Annex VII to the Staff Regulations of Officials, and a declaration that the Council has a duty to treat the applicant's mother as a dependent child, it must be dismissed as unfounded and, for the remainder, as inadmissible. As this is the outcome of the proceedings, the question of costs falls for decision under Article 70 of the Rules of Procedure, which means that each of the parties must bear its own costs.