OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 22 June 1989 *

My Lords,

1. This case concerns a claim for expatriation allowance by a Commission official, Mrs Atala-Palmerini.

2. Mrs Atala-Palmerini, who was born in Peru in 1949 of Peruvian nationality, came to Belgium and pursued university studies for a degree there from September 1970 to June 1973. She returned to Peru between 7 July and 25 August 1973. She came back to Belgium and carried out a traineeship ('stage') at the Commission from 1 September 1973 to 31 January 1974. From September 1973 to October 1974 she also followed courses for a Master's degree at the University of Antwerp. On 7 December 1974 she married a Commission official of Italian nationality, thereby acquiring Italian nationality herself. In November 1974 she was accepted at the University of Paris for doctoral studies, which she pursued whilst residing in Belgium. The Court is told that she was accepted for a second year of studies at the University of Paris for the academic year 1975/76 and that she carried out no paid work until 6 March 1978. It is not specified exactly how she spent her time between 1975 and 1978 but it is not disputed that she continued to reside in Belgium. From 6 March 1978 to 30 March 1987 she worked at the Peruvian Embassy in Brussels. She entered the service of the Commission in Brussels on 16 April 1987. She now claims that the Commission should pay her an expatriation allowance.

3. Expatriation allowance is governed by Article 4(1)(a) of Annex VII to the Staff Regulations in the following terms:

'An expatriation allowance shall be paid, equal to 16% of the total amount of the basic salary plus household allowance and the dependent child allowance paid to the official:

(a) to officials:

(i) who are not and have never been nationals of the State in whose territory the place where they are employed is situated, and

(ii) who during the five years ending six months before they entered the service did not habitually reside or carry on their main occupation within the European territory of that State. For the purposes of this provision, circumstances arising from work done for another State or for an international organization shall not be taken into account.'

* Original language: English.

4. Mrs Atala-Palmerini plainly fulfils the nationality requirement under the first indent of Article 4(1)(a). The question is whether she habitually resided or carried on her main occupation in Belgium during the five-year reference period stipulated in the second indent of that provision. The Commission takes the view that the reference period is established in the following way. Two periods must be left out of account (or 'neutralized') pursuant to the second sentence of the second indent of Article 4(1)(a): the period of Mrs Atala-Palmerini's traineeship at the Commission from September 1973 to January 1974 and the period of her employment at the Peruvian Embassy from 6 March 1978 to 15 October 1986. The reference period which results is 6 October 1972 to 5 March 1978, excluding a five-month interlude for the traineeship from September 1973 to January 1974.

5. Within that reference period, it is clear, and Mrs Atala-Palmerini has expressly admitted, that she was habitually resident in Belgium from the date of her marriage on 7 December 1974, that is, for the last three years and three months of the reference period.

6. Before considering the part of the reference period prior to Mrs Atala-Palmerini's marriage, I should point out that the approach followed by the Commission of constructing an earlier five-year reference period by excluding her traineeship at the Commission and her employment at the Peruvian Embassy is not expressly required by Article 4(1)(a). A different approach was adopted by the Court on somewhat similar facts in the judgment of 31 May 1988 in Case 211/87 *Nuñez* v *Commission* [1988] ECR 2791. There the Court held (at paragraphs 11 and 12) that the exception provided for by the second sentence of the second indent of Article 4(1)(a) had as its purpose not to penalize persons who have established themselves in the country of employment in order to work in the service of another State or an international organization but do not have any lasting tie with that country, by depriving them of the expatriation allowance, and that the exception could not apply where an official, while having worked in the embassy of another State within the territory of the country of employment, already had lasting ties with that country, since he had been habitually resident and carried on his occupation there for a long period of time previously. On that approach, although the period which Mrs Atala-Palmerini had spent in Belgium before working at the Peruvian Embassy was considerably shorter than the corresponding period in the *Nuñez* case, she must in my view be regarded as having already had lasting ties with Belgium by virtue of her marriage and her habitual residence there. Moreover, since the exception requires that account shall not be taken of 'circumstances arising' from work done for another State, it is doubtful on the facts of the present case whether Mrs Atala-Palmerini's residence in Belgium during her period of employment at the Peruvian Embassy should be discounted as circumstances arising from that employment, precisely because she was already habitually resident there.

7. Returning to the reference period starting on 6 October 1972, I must now consider the period before 7 December 1974, the date from which Mrs Atala-Palmerini accepts that she was habitually resident in Belgium. She contends that in that period, because she was a student, she cannot be regarded as 'habitually resident' in the place of her studies. She relies in this connection on trips back to Peru, the fact that she lived in a furnished room, the fact that she moved several times, the fact that she had only a provisional residence permit and the allegation that she had at that time no intention of staying in Belgium or even in Europe. She maintains that she has to be regarded as habitually resident in Peru at that time, notwithstanding her physical presence in Belgium. In that connection she relies in particular on paragraph 9 of the judgment in Case 61/85 *Urhausen, née von Neuhoff von der Ley* v *Commission* [1987] ECR 2853, at p. 2864, where the Court held that some two-and-a-half years university study in Innsbruck did not suffice to interrupt the applicant's habitual residence in Luxembourg. Mrs Atala-Palmerini argues that it follows from the case-law of the Court that a stay in a particular country for the purpose of studying cannot effectively interrupt the social and professional ties of the student with his own country.

8. To my mind the Court's case-law establishes no such principle. On the contrary, that case-law treats the pursuit of university studies abroad as a mere matter of fact which is to be taken into account along with other relevant facts in considering whether habitual residence is established. Both in paragraph 9 of *Urhausen* and in paragraph 8 of Case 330/85 *Richter* v *Commission* [1986] ECR 3439, at p. 3447, the Court treated the pursuit of university studies abroad as a matter of fact to be weighed up along with all other relevant facts as a whole in ascertaining the applicant's habitual residence.

9. That approach to the question of university studies abroad is consistent with the Court's overall approach to the matter of habitual residence in the numerous judgments which it has delivered on the point. The term 'habitual residence' in Article 4(1) of Annex VII to the Staff Regulations is not a technical, legal concept (see the Opinion of Advocate General Warner in Case 42/75 *Delvaux* v *Commission* [1976] ECR 167, at pp. 178 and 179). Indeed, to my mind, the word 'habitual' indicates that it should be approached as a straightforward question of fact. Moreover, the Court held at paragraph 10 of the judgment in *Nuñez* that 'although, for the purpose of determining cases of expatriation, [Article 4(1)(a)] refers to the habitual residence and main occupation of officials in the State in whose territory the place where they work is situated over a certain reference period, it takes those connecting factors in order to establish simple, objective criteria to cover the situation of officials who are obliged, as a result of taking up employment with the Communities, to change their place of residence and to integrate themselves in their new environment'. Thus in my view the case-law shows that claims such as the present one turn on the facts of each

particular case. Regarding university studies in particular, it seems to me that it is possible for a student to be resident in one State whilst pursuing studies in another and equally possible for a student to be resident in the same State in which he pursues his studies: it is a matter of fact to be assessed in each case.

10. In the case of Mrs Atala-Palmerini it is relevant that she continued to live in Belgium after the end of her university studies. It is also relevant that at the beginning of the reference period, on 6 October 1972, she had already been in Belgium for two years studying. Furthermore from that date onwards she was consistently in Belgium until the close of the reference period on 5 March 1978. For most of the period in question she was in Belgium and did not often return to Peru. During the reference period she apparently returned to Peru once before her marriage, for seven weeks in 1973, and once after her marriage, for four months in 1975. Apparently she was also absent from Belgium for two months in 1974, when she went to Italy. Such sporadic absences do not suffice to deprive her residence in Belgium of its habitual nature within the meaning of Article 4(1)(a): see Case 188/83 *Witte* v *Parliament* [1984] ECR 3465, at p. 3474, paragraph 11. Conversely, her trips back to Peru were far from sufficient to establish that she was still habitually resident there as she contends. Finally, the maintenance of family and possibly emotional links with Peru is not incompatible with the establishment of habitual residence in Belgium. Weighing up the relevant facts in the case of Mrs Atala-Palmerini, I consider that she was habitually resident in Belgium throughout the whole of the reference period, even the first part of that period (the one year and nine months preceding her marriage). On that view she does not in my opinion qualify for the expatriation allowance.

11. That result is in accordance with the object of the expatriation allowance. As stated in the case-law of the Court, that object is to compensate officials for the extra expense and inconvenience of taking up employment with the Communities and being thereby obliged to change their residence and move to the country of employment: see, for example, Case 246/83 *De Angelis* v *Commission* [1985] ECR 1253, at p. 1263. That formula, although often repeated in the decisions of the Court, to my mind overemphasizes the single event of changing residence and moving to another country and only indicates by implication the true object of the allowance, which is to compensate for the lasting disadvantages of living as an expatriate. As I see it, the single event of changing the place of residence is primarily intended to be covered by the installation allowance under Article 5 of Annex VII to the Staff Regulations, which consists of a single payment. The expatriation allowance, under Article 4(1) of Annex VII, is a continuing monthly payment and as such is intended to compensate for the continuing disadvantages which result from living in a foreign country in order to work for the Communities. This is brought out better by the words used in paragraph 10 of *Nuñez*, cited above. Moreover, in Case 147/79 *Hochstrass* v *Court of Justice* [1980] ECR 3005, at p. 3020, the Court explained that the foreign residence allowance under Article 4(2) of Annex VII was intended to compensate for the disadvantages which

officials undergo as a result of their status as aliens, and it held: 'It cannot be denied that an official who has not and has never had the nationality of the State in whose territory his place of employment is situated may be subject, by reason of his status as an alien, to a number of inconveniences both in law and in fact, of a civic, family, educational, cultural and political nature, which the nationals of the country do not experience.' Similar considerations in my view apply to the expatriation allowance under Article 4(1) of Annex VII, and the emphasis should be placed on the fact that that allowance is intended to compensate for the long-term disadvantages of becoming an expatriate. But, whether the object of the expatriation allowance is expressed in this way or in terms of the formula used *inter alia* in *De Angelis*, in the present case it cannot be maintained that the taking up of employment with the Communities obliged the applicant to change her residence and move to the country of employment; she had already been there for some considerable time of her own choice. Such a case does not fall within the object of the expatriation allowance: see paragraph 12 of *Nuñez*.

12. The result is also in my view a reasonable one in the light of all the facts and in particular of the fact that Mrs Atala-Palmerini was resident in Belgium for more than 16 years before entering the service of the Commission and accepts that she was habitually resident there for more than 12 years before that date. I would add that, while she fails in my view to qualify for expatriation allowance under Article 4(1) of Annex VII to the Staff Regulations, she is entitled to a foreign residence allowance equal to one-quarter of the expatriation allowance under Article 4(2) thereof.

13. Accordingly I consider that the application should be dismissed and that, pursuant to Article 69(2) and Article 70 of the Rules of Procedure, each party should be ordered to pay its own costs.