OPINION OF ADVOCATE GENERAL TESAURO
delivered on 16 June 1994 *

Mr President,
Members of the Court,

1. Mr Magdalena Fernández, a Commission official of Spanish nationality, brought proceedings before the Court of First Instance against the administration's refusal, by decision of 24 July 1992, to grant him the expatriation allowance under Article 4(1)(a) of Annex VII to the Staff Regulations applicable to officials of the European Communities (hereinafter the 'Staff Regulations').

The provision in question, I would remind the Court, states that an expatriation allowance is to be paid to officials 'who are not and have never been nationals of the State in whose territory the place where they are employed is situated, and 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'.

2. By its judgment of 28 September 1993 [1] the Court of First Instance dismissed the action, holding that the applicant failed to satisfy the conditions upon which entitlement to the expatriation allowance depends, that is to say, that for the duration of the reference period he neither habitually resided nor pursued his main occupation in the territory of the State in which the place of employment was situated (paragraphs 24 to 30).

In particular, the Court of First Instance rejected the argument based on the fact that the applicant had spent the first eight months of the reference period in Spain, [2] and held that to be irrelevant since 'the applicant continued thereafter to live and work in Liège. An absence of that kind from the country of employment, being of an episodic and brief nature, cannot be considered sufficient to deprive the applicant's residence in the State of employment of its habitual nature for the purposes of the provision of the Staff Regulations mentioned above. That absence concerns only the first eight months of the

* Original language: Italian.

1 — Case T-90/92 *Magdalena Fernández* v *Commission* [1993] ECR II-971.

2 — To be more precise, the Court of First Instance found that the applicant did indeed live in Belgium from 1965 until 1 May 1986, except for the period from 1 October 1980 until 28 June 1981 in which he returned 'temporarily' — as a certificate from the Spanish Consulate attests — to Spain. Since in this instance the reference period runs from 1 November 1980 until 30 October 1985, it follows that the applicant was not living in Belgium during the first eight months of the reference period (see paragraph 28 of the judgment).

reference period and is not sufficient, therefore, to cause the applicant's habitual residence in Belgium since 1965 to be regarded as interrupted, since he resided continuously in Belgium throughout the remainder of the reference period' (paragraph 29).

3. In essence, it is those findings in the judgment under appeal that are challenged by Mr Magdalena Fernández, in so far as he complains that the Court of First Instance, for the purposes of determining the place of habitual residence, either failed to take into account or erroneously assessed the period of eight months which he spent in Spain, and that the Court of First Instance thus infringed Article 4(1)(a) of Annex VII to the Staff Regulations.

With respect to that complaint, the Commission has raised a preliminary objection of inadmissibility on the ground that, in its opinion, the appellant is thereby seeking to call in question the findings of fact made by the Court of First Instance, [3] a matter which lies outside the appellate jurisdiction of the Court of Justice.

4. In my opinion, however, the objection misses the point. The appellant does not, in fact, seek to dispute that for almost the entire duration of the reference period he effectively resided in Belgium, but rather the finding contained in the judgment of the Court of First Instance to the effect that the period of eight months spent in Spain was not sufficient to cause the (habitual) residence established in Belgium since 1965 to be regarded as interrupted. In the appellant's view, the Court of First Instance did not even consider it relevant to ascertain whether and to what extent the stay in question might have interrupted the residence in Belgium.

The complaint does not, therefore, concern the finding of facts, but the interpretation on the part of the Court of First Instance of Article 4(1)(a) of Annex VII to the Staff Regulations at the point where reference is made to the concept of habitual residence.

5. Thus it must be established whether an interruption of residence which takes place during the reference period constitutes *ipso facto* the deciding factor with regard to entitlement to the expatriation allowance and, more particularly, whether the Court of First Instance was correct in considering that the period spent outside the territory of the State in which the appellant is employed was not sufficient to cause the appellant's residence in Belgium to lose the status of habitual residence within the meaning of the provision of the Staff Regulations in question.

That said, I would first of all point out that it is settled case-law that 'the object of granting an expatriation allowance 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 and to integrate themselves in their new environment. Fur-

3 — See paragraph 28 of the judgment of the Court of First Instance.

thermore, the concept of expatriation also depends on the personal position of an official, that is to say on the extent to which he is integrated in his new environment, which is demonstrated, for example, by habitual residence or by the main occupation pursued'. [4]

6. Bearing in mind the wording of Article 4(1)(a) of Annex VII to the Staff Regulations and the purpose of the expatriation allowance, as explained in the case-law just referred to, it is evident that the official's (habitual) residence immediately before his entry into service constitutes a fundamental criterion for recognition of the right to the expatriation allowance.

It is true that the relevant provision of the Staff Regulations does not define the concept of habitual residence, and merely refers to the place in which the official had 'habitually resided'. Nevertheless, the Court of Justice has consistently held — albeit in other areas of Community law — that habitual residence must be regarded 'as the place where a person has established his permanent centre of interests' [5] and that, for proof of residence, it is necessary to refer to all the factual circumstances which constitute residence. [6]

7. The Court of First Instance found — and the appellant does not dispute that finding — that, during the reference period, save for the eight months spent in Spain, the appellant had resided in Belgium. In those circumstances, the fact that in the course of the reference period the official concerned was physically absent (for eight months) from the place of employment cannot be regarded, as the appellant appears to claim, as entailing — automatically — an interruption of the residence established in Belgium since 1965 and, solely on that account, entitlement to the expatriation allowance. [7]

On the contrary, it is necessary to ascertain, in the light of the case-law mentioned above, whether an interruption of that nature is sufficient basis for holding that the official concerned has transferred the permanent centre of his interests to another State.

8. In that connection, I would recall that the Court of First Instance arrived at the conclusion that the stay in Spain 'cannot be considered sufficient to deprive the official's residence in the State of employment of its habitual nature' (paragraph 29). I find myself

4 — See judgment in Case 201/88 *Atala Palmerini* v *Commission* [1989] ECR 3109, paragraph 9. See also, more recently, judgments in Case T-18/91 *Costacurta Gelabert* v *Commission* [1992] ECR II-1655, paragraph 42, and in Case T-4/92 *Vardakas* v *Commission* [1993] II-357, paragraph 39.

5 — See, most recently, judgment in Case C-297/89 *Ryborg* [1991] ECR I-1943, paragraph 19; also judgment in Case T-63/91 *Benzler* v *Commission* [1992] ECR II-2095, paragraph 25.

6 — See judgment in Case 248/87 *Schaflein* v *Commission* [1988] ECR 4475, paragraph 10.

7 — On that point, see judgment in Case 188/83 *Witte* v *Parliament* [1984] ECR 3465, paragraphs 9 to 12.

in agreement with that conclusion, since the Court of First Instance found that the appellant 'left (only) temporarily' for Spain, with the intention of later resuming his residence and work in Belgium. Having regard to the interpretation of the concept of habitual residence, the absence of eight months from Belgian territory cannot be regarded — without completely distorting the meaning and purpose of Article 4(1)(a) of Annex VII to the Staff Regulations — as implying that the official concerned has transferred the centre of his interests to Spain.

Consequently, the complaint in question is unfounded, since the interpretation provided by the Court of First Instance in this case discloses no error in law.

9. In the light of the foregoing I propose that the Court dismiss the appeal brought by Mr Magdalena Fernández.

I propose that the appellant be ordered to pay the costs, including the costs incurred by the other party to the proceedings.