OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 20 NOVEMBER 1980 [1]

Mr President
Members of the Court,

The central issue of this staff case is the expatriation allowance which is provided for by Article 69 of the Staff Regulations of Officials of the European Communities and has already been the subject of a series of decisions by the Court. The conditions for the grant of the allowance are laid down by Article 4 (1) of Annex VII to the Regulations. Under that provision the allowance is granted *inter alia:*

"(a) 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;".

A second paragraph was inserted into that article by Council Regulation No 912/78 of 2 May 1978 amending the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the European Comunities (Official Journal 1978 L 119, p. 1), which provides as follows:

"An official who is not and has never been a national of the State in whose territory he is employed and who does not fulfil the conditions laid down in paragraph (1) shall be entitled to a foreign residence allowance equal to one quarter of the expatriation allowance".

Pursuant to that provision, the applicant, an official in the service of the Commission with Italian nationality, does indeed receive a so-called "foreign residence allowance". He was born in Sicily in 1944 and joined his father in Belgium in 1947, where he has since lived without break; he was educated and held various posts there before his recruitment by the Commission on 17 March 1975. On 1 April 1979 he was appointed as a probationary official in Grade D 3 by decision of the Head of the Recruiting, Appointments and Promotion Division and subsequently became an established official in the same grade with effect from 1 October 1979.

In view of the fact that he has retained his Italian nationality and is still enrolled on the Italian register of electors, and since his wife is also of Italian nationality and his children attend the Italian School in Bussels, the applicant is of the opinion that he is entitled to an expatriation allowance under Article 4 (1) of Annex VII to the Staff Regulations.

1 — Translated from the German.

The allowance was not granted to him and he then submitted a complaint on 19 June 1979 pursuant to Article 90 (2) of the Staff Regulations; he received notification on 25 September 1979 of the decision rejecting that complaint and thereupon lodged this application, received on 21 December 1979, whereby he claims that the Court should:

Declare the application admissible and well-founded;

Consequently, annul the decision notified to the applicant on 25 September 1979, whereby the Commission rejected the complaint lodged by the applicant on 19 June 1979 pursuant to Article 90 (2) of the Staff Regulations of Officials of the European Communities with the object of obtaining payment of the expatriation allowance provided for by Article 4 of Annex VII to the Staff Regulations;

Order the Commission to pay the costs.

My opinion on this matter is as follows:

By his application duly lodged within the prescribed period, the applicant relies on the alleged illegality and Article 4 (1) of Annex VII to the Staff Regulations on which the contested decision was based, but he does not question the application of that provision. Like the *Hochstrass* case, which is comparable in this respect (judgment of 16 October 1980 in Case 147/79 *Hochstrass* v *Court of Justice* [1980] ECR 3005) this case raises the question (although the point is not taken by the Commission), with regard to admissibility, whether the applicant can show an interest capable of legal protection, since, even if the Court were to declare the provision in question inapplicable, the applicant would still have no claim to the expatriation allowance. However, having regard to the Court's decision in the *Hochstrass* case, I would seem to be justified, in view of the close connexion between the question of an interest capable of legal protection and the submissions of the parties as to the substance of the action, in turning directly to an examination of the latter question.

The applicant founds his action on a submission that the illegality of Article 4 (1) of Annex VII to the Staff Regulations arises from the disregard of a superior legal principle, namely the principle of equal treatment and non-discrimination. The provision is in breach of that principle by not granting an expatriation allowance to an official who during the five years ending six months before he entered the service habitually resided or carried on his main occupation in the State in whose territory the place where he is employed is situated, but who is not and never has been a national of that State. On the other hand, the expatriation allowance is granted to three groups of officials who, as regards "living in a foreign country" (dépaysement), are in fact in a comparable situation. First, officials who had carried on their main occupation or had habitually resided within the European territory of the State concerned for less than five and a half years before they entered the service receive the allowance. Secondly, those officals are also entitled to the allowance who, however long they had habitually resided in the State concerned, had been employed in the service of another State or of an international organization. Finally, the allowance is also granted without time-limit to officials who had worked for the Communities for more

than five and a half years. The applicant claims, however, that the officials referred to above are all subject to the same material and non-material disadvantages as regard ties with their countries of origin. The different treatment is therefore unjustified and, particularly having regard to the requirements of the service, arbitrary.

But the Commission, having regard particularly to previous decisions of the Court, considers the application unfounded.

This opinion must, in my view, be endorsed on account of the following considerations. According to the established case-law of the Court, the principle of equal treatment or non-discrimination only prohibits differentiation which is not objectively justified. Different treatment of officials is on the other hand permissible in so far as particular grounds exist to justify such differentiation.

It is therefore necessary in the present case to examine whether the different treatment of officials with regard to the expatriation allowance provided for by Article 4 (1) (a) of Annex VII to the Staff Regulations is objectively justified. The question whether differentiation is objectively justified is closely connected with the nature and function of the expatriation allowance.

The purpose of the expatriation allowance is, at the Court most recently pointed out in the *Hochstrass* case, referring to the judgments of 20 February 1975 in Case 21/74 *Airola* v *Commission* [1975] ECR 221 and Case 37/74 *Van den Broeck* v *Commission* [1975] ECR 235, "to compensate officials for the extra expense and inconvenience of taking up employment with the Communities and being thereby obliged to change their residence". (Compare in this respect the judgments of 7 June 1972 in Case 20/71 *Sabbatini* v *European Parliament* [1972] ECR 345 and Case 32/71 *Bauduin* v *Commission* [1972] ECR 363).

That purpose was expressly contrasted in the *Hochstrass* case with the function of the foreign residence allowance granted pursuant to Article 4 (2) of Annex VII to the Staff Regulations, which is designed to "compensate for the disadvantages which officials undergo as a result of their status as aliens". As the applicant rightly emphasizes, all officials who are not nationals of the State in whose territory the place where they are employed is situated are subject to such disadvantages. Thus the Court held in its judgment in the *Hochstrass* case that in basing the grant of the foreign residence allowance upon the sole criterion of nationality the Council acted within the limits of its legislative discretion.

Therefore, contrary to the view taken by the applicant the illegality of the criteria governing the grant of the expatriation allowance cannot be inferred from the existence of the foreign residence allowance, which, as has been shown, is granted for reasons other than those for granting the expatriation allowance. As is apparent from the general pattern of Article 4 of Annex VII and as the Court has repeatedly held in the cases cited above, for the payment of the latter allowance "the official's habitual residence before he entered the service is

the paramount consideration", whilst "the official's nationality is regarded as being only a subsidiary consideration".

Since the expatriation allowance is intended to compensate for these disadvantages which a change of residence as a result of entering the service of the Communities entails, it is logical and not in breach of the principle of equality for the grant of that allowance to be made dependent on the habitual residence of the official before he entered the service. A particular consequence of that is that the expatriation allowance is not payable if an official's habitual residence before he entered the service was already in the country in which he is employed, since in that case entry into the service of the Communities is not the cause of the extra expense and inconvenience which the necessary change of residence entails. Indeed, officials who before entering the service had no residence at all in the country in which they are employed are in this regard in a different factual situation to officials who, irrespective of their entry into the service of the Communities, already had their habitual residence there.

Moreover, the adoption of the criteria for determining whether "habitual residence" has been acquired must in principle lie within the legislative discretion of the Council, in which regard the only proviso is that those criteria may not be in breach of the principle of equal treatment.

In this case, however, contrary to the opinion of the applicant, there can be no question of an arbitrary inequality of treatment. As Mr Advocate General Warner pointed out in his opinion of 3 February 1976 in the *Delvaux* case (Case 42/75, [1976] ECR at p. 179), in order to ascertain whether a person was habitually resident in a particular place during a particular period, it is necessary to consider *inter alia* to what extent he was present there during that period and what the reasons were for that presence.

When adopting the provision in question the Council was clearly guided by such considerations in so far as it worked on the principle that an official cannot be deemed to have acquired an habitual residence if he resided in the country in which his place of employment is situated for a period of less than five and a half years before entering the service, or if the reason for that residence was that he was in the service of another State or an international organization.

Thus it cannot be disputed that officials who were in the service of another State or of an international organization were not, despite spending a prolonged period before entering the service in the country in which they were later employed, habitually resident there in the sense that they developed close, long-term ties with that country. Such persons are, as a rule, sent to a particular country for a limited period only and during that period maintain their close ties with the State which sends them. In order to compensate for the extra expense and inconvenience which service in a foreign country entails, such officials, as far as I can see, also as a rule receive an expatriation allowance.

Furthermore, in view of the foregoing considerations, there cannot be any objection to the fact the Council made the grant of the expatriation allowance dependent on the length of residence. As the Commission rightly stresses, officials who before entering the service had resided in the country in which they were later to be employed for only a relatively short period and had not yet become habiltually resident there, should

not suffer any disadvantage. In the case of those officials too, it is only their entry into the service of the Communities which leads to habitual residence "in a foreign country", for the disadvantages of which the expatriation allowance is designed to compensate.

What must constitute the period of time, however, within which a person can still be considered not to have acquired an habitual residence, is ultimately a matter upon which the Council must exercise its discretion. I am unable to find any indication that the prescribed period of five and a half years constituted a misuse of such discretion.

Nor can it be objected in this case (as was also emphasized by the Court in the *Hochstrass* case) that the Council has resorted to categorization for the sake of a general and abstract system of rules, even if in individual cases the application of the provision in question leads to certain problems, provided that it is not discriminatory having regard to the objective which it pursues. But as I have shown, that is not the case with Article 4 (1) of Annex VII to the Staff Regulations, as that provision lays down different treatment for reasons which are objectively justifiable for officials who are in different situations.

Since the applicant has not shown that he fulfils the factual conditions upon which, pursuant to the aforesaid article, the grant of the expatriation allowance depends, the decision by the appointing authority to reject his complaint is not irregular. Nor is there under these circumstances any need to consider further the question of the lack of an interest capable of legal protection. My opinion, therefore, is that the Court should dismiss the application and order the parties to bear their own costs in accordance with Article 70 of the Rules of Procedure.