OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 13 DECEMBER 1972 [1]

Mr President,
Members of the Court,

Mrs Goeth-Van der Schueren is of Belgian nationality and entered the service of the High Authority in 1954; she is employed by the Commission in Luxembourg, and holds a post in category C 1, as head of the central filing department.

As part of her remuneration she was paid an expatriation allowance as provided by Article 69 of the Staff Regulations.

She married on 1 October 1971, Mr Goeth, an Austrian national, settled in Luxembourg since 1964 and employed by a private undertaking.

Mrs Goeth, having informed the Administration of her marriage, was requested by a note of 15 October following to submit an 'official document' showing the place where her husband had resided or exercised his principal professional activity for the five-year period ending six months before the date of the marriage.

In the version of the Regulations applicable at the time, Article 4 (3) of Annex VII provided that 'an official who marries a person who at the date of marriage does not qualify for the allowance shall forfeit the right to expatriation allowance unless that official thereby becomes a head of household.'

On 28 October 1971, the Head of the Personnel Division of the Directorate-General of Personnel and Administration addressed a memorandum to Mrs Goeth in the following terms:

'Following your marriage on 1 October 1971, your right to the expatriation allowance has been re-examined. According to the certificate of residence which you submitted to us, it appears that your husband has lived in Luxembourg since 25 September 1964. The conditions laid down in Article 4 (3) of Annex VII of the regulations accordingly do not allow you to retain the expatriation allowance after your marriage and steps will be taken to withdraw it as from 1 October 1971.

The amount which you have continued to receive on account of this allowance in October and November will be recovered in four instalments from your next payments of salary.'

By letter of 22 December following, the applicant requested the Head of Division to institute a further examination of her case, claiming that, since her husband was compelled to get his work permit renewed each year by the authorities of the Grand Duchy in order to carry on a paid occupation in Luxembourg, he could only be regarded as provisionally settled in that State. Mrs Goeth expressed the hope that in these circumstances she would be allowed to retain the benefit of the expatriation allowance.

The Head of the Personnel Division, on 14 January 1972, rejected this argument and purely and simply confirmed his previous position.

The applicant took no immediate action. It was only on 5 April 1972 that she addressed to the President of the Commission a complaint seeking the restoration of her expatriation allowance. This complaint, registered with the General Secretariat on the following day, 6. April, has remained unanswered except for an acknowledgment of receipt.

On 7 June 1972, judgments were given by your Chamber in Case 20/71, Mrs Bertoni-Sabbatini (Rec. 1972, p. 345) and Case 32/71, Mrs Bauduin-Cholet

1 — Translated from the French.

(Rec. 1972, p. 363), in which you held that in making the retention of the expatriation allowance dependent, in the case of an official who has married a person not qualifying for such an allowance, upon the acquisition ot the *position of head of household*, the regulations have introduced an arbitrary difference of treatment between officials according to their sex.

As soon as these judgments were known, Mrs Goeth did not fail to request the revision of her own position.

By note of 5 July, the Administration informed her that the expatriation allowance would be restored to her with effect from 1 July, but that 'this regularization does not, however, in any way prejudge the answer that will be given to your complaint under Article 90 of the regulations'.

Mrs Goeth on 3 August submitted to your Court an application for the annulment of the implied decision rejecting her complaint of 5 April; she asks you, in consequence, similarly to annul the decision by which her expatriation allowance was withdrawn from 1 October 1971 to 1 July 1972, and to state that the said allowance must be paid to her retrospectively for this period.

In opposing this application, the Commission, under Article 91 of the Rules of Procedure, raises the preliminary objection of inadmissibility due to delay. You have decided to open the oral procedure on this objection of inadmissibility, the merits of which I am now going to examine.

The decisive point in this regard consists in the analysis of the memorandum of the Head of Division dated 28 October 1971. If, as the Commission maintains, this memorandum bears the character of a decision adversely affecting the official, it follows that under the terms of Article 90 of the regulations then in force, the complaint addressed only on 5 April 1972 to the President of the Commission, that is more than three months after the decision withdrawing the expatriation allowance, was presented out of time. In consequence, this complaint could not have had the result of keeping alive the right to a legal action before your Court, since the time for this had itself already expired.

The applicant claims, on her part, that the memorandum of 28 October 1971 was merely a piece of information, a preliminary step. It contained nothing that could be considered as final and decisive; especially, the words 'decide' and 'decision' were not used in it.

Further, the applicant believes that support for this view is found in the fact that it is only in the second memorandum, signed by the Head of the Personnel Division on 14 January 1972, that the term 'decision' was used. Thus, Mrs Goeth holds that she submitted a valid complaint to the President of the Commission on 5 April within the three months time-limit beginning from 14 January.

Members of the Court, I am unable to share this point of view. The current of your decisions is well established in that you do not stop at the external form of an act, at its appearance, but in order to determine its true nature and real meaning, you consider its objective content and its real meaning.

It is not important, therefore, that the communication made to the applicant on 28 October 1971 does not use the term 'decision' and appears in the form of a 'memorandum for the attention of Mrs Goeth'.

Secondly, this memorandum is manifestly not simply a piece of information, a warning or a preparatory measure.

It bears a decisive character. After having pointed out that 'according to the certificate of residence which you submitted to us, it appears that your husband has lived in Luxembourg since 25 September 1964. The conditions laid down in Article 4 (3) of Annex VII of the regulations accordingly do not allow you to retain the expatriation allowance'. Thus the reasons for the decision are given. The final decision

comes then: 'steps will be taken to withdraw it (the expatriation allowance) as from 1 October 1971'.

Although the phrasing is no doubt imperfect, and it would have been preferable to write: the allowance is withdrawn as from 1 October 1971, it is nonetheless perfectly clear; it states a decision finally taken, and the practical measures for its implementation are further specified in the final sentence of the memorandum:

'The amount which you have continued to receive on account of this allowance will be recovered in four instalments from your next payments of salary.'

Further, let us recall that on 15 October, the Administration had actually warned the applicant of the possibility of this withdrawal, by asking her to produce an official document relating to her husband's habitual residence, or to the place of exercise of his professional activity, during the period of five years prior to the marriage.

The Administration, then, intended to inform Mrs Goeth quite clearly that her recent marriage was likely to affect her right to an expatriation allowance. This first note did constitute a simple preliminary step. On the other hand, the memorandum of 28 October is the real decision, the possibility of which had been brought to the applicant's notice.

In the second place, it is not possible to see a 'complaint', within the meaning of Article 90 of the Staff Regulations, in the letter addressed by Mrs Goeth to the Head of the Personnel Division on 22 December 1971:

— firstly because it was not addressed to the appointing authority, as required by this Article;

— further, because the applicant did not request that the decision contained in the memorandum of 28 October be rescinded; she merely claimed that her husband was only conditionally and provisionally settled in Luxembourg, subject to an annual work permit, renewal of which might be refused him.

Finally, even if you could consider this letter as constituting a true complaint, the application would be nonetheless out of time, for the note in reply, from the Head of the Personnel Division dated 14 January 1972 would have to be regarded as explicitly rejecting the said complaint. The applicant would then have been bound to appeal to you within a period of three months counting from this rejection, that is by 15 April 1972 at the latest.

But, in fact, for the reasons we have just indicated, this letter does not bear the character of a complaint made in conformity with Article 90 of the regulations. As for the note by which the Head of the Personnel Division rejected the argument put forward by the applicant this is purely confirmatory of the initial decision of 28 October 1971. It does not contain any new decision.

Under these circumstances, Members of the Court, it must be held that, according to the current of your decisions, the applicant ought either to have instituted a legal action before you within the period of three months beginning 28 October 1971, the date of notification of the decision complained of, or else, but within the same period, to have submitted a preliminary complaint to the Administration in accordance with Article 90 of the regulations; she would thus have been able to oppose the explicit or implicit rejection of this complaint, and, at the same time, to have asked you to annul the original decision.

But, as we have seen, she did not submit to the President of the Commission a complaint, in accordance with Article 90 of the regulations, until 5 April 1972, that is after the expiration of the three month period beginning from the notification of the decision complained of.

Accordingly I can only submit

— that application 56/72 be dismissed as inadmissible,

— and that, in accordance with Article 70 of the Rules of Procedure, the applicant should bear her own costs and that the costs and expenses incurred by the Commission should be borne by the latter.