REPORT FOR THE HEARING
delivered in Case 159/86 *

I — Facts and written procedure

The applicant, a national of the Federal Republic of Germany, was born in 1953 in Italy where he has lived since 1959.

On 27 October 1975 he entered the service of the Ispra Joint Research Centre as a member of the temporary staff working in the accounts department.

When he was recruited, the Staff Regulations of Officials provided for only one expatriation allowance, the grant of which was primarily based on the criterion of actual change of residence and, in the alternative, on that of nationality.

Subsequently, Article 21 of Council Regulation (Euratom, ECSC, EEC) 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 Communities added the following paragraph to Article 4 of Annex VII to the Staff Regulations:

'2. 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.'

On the day of publication of that regulation in the *Official Journal of the European Communities* (Official Journal L 119, 3.5.1978, p. 1) the Director-General of Personnel and Administration published Infor-Rapide No 78 in which the attention of officials and other servants of the European Communities was drawn to the introduction of the abovementioned allowance.

That communication was followed by the distribution of a new notice contained in the bulletin of administrative notices 'Spécial Commission du 29 mai 1978' in which the Commission staff members affected, including those of the Joint Research Centre, were invited to submit a written application to their local administrative department with a view to establishing their entitlement, if appropriate, to the foreign residence allowance.

On 12 March 1985 the applicant submitted an application for the said allowance pursuant to Article 4 (2) of Annex VII to the Staff Regulations to the Head of the Administrative and Financial Rights Division.

On ascertaining from his salary statement for September 1985 that the foreign residence allowance had been paid to him retroactively only from March 1985, that is to say when he submitted his application, the applicant submitted a complaint on 9 December 1985 under Article 90 (2) of the Staff Regulations.

* Language of the Case: Italian.

He claimed that the foreign residence allowance should have been paid to him retroactively as from 4 May 1978, the date on which Council Regulation No 912/78 entered into force.

On 1 April 1986 the appointing authority rejected his complaint on the ground that the introduction of the foreign residence allowance had been brought to the attention of the staff working at Ispra in 1978, that the applicant had also received at that time a copy of the relevant Council Regulation in his mother tongue and that at no time before 12 March 1985 had he lodged an application with his local management or told it that he fulfilled the conditions for the foreign residence allowance, and at that time he was not absent on leave. The appointing authority emphasized that the fact that the applicant had become aware of the change to the Staff Regulations only belatedly was not attributable to any lack of care on its part.

The applicant brought the present action against that rejection on 1 July 1985.

The written procedure followed the normal course. The Court, upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, decided to open the oral procedure without any preparatory inquiries.

II — Conclusions of the parties

The *applicant* claims that the Court should:

(1) declare that the applicant is entitled to the foreign residence allowance as from 4 May 1978;

(2) annul the measure whereby the appointing authority refused to pay all the amounts due as at February 1985;

(3) order the defendant to pay the costs.

The *defendant* contends that the court should:

(1) dismiss the application as inadmissible;

(2) otherwise declare the action unfounded;

(3) make an order as to costs in accordance with the rules of procedure.

III — Submissions and arguments of the parties

A — *Admissibility*

The Commission has alleged, under Article 91 of the Rules of Procedure, that the application is inadmissible because the applicant's complaint was lodged out of time.

It claims that the measures adversely affecting the applicant are each of the refusals, embodied in successive months in his salary statements in which the foreign residence allowance was not mentioned, between May 1978 and February 1985. It was therefore against those measures that the applicant could have submitted a complaint under Article 90 (2) of the Staff Regulations.

By lodging his complaint against those decisions, the most recent of which dated back to 15 February 1985, on 9 December 1985 the applicant failed to observe the time-limit laid down in Article 90 (2) of the Staff Regulations.

The Commission also states that the appointing authority's decision of 1 April 1986 merely confirmed the previous decisions embodied in the salary statements and did no more than set out the reasons for maintaining those decisions.

It emphasizes that its analysis, which is supported by the very terms of the decision of 1 April 1986, is in conformity with a consistent line of decisions of the Court (see in that connection the judgment of 15 June 1976 in Case 1/76 *Wack* v *Commission* [1976] ECR 1017; the judgment of 8 May 1973 in Case 33/72 *Gunnella* v *Commission* [1973] ECR 475; and the judgment of 24 June 1971 in Case 53/70 *Vinck* v *Commission* [1971] ECR 601).

The applicant considers that the salary statement for May 1978 cannot reasonably be deemed to be a negative decision merely because it did not include the foreign residence allowance which had just been introduced. He maintains that, as is apparent from previous decisions of the Court, and in particular its judgment of 21 February 1974 in Joined Cases 25 to 33/73 *Schots-Kortner* v *Council and Parliament* [1974] ECR 177, a salary statement does not constitute a measure capable of setting time running for the purpose of time-limits for instituting proceedings unless a decision of the administration is clearly apparent from it. In the present case there was merely silence, or an omission, on the part of the administration, which did not involve any deduction from or reduction of existing emoluments. In no legal order, and particularly not in the Community legal order, is it possible to endow silence on the part of the administration — when not preceded by an express notification, request or warning — with the scope and effect of a refusal.

The applicant also points out that the appointing authority's refusal of 1 April 1986 confirms not, as the Commission contends, the decision expressed in the salary statement for May 1976 but that expressed in the salary statement for September 1985 in which the arrears of the allowance were paid to the applicant as from March 1985. His complaint should thus have been submitted in good time against the decision expressed in the salary statement for September 1985. In any event, the alleged inadmissibility of the complaint — on which the allegation of inadmissibility of this action is based — was never notified to him, not even in the rejection of the complaint dated 1 April 1986. The applicant also contests the defendant's assertion that he should have lodged a complaint before 15 August 1978 — such a complaint would have been of no practical use since at that time he would only have been able to request payment of the allowance.

The applicant maintains that the Commission's arguments confuse admissibility and the substance of the case, by clouding the issue as to whether it was incumbent upon the applicant to apply to the administration for the allowance, failing which he would forfeit it, or whether the administration was obliged to grant it on its own initiative.

B — *Substance*

The applicant claims in the first place that the payment of the foreign residence allowance is linked with the fact that an

employee is of a nationality other than that of the State where he is employed and therefore that he fulfilled the conditions for the grant of that allowance as from the date of its introduction, that is to say 4 May 1978.

It is apparent from the case-law of the Court, and in particular its judgment of 16 October 1980 in Case 147/79 (*Hochstrass* v *Court of Justice* [1980] ECR 3005), that the foreign residence allowance is based exclusively on the objective and explicit criterion of nationality. Since the applicant has been a national of the Federal Republic of Germany since birth and has possessed no other nationality, the defendant's allegations regarding his family background and his residence at the time of recruitment are irrelevant. In particular the applicant describes as gratuitous the Commission's statement that he is 'an Italian with a German passport'.

Moreover, it is disputable whether persons entitled to a benefit must come forward and state that they possess a nationality other than that of the territory where they are employed, so as to enable the Commission to identify those officials who fulfil the conditions for the grant of the foreign residence allowance. In other words, by contrast with the position regarding family allowances, for example, which are linked to personal events of which the administration can be informed only by the person concerned (change of civil status, new dependants, birth of a child, and so on), the conditions for the grant of the foreign residence allowance may be verified on the administration's own initiative since, in this case, the applicant's nationality and place of employment were definitely and officially known to the administration.

The applicant describes as incomprehensible the defendant's statement in its defence that the administration 'could not necessarily know that the applicant, who answers to an Italian forename (Michele) and is wholly integrated in Italy where he has always lived and whose language he speaks fluently, was of German nationality'. It need merely be borne in mind that, on recruitment, the nationality of each candidate is specifically certified and that the Commission publishes periodically an updated personal record showing all the details by which each employee's administrative situation is characterized and, annually, a list of the serving staff showing, in particular, the nationality and place of employment of each person. Thus, for example, the applicant's name appears on page 46 of the current list together with the letters 'D' for his nationality and 'IPR' for his place of employment. Those two items of information, which have always been at the disposal of the Commission, provide a more than adequate basis for the allowance to be paid automatically, in the same way as there is an automatic increase of salary on progression to the next step in seniority and adjustment of the weightings when an employee is transferred to another place of employment.

The applicant considers that the appointing authority's decision, which had the effect of depriving him of a component of his remuneration for several years, constitutes an infringement of Article 62 of the Staff Regulations. In common with the other emoluments due to officials, the foreign residence allowance forms an integral part of remuneration and, within the meaning of the abovementioned provision of the Staff Regulations, it is impossible to waive entitlement to it. Moreover, it cannot be refused or suspended unless the conditions for its

payment are no longer fulfilled, in circumstances expressly envisaged in the Staff Regulations (employment in a Member State of which the official is a national, unpaid leave, application of disciplinary measures, and so forth). As the Staff Regulations stand at present, there is no provision for the rights either of officials or of the administration to become time-barred. Therefore, entitlement to the foreign residence allowance must be considered to be inextinguishable. For that reason, in the same way as the administration is able, without delay, to check and readjust the financial position of officials on its own initiative, it seems fair that the same process should be possible with regard to the reciprocal relationship between officials and the administration, at least where there is no fraud, bad faith or other wilful misconduct on the part of the person concerned.

The applicant also maintains that the appointing authority's abovementioned decision is in breach of Article 16 of Annex VII to the Staff Regulations since the allowance in question could and ought to have been paid in this case on the same basis and with the same frequency as the main remuneration.

In the applicant's opinion, the provisions creating the foreign residence allowance imposed no obligation on the persons concerned of which the fulfilment was a precondition for entitlement to the allowance; the notice published in the 'Staff Courrier' was merely an invitation to come forward which could be interpreted only as being for the benefit of officials with a view to ensuring prompt payment of the sums due to them. He considers that he cannot be accused of any negligence, particularly if account is taken of the subjective aspects (the applicant's good faith, an attitude wholly remote from petty adherence to procedure, devotion to duty rather than concern with the related financial benefits) and the objective aspects (recent introduction of the allowance, entitlement to the benefit *ab initio*, lack of restrictive provisions in the Staff Regulations).

The refusal of the allowance also entailed a breach of the general principle whereby any forfeiture or restriction of rights must be expressly prescribed in the applicable legislation. In fact, the contested measure has no basis in the Staff Regulations or in any implementing provisions or in the information notices distributed at that time by Directorate-General IX, which could not have brought about such a result.

Neither can the refusal of the allowance be based on the decisions of the Court cited by the defendant; according to the applicant, those decisions are confined to their own facts. That applies to the judgment of 13 July 1972 in Case 90/71 *(Bernardi* v *Parliament* [1972] ECR 603), in which the applicant was accused of improper conduct in so far as he criticized a failure to take account of a periodic report of which he had deliberately retained possession. Similarly in the judgment of 14 December 1966 in Case 3/66 *(Alfieri* v *European Parliament* [1966] ECR 437), the Court dismissed the application of an official who deliberately omitted to appoint a doctor of his choice as a member of an invalidity committee and then challenged the validity of the procedure. And the judgment of 15 June 1976 in Case 1/76 *Wack* v *Commission*, cited above, concerned non-payment of the expatriation allowance as a result of the conditions for its payment

not being satisfied when the official took up his duties. Finally, the judgments of 11 July 1979 in Case 252/78 *(Broe* v *Commission* [1979] ECR 2393), and of 9 March 1978 in Case 54/77 *(Herpels* v *Commission* [1978] ECR 585) confirm the legality of the Commission's recovering from an official sums unduly paid in circumstances wholly dissimilar to those of the present case.

The applicant also maintains that the decision at issue is indicative of excessive severity if it is borne in mind that both the Administration and Personnel Division at Ispra and the Administrative and Financial Rights Division in Brussels declared themselves agreeable to payment of the arrears. He emphasizes that the note of 13 March 1985 to the Ispra Administration and Personnel Division had even indicated the appropriate technical solution, namely retroactive charging of the payments to the research budget for 1978 to 1983.

He considers that the penalty — or the privation inherent in it — imposed upon him is manifestly disproportionate and unjust and that the only financial penalty which seems to him justifiable from the legal point of view is payment of the arrears without any default interest, in view of the fact that interest is traditionally paid only if requested by the person concerned.

The Commission does not deny that the applicant meets the conditions for the foreign residence allowance and that the payment thereof is based only on the criterion of nationality, as defined by the Court in the judgment of 16 October 1980 in Case 147/79 *(Hochstrass* v *Court of Justice* [1980] ECR 3005), which has the merit of being uniform, objective and directly linked with the purpose of the rules.

Nevertheless, in the abovementioned judgment the Court stated that the fundamental purpose of the foreign residence allowance is to 'compensate for the disadvantages which officials undergo as a result of their status as aliens', consisting in a number of 'inconveniences both in fact and in law, of a civic, family, educational, cultural and political nature which the nationals of the country do not experience'.

On the basis of those considerations, the Commission observes that the applicant, who was born in Italy in 1953, has always lived there, even studied there until 1973 and worked there until 27 October 1975, was in fact to so limited an extent an expatriate in Italy that he was subject to no disadvantage by reason of his status as an alien. His integration into the host country and with his Italian colleagues was such as to make him forget that he was a German subject. Accordingly the Commission, which had on two occasions drawn the attention of all officials to the change made to the Staff Regulations in 1978 and could not necessarily be presumed to know that the applicant was of German nationality, was right to pay him the foreign residence allowance only with effect from the date on which he applied for it.

The solution adopted by the appointing authority in its decision of 1 April 1986, which may seem very rigorous from the pecuniary point of view in so far as it affects an official in a fairly low grade, cannot however be regarded as a penalty. It is merely the direct consequence of the passive, or even negligent, conduct of the applicant. Even if it is assumed that the applicant's financial situation is irregular, it

follows from the Court's judgment of 13 July 1972 in Case 90/71 *Bernardi* v *European Parliament*, cited above, that he cannot rely upon an irregularity which is the result of his own conduct.

Moreover, the decisions of the Court consistently and categorically state that where the administration has committed an error 'it is not a question of whether the error was or was not patent to the administration, but whether it was so to the applicant and the situation of an administrative authority, which is responsible for the payment of thousands of salaries and allowances of all kinds, cannot be compared to that of an official who has a personal interest in checking the payments made to him each month' (judgment of 11 July 1979 in Case 252/78 *Broe* v *Commission*, *supra*). It was therefore the responsibility of the applicant to give specific details of his situation as from 1978 to the Joint Research Centre administration.

As regards the alleged infringement of Article 62 of the Staff Regulations, the Commission states in the first place that the applicant never waived his entitlement to the foreign residence allowance and that he was given the allowance as soon as the appointing authority became aware of his circumstances. The appointing authority proceeded in accordance with the principle upheld by the Court in the judgment of 9 March 1978 in Case 54/77 *Herpels* v *Commission*, *supra*, according to which the retroactive withdrawal of a wrongful or mistaken decision is generally subject to very strict conditions, although the reversal of such a decision as regards the future always remains a possibility. Furthermore, it is incorrect to affirm that the allowance in question cannot be time-barred. In the same way as the expatriation allowance and family allowances, which form an integral part of remuneration, the foreign residence allowance may be withdrawn at any time from an official who no longer fulfils the conditions which enabled him to receive it previously. It is thus granted as regards the future to anyone who fulfils the prescribed conditions and that applies as from the time when he is informed of it.

The submission as to infringement of Article 16 of Annex VII to the Staff Regulations likewise cannot, in the Commission's view, be upheld since that provision, and more particularly Article 16 (3), relates only to the expatriation allowance and excludes the foreign residence allowance.

J. C. Moitinho de Almeida
Judge-Rapporteur