On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application.**

2. **Orders the parties to bear their own costs.**

Mackenzie Stuart Sørensen Touffait

Delivered in open court in Luxembourg on 9 November 1978.

A. Van Houtte
Registrar

A. J. Mackenzie Stuart
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL RÈISCHL DELIVERED ON 12 OCTOBER 1978 [1]

Mr President,
Members of the Court,

The proceedings on which I am delivering my opinion today concern a claim for an installation allowance which is provided for as follows in Article 5 of Annex VII to the Staff Regulations of Officials: I shall only quote the portions which are of interest in this case:

"All installation allowance equal to two months' basic salary in the case of an official who is entitled to the household allowance ... shall be paid to an established official ... who furnishes evidence of having been obliged to change his place of residence in order to comply with Article 20 of the Staff Regulations.

...

An installation allowance of the same amount shall be paid to any official who is transferred to a new place of employment and is thereby obliged to change his place of employment and is thereby obliged to change his place of residence in order to comply with Article 20 of the Staff Regulations.

...

1 — Translated from the German.

The installation allowance shall be paid on production of documents establishing the fact that the official, together with his family if he is entitled to the household allowance, has settled at the place where he is employed.

An official who is entitled to the household allowance and does not settle with his family at the place where he is employed shall receive only half the allowance to which he would otherwise be entitled; the second half shall be paid when his family settles at the place where he is employed, provided that it does so within the period laid down in Article 9 (3). Where the official is transferred to the place where his family resides before his family has settled at the place where he is employed, he shall not thereby be entitled to an installation allowance".

So far as the facts of the case are concerned it is necessary to state the following:

The applicant, who is a Netherlands citizen, resided in 1975 with his family in Brussels. He was employed in Brussels at the Commission as an official in Grade B 1 and was, as an official in the Directorate-General for Transport, seconded to the Secretariat of the Staff Committee, which comes under the Directorate-General for Personnel and Administration.

As from 1 August 1975 he was transferred *at his request* to the Joint Research Centre at Petten in the Netherlands. In this connexion a decision of the Director of Personnel was issued on 11 September 1975 to the effect that the transfer should be valid initially for a period of six months from 1 August 1975. At the applicant's wish the transfer was extended for a further six months, in other words until 31 July 1976, by decision of the Director of Personnel of 24 January 1976. Before the expiry of this period the applicant requested in a letter of 22 March 1976 to be permitted to return to Brussels. The reason he stated for this was that his private circumstances had become stable and that it was important for him to have more interesting work. This request was granted orally with the result that from 17 May 1976 the applicant was once more employed in Brussels. In this connexion a formal decision was issued by the Director of Personnel on 24 May 1976.

So far as the financial consequences of those measures is concerned, it must first be mentioned that as from 5 August 1975 — this was the date of his removal from Brussels to Petten — the applicant no longer received an expatriation allowance under Article 4 of Annex VII to the Staff Regulations of Officials in view of his Dutch nationality and of the fact that from thenceforth he resided in the Netherlands. The applicant was paid daily subsistence allowances for the period from 1 to 5 August 1975 as well as travel and removal expenses in respect of the removal to Petten. In addition, he was reimbursed for the costs of his removal from Petten to Brussels. On the other hand there were difficulties first of all concerning the installation allowance which the applicant claimed because he had rented a house in Petten and installed himself there — apparently with one child; his wife and one child stayed behind in Brussels. It was initially refused with reference to the fact that the transfer was to be valid for a period of six months only. It was however paid on 26 February 1976 when the extension of the transfer had been issued.

There were further difficulties concerning a second installation allowance which the applicant claimed on 31 May 1976 in respect of his removal back to Brussels from Petten. The applicant was refused payment thereof in a memorandum from the Head of the Individual Rights and Privileges Division of 30 June 1976. The refusal was also maintained, in a modified form, after the applicant had submitted a formal request on 16 September 1976 in accordance with

Article 90 of the Staff Regulations of Officials. In this connexion it was stated in a memorandum from the Director of Personnel of 21 January 1977 that this was in accordance with established administrative practive; installation allowances were never granted when the prospective length of a transfer was less than a year. The administration however declared that it was ready to reimburse expenses actually incurred and justified by supporting documents to the full extent of the installation allowance laid down in Article 5 of Annex VII to the Staff Regulations of Officials. This was not however done because the applicant was unable to produce the supporting documents required.

Thereupon he submitted a formal complaint to the appointing authority on 20 April 1977. As he received no reply to that complaint he finally lodged an application to the Court of Justice on 17 November 1977.

In the application the applicant requests that the Court should:

— Declare null and void the implied decision rejecting the administrative complaint submitted on 20 April 1977;

— Annul the decision of the Director of Personnel of 21 January 1977 in so far as it refuses the payment of a standard installation allowance;

— Rule that the applicant is entitled to an installation allowance from the date on which he settled in Overijse and order the Commission to pay that allowance; and finally

— Order the Commission to pay damages for the loss which the applicant has suffered and still suffers as a result of the fact that he was not paid the installation allowance on 17 May 1976, in other words order the Commission to pay interest at the legal rate on the installation allowance from the above- mentioned date.

I adopt the following viewpoint with regard to these claims:

The applicant relies in support of his point of view above all on the wording of Article 5 Annex VII to the Staff Regulations of Officials, which was quoted at the beginning. This provision sets out definitively the conditions for the grant of an installation allowance, in other words, transfer to a new place of employment and change of place of residence in order to comply with the duty of residence resulting from Article 20 of the Staff Regulations of Officials. So far as payment is concerned, it is provided merely that it is necessary to provide evidence that the person concerned has taken up residence; if this is the case, a standard sum is payable whilst expenses actually incurred should be irrelevant. In the applicant's case these conditions are all fulfilled, as results, first, from the last relevant transfer decision and, secondly, from the uncontested fact that he has rented a flat near Brussels (in Overijse). In addition, further considerations, for example taking into account the particular circumstances of his case, are irrelevant. In this connexion it is indeed necessary to acknowledge that the transfer may be ascribed to the applicant's personal wish. This is however unimportant because Article 7 of the Staff Regulations of Officials provides for transfer upon request and such a request need only be granted if it is also in the interests of the service. In addition, the applicant considers that it is incorrect to speak of a temporary transfer and to draw conclusions from this. In fact it must be said in relation to every transfer that it creates an uncertain state of affairs because such decisions can at any time be taken up again. So far as the Staff Regulations of Officials are concerned the determining factor is only the difference between a transfer, of whatever kind, in the case of which it is necessary to pay an installation allowance if there is a change of place of

residence, and a temporary absence from the place of employment on a travel order, in the case of which daily subsistence allowances must be paid because no new place of employment has been established. On the facts in the present case it is however impossible to speak of a *temporary transfer* since the applicant left Brussels without intending to return, gave up his flat in Brussels and was replaced in Brussels by another official. Finally, in the applicant's opinion the fact that he was no longer paid the expatriation allowance from the date on which he took up residence in Petten and that he was paid removal expenses under Article 9 of Annex VII and daily subsistence allowances under Article 10 of Annex VII is also important for the purpose of assessing his situation; in this connexion a change of place of residence in the interests of the service is also of decisive importance.

The Commission will not accept these arguments. It is true that in the proceedings before the Court the view that the important factor is the length of a transfer was not repeated, nor in fact can any support for it be found in the Staff Regulations. In any case the Commission is against a purely automatic and literal application of the provisions in question but considers that it is necessary to take into consideration all the circumstances of each individual case — principally for reasons of scrupulous use of public funds. Thus it might occur — and it is actually so in the present case — that a claim which is *prima facie* justified is finally rejected whether in reliance upon considerations of natural justice or by reference to the principle of misuse of rights. In the present case it is important in particular in this connexion that the transfer was *purely a measure taken in pursuance of the employer's duty of assistance* in respect of which there were *no considerations of the interests of the service.* It was necessary to remove the applicant from Brussels quickly — in this connexion the situation was understandably merely alluded to — because of family difficulties and to save him from imminent danger. For this purpose he was transferred with his post to Petten where there was no proper work for him but where however the existing security measures guaranteed him sufficient protection. Whilst transfer decisions are usually definitive in nature or their length is not at any rate linked to personal circumstances, in the applicant's case a measure was chosen which was limited in time, in other words a temporary transfer. This occurred because it was assumed from the outset that when the situation had eased the applicant would return to Brussels where the family connexions — his wife and one child remained in Brussels — had not been completely relinquished. This however happened before the end of the period envisaged: when the situation had eased, as expected, the transfer was terminated early, in other words in May instead of not until July 1976. The applicant did not however return to the family home in Brussels, solely because in the meantime the family had separated owing to the fact that divorce proceedings had been started. The installation allowance laid down in the Staff Regulations of Officials certainly does not however envisage the re-installation which has become necessary for a reason *such as that.*

So far as this dispute is concerned, it is appropriate first of all to refer to the purpose of the installation allowance, as follows from the general context of the allowances to be granted under the Staff Regulations of Officials. Their function is clearly to compensate to a certain extent for the expenditure which is as a rule connected with removal to a new home in the case of a change of place of residence made necessary in the *interests of the service.* In this connexion the *need* for reimbursement is presupposed — here the Commission correctly refers to Article 71 of the Staff Regulations of

Officials which speaks of costs *incurred;* however, in order to simplify administration, the extent of the costs incurred each time is not ascertained.

It is in my opinion clear in addition that if the function of the installation allowance and the other allowances to which the applicant has referred (daily subsistence allowances, removal expenses and expatriation allowance) is considered it is impossible to draw any compelling conclusions from the grant or refusal of one allowance as to the need to grant another allowance. This applies in particular with regard to the expatriation allowance which the applicant was able to receive when his place of employment was Brussels, but which had to be discontinued in his case in a place of employment in the Netherlands because of his nationality. It is necessary to make a corresponding assumption with regard to the grant of daily subsistence allowances until the change of place of residence and with regard to the payment of removal expenses.

On this basis I would however also emphasize that I do not consider as appropriate a virtually automatic application of the provisions of the Staff Regulations which adheres slavishly to the wording and in other words disregards their purpose and the particular circumstances of the individual case. The provisions of the Staff Regulation are obviously tailored to certain typical average situations. If circumstances occur which are very considerably different from those situations it must be possible, in the case of an enactment which naturally could not take into consideration all the slight variations in life, to take account of those circumstances, and, whether on the basis of general considerations of natural justice or in consideration of the concept of misuse of rights to refrain accordingly from an assumption which might seem obvious at first sight.

Thus in the present case the reasons for which the applicant was removed from Brussels almost precipitately — the transfer decision came only afterwards — and only for a specific limited period and those for which he was permitted to return early to Brussels where some of his family were still resident, are of great importance.

In this connexion the applicant himself admits that his transfer arose for personal reasons and that he was unable to do appropriate work in Petten. In addition his application for a re-transfer to Brussels expressly states that his private circumstances have become stable. All this indicates that the Commission's argument is correct that the transfer for a limited period was made for family reasons and not — as the applicant claimed in the proceedings before the Court — so that he could decide after a time whether the work in Petten interested him. In addition there are many indications that from the outset it was envisaged to permit the applicant to return as soon as possible to Brussels where, apparently, his wife remained with one child.

In these circumstances it is correct to arrive at an appropriate treatment of the event by reference also to a consideration expressed in Article 5 (4) of Annex VII of the Staff Regulations of Officials in the sentence which provides as follows: "Where the official is transferred to the place where his family resides before his family has settled at the place where he is employed, he shall not thereby be entitled to an installation allowance". In fact it is obvious that the applicant could have acted in accordance with the principle contained in this provision. Such a solution — a return to the family home — was out of the question for him solely for purely personal reasons, in other words, because in the meantime the family had apparently separated owing to the fact

that divorce proceedings had been started. In such a case it seems to me however to be quite justifiable for the applicant's employer to refuse allowances from the Community budget in the form of an installation allowance in view of the fact that they had very little or nothing to do with compensation for expenditure which had arisen in the *interests of the service.*

Without it appearing necessary further to clarify the circumstances of the case I can therefore state that the Commission, which was concerned only to use public funds appropriately, correctly refused the applicant's claim for a second standard installation allowance on his return to Brussels after the termination of his temporary transfer from Brussels to Petten.

I therefore conclude that the application should be dismissed in its entirety as unfounded and that a decision on costs should be made in accordance with Article 70 of the Rules of Procedure.