OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 15 June 1988 *

Mr President,
Members of the Court,

1. This dispute concerns the conditions governing the application of the weighting to the allowance granted on the basis of Council Regulation (ECSC, EEC, Euratom) No 1679/85 of 19 June 1985 introducing special and temporary measures to terminate the service of certain officials in the scientific and technical services of the European Communities (Official Journal 1985, L 162, p. 1).

The facts of the case. In December 1986, Mr Oskar Schäflein, who was employed at the Joint Research Centre in Ispra, was considered to be eligible for early retirement from the service for the purposes of that regulation. In calculating the allowance granted to him for January 1987, the Commission applied the weighting for Switzerland, but subsequently informed him that, as from the following month, it would apply the weighting for Italy since it did not appear that the applicant had transferred his main residence to Switzerland. Once again that measure proved to be short-lived. Following a meeting in February between Mr Schäflein and officials of the Commission, the relevant department determined that the weighting of 100 should be applied until the applicant had decided where he was going to live.

The applicant was dissatisfied with that solution and submitted a complaint (in April 1987) against the fact that his salary for February had been calculated on the basis of the weighting for Italy. The Commission did not react. However, it withheld from the allowance for April the sum of SFR 3 054.87 being the amount which, in its view, the applicant had been overpaid in January when the weighting for Switzerland was applied.

By an application lodged at the Court Registry on 24 September 1987, the applicant contested the salary statements for February and March 1987 and requested the Court (a) to annul the Commission's calculation of the sums owed to him, (b) to declare that as from February 1987 he is entitled to an allowance adjusted by the weighting for Switzerland, and (c) to order the Commission to pay him the difference between the sums paid and the sums owed, including the sum of SFR 3 054.87 which it had deducted from the allowance for April.

2. The issue which the Court is called upon to resolve is whether, at the time when he lodged his official complaint (15 April 1987), the applicant was able to show proof that he was resident in Switzerland. Article 3 (3) of Regulation No 1679/85 provides that 'the allowance . . . shall be adjusted by the weighting fixed for the country inside or outside the Communities in which the recipient *proves that he is resident*' (emphasis added).

* Translated from the Italian.

The applicant claims to reside in Massagno (Canton of Ticino) and, in support of that contention, has produced: (a) a statement from the population bureau of that municipality issued on 5 February 1987 to the effect that he 'owns a secondary apartment in 20 via al Roccolo which he occupies consecutively for periods of less than three months but not exceeding six months in aggregate over a period of 12 months'; (b) two invoices relating to his apartment, namely the telephone bill for the period from 17 October to 16 December 1986 and the electricity bill for the period from April to September 1986, and (c) two statements made by his brother Rudolf and an acquaintance in Darmstadt respectively which are to the effect that Switzerland is the centre of the applicant's interests and that, when he lives in his brother's apartment in Gerbrunn (Federal Republic of Germany), he has the use of only one room there.

According to the applicant, those documents show that he has established his residence in Switzerland, where he owns an apartment the running costs of which, including the housekeeper's salary, absorb a large part of his income. The fact that he does not spend more than six months of the year there and spends the other six months with his brother is the result of Swiss law. As is well known, Swiss law prohibits foreigners aged under 60 from residing in Switzerland for periods longer than six months.

3. The Commission takes the opposite view. It points out in the first place: (a) that for pensioners living in Switzerland proof of residence must be provided by way of an official document (residence permit) the issue of which has never given rise to difficulties; (b) that the applicant has not in any event asked the Commission to intercede with the Swiss authorities in order to request the grant of a permit of that kind; and (c) that the documents produced by the applicant are not sufficient to support his contention and merely show that, even before he left the service, he had a 'secondary' residence in Massagno.

More generally, the defendant points out that, by resorting like Article 82 of the Staff Regulations of Officials to the expression 'his residence', Article 3 (3) [1] of Regulation No 1679/85 proceeds from the premiss that people reside in a single place. Accordingly, if a pensioner has more than one home, the Commission considers that person to be resident in the place in which he lives for at least 185 days per year. Moreover, that procedure is in conformity with the rule laid down by certain provisions of secondary legislation that are not applicable to the public service. For instance, Article 7 (1) of Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another provides that '"normal residence" means the place where a person usually lives, that is for at least 185 days in each calendar year, because of personal and occupational ties . . . ' (Official Journal 1983, L 105, p. 61; see also Article 6 of Council Directive 83/183/EEC of 28 March 1983 on tax exemptions applicable to permanent imports from a Member State of the personal property of individuals, Official Journal 1983, L 105, p. 64).

According to the Commission, the applicant has produced no proof of *residence* in Switzerland for the minimum period required. He may well live in his apartment for a total of 185 days, but the provisions which forbid him to remain in Switzerland for more than three consecutive months require him to interrupt that period in a manner which is incompatible with the concept of residence.

1 — Translator's note: the expression used in Article 3 (3) is 'the country in which . . . he is resident'.

4. The Commission's argument cannot be accepted. In the first place, I would point out that, according to the case-law of the Court, a person resides in the place in which he has established, with *animus manendi*, the 'permanent' or 'habitual' centre of his interests (judgment of 12 July 1973 in Case 13/73 *Angenieux* v *Hakenberg* [1973] ECR 935, and judgment of 17 February 1977 in Case 76/76 *Di Paolo* v *Office national de l'emploi* [1973] ECR 315). I would also point out that the place of residence cannot be determined on the basis of the purely quantitative factor of the time spent by the person concerned in the territory of one country or another, with the result that the country in which that person spends most of the year is recognized as the State of residence. From that point of view, recourse to a minimum period of 185 days, which, for one thing, is prescribed for situations that are utterly different from the one under consideration, is not suited to a situation governed by a provision (Article 3 (3) of Regulation No 1679/85) which is devoid of any reference to time.

As Mr Advocate General Trabucchi stated in his Opinion in Case 13/73 ([1973] ECR 953, at p. 960), in order to determine the place of residence in cases where the link between the person's life and the territory is not clear, 'use must be made of yardsticks which help to identify the link over and above the purely physical factor of time if the factors of appearance, a degree of permanence, intention and so on are not also present'. Residence is not based simply on the actual fact of living in a given place. It also involves the intention of thereby achieving the continuity which stems from a stable way of life and from the course of normal social relations. From that point of view, therefore, the passage of a certain period of time can at most constitute an indication of residence; it is by no means a constituent element thereof.

Turning to this case, I consider that the documents produced by the applicant when he lodged his complaint constitute sufficient proof of the fact that he is resident in Switzerland. Quite apart from the adjective used by the Swiss authorities to describe his apartment ('secondary') and the temporal limits within which they authorize him at this stage of his life to remain in Switzerland, it seems indisputable to me that, when he left the service, the applicant established the permanent centre of his interests in that State. It is noteworthy, incidentally, that the Commission acknowledges that it was aware of the applicant's removal to Massagno in 1981.

5. In the light of the foregoing considerations I propose that the Court uphold the action brought on 24 February 1987 by Mr Oskar Schäflein against the Commission of the European Communities and, accordingly:

(a) annul the applicant's salary statements for February and March 1987;

(b) declare that as from February 1987 the applicant is entitled to have the weighting for Switzerland applied to the allowance granted to him under Article 3 of Regulation No 1679/85;

(c) order the Commission to pay the applicant the difference between the allowance which was actually paid to him and the allowance to which he would be entitled as a result of the calculation of the sums owed to him on the basis of that other weighting.

I also propose that the unsuccessful party be ordered to pay the costs.