OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 3 FEBRUARY 1976

My Lords,

The applicant in this case, Mr Jean-Louis Delvaux, is and always has been a Belgian national. He has however lived for a number of years in Denmark and says that he has applied for Danish nationality. He works in the Danish Division of the Translation Service of the Commission in Brussels, translating into Danish. He entered the service of the Commission as a member of the temporary staff on 16 July 1974. Subsequently, after having been successful in a competition, he was appointed, as from 1 January 1975, to a post in Grade LA/7 as a probationary official. I imagine that he is by now established.

At the time when the applicant entered the service of the Commission he made representations to the effect that, having regard to his past residence in Denmark, his remuneration should include an expatriation allowance. Your Lordships will remember that Article 4 (1) of Annex VII to the Staff Regulations provides that an expatriation allowance shall be paid:

(a) putting it shortly, to officials who are not and never have been nationals of the State where they are employed and did not during the five years ending six months before they entered the service reside or mainly work within the European territory of that State, there being ignored for this purpose circumstances arising from work done for another State or for an international organization; and

'(b) to officials who are have been nationals of the State in whose territory the place where they are employed is situated but who during the ten years ending at the date of their entering the service habitually resided outside the European territory of that State for reasons other than the performance of duties in the service of a State or of an international organization' (OJ C 12 of 24. 3. 1973)

Articles 19 to 21 of the Conditions of Employment of other servants of the Communities render those provisions applicable 'by analogy' to temporary staff.

The applicant's claim to an expatriation allowance, which was of course founded on paragraph (b) of Article 4 (1) as thus made applicable to temporary staff, was rejected by the Directorate-General of Personnel and Administration of the Commission by a letter dated 9 August 1974.

Against the rejection of his claim the applicant submitted a complaint under Article 90 (2) of the Staff Regulations on 23 September 1974. This complaint was registered at the Secretariat-General of the Commission on 2 October 1974. The Commission did not reply to it within the four-month period prescribed by Article 90 (2). On 29 April 1975 the applicant commenced the present action appealing against the implied decision rejecting his complaint.

A procedural complication arises because in the application alternative claims were made on behalf of the applicant according to whether the date of his 'entering the service', for the purpose of computing the ten-year period that is relevant under Article 4 (1) (b), should be taken to have been 16 July 1974 (when he became a member of the temporary staff) or 1 January 1975 (when he became a probationary official). It seems that a doubt as to this arose in the mind of the applicant as a result of some words

contained in the Opinion of Mr Advocate-General Mayras in Case 33/72 *Gunnella* v *Commission* [1973] ECR 475 at pp. 487-488. The doubt, though perhaps understandable, seems to me unjustified. Mr Advocate-General Mayras was not there concerned with a case of a person entering the service of the Communities as a member of the temporary staff and subsequently becoming an official. Melle Gunella had never been anything but an official and it is, I think, clear that in that context Mr Advocate-General Mayras was merely contrasting initial appointment with subsequent transfers and with return into employment after a period of special leave.

In the case of a person entering the service of the Communities as a member of the temporary staff and subsequently becoming an official, it is in my opinion beyond question that the relevant date is that of his first entering the service as a member of the temporary staff. If, on the facts as to his residence in the ten years before 16 July 1974, the present applicant was entitled to an expatriation allowance while he was on the temporary staff, he could not lose the right to such an allowance by becoming an official. Conversely, if those facts were not such as to entitle him to an allowance, he could not become entitled to one on becoming an official by counting in the relevant ten-year period the time spent by him on the temporary staff.

Although the problem thus raised on behalf of the applicant is therefore in my opinion non existant, the discussion of it in the pleadings has resulted in the applicant asking that this action should be treated as limited to the period during which he was a member of the temporary staff and in his introducing another action, Case 107/75, dealing with the period from 1 January 1975. That action has in effect been stayed pending Your Lordships' decision in this action.

There is no dispute between the parties as to the facts of the case, except perhaps as to the whereabouts of the applicant in the first four days of the relevant ten year period, that is to say from 16 to 20 July 1964.

The applicant was born in Louvain on 20 August 1945. He was at school in Belgium from 1951 to 1963. At some time in 1963 he attended a course in Strasbourg where he met a Danish girl, Else Margrethe Pade. They became engaged and it was agreed between them that the applicant would go to live in Denmark.

In 1963/64 the applicant studied at the University of Ghent.

In early July 1964 Miss Pade went to Brussels and in mid-July she and the applicant left Brussels together for Denmark, where, as is shown by an entry in his passport (Annex 1 to the Defence), they arrived on the 20. It is stated on behalf of the applicant, but not admitted on behalf of the Commission, that they hitch-hiked through Germany and then caught a ferry from a German port, and that the date of their departure from Brussels was 16 July. It is also said on behalf of the applicant that his parents would be able to give evidence to that effect. I do not, my Lords, think that it will be necessary to call them. I am content to assume in the applicant's favour that he and Miss Pade did leave Brussels on 16 July.

The applicant stayed in Demark until 24 August 1964. While he was there he explored possibilities of his pursuing his studies and eventually settling there.

From Denmark he returned to Belgium, where he approached the authorities to see whether he could be excused military service or at least have his call-up advanced. While awaiting his call-up, that is from September 1964 to April 1965, he worked in a shipping firm in Antwerp belonging to a friend of his family. It is stated on his behalf that while there he had no contract of

employment and received only pocket-money. At all events he interrupted his work there to visit Denmark again from 13 December 1964 to 23 January 1965 and from 10 April to 1 May 1965.

On 1 May 1965 he joined the Belgian army to do his military service. He elected to serve outside Belgium, which, I understand, earned him a reduction in the length of that service from 15 months to 12. He served first at Düren in Germany and then, from 8 September 1965 to 25 April 1966, at SHAPE, which was at that time at Rocquencourt in France. During his military service he spent short periods of leave in Denmark. On 7 April 1966 he married Miss Pade, but we do not know where. There is no trace in his passport of a visit to Denmark at that date.

After his release from the army he stayed for 11 days in Belgium. On 8 May 1966 he went to Denmark, where he then settled. He studied at Copenhagen University and subsequently found employment in Denmark in various capacities. On 1 October 1966 a child was born to him and his wife. On 17 April 1972 they were divorced, but he remained in Denmark.

The applicant arrived back in Brussels, to take up his appointment with the Commission on 13 July 1974.

He says that his principal residence is still in Denmark. He does not specify what it consists of but says that, in Brussels, he merely rents a furnished flat.

The question is whether, on those facts, the applicant should be regarded as having habitually resided outside Belgium for the 10 years preceding 16 July 1974.

The Commission concedes, and I think rightly, that he should be regarded as having so resided for the period 8 May 1966 to 16 July 1974. The questions at issue between the parties relate to the earlier period.

At the hearing, the Court was invited by Counsel to decide those questions on the basis only of the French text of the Staff Regulations, the reason being, I understand, that in certain of the other texts, in particular the German and the Danish, the reference to habitual residence is in terms that connote a more permanent establishment than do those of the French text 'a, de façon habituelle, ... habité'. I have, for the reasons that I shall state, come to the clear conclusion that, even on the basis of the allegedly more liberal English and French texts, the applicant is not entitled to claim that he habitually resided outside Belgium during the period 16 July 1964 to 8 May 1966. I need not therefore take up Your Lordships' time with a discussion of the expressions used in the other texts to connote habitual residence.

I must, however, voice my protest against the suggestion that, in a case under the Staff Regulations, this Court can shut its eyes to all but one of the six authentic texts. Indeed the dangers of doing so are illustrated by some of the arguments that we have read and heard in the present case. Those arguments centred on the dual meaning in the French language of the word 'dépaysement', which is the equivalent, in the French text of Article 4, of 'expatriation' in the English text. 'Dépaysement' has a subjective sense and an objective sense. In its subjective sense its connotes a feeling of not being at home. In its objective sense it connotes the fact of living abroad. A glance at the English text of Article 4 is enough to show that, in that Article, 'dépaysement' must be interpreted as having only its objective sense, for 'expatriation' cannot be used in English in an subjective sense. It means 'dépaysement' only in its objective sense. I do not overlook that in its Judgments in Cases 21/74 and 37/74 *Airola* v *Commission* and *Van Den Broeck* v *Commission* [1975] ECR 228

and 244 the Second Chamber stated that 'expatriation' is a subjective state'. With all respect to the Second Chamber, that is an impossible proposition, though the French equivalent 'le "dépaysement" est une situation subjective' (Rec. 1975 at pp. 228 and 244) is, as a matter purely of language, acceptable. I understand that the equivalents of 'expatriation' and 'dépaysement' in the Danish and German texts of Article 4 have the same purely objective sense that 'expatriation' has, whilst the Dutch and the Italian equivalents are susceptible of bearing the dual meaning of 'dépaysement'.

In the result we are not here concerned at all with the question whether the applicant felt more at home in Belgium or in Denmark but only with the question whether he resided outside Belgium during the period in issue.

It is, I think, clear that that period falls into two parts, first the period 16 July 1964 to 1 May 1965 before the applicant joined the army, and second the period of his military service.

I find it convenient to start by dealing with the latter.

As to this the Commission points out that, according to Article 4 (1) (b), the applicant's residence outside Belgium must, in order to be taken into account, have been 'for reasons other than the performance of duties in the service of a State or of an international organization'. The Commission submits that the applicant's service in the Belgian army, including the period he spent at SHAPE, comes within these excepting words.

On behalf of the applicant, it is argued that this exception refers to service in the non-European territory of the State concerned, or to the performance of their duties by diplomats or persons holding similar positions, and cannot include duties imposed upon a person by law, such as military service. My Lords, I can see no justification for such a restrictive interpretation and at least two good reasons for rejecting it. Firstly, I do not think it would be possible to draw a sensible line between 'voluntary' and 'compulsory' service: for instance, on which side of the line would the case fall of a soldier who was not a conscript but who was posted abroad? Secondly, the adoption of such an interpretation for the purposes of Article 4 (1) (b) would entail the adoption of a corresponding interpretation of the converse exception in Article 4 (1) (a), where it could lead to absurd results.

I am therefore of the opinion that the applicant's period of military service cannot be treated as a period of habitual residence outside Belgium. It might I think have been different if, before beginning his military service, he had acquired a settled abode in Denmark to which he had returned at the end of that service. It might then have been argued on his behalf that the performance of his military duties was not the reason for his residence outside Belgium, in that he would have been so resident anyway. But, as the applicant has himself stated on three occasions (first in the curriculum vitae that he supplied to the Commission at the time of his application to join its staff (Annex 2 to the Defence), second in his complaint dated 23 September 1974 (Annex 1 to the Application) and third in a letter that he wrote on 12 February 1975 supplementing that complaint (Annex 5 to the Defence)), he did not actually settle in Denmark until after completing his military service.

I turn to the question whether the applicant can be regarded as having habitually resided outside Belgium in the period 16 July 1964 to 1 May 1965, though this question must logically be immaterial if he cannot be regarded as having so resided between May 1965 and May 1966.

It appears that 'habitual residence' and its equivalents in the other authentic texts

of the Staff Regulations are not expressions that have any technical meaning in any of our national legal systems. So far as English law is concerned, whilst the phrase 'ordinary residence' has acquired a highly technical meaning in revenue law, the epithet 'habitual' is more often applied to drunkards than to residence. In his Opinion in the *Gunnella* case [1973] ECR 486) Mr Advocate-General Mayras did suggest that the concept of habitual residence might possibly require interpretation, but I do not feel called upon to attempt a definition of it in this case. It seems to me that habitual residence is, rather like an elephant, easier to recognize than to define. I will say only that, in my opinion, in order to ascertain whether a person has been habitually resident in a particular place during a particular period, one must ascertain to what extent he has been present there during that period and then ascertain the reason or reasons for that presence.

In the course of argument, Counsel referred to dictionary and even theological definitions of the words 'habiter' and 'habituelle' appearing in the French text of the Regulations, but in fact the meaning of the phrase did not appear to be the subject of any serious dispute between them. They were agreed that one can be habitually resident in a country without being there constantly. They were also agreed that short and episodic stays cannot be regarded as habitual residence. The dispute between the parties relates rather to the application of the concept to the facts of this case.

The argument put forward on behalf of the applicant, as I understand it, is that his trips to Denmark, beginning in July 1964, were part of a continuing course of conduct resulting from his intention to live in Denmark and which culminated in his settling in Denmark in May 1966. The argument is that the periods that he spent in Denmark represented his habitual residence, and that the periods that he spent in Belgium are to be regarded as having been brief and episodic. The Commission, on the other hand submits the opposite: that the applicant was habitually resident in Belgium, but making brief and episodic trips to Denmark.

My view is that what matters is the reasons for which the applicant went to Denmark during the period in question. After all, he had his roots in Belgium and, for a substantial part of that period, he worked in Antwerp. So there is a heavy onus on him to show that the reasons for his presences in Denmark were such as to give to those presences the quality of residence.

We know, largely from an affidavit sworn by his former wife and put in on his behalf (by way of Annex to the Reply), that the purpose of his first trip to Denmark was to investigate the possibilities of his studying there and living there. There is no evidence at all about the reasons for his subsequent trips, though they may have had in part the same purpose as the first and it is reasonable to infer that one at least of his objects in making them was to visit his financée.

To go to a country to investigate the possibilities of studying there and living there is in my opinion consistent with residence there later, that is to say when those possibilities have been realised, but it is not consistent with residence there at the time of the investigations themselves. To go to a country to visit one's fiancée is understandable, indeed laudable, but it does not of itself constitute residence in that country.

I do not therefore think that the applicant can be regarded as having been habitually resident outside Belgium at any time before May 1966.

Article 4 (1) (b) however requires that, in order for him to be entitled to an expatriation allowance, he should have had his habitual residence abroad for the whole of the 10 year period before his entry into the service of the Communities. Eight years and some months are not enough.

In the result, I am of the opinion that this action should be dismissed.