On those grounds,

THE COURT (First Chamber)

hereby:

1. **Dismisses the application;**

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

Bosco Donner O'Keeffe

Delivered in open court in Luxembourg on 9 March 1978.

A. Van Houtte
Registrar

G. Bosco
President of the First Chamber

OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 16 FEBRUARY 1978 [1]

Mr. President,
Members of the Court,

Mr Antoon Herpels, of Belgian nationality, born in Wevelgem on 24 January 1933, entered the service of the High Authority of the ECSC in Luxembourg in September 1961 as probationer official in Grade A 8. Before that he had lived for two years in the conurbation of Brussels at Ixelles. He had in fact worked first as a journalist with the Belgian Dutch-language radio and television and then as press attaché to the Prime Minister's office in Brussels.

He was married on 14 November 1959 and registered in the commune of Ixelles where he also registered the birth of his first child on 4 January 1961.

Thus his family residence prior to his employment by the High Authority was without any doubt Ixelles. Nevertheless, the applicant procured a certificate of residence and nationality from the Mayor of Wevelgem, the town where his parents still lived. That certificate, dated 19 September 1961, states that the applicant has resided at Wevelgem since 15 September 1961. He took up his employment in Luxembourg on 18 September 1961.

1 — Translated from the French.

In any case, whether regard had been had to his prior effective residence at Ixelles or his place of origin at Wevelgem, since Mr Herpels was posted to Luxembourg he was lawfully entitled to the so-called separation allowance, subsequently replaced by the expatriation allowance.

It was when he was transferred to Brussels in June 1968, to the seat of the Commission, that the problem of the withdrawal of the expatriation allowance ought in the normal course of events to have arisen, in view of the provisions in force at the time, which I shall consider later. But payment of that allowance was continued: there are two hypotheses which may explain this. Either the Commission wrongly considered that his effective place of residence before taking up his duties with the High Authority was Wevelgem, a place more than 25 kilometres from Brussels, the place of his new posting, or (and this is the more likely) there was a confusion between the applicant's "place of origin", that is to say Wevelgem, and his "place of residence" at the time of his engagement, that is to say Brussels, since these two particulars were at all times included in the applicant's file from 1968 to 1976. The continued payment of the expatriation allowance was therefore due to a material error on the part of the Commission.

That situation might well have continued if an examination by the Directorate General for Financial Control had not revealed the irregularity of this aspect of Mr Herpels' financial position and resulted in a refusal by the Directorate to sanction it.

That is why, by memorandum dated 19 January 1976, the head of the "Individual Rights and Privileges" Division informed the applicant that the amount of the expatriation allowance would cease forthwith to be paid to him. The payment of the allowance was suspended for January and February 1976 but was paid into a suspense account. It was only from March 1976 that the allowance ceased to be entered on the applicant's pay slip.

As from that time the pre-litigation stage began when Mr Herpels made complaints and there were two successive answers by the Commission.

To start with, on 7 April 1976 the applicant submitted his first complaint, registered on 12 April, under Article 90 (2) of the Staff Regulations in which he claimed the annulment, that is to say the retroactive withdrawal, of the original decision stopping the expatriation allowance.

At the same time however, very precisely on 8 April, the Director General for Personnel and Administration informed the applicant after reconsidering the matter that he was confirming the original decision to withdraw the allowance but had decided to grant him a differential allowance *ad personam* intended to compensate for the loss of the expatriation allowance until it was absorbed by future increases in salary.

On 28 June 1976 the applicant submitted a second complaint against that decision claiming the annulment of the decision of the Director General.

Finally, on 27 January 1977 the Commission itself sent Mr Herpels an answer to his two successive complaints, signed by one of its Members. That answer confirms the previous decisions but states that the progressive statement of the differential allowance would be proportional to increases only of salary and not to any increases which might be occasioned by increased family responsibilities.

Following this last and express decision the applicant brought an action before the Court of Justice on 26 April 1977.

To this action the Commission makes objection on general grounds of

inadmissibility arising, in its view, from the time-limit under the provisions of Article 90 of the Staff Regulations.

The defendant bases itself on the fact that only the original decision of 19 January 1976 was of a decisive nature and adversely affected the applicant. That decision, which was taken by the head of the "Individual Rights and Privileges" Division, was immediately executed by the suspension of the expatriation allowance; Mr Herpels submitted a complaint against that decision within the time-limit laid down by Article 19.

In the absence of an answer from the Commission that complaint was rejected by implication on 12 August 1976 and the applicant should have brought the matter before the Court at the latest on the following 12 November, that is to say within three months. Accordingly his application registered only on 27 April 1977 is out of time and as such inadmissible.

I cannot adopt that reasoning. It disregards first of all the fact that on 8 April 1976, that is to say even before the first administrative complaint was registered, the Director General for Personnel and Administration, after a thorough re-examination of the applicant's position, did not confine himself to confirming the decision of the competent head of division, but took a new decision awarding Mr Herpels a differential allowance on a personal basis.

The two elements of that decision appear to me inseparable. Accordingly the decision is not purely confirmatory in character, but introduces a new element of such a nature as to prolong the period during which application could be made to the Court and also to allow the applicant to submit a further complaint under Article 90 of the Staff Regulations, which he did not fail to do, the new complaint being registered on the following 30 June. Even accepting that the second complaint was submitted "in so far as is necessary" and "without prejudice" to the first, the fact is that it was directed against the decision taken after a re-examination by the Director General for Personnel and Administration. Accordingly the effect was to reopen the period during which application could be made to the Court until 30 January 1977.

On 27 January, that is to say before the expiry of that period, the Commission itself, as we know, after referring to the dispute proceeded to re-examine the applicant's claim and altered to his advantage the conditions of grant of the differential allowance which had been awarded to him.

Accordingly the application brought before the Court on 26 April 1977, that is less than three months after that express decision of the Commission, appears to me admissible.

We can therefore proceed to consider the substance of the action postponing, for the moment, consideration of the claim for Bfrs 15 000 in respect of lawyer's fees incurred during the period prior to action.

First it is necessary to analyse the contested decisions in so far as they terminate payment of the expatriation allowance. The decisions did not withdraw the allowance retroactively; they merely revoked it, that is to say they terminated it for the future.

Having regard to the first claim in the application it must be considered whether such revocation was legal. The first claim is based on an alleged infringement of the fourth paragraph of Article 97 of the Staff Regulations of Officials of the European Coal and Steel Community, under which the applicant was entitled on his posting to Brussels to retain the benefit of the expatriation allowance which he had received while posted to Luxembourg.

That provision, continued in force by the final paragraph of Article 2 of the regulation of the Council of the three Communities dated 29 February 1968, provides: "Where as a result of an alteration in his place of employment an official established under Article 93 [of the new Staff Regulations] no longer fulfils the conditions laid down in Article 4 of Annex VII for receiving the expatriation allowance, he shall nevertheless continue to receive that allowance if the former Staff Regulations of Officials of the European Coal and Steel Community entitled him to the separation allowance".

It is not disputed that that provision applied to the applicant who is a former official of the European Coal and Steel Community, but it is also necessary that the former regulations should have entitled him to continued payment of the expatriation allowance.

On this issue I think the Commission's argument should be adopted.

The case must be decided on the basis of Article 9 of the former General Regulations of the Coal and Steel Community of 1956, which provides in particular:

"(b) officials who as a result of a new posting take up residence less than 25 kilometres from the place where they resided before their entry into the service lose the right to the allowance provided for in paragraph (a)",

that is to say the separation allowance, subsequently termed the expatriation allowance.

Article 47 of the Staff Regulations of Officials of the Community to which that implementing provision refers states that the separation allowance shall be granted to officials who before they took up their duties (with the Community) resided continuously for more than six months in a place more than 25 kilometres from the seat (of their employment).

The effect of those provisions taken together is that since his transfer from Luxembourg to Brussels in 1968 the applicant could not legally claim that his expatriation allowance should continue unless his residence during the six months prior to his entry into the service of the High Authority in September 1961 was more than 25 kilometres from Brussels (his place of work), since the place of employment, both under Article 20 of the Staff Regulations of Officials of the European Communities and under Article 47 (3) of the Staff Regulations of Officials of the European Coal and Steel Community, should alone be taken into account.

The facts to which I referred at the beginning of my opinion lead to the conclusion that the personal and family residence of the applicant was in Brussels, first of all from the end of his studies in 1959 and when we started work with the Belgian Dutch-language Radio and Television Network, and then in the Prime Minister's office. The fact that he established his family home in Ixelles, a locality in the Brussels conurbation, in any event as from his marriage, in no way altered the situation. The documents in the file completely confirm this: it was in Ixelles that in accordance with national law he entered his name in the population register; his first child was born in that locality.

That position lasted some two years, that is to say much longer than the period of six months referred to in Article 47 of the former Staff Regulations, and it was only when he was posted to Luxembourg, because of his recruitment by the European Coal and Steel Community that the applicant left the conurbation of Brussels. He had thus effectively lived, during the period prior to his recruitment, less than 25 kilometres from the place of his new employment in 1968.

Against this evidence based on incontrovertible facts, Mr Herpels confines himself to putting forward a certificate showing that he was entered in the population register in the locality of Wevelgem, situated more than 25 kilometres from Brussels; however, as we already know, all that is proved by that certificate, dated 19 September 1961, that is to say at a date when the applicant had already taken up his duties in Luxembourg, is that he lived at Wevelgem for some days before going to the place of his first employment.

In reality he caused himself to be registered at the home of his parents and, although Wevelgem must be regarded as his place of origin, there is no doubt that that locality had not been or for two years was no longer the place where he actually resided any more than the place of his employment.

Even accepting that Mr Herpels wished to emphasize his intention of retaining a link with his place of origin and maintaining his ties in the locality where his parents lived such a bare intention cannot prevail against abundantly established facts from which it appears that his effective residence had been since 1959 in the conurbation of Brussels.

Accordingly, in view of the provisions cited he could not legally claim that his expatriation allowance should continue upon his transfer to Brussels in 1968. Continued payment of it was irregular. It is to be explained only by a material error on the part of the Commission.

It is nevertheless true that in a "memorandum for the file" from the High Authority of the European Coal and Steel Community in Luxembourg dated 28 September 1961, reference No E 3 (and not 4 October 1961 as was stated at the hearing), only the *"place of origin"* of the applicant is expressly referred to as being at Wevelgem. There is no reference in that memorandum to his place of residence before his recruitment.

The applicant's advisers see this as proof that according to the Staff Regulations of 1956 applicable to officials of the European Coal and Steel Community the place of origin and the place of residence prior to recruitment meant the same thing.

They claim that it was only with Regulations Nos 11/62 and 31/62 of the Council laying down the general staff regulations of officials of the three Communities that a distinction was made between the place of origin and the place of recruitment, defined as being the place where the person concerned was normally resident when he took up his appointment. That distinction was clarified in staff memorandum No 212 of 14 April 1965.

Then in 1968 a staff notice dated 16 September stated that the place of origin is only presumed to be the place of recruitment, which is the place where the person concerned was normally resident when he took up his appointment.

In the present case it is alleged that it is necessary to have regard only to the Staff Regulations of 1956 and to conclude that in 1961 the High Authority could properly regard the applicant's place of origin, that is Wevelgem, as being also his normal residence and the centre of his interests within the meaning of the former regulations.

Although this reasoning may be sound as regards the grant of the separation allowance when Mr Herpels was recruited by the High Authority in Luxembourg in 1961, it cannot apply when he was transferred to Brussels in June 1968 under the Staff Regulations of 1968. Officials of the European Coal and Steel Community who are established under Article 93 of those Staff Regulations retain the benefit of the expatriation allowance "if application of the former Staff Regulations of the European Coal and Steel

Community entitled them to the separation allowance". But as I have said, Article 47 of the Staff Regulations states that the separation allowance shall be paid only to officials who before they took up their duties resided continuously for more than six months in a place more than 25 kilometres from the seat of their employment. On this hypothesis the concept of place of origin is thus no longer relevant. The sole criterion is the normal residence for more than six months before recruitment.

This means that the memorandum of 28 September 1961 put into the applicant's personal file and referring only to his place of origin cannot affect the outcome of the case.

It is now necessary to consider the second and third claims in the application, based on infringement of a "vested right" and frustration of "legitimate expectation". In this respect it is essential to make a distinction, as I have said, between *revocation*, that is to say the abrogation for the future of a benefit improperly granted, and retroactive withdrawal of such a measure.

Although withdrawal of an illegal measure is subject under national case-law to a temporal condition, whether it be a time-limit for bringing an action or a reasonable period, on the other hand the mere revocation of a benefit improperly granted is not subject to any condition of that kind. The Community case-law in this respect is contained in three judgments.

In the first place, in the judgment in Joined Cases 7/56 and 3 to 7/57, *Algera and Others* ([1957] ECR 39) the Court recognized the principle of revocation (that is to say withdrawal of an unlawful administrative measure) where "the absence of an objective legal basis for the measure affects the individual right of the person concerned and justifies the revocation of the said measure", but the Court made such retroactive withdrawal subject to a time-limit.

In Case 15/60, *Simon* ([1961] ECR 115), which dealt precisely with the stopping of a separation allowance previously paid to the applicant, in a situation very close to the present case, the Court made clear its position as regards not the annulment but the mere revocation of an unlawful individual measure.

The Court expressly decided that: "If the administrative authority becomes aware that a certain allowance has been granted as a result of a wrong interpretation of a legal provision it has the power to amend the previous decision ... Even if in certain cases in view of vested rights withdrawal on grounds of unlawfulness does not have a retroactive effect it always takes effect from the present."

That recognized that the revocation or abrogation as regards the future of a benefit improperly granted was always possible without any time-limit.

That distinction was restated recently in the judgment of 24 June 1976 in Case 56/76, *Elz* ([1976] ECR 1097). The applicant challenged the refusal to maintain a benefit previously granted for eight years. The Court decided that "The immediate withdrawal [that is the revocation] of such a benefit based on a situation which is not in conformity with the Staff Regulations cannot infringe the principle that vested rights must be respected."

Pursuant to this case-law I agree with the Commission in saying that no right acquired in an intangible manner can derive from an irregular measure and that the requirement of a reasonable period can apply only in the case of retroactive withdrawal.

Likewise, I think that the fact that payment of the expatriation allowance to Mr Herpels was irregularly continued for more than seven years

cannot deprive the administration of the right to terminate it, whether the situation arose as a result of administrative forebearance or negligence or whether it was the result of an irregular measure having regard to the relevant provisions of the Staff Regulations.

It remains for me to consider the admissibility and, subject thereto, the validity of the claim in the application for Bfrs 15 000 in respect of legal costs which the applicant incurred prior to instituting proceedings, that is to say for the purpose of substantiating the complaints which he made to the Commission.

This claim is made for the first time in the application to the Court. It appears neither in the first nor in the second complaint through official channels. It has no direct connexion with the main claim for the continued payment of the expatriation allowance. It constitutes a new claim based on a distinct legal ground. Therefore, since the procedure laid down in Article 90 has not been followed, the claim for the costs is not admissible.

If the Court does not take this view it is necessary in my opinion to dismiss the claim as unfounded. In the first place, the costs of consulting a lawyer at the stage of a complaint through official channels must be distinguished from lawyer's fees incurred as a result of proceedings before the Court of Justice, which fees the Court must deal with when fixing the costs under the Rules of Procedure.

Whereas to bring a direct action before this Court the services of a lawyer are necessary, no legal adviser is required at the stage prior to action governed by Article 90 of the Staff Regulations. On the contrary, it is a dispute between the official, acting personally, and the administration. The drafting of the complaint or complaints prior to bringing the matter before the Court is the act of the official himself. In practice this is how the administrative stage normally proceeds.

Although, obviously, it is not possible to prohibit an official from consulting a lawyer at this stage, he does so on his own initiative and the institution can in no way be held liable for his decision.

Moreover, since the present case is an action to establish liability, there has to be a causal link between the alleged damage and a wrongful act on the part of the institution. Obviously there is no such thing and the claim for compensation under this head must therefore be dismissed.

On these grounds my opinion is:

— That the application should be dismissed;

— That in accordance with Article 70 of the Rules of Procedure each party should bear its own costs.