OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 14 NOVEMBER 1974 [1]

Mr President,
Members of the Court,

In the past it has been the duty of the Court to uphold the principle of equal rights, and remove the discrimination between man and woman associated with a particular use of the title 'head of household', with all that that implied for its female members. I believe that, today, it is necessary to define the limits within which the principle is recognized, since it is worthy of being upheld only in so far as it is based on reason and feasibility.

Two officials of the Commission have lodged the present appeals (Case 21/74 and Case 37/74) which seek substantially the same declaration: they are asking the Court to place an interpretation on Article 4 of Annex VII of the Staff Regulations which would extend the expatriation allowance to persons who are nationals of the country in which they acquired that nationality only through marriage.

It must be borne in mind that, under the provision concerned, an expatriation allowance is due to an official who is not a subject of the State in which he works or, if he is, he has remained abroad for at least ten years.

Commonsense, even more than straightforward application of a clear provision of the Regulations, requires that all uncertainty should be dispelled by the answer which I propose, which is to dismiss these appeals. On the basis of legal considerations, which alone carry weight before this Court, it is worth recalling some elementary principles in harmony with that duty to daclare the law which is imposed upon this Court.

Under the provision concerned, the expatriation allowance is granted on the basis of a *position in law* which takes the form of a status, the old *status civitatis,* looked at in this case from the negative point of view of possession of foreign nationality. In principle, only an alien is an expatriate in a State which is not his own homeland and it is he, therefore, who is entitled to the financial concession which offers him partial compensation for the disadvantages of life away from his normal environment. On the other hand, again in principle, anyone who possesses the status of citizen of the country in which he is required to work cannot enjoy those privileges.

Such is the rule, to which there are only two exceptions. First of all, there is the exception whereby the alien loses his entitlement to the allowance if he has previously been a national of the State concerned, or if he has habitually resided or carried on his main occupation in the European territory of that State during the five years ending six months before he entered the service, unless during this period he was working on behalf of another State or for an international organization.

There is another exception, and this has the effect of widening the range of cases where the allowance is applicable in favour of the national who, for the ten years immediately prior to his entry into service, has habitually resided outside the European territory of the State concerned. This exception is of a strictly limited character, as it does not cover nationals who have been employed abroad as officials either of a State or of an international organization.

Let us first of all consider the aetiology of the basic principle which makes nationality the determining factor.

The status of nationality is, like all rights conferring status, the legal classification

1 — Translated from the Italian.

of a person, carrying with it a number of rights, obligations, capacities and disabilities which are normally governed by the legal system. In our case, Community legislation used this status to ensure that anyone who possesses it shall not be able to enjoy a particular right granted only to nationals of foreign countries. The said status of nationality is therefore regarded as a qualification unconnected with classifications peculiar to Community law, which allows it to have only certain specific effects within the scope of that law. The reference to nationality of origin made by the Staff Regulations rule in respect of a person who does not currently possess the nationality of the State in which he works, serves, as we have seen, not to widen but to restrict the non-citizen's right to receive the allowance, whereas it can have the effect of broadening the scope of the rules intended for aliens exclusively in the case in which the national is, exceptionally, recognized as possessing that right.

Community law distinguishes the position of a national only in this narrow context, by way of exception; in accordance, therefore, with the old maxim, *ubi lex non distinguit nec nos distinguere debemus,* we have no right to apply this distinction otherwise than in the cases and for the purposes specifically provided for.

Where Community law takes a status as its point of reference, we cannot separate the advantages from the disadvantages associated with this classification. Here again we must bear in mind a basic principle of jurisprudence: *ubi commoda ibi incommoda.* It is, for example, clear that if we take the case of a privilege which is recognized as belonging to the nationals of the country where a person has his habitual residence, this privilege could be justifiably claimed by anyone for no other reason than that he had the status of a national, even if nationality had been automatically acquired on marriage.

Under a system based on the rule of law, legislative provisions are always associated with categories. This is a consequence of the state based on the rule of law, and once the law has laid down the category, the law must be applied to all. To do otherwise would be to depart from the road which traditionally protects fundamental rights. If, for example, only an alien has the right when he comes to Ispra to enjoy certain privileges associated with his nationality, it is obvious that these privileges could be claimed by the citizen of Savoy or of Lower Bavaria but not, on the other hand, by anyone whose normal residence is in Sicily, even though the latter's place of work is further away from home than it is in the case of the French or German national in the example given.

In determining the categories of person qualified to receive the allowance in question, it is true that the law makes the exception already indicated to the rule disqualifying a person who is a national of the country where he has to work. But, quite apart from the basic principle that there must be no extension of exceptions beyond the cases to which they apply, it seems clear that the grounds on which the legislature extended the allowance to the national who has remained abroad during the last ten years are incapable of being applied, even by analogy, in the present cases. Provision is, indeed, made for the case of the expatriate who has remained abroad for ten years, but his case is very different from that of the new citizen who has only recently acquired this status. In other words, the case of the citizen who has been abroad for a considerable time and returns home solely in order to take up Community employment is different from the case of a woman who has, by marriage, acquired the nationality of the country because taking up or continuing employment in its territory does not make her position any different from that which, even on a territorial basis, is the normal outcome of the new situation in which the marriage has placed her.

It is true that double nationality is involved in Case 21/74, where the person concerned claims that the second nationality can be used to obtain the concession granted to compensate for the feeling of absence from home. But this overlooks the fact that it is being an alien in the country of residence which justifies the concession, whereas, in fact, the applicant is a national of that country.

The applicant in Case 37/74 states that the nationality acquired by law by the lady married in Belgium (the right to which, it should be noted, could in this case have been waived) is in its nature different from and more limited than the full nationality acquired in one of the other ways provided for by the law. On this basis it is contended that those who apply Community law are entitled to look behind the formal criterion of conferment of civil status by analysing the various capacities and rights associated with a type of nationality regarded as inferior. Consideration of the actual nature of the grant of nationality of this kind may have some relevance where the law expressly provides for it, but, in the absence of such provisions, it is always necessary to act in terms of nationality being an overall symbol which Community legislation has adopted, not because of its actual legal content but as a point of reference for a rational application of the expatriation allowance.

Finally, as indicated at the beginning of this opinion, it is said that this may involve discrimination against married women, contrary to the basic principle (about which, needless to say, there can be no question) of equality between the sexes, which is enshrined in the law of the Community. This refers to discrimination arising from the fact that, when he gets married, a man does not automatically acquire the nationality of the wife and would, therefore, never be in the position of losing the privileges associated with the status he had before the marriage. But, as I have already indicated, Community law cannot remould from its own point of view the whole world of social and human relationships. Where the national legislation provides for a method of acquiring nationality and links it with the normal consequences of a status which takes the form of various rights and obligations, those responsible for drafting the Community legislation rightly accept the situation as they find it as a point of reference, and they will do so so long as it is not in itself repugnant to a fundamental human right, as discrimination based on sex alone would be. Community law cannot object to the fact that, in the management of its internal relationships, each State pays regard to the principle of family unit in accordance with its own conception of it and without in social terms conflicting with the public policy of the Community. From another point of view, Mr Advocate-General Mayras (in Case 33/72, *Gunnella* [1973] ECR 485) dismissed any suggestion that to use nationality as a basis for the expatriation allowance conflicted with the principle upheld by the judgments in Cases 20/71 and 32/71 *(Sabbatini-Bauduin,* Rec. 1972, pp. 345 and 363), of equality of treatment between employees of different sexes.

Finally, it must be pointed out that although, as was the case in defining a head of household, the use of nationality as a criterion may sometimes be to the disadvantage of officials who contract marriage, there is a fundamental distinction between the two cases. While, as far as the State where she resides is concerned, a woman's entry into membership of a new family on marriage may have no effect whatever on her status as an alien and, accordingly, did not justify automatic loss of her expatriation allowance solely on account of the marriage, the case of the woman official who acquires the nationality of the country in which she works is very different. In that case, the legal reason for the allowance, which is

its *raison d'être,* is missing, and the Court indicated as much in the judgments cited *(Sabbatini-Bauduin,* Rec. pp. 351 and 370). In such conditions, only an express provision to the contrary in the enactment could confer the allowance in question. It would, however, constitute an abnormal concession which could no longer be described as an expatriation allowance. To confer special privileges granted to aliens on anyone who is a national of the country where he works is a contradiction in terms, with a single exception, already considered, in Cases where there has been prior absence abroad lasting more than ten years. The principle of equality of treatment would require that such wider consideration, which amounts to replacing the legal criterion of nationality by one based on a different set of facts, should be extended to all those who, for whatever reason, are now or have once been nationals also of a State other than the State where they work.

I therefore recommend rejection of the two appeals as being without foundation and the question of costs, application of Article 70.