brought by servants of the Communities the institutions shall bear their own costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Protocol on the Statute of the Court of Justice of the European Atomic Energy Community;
Having regard to Article 152 of the Treaty establishing the European Atomic Energy Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;
Having regard to the Staff Regulations of officials of the European Atomic Energy Community;

THE COURT (First Chamber)

hereby:

1. Dismisses Application 69/63 as unfounded;

2. Orders that each of the parties shall bear its own costs.

Trabucchi Delvaux Strauß

Delivered in open court in Luxembourg on 9 June 1964.

A. Van Houtte
Registrar

A. Trabucchi
President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL LAGRANGE DELIVERED ON 11 MARCH 1964[1]

Mr President,
Members of the Court,

Miss Capitaine, a secretary at the Joint Nuclear Research Centre at Ispra, was recruited by the Euratom Commission following a letter of engagement of 2 March 1960 and was thereby made subject to the system of so-called Brussels contracts. Following her marriage

1—Translated from the French.

on 6 May 1961 to another servant of the institution, Mr Marcillat, a decision of 14 June 1961 withdrew her separation allowance which she had received until then by virtue of her contract. By an application lodged at the Registry on 22 June 1963 she contested this decision as well as several subsequent decisions confirming it either expressly or by implication. It should be borne in mind that during the intervening period, in February 1963, the applicant became established as an official in accordance with the Staff Regulations.

As you know, the Commission disputes the admissibility of the application, alleging that it is out of time. That is the first issue which I must examine.

A — Admissibility

According to the defendant the appeal was filed outside the prescribed time-limit in relation to the decision of 14 June 1961 and, moreover, this time-limit could not 'start to run afresh' following the subsequent decisions, express or implied, as the latter merely 'confirmed' the first decision.

First question: Had the time-limit for lodging an appeal against the decision of 14 June 1961 expired?

The two parties both recognize — this is no more than a statement of fact — that at the date of the decision no time-limit for an appeal existed. In fact, the Rules of Procedure of the Court of Justice of 21 February 1957, adopted in application of Article 58 of the Staff Regulations of the ECSC then in force, and which provided in Article 2 a time-limit of 2 months, were simply repealed by the new Rules of Procedure of the Court which became the Court of Justice of the three Communities on 3 March 1959. But, according to the defendant, Article 91 of the Staff Regulations of officials, which lays down a time-limit of three months from the publication or notification of the measure, whichever is applicable, applies to the present case as this time-limit began to run from the publication of the Staff Regulations in the Official Journal, in other words on 14 June 1962, as regards measures previously published or notified. It thus expired on 15 September 1962.

You are acquainted with the respective arguments of the parties on this matter: the applicant maintains that the provisions of the Staff Regulations of officials, including the provisions of Article 91, can only apply to disputes relating to the application of those Regulations, whether it is a question of the Regulations properly so-called or the 'Conditions of Employment of Other Servants' (which refer to Article 91 in all cases where the Court of Justice has jurisdiction), and not to disputes which, like the one in the present case, relate to a contract of employment concluded before the entry into force of the Regulations and which has never been subject to them. According to this argument, there was no time-limit operating against the applicant.

The Commission, on the contrary, maintains that the provisions of Article 91 which concern 'any dispute between one of the Communities and any person to whom these Staff Regulations apply regarding the legality of an act adversely affecting such person "as well as" disputes of a financial character between one of the Communities and any person to whom these Regulations apply' have a general scope, independent of the nature and object of the dispute; they therefore apply to the present case, as Mrs Marcillat must be considered 'a person to whom these Regulations apply' because by virtue of Article 102 she could become established.

I will not go over the arguments put forward by the two sides, which have been clearly and fully explained to you at both the written and oral procedures. I will merely give you my opinion which is as follows.

First, as regards the date when Article 91 became applicable; as you know, the entry into force of the Staff Regulations was laid down by the Regulation of the Councils of the EEC and the EAEC, which enacted these Staff Regulations on 1 January 1962. Nevertheless, as the Commission recognizes, there can be no retroactive application of a provision like Article 91 which prescribes time-limits; to the extent that, in conformity with the principle of the immediate applicability of the Rules of Procedure, this provision must be considered as applicable even in respect of previous decisions, the time-limit which it lays down cannot in any event begin to run, as regards these decisions, before the date of its publication.

Secondly, I think, as does the Commission, that if one is confronted with a dispute between the Community and 'any person to whom these Staff Regulations apply', as the Court of Justice has jurisdiction to settle such a dispute, Article 91 becomes applicable, including Article 91 (2) relating to the time-limit, whatever the object or nature of the dispute. It is not necessary that the dispute should concern the application of the Staff Regulations themselves; it is enough that it refers to the 'legality of an act adversely affecting' the person concerned or constitutes a 'dispute of a financial character' between him and his institution. In other words, it is only necessary that the dispute concerns the *relationship of employment* between the servant and his administration. Of course, the disputes which will occur in the future will normally be concerned with the application of the Staff Regulations, but it can also be a question, as in this case, of a dispute concerning the situation prior to the Regulations. *The Court had and continues to have jurisdiction by virtue of Article 152 of the Treaty.* There is no real 'break' and it is reasonable to admit that, by using the powers which they held under Article 152, the authors of the Staff Regulations intended, by a provision having an absolutely general scope, to submit to the same rules, as regards both procedure and jurisdiction, disputes between integrated servants and their administration, including disputes relating to the period before the entry into force of the Staff Regulations.

I am also in agreement with the defendant on the principles of the applicability of the Rules of Procedure: immediate applicability, but without retroactive effect. These principles were clearly stated in the opinion of my colleague Roemer in the Elz case, an opinion which the Court followed in its judgment of 4 April 1960: the introduction of a time-limit to begin to run from the publication of the regulation prescribing it in respect of all previous decisions whatever their date. As for the applicant's argument that the principle established by the judgment in the Elz case does not apply to servants engaged on a contractual basis who keep, under a new legal scheme, the benefits of the time-limit applying to the date of the contract (that is, in this case, no time-limit), this seems to me to have no value once the servant under contract has become established and thereby finds himself automatically subject to the application of the provisions of the Staff Regulations. As I have said, these Regulations can legally include — and, in my opinion, do include — a provision which has immediate application and which lays down a time-limit in respect of any dispute between the newly established official and his administration, whatever the origin of the particular dispute.

In short, the only question is *at what moment* the applicant can be considered as having become a 'person to whom these Staff Regulations apply' and subject to them in law in consequence of Article 91. As I have said, the Commission refers on this matter to the transitional provisions of Article 102 which gives a 'servant of the Communi-

ties who is occupying a permanent post in one of the institutions of the Communities when these Staff Regulations enter into force' the prospect of establishment, and this is the applicant's case. It seems difficult to follow the defendant's argument on this matter. In fact, the sole aim of the transitional provisions is to enact the derogations considered necessary to enable servants already employed to come under the application of the Staff Regulations and to become established in certain grades and steps of those Regulations, in addition to the normal rules of recruitment. But it is clear that, as long as establishment has not been duly granted and waiver of the contract (which must accompany it) has not occurred, the Staff Regulations as a whole are not applicable and I do not see how it could be otherwise when one looks solely at Articles 90 and 91. To recognize the immediate applicability of these provisions is equivalent to prejudging the decision as to establishment, which is impossible since, as you know, that decision is subject to different conditions as to substance and procedure which in part involves subjective facts of appraisal. As long as the servant concerned has not been established (or one of the other sets of 'Conditions of Employment' has not been applied to him), he remains subject to his contract and no provision of the Staff Regulations can be applied to him. It is thus, in my opinion, at the date when the Staff Regulations were applied to the applicant that the time-limit laid down in Article 91 began to run in respect of all previous decisions, in particular the decision of 14 June 1961. I would add, in reply to one of the defendant's objections, that this system avoids extending indefinitely the period during which disputes can arise concerning the application of the contract since, according to this system, establishment causes this time-limit to begin to run. It is true that the servant could refuse to waive his contract, but one might ask whether it is not for the administration to terminate it if it considered it necessary and to insert in a possible new contract an appropriate clause intended to put an end to any previous dispute within a certain time-limit; that is a problem on which it is not necessary to take a stand. In any case, the disadvantage does not exist in general where the servant obtains and accepts his establishment.

In this case, the decision to establish is dated 6 February 1963 (I do not know the date when it was notified). But as early as 22 February 1963 the applicant presented a complaint to the Director of the Centre at Ispra, referring expressly to her previous complaints regarding the withdrawal of the separation allowance. As there was no reply, the appeal, lodged on 22 June 1963, in other words within the time-limit of 4 months, is admissible by virtue of the provisions of the second indent of Article 91 (2) of the Staff Regulations.

This being the case, it appears to me to be unnecessary to examine the *second question* relating to whether the express or implied decisions which rejected the applicant's complaints against the decision of 14 June 1961 are of a confirmatory nature or not. I would merely point out that, if it was necessary to take a stand on this matter, these decisions, which merely support the initial decision, must in my opinion be recognized as being of a confirmatory nature: the situation with regard to this matter seems to me to be very similar to that in the Elz judgment (Rec. 1960, p. 229).

B — The substance of the case

You are acquainted with the arguments of the two parties on the substance of the case. The *applicant* bases her argument solely on the terms of her contract which prescribes the allocation to her of a separation allowance on the sole condition that the place of work is

situated more than 70 kilometres from the place where the servant concerned had resided permanently for more than six months; no other condition, in particular none subjecting the continuation of the allowance to the absence of any subsequent marriage to an official enjoying the same allowance, appears in the contract.

The *Commission* considers that the provision in Article 9 (c) of the General Regulations of the ECSC, under the terms of which 'when a husband and wife are employed in the service of the Community this allowance shall be payable only to the spouse whose salary is the higher', applied to all servants of the EAEC (like the EEC) who were subject, before the entry into force of the Staff Regulations, to a so-called Brussels contract. According to the defendant, this can be deduced from the desire of the staff, which was both well known and clearly shown, to apply by analogy the rules in force in the ECSC to everything which related to the financial status (salaries, allowances, pensions) of servants of the new Communities.

This is a rather delicate question, for it touches on the problem of the source of obligations of public servants employed on a contractual basis and of the administration's power to issue regulations in respect of such servants.

Of course, the principle is that a contract, whether governed by public or private law, 'is law for the parties'. Nonetheless, it is recognized by legal writers and admitted by case-law[1] that public servants employed on a contractual basis remain subject to the general rules applying to all (in other words the regulations) enacted by the administration with the aim of ensuring the proper functioning of the service. These regulations apply to servants who are taking up their duties and the new regulations or the alteration of regulations in force even apply automatically to servants already in office. It is only otherwise in the case of terms which, in the contract itself, directly governed the individual position of the servant concerned and, of course, subsequent decisions which could have created rights in favour of the servant. The position of servants who are employed on a contractual basis is very close to that of established officials, the principal difference being the absence of any permanent relationship between the servant concerned and his administration.

In this case, I think one must make a distinction between the principle of the separation allowance, which is provided for by the contract together with the basic conditions on which its grant depends, and the general rules which apply to the matter, of which the contract becomes a part. The provision invoked by the Administration forms part of these general rules, such as those which relate for example to the plurality of salaries, to the definition of 'dependent child', etc. which cannot be inserted in the contract itself.

But, before these regulations can be invoked against the servants concerned in the absence of any express reference to them in the contract, two conditions are necessary:

1. The regulation, duly enacted by the competent authority, must be directly applicable to the servants of the administration concerned or, if it is a question of application by analogy or by extension of regulations enacted for other servants, that this reference must itself be the subject of an express decision.
2. In addition, the regulation, or if necessary, the reference to another set of rules, must be brought to the knowledge of the servants.

In this case, the first condition seems to me to be fulfilled. In this respect it suffices to refer to the communication in the Official Journal of 28 August

1—See in particular, in the case of French law, Duez and Debeyre, *Traité de droit administratif*, 1955, pp. 744 et seq.

1959, cited on page 10 of the rejoinder. It is stated there that the Council has authorized the Presidents of the Commissions provisionally to apply the *system* of salaries, allowances and pensions in force in the ECSC to the senior officials of the Communities; then there follows the sentence: 'In the absence of any other appropriate scale and in order to avoid any discrimination between the different categories of staff of Euratom, the Commission has applied *the rules used in the ECSC to all its servants*'.
It is thus a matter of a decision of the Commission which applies to *all its servants*, not only senior officials, and which declares the *rules* of the ECSC on salaries and allowances and not merely the salary scales or the rates of allowances to be applicable. One should note in addition that this decision, which is reported in the Official Journal as a 'commentary' to the budget, refers expressly, *inter alia*, to heading 112 of Article 11 which refers to the residence allowance and the separation allowance. As for the second condition, I think that it has also been fulfilled by the publication of the decision in the Official Journal of the Communities, especially if one adds that in fact the position of those engaged on the basis of Brussels contracts was brought into line with that of officials of the ECSC, at least in respect of what one could call 'financial status', and this fact was well known to the staff as a whole. There was no need at all in my opinion for special publicity in the form of display or circulation in the offices, as is sometimes considered necessary.

I am therefore of the opinion that:

— the application should be dismissed; and

— the parties should bear their own costs in accordance with Article 70 of the Rules of Procedure.