OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 10 JULY 1980 [1]

Mr President,
Members of the Court,

Article 4 (1) (a) of Annex VII to the Staff Regulations of Officials of the European Communities provides that an expatriation allowance equal to 16% of the total amount of the basic salary shall be paid:

"to officials:

— Who are not and have never been nationals of the State in whose territory the place where they are employed is situated; and

— Who during the five years ending six months before they entered the service did not habitually reside or carry on their main occupation within the European territory of that State . . .".

Article 21 (2) of Council Regulation No 912/78 of 2 May 1978 amending the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the European Communities (Official Journal L 119 of 3 May 1978, p. 1) added to the above-mentioned Article 4, *inter alia*, paragraph (2) worded as follows:

"An official who is not and has never been a national of the State in whose territory he is employed and who does not fulfil the conditions laid down in paragraph (1) shall be entitled to a foreign residence allowance equal to one quarter of the expatriation allowance".

In implementation of that provision the Personnel Branch of the Court of Justice decided on 16 May 1978 to pay, as from 4 May 1978, the foreign residence allowance to the category of persons concerned.

On 8 November 1978 the applicant, an official in Grade B 4, who has been in the service of the Court of Justice since 1953 and who, since birth, has been exclusively a national of Luxembourg, submitted a request to the appointing authority, pursuant to Article 90 (1) of the Staff Regulations, that he be granted the foreign residence allowance. That request was rejected by a memorandum from the Registrar of the Court of Justice of 16 January 1979 which was communicated to the applicant on 7 March 1979.

On 11 May 1979 that rejection was the subject of a complaint by the applicant through official channels under Article 90 (2) of the Staff Regulations which was rejected on 22 June 1979 by a decision of the President of the Court of Justice, acting in his capacity as the appointing authority.

Subsequently, the applicant submitted the application which was lodged at the Court of Justice on 21 September 1979 in which he claims that the Court should: declare the application admissible; declare that the provision in Article 21 (2) of Council Regulation No 912/78 is unlawful and, consequently, annul the decision of the Court of Justice of 22 June 1979.

Together with the Council and the Commission, which have intervened in

1 — Translated from the French.

the proceedings, the defendant, the appointing authority, contends on the contrary that the Court should: declare the application inadmissible or, in any event, dismiss it as unfounded and order the applicant to bear the costs incurred by him.

My opinion on this case is as follows:

The defendant and the parties who have intervened in support of its conclusions base the argument on inadmissibility in the first place on the applicant's lack of legal interest. In addition, the Commission contends that the application is inadmissible on the ground that the applicant did not submit the complaint through official channels provided for in Article 90 (2) of the Staff Regulations within the period laid down by that provision. It considers that where a provision leaves no margin of discretion to the administration the procedure provided for in Article 90 (1) of the Staff Regulations may not be applied; there is room only for a complaint through official channels under paragraph (2) of that same article against individual measures adversely affecting the official. Such a measure may be found in the refusal to grant the applicant the foreign residence allowance on the putting into effect of the provision in issue, which was brought to the knowledge of the staff of the Court of Justice on 10 May 1978. The question whether the complaint was submitted in due time thus depends on the date on which the foreign residence allowance was paid for the first time.

However, and this is the issue I shall examine first, the interpretation just referred to is inconsistent with the wording of Article 90 of the Staff Regulations. Failure to apply a general provision to an individual case cannot, in the absence of a request to that effect, constitute either a general measure or an individual measure adversely affecting the person concerned adopted by the administration within the meaning of Article 90 (2) of the Staff Regulations. Furthermore, the granting of a foreign residence allowance to the category of persons envisaged in Article 4 (2) of Regulation No 912/78 likewise does not constitute an individual measure capable of adversely affecting a third party. Rather, any person to whom the Staff Regulations apply may (as is shown by the wording of Article 90 (1)) submit to the appointing authority a request that it take a decision relating to him. The express or implied decision of rejection taken by the appointing authority then provides grounds for a complaint through official channels under Article 90 (2) of the Staff Regulations.

The applicant submitted a complaint against the decision of rejection within the period laid down by that provision and, in addition, he has filed an appeal within the period prescribed in Article 91 (3) of the Staff Regulations and thus in due time.

The defendant, as well as the parties who intervened in support of its conclusions, considers that the application is also inadmissible by reason of the absence of legal interest, the applicant having no direct or even potential personal interest in the annulment of the decision. Even if the Court of Justice were to declare the provision in question inapplicable, the applicant would not be entitled to receive the foreign residence allowance because, if it can be contemplated at all, it is wholly unlikely that the Council would amend the provision in question to the applicant's advantage. A wholly non-material interest in the annulment of a provision cannot constitute a sufficient interest to pursue an action.

The applicant, on the other hand, claims that he has an interest in the annulment of the provision in question, which would either bring to an end a legal

situation which is unjust and discriminatory or result in the adoption of rules which would be unfavourable to him.

These submissions of the parties, which reveal the close relationship between the objection raised as to the admissibility of the application and its substance is justification, in my opinion, and here I refer to various judgments which have been given in staff cases, for my proceeding immediately to consider the substance of the application (see judgment of 27 October 1977 in Case 126/75, *Giry* v *Commission*, [1977] ECR 1937; judgment of 15 December 1977 in Case 95/76, *Bruns* v *Commission*, [1977] ECR 2401; judgment of 26 October 1978 in Case 122/77, *Claes (*nee *Agneessens) and Others* v *Commission*, [1978] ECR 2085; judgment of 11 October 1979 in Case 142/78, *Exner (*nee *Berghmans)* v *Commission*, [1979] ECR 3125).

The applicant, who seeks the annulment of the decision of rejection adopted by his appointing authority on 22 June 1979, pleads, under Article 184 of the EEC Treaty, that Article 21 (2) of Council Regulation No 912/78, on which that decision is based, is inapplicable. According to the applicant, by reserving the foreign residence allowance exclusively for officials who do not have the nationality of the State on whose territory the place where they are employed is situated and who do not receive the expatriation allowance, the provision in question infringes the general prohibition against discrimination on grounds of nationality which is rooted in Community law and which is expressed, in particular, in Article 7 of the EEC Treaty but also in the provisions of the Staff Regulations of Officials. However, the position of officials who have benefited under that provision is no different, whether from a material, a non-material or even a psychological point of view, from the position of those possessing the nationality of the State in whose territory the place where they are employed is situated. The principle of equal treatment therefore requires that the latter be treated in the same way as the former.

The applicant argues further that the reference exclusively to nationality, which constitutes neither an objective nor a uniform criterion for treating the officials in question differently, is artificial and even arbitrary. Whereas the majority of international agreements have eliminated nationality as a distinguishing criterion it is precisely that criterion which the Council has reintroduced. Finally, still according to the applicant, the Court of Justice, too, has repeatedly emphasized with regard to the grant of an expatriation allowance, that an official's nationality is of subsidiary importance and, at most, has a part to play in relation to the question of the duration of residence outside the territory in which he is employed.

That argument is, however, rendered unsound by the fact that not every distinction connected with nationality must be regarded as discrimination prohibited by Community law. It is in that sense that Article 7 of the EEC Treaty, which may be regarded as giving specific expression to a general prohibition against discrimination on which Community law is founded, does not speak of distinction based on nationality as being prohibited but confines itself to prohibiting discrimination on grounds of nationality. In the case-law of the Court it has been consistently held that discrimination means exclusively a distinction which cannot be objectively justified. Consequently Article 7 of the EEC Treaty means simply that nationals of the

Member States must enjoy identical treatment in so far as there are no special factors justifying a difference in treatment.

Thus, for instance, according to Articles 7 and 27 of the Staff Regulations of Officials, nationality must not, in principle, play any part in relation to the appointment, transfer or the progress in the career of an official.

On the other hand, once a difference in treatment connected with the status of alien is justified, there is no discrimination which is prohibited by Article 7 of the EEC Treaty and, as a result, no infringement of the principle of equal treatment of officials. In addition, in regard to freedom of both movement and establishment, it follows from the proviso thereto that if persons who do not possess the nationality of the Member State concerned contravene rules relating to national order or security and public health they may be given different treatment without the prohibition against discrimination contained in Article 7 of the EEC Treaty being breached.

Contrary to the applicant's view, however, officials who do not have the nationality of the country in which they are employed are subject, irrespective of the duration of their residence in the place of employment concerned, to a range of disadvantages in both law and fact which are not experienced by nationals of the country in question. That is a consequence of the mere fact that, by virtue of the sovereignty exercised over their territory, all States reserve certain rights for their own nationals, or rather, they subject non-nationals to special legal rules known as the law relating to aliens.

First, to give only a few examples, for an official to stand for an elective public office in the context of the exercise of his right to be elected, is made, if not impossible, at least considerably more difficult by reason of his remoteness in place and in time, but, for obvious reasons, that disadvantage is not compensated by the right to take leave on personal grounds which is given to him by the Staff Regulations. On the other hand, it is impossible for a non-national to offer himself as a candidate in the country where he is working simply because of the provisions of the Member States' electoral law, quite apart from the fact that, even if national law did permit him to do so, it would be more difficult in practice for a foreigner to be elected.

Furthermore, by reason of the respective provisions of electoral law in the Member States, foreigners are, as a general rule, excluded from exercising the right to vote in the State in which they reside. On the other hand, the right to vote in their State of origin is either dependent upon a permanent domicile in that State or may be exercised only in the country of origin itself, with all the travelling expense which that implies.

It should not be forgotten, moreover, that officials who do not have the nationality of the country in which they are employed are bound, irrespective of the length of their stay in that State, to accept certain disadvantages in their family life as well. Their children, who may later wish to return to follow a career in the State of origin, are often obliged to study in the State whose nationality they have, if only because many university qualifications are not recognized. To that is often added the

duty to support parents still living in the country of origin, which entails an increased financial burden. Nor is that particular extra expense covered, as the applicant thinks, by the other allowances provided for under the Staff Regulations, which have the common feature that they may be granted to any official who fulfils the requirements, irrespective of his nationality.

Besides these examples, which are sufficient to justify a difference in treatment, there are certainly many other disadvantages on a cultural and social plane upon which it is no longer necessary to dwell.

As we have been given to understand by the Council and the Commission (see also on this subject the Commission's reply of 2 February 1979 to Written Question No 813/78 by Mr Dondelinger, Mr Glinne and Mr Lezzi, Official Journal C 60 of 5 March 1979, p. 16), the foreign residence allowance was introduced to compensate for these additional constraints and to put all officials in a given place of employment on the same footing, whatever their nationality. Contrary to the applicant's opinion, it is not merely officials who draw the expatriation allowance provided for in Article 4 (1) of Annex VII to the Staff Regulations of Officials, but also those who, during more than 5½ years prior to their entry into the service, carried on their principal permanent occupation or had their permanent residence in the State in which they reside who are subjected to those objectively different conditions or circumstances. The grant of a special allowance does not, therefore, constitute discrimination against officials who do not have to suffer the inconveniences which have been described. To that extent the present case is not, therefore, comparable with the international agreements relied upon by the applicant, which, in general, are intended to ensure that the nationals of different countries are not placed in a more favourable situation.

As the purpose of the foreign residence allowance is to compensate for the disadvantages which officials suffer by reason of their status as foreigners, it is also logical, moreover, to make the grant of that allowance dependent on the status of nationality. That link should ensure that persons who have such status qualify for the allowance, which is reserved for foreign nationals alone. In addition, the objectively identifiable criterion of nationality is also, despite the different rules in various Member States, a uniform criterion in that it enables the category of officials who do not have the nationality of the country in which they are employed to be distinguished from those who have that nationality. Moreover, by virtue of the principle of the rule of law, any legislature is bound, when adopting legal provisions which, as is known, contain general and abstract rules, to have recourse to general categories even if, in a small number of individual cases, certain disadvantages arise when that provision is applied.

Lastly, however, the Court of Justice itself has already recognized on many occasions that, in regard to the grant of the expatriation allowance, the nationality of officials has a significance which may justify a difference in treatment. In distinction to the foreign residence allowance, the justification for which will become clear in the present case, it is true that, as the Court of

Justice emphasized in its judgments of 20 February 1975 (Case 21/74, *Airola* v *Commission,* (1975] ECR 221, and Case 37/74, *Van den Broeck* v *Commission,* [1975] ECR 235), the purpose of the expatriation allowance is "to compensate officials for the extra expense and inconvenience of taking up employment with the Communities and being thereby obliged to change their residence". It is for that reason that the Court of Justice also laid down that the paramount consideration in determining entitlement to the expatriation allowance is the official's habitual residence before he entered the service, whereas his nationality is regarded in that case as being only a subsidiary consideration since it is relevant only in relation to the question of the length of residence outside the territory in which he is employed.

Since, as we have seen, the foreign residence allowance, unlike the expatriation allowance, is only intended to compensate for the inconvenience of "living in a foreign country", the Council has determined, and rightly so, that the amount of the foreign residence allowance shall equal only a part of the expatriation allowance. There is no ground for criticizing the discretionary power exercised by the legislature in fixing the percentage in question.

I must accordingly state in conclusion that, for the reasons given above, Article 21 (2) of Council Regulation No 912/78, which inserted paragraph (2) in Article 4 of Annex VII to the Staff Regulations, is not open to any substantive objection.

As the applicant has not shown that he ever fulfilled the conditions of fact to which that article makes the grant of the allowance in question subject the decision of the appointing authority is likewise not vitiated in any way.

On those grounds, I propose that the Court should:

— Dismiss the application; and,

— In accordance with Article 70 of the Rules of Procedure, order the parties to bear their own costs.