OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 1 December 1988 *

Mr President,
Members of the Court,

1. The problem before the Court does not seem to me to present much difficulty, in view of the clarity of the rules cited and the previous case-law of the Court. Furthermore, the applicant's arguments and those of the Commission, which were set out in the written procedure and are clearly presented in the Report for the Hearing, to which reference may be made, have not been changed at this hearing. In essence the question is whether a divorced official who continued to receive the household allowance after the date on which he ceased to have children dependent on him must return the sums wrongly received.

I propose to state briefly what my views on the matter are. Briefly, because I do not think that the facts of the case and the applicant's claims require much of the Court's time. Moreover, if the applicant had properly considered the very clear guidelines of the case-law of the Court we could have been spared these proceedings.

2. Turning to the substance of the case, in general I should like to refer to and adopt, notwithstanding the criticisms raised by the applicant at the hearing, the observations of my predecessor, Mr Advocate General Mayras, in Case 252/78 (*Broe* v *Commission* [1979] ECR 2393). On the one hand the solutions adopted to the problem of the recovery of undue payment by the law governing the public service in the Member States are in general more severe than Article 85 of the Staff Regulations. On the other, the intention of the Community legislature when amending the Staff Regulations in 1972 was clearly to impose the principle that in appropriate circumstances restitution of the sum wrongly received is the rule and cases in which the official may retain the benefit of those sums are the exception.

3. Still from a general point of view, I am convinced that the Court should confirm its case-law, in particular its judgment in *Broe*. Article 85 must be applied in such a way that sums wrongly received must normally be repaid. In particular it cannot be accepted that officials should adduce their own ignorance of the Staff Regulations as justification for placing on the administration, and ultimately on the taxpayers of the Member States, the burden of any mistakes of the administration in calculating the various allowances, when the issue is simply the official's knowledge of a provision of the Staff Regulations which is clear, unambiguous and not open to any debate — one which may be understood by anyone who is able to read.

* Original language: Italian.

Finally, I do not think it necessary to consider the issue of deceit, suggested by the applicant at the hearing without any supporting evidence.

4. Obviously there may well be border-line cases in which in spite of the care which an official should normally display he is not able to appreciate the wrongful nature of sums received. In such cases the official must adduce evidence to justify his failure to notice the mistake made by the administration; the applicant in the present case has not done so, and indeed could not have done so in view of the clarity of the rule in question.

5. I should add that the Court's case-law points unequivocally to the need to determine the required degree of diligence by reference to the specific circumstances and not in the abstract. I do not think that in this case the applicant can maintain that he has exercised the care that may be expected of an official of his level (A 2) and his seniority (28 years), which he himself highlighted at the hearing. First of all, he received each month his salary slip, on which was shown the amount of the household allowance. Secondly, simple perusal of Article 1 of Annex VII to the Staff Regulations must enable an official of his grade and administrative responsibilities to appreciate that from the moment when a divorced official no longer has dependent children payment of the household allowance is unjustified.

To conclude, I thus think that the applicant has not given evidence of the normal degree of care corresponding to his grade and responsibilities in order for the exceptions and not the rule in Article 85 to apply; the Commission was therefore right to apply Article 85.

6. I conclude by proposing that the application should be rejected and Article 70 of the Rules of Procedure applied.