On those grounds,

THE COURT (First Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders each party to pay its own costs.**

O'Keeffe Mertens de Wilmars Koopmans

Delivered in open court in Luxembourg on 14 December 1979.

A. Van Houtte
Registrar

A. O'Keeffe
President of the First Chamber

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 22 NOVEMBER 1979

My Lords,

The applicant in this case, Mrs Evelyn Anna-Maria Devred, *née* Kenny-Levick, is a grade C 4 official on the staff of the Commission in Brussels. She is British by birth and Belgian by marriage. Essentially she claims in this action:

(1) a declaration that a decision of the Commission to the effect that she is not entitled to an expatriation allowance under Article 4 of Annex VII to the Staff Regulations is void;

(2) alternatively, compensation for a financial detriment that she alleges she suffered as a result of that decision.

By virtue of Article 4 (1) of Annex VII to the Staff Regulations an expatriation allowance is payable —

"(a) to officials:

— who are not and have never been nationals of the State in whose European 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. For the purposes of this provision, circumstances arising from work done for another State or for an international organization shall not be taken into account;

(b) to officials who are or have been nationals of the State in whose territory the place where they are employed is situated but who during the ten years ending at the date of their entering the service habitually resided outside the European territory of that State for reasons other than the performance of duties in the service of a State or of an international organization."

Mrs Devred was born in Alexandria on 15 March 1946. Her father was a British subject by birth. We are told that he was serving, or had served, in the RAF. She was at school in Egypt from 1949 to 1962. Her parents having moved to Rome, she went to the American Business School there in 1962 and 1963 and obtained her diploma as a secretary. From 1965 to 1967 she worked as a secretary at the FAO in Rome. In April 1967 she joined the staff of the Euratom Commission in Brussels. On 5 August 1970 she married, at Woluwe-Saint-Lambert, Mr Jacques Jean Christian Devred, a Belgian citizen. By virtue of Article 4 of the Belgian statute of 14 December 1932 consolidating the law on the acquisition, loss and recovery of nationality, she thereby automatically acquired Belgian nationality, but she was entitled to renounce it by making an appropriate declaration within six months. She did not make such a declaration. Her British nationality was not however affected.

Mrs Devred had, of course, unquestionably been entitled to an expatriation allowance up to the date of her marriage. The allowance was not withdrawn as a result of it. On behalf of the Commission, it was explained to us that was in accordance with administrative practice at the time and was due to the circumstances that Mr Devred's family home was also in Rome and that he was in Belgium only as a student.

In September 1971 Mrs Devred was posted from Brussels to the Joint Research Centre at Ispra. In June 1972 she resigned from the service of the Commission in order, so I understand, to accompany her husband to Saudi Arabia where he had obtained a job. While in Saudi Arabia she worked as a (locally recruited) secretary with the United Nations Development Programme. In 1974 she and her husband moved to

Tunisia, again because he had obtained a job there. That job came to an end in 1976. Mr and Mrs Devred then returned to Rome, where she worked on a short-term contract with the FAO.

On 1 December 1977, as a result of having taken part in a competition, Mrs Devred again became a Community official in Brussels. For a fortnight she served on the staff of the Secretary-General of the Council but on 16 December 1977 she was transferred to the staff of the Commission, and she has been a member of it ever since.

At first Mrs Devred was treated by the Commission as entitled to an expatriation allowance. We were told on behalf of the Commission that this was because those responsible had neglected to check whether she was entitled to it. On 15 February 1978, however, she received a pay slip indicating not only that the allowance was withdrawn but that the amount previously paid to her in respect of it would be recovered by deduction from her salary for February 1978. On the same day, or perhaps a day or two later — the exact date is not certain — she had an interview with Mr Pratley, the Head of the "Individual Rights and Privileges" Division in the Commission's Directorate-General of Personnel and Administration, at which the reasons were explained to her.

On 28 April 1978 Mrs Devred submitted a complaint under Article 90 (2) of the Staff Regulations against the decision withdrawing her expatriation allowance. She received no reply to that complaint within the four months prescribed by Article 90 (2) and so she initiated this action. Her complaint did however have the result that the Commission decided to pay her the sum that had been deducted from her salary for February 1978. The Commission took the view, as to that, that Article 85 of the Staff Regulations, relating to the recovery of undue payments, did not apply because she had accepted the expatriation allowance for the period 16 December 1977 to 31 January 1978 in good faith.

There can of course be no doubt that, if Article 4 of Annex VII to the Staff Regulations is to be interpreted according to its tenor, Mrs Devred is not entitled to an expatriation allowance. On 1 December 1977, the date when she re-entered the service of the Community in Brussels, she was a Belgian national and she had not during the ten years ending at that date habitually resided outside Belgium: she had lived in Belgium from 1967 to 1971.

In support of her claim that she is none the less entitled to an expatriation allowance it was contended on her behalf, first, that she was entitled to it under Article 4 (1) (a) of Annex VII and secondly, in the alternative, that she was entitled to it under Article 4 (1) (b).

In support of her claim to be entitled to the allowance under Article 4 (1) (a), three arguments were put forward.

The first rested on Article 119 of the Treaty and on the jugdments of this Court in Case 21/74 *Airola* v *Commission* and Case 37/74 *Van den Broeck* v *Commission* [1975] 1 ECR 221 and 235.

Your Lordships will remember that in *Airola* v *Commission*, the applicant, who worked at Ispra, was Belgian by birth and had married an Italian. Under

Italian law she thereby automatically acquired Italian nationality without any right to renounce it. Two days after her marriage she had made a declaration under Article 22 of the Belgian statute of 14 December 1932 as a result of which she retained her Belgian nationality. But for that declaration she would have lost it. The Court held that, in those circumstances, her Italian nationality must be ignored for the purposes of Article 4 of Annex VII, because otherwise that Article would wreak discrimination between male and female officials, in that a male official could never have the nationality of his spouse imposed on him.

In *Van den Broeck* v *Commission*, in contrast, the applicant, who worked in Brussels, had been by birth French. She married a Belgian. By the combined effect of the Belgian statute of 14 December 1932 and of a Franco-Belgian Agreement of 9 January 1947 she thereby acquired Belgian nationality and lost her French nationality but she was given an option to make, within six months of her marriage, a declaration resuming her French nationality and renouncing her Belgian nationality. She made no such declaration. The Court held that, as she had not chosen to avail herself of the option, there was no reason "associated with equal treatment" why her Belgian nationality should be ignored in applying Article 4.

On behalf of Mrs Devred it was submitted that her case was in principle like the *Airola* case and unlike the *Van den Broeck* case. Mrs Van den Broek's Belgian nationality, it was pointed out, was the only one she had. She had had the option of being French or Belgian, but she could not be both. To have ignored her Belgian nationality would therefore have been to treat her as stateless. Mrs Devred, on the other hand, like Mrs Airola, had dual nationality. It was therefore proper to ignore the nationality she acquired by marriage, since a man would not have acquired it in that way. In any case, the submission continued, even if Mrs Devred had renounced her Belgian nationality, as she was entitled to do within six months of her marriage, the fact would have remained that she had been Belgian between the date of her marriage and the date of the renunciation. The renunciation would therefore have been of no avail to her on a literal reading of Article 4, since that Article refers to "officials who are or have been" nationals of the State where they are employed.

That led to argument between the parties as to whether, as a matter of Belgian law, a renunciation of the kind in question did or did not have retroactive effect, a point on which, it seems, authorities in Belgium are divided. It led also to our being told on behalf of the Commission that its practice was, where there had been such a renunciation, to ignore the temporary acquisition by the female official concerned of Belgian nationality.

In my opinion that practice is obviously correct. It is so for two reasons, either of which would suffice. One is that the acquisition by marriage of a nationality

that is renounced within six months of the marriage must be something that falls to be disregarded by virtue of the maxim *de minimis non curat lex*. The second is that, such acquisition being entirely involuntary, and impossible in the case of a man, it falls fairly and squarely within the principle on which the decision of the Court in the *Airola* case rests.

Where, however, as here, there is no renunciation, I do not think that the principle of the *Airola* case applies. Mrs Devred, like Mrs Van den Broeck, had an option. True it was not quite the same option. It was in fact a less daunting option. Mrs Van den Broeck had to choose between the nationality to which she was entitled by birth and the nationality to which she was entitled by marriage. Mrs Devred had only to choose whether or not to accept permanently the nationality to which she was entitled by marriage. She would retain the nationality to which she was entitled by birth in any event. It is true also that to have ignored Mrs Van den Broeck's Belgian nationality would have amounted to treating her as a stateless person. But the decision of the Court in her case did not turn on that. It turned on the fact that, because she had the option, she was in no worse a position than a male official would have been: neither of them could have the nationality of his or her spouse foisted on him or her. Indeed, it seems to me, a female official in Mrs Devred's position is, in a way, better off than a male official who marries a national of another Member State. He is, in general, given no right to acquire his wife's nationality, even if he would like to do so.

I would therefore reject the first argument put forward on behalf of Mrs Devred in support of her claim to be entitled to an expatriation allowance under Article 4 (1) (a).

The second argument put forward on her behalf in support of that claim was that, in the case of an official having dual nationality, Article 4 required, on its true interpretation, that one should ascertain his or her "effective" or "active" or "dominant" or "preponderant" nationality, and ignore the other. (Among that multiplicity of adjectives I propose to select, for the sake of simplicity, "preponderant"). It was said that, in Mrs Devred's case, her preponderant nationality was the British.

I confess that, to one whose legal training was acquired in England, the concept of a preponderant nationality is difficult to grasp. It is not a concept that exists in English law; nor does it exist, so far as I am aware, in any of those countries whose laws are derived from the common law of England. One knows of course that the concept is used in public international law, particularly where two or more States claim the allegiance of the same individual — see for instance The Hague Convention of 12 April 1930, ratified by both Belgium and the United Kingdom, though not, it seems, by all the Member States of the Community.

Fundamentally, however, the concept has been evolved by the courts of those countries whose private international law looks to nationality rather than to

domicile (in the common law sense) to ascertain the "personal" law of an individual. Confronted with situations in which individuals have dual nationality, those courts have necessarily had to evolve a concept of preponderant nationality.

In Case 33/72 *Gunnella* v *Commission* [1973] 1 ECR 475, at p. 486, Mr Advocate General Mayras carefully considered the question whether that concept should be applied in the context of Article 4 of Annex VII to the Staff Regulations. He concluded that it should not. I respectfully agree. Article 4 is concerned only with the question whether an official has or has not (or has or has not had) the nationality of the State in whose territory his place of employment is situated. It is not concerned with the question whether that official has or has not (or has or has not had) some other nationality also.

Should Your Lordships, however, not share that view, it will be necessary to determine whether Mrs Devred's preponderant nationality is the Belgian or the British. To enable that to be done, I think that further evidence as to the nature of her British nationality would be required. This is because of the complexity of the law about British nationality.

Basically, every citizen of every country in the Commonwealth is a British subject. By virtue of Section 1 of the British Nationality Act 1948, the expressions "British subject" and "Commonwealth citizen" are synonymous. This means that something approaching one-fifth of mankind are British subjects.

Within that vast category there is a smaller category of people who are "citizens of the United Kingdom and Colonies". We know that Mrs Devred belongs to this smaller category because we have before us (in her personal file) a photocopy of the first two pages of her British passport.

Not every citizen of the United Kingdom and Colonies has however "the right of abode" in the United Kingdom itself. That right belongs to a narrower category still, created by the Immigration Act 1971, consisting of those who are "patrials". A citizen of the United Kingdom and Colonies who is not a patrial may not enter the United Kingdom as of right.

Moreover, at the time of the signature of the Treaty of Accession, the Government of the United Kingdom made a declaration of which the effect was that the term "nationals" wherever used in the ECSC Treaty, the EEC Treaty, or the Euratom Treaty, or in any Community act deriving from those Treaties, was, as to the United Kingdom, to be understood as referring only to patrials and Gibraltarians. The legal effect of that declaration has been a matter of debate among learned writers. Taking it, however, at its face value (and presumably the other Member States ratified the Treaty of Accession on the faith of it) it means that a citizen of the United Kingdom and Colonies who is neither a patrial nor a Gibraltarian is not a United Kingdom national for the purposes of Community law.

Since Mrs Devred was born in Alexandria and has never lived in the United Kingdom (indeed, so far as we know, she has never set foot there) it cannot be assumed that she is a patrial. Nor can the answer to the question whether she is a patrial be found in her passport, because that was issued in 1970. The answer can be ascertained

only by enquiry into her ancestry, to see if she satisfies the requirements of Section 2 of the Act of 1971. Your Lordships will remember that I asked her Counsel at the hearing whether he could supply the answer and that he could not. We have since been informed by him that an approach by Mrs Devred to the British Consulate in Brussels had yielded no answer other than that enquiries would be necessary.

I will add no more than this. If it were to turn out that Mrs Devred is not a patrial, her Belgian nationality would, if she ever wished to work in the United Kingdom, give her, by virtue of the provisions of the EEC Treaty, a better right to do so than her British nationality. It might be difficult to hold then, at all events in a Community law context, that her British nationality was preponderant.

The third argument put forward in support of Mrs Devred's claim to be entitled to an expatriation allowance under Article 4 (1) (a) was based on some observations of Mr Advocate General Mayras in the *Gunnella* case ([1973] 1 ECR at pp. 487-488), where he was dealing with a contention put forward on behalf of Mrs Gunnella that the references in Article 4 to the date of an official's "entering the service" must be understood as references to the date of his or her entering the service at a particular place. Mrs Gunnella had in fact been reinstated in the service at Ispra after a period of leave granted to her on personal grounds, prior to which she had served in Brussels. In rejecting that contention Mr Advocate General Mayras said that the concept of entry into service in Article 4 could only be understood, as meaning the first entry into the service of the Community. Fastening on that, Counsel for Mrs Devred submitted that, in her case, Article 4 (1) (a) must be applied on the footing that she entered the service in April 1967 and on the basis of the facts then existing. At that date her only nationality was British and she had never resided in Belgium.

That argument would have been better put forward in support of Mrs Devred's claim to be entitled to an expatriation allowance under Article 4 (1) (b), because there is nothing in Article 4 to say, or to imply, that changes in an official's nationality occurring after his entry into the service are to be ignored. Lifting Mr Advocate General Mayras's observations out of their context, it could then be argued that, granted that Mrs Devred is now a Belgian national, the ten-year period relevant under Article 4 (1) (b) ended in her case in April 1967.

Even put in that way, however, the argument must in my opinion be rejected.

Mr Advocate General Mayras's observations were not directed to a case, such as is Mrs Devred's, of a person who, having left the service of the Community altogether by resignation, is recruited to it afresh some years later. Mrs Gunnella had never ceased to be a Community official.

I turn to the arguments put forward in support of the contention that Mrs Devred is entitled to an expatriation allowance under Article 4 (1) (b). There were two.

The first was that Mrs Devred's residence in Belgium from 1967 to 1971 must be ignored because it was due to her being in the service of the Community and the Community is "an international organization" within the meaning of that expression in Article 4.

I will assume in favour of Mrs Devred that the Community is an "international organization" within the meaning of its own Staff Regulations. (Mr Advocate General Mayras thought so in the *Gunnella* case: see [1973] 1 ECR at p. 487). But even so the argument turns Article 4 (1) (b) on its head. What, in terms, that provision says is that an expatriation allowance is to be paid to an official who is a national of the State where he is employed if, during the ten years before his entering the service, he has habitually resided *outside* the European territory of that State "for reasons *other* than the performance of duties in the service of a State or of an international organization". We are here invited to say that that provision extends the right to an expatriation allowance to an official who, being a national of the State where he is employed, was resident *in* that State during part of the ten-year period if the reason *for* such residence was that he was in the service of that or of any other State or of an international organization. I can see no reason for doing such violence to the language of the provision. The suggestion put forward on behalf of Mrs Devred was that one might deduce from the presence also in Article 4 (1) (a) of an exception for "circumstances arising from work done for another State or for an international organization" an underlying intention on the part of the authors of Article 4 that residence anywhere in the service of an international organization should always be left out of account. The short answer in my opinion is that, if those authors had had any such intention, they would have expressed it and constructed Article 4 differently. In truth it would have been a strange intention for them to have.

The other argument put forward on behalf of Mrs Devred on this part of the case was that the period she spent in Belgium before her marriage, i. e. before she became a Belgian national, should at least be ignored. She should thus be taken to have resided outside Belgium for rather more than eight years of the relevant ten-year period. As to that I think it enough to say that in Case 42/75 *Delvaux* v *Commission* [1976] 1 ECR 167 this Court clearly held that the reference in Article 4 (1) (b) to ten years means ten years and nothing less.

I would therefore reject Mrs Devred's claim that the decision of the Commission withdrawing her expatriation allowance should be declared void.

Her alternative claim for compensation is founded on an allegation that, in reliance on the initial grant to her of an expatriation allowance and on the confirmation of that grant by a certificate issued to her by the Commission on 25 January 1978, she entered into transactions concerning the purchase of a flat in Brussels under which she undertook financial

obligations that she would not otherwise have thought fit to commit herself to.

I need not trouble Your Lordships with all the details of those transactions because it became clear at the hearing that the evidence did not support her allegation. Essentially Mrs Devred entered into three successive contracts of loan. The first, under which she was to borrow 600 000 BF, was dated 17 February 1978. It was the only one that she might have entered into under the impression that her remuneration from the Commission was to include an expatriation allowance. It was however cancelled and replaced by the second contract, which was dated 16 March 1978, and which was for a smaller sum, viz. 212 600 BF. The second contract was in its turn cancelled and replaced by the third, dated 22 September 1978, which was for 975 000 BF. By the time Mrs Devred signed the second contract, let alone the third, she was unquestionably aware that her right to an expatriation allowance was in doubt. Plainly, therefore, her claim for compensation must fail.

In the result I am of the opinion that this action should be dismissed with, having regard to Article 70 of the Rules of Procedure of the Court, no order as to costs.