OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 29 MAY 1980 [1]

Mr President,
Members of the Court,

I must first of all explain the carefully drafted rules at issue in this case. I apologize for trying your patience.

I — As provided for in Article 3 of Annex VII to the Staff Regulations of Officials of the European Communities as contained in Regulation No 2278/69 of 13 November 1969:

"An official shall receive an education allowance equal to the actual education costs incurred by him up to a maximum of Bfr 1 250 per month for each dependent child, within the meaning of Article 2 (2) ..., who is in regular full-time attendance at an educational establishment.

Entitlement to this allowance shall commence on the first day of the month in which the child begins to attend a primary educational establishment and shall cease at the end of the month in which the child reaches the age of twenty-six.

The maximum referred to in the first paragraph above shall be raised to Bfr 2 500 for an official receiving the expatriation allowance whose place of employment is at least 50 km from a European school."

However, Regulation No 1473/72 of the Council of 30 June 1972 has replaced this last paragraph with the following provision:

"The maximum prescribed in the first paragraph shall be raised to 3 129 Belgian francs for officials in receipt of expatriation allowance whose place of employment is at least 50 km:

— from a European School, or

— from an educational establishment of university level of his country of origin, provided that the child actually attends an educational establishing of university level at least 50 km from the place of employment."

Regulation No 711/75 of the Council of 18 March 1975 replaced that provision again, as from 1 March 1975, with the following:

"The maximum prescribed in the first paragraph shall be doubled for:

— an official whose place of employment is at least 50 km from a European school or an educational establishment working in his language, provided that the child actually attends an educational establishment at least 50 km from the place of employment;

— an official whose place of employment is at least 50 km from an establishment of higher education in the country of which he is a national or working in his language, provided that the child actually attends an establishment of higher education at least 50 km from the place of employment and the official is entitled to the expatriation allowance; the latter condition shall not

1 — Translated from the French.

apply if there is no such establishment in the country of which the official is a national."

In anticipation of this amendment the Commission of the European Communities had adopted, as from 1 March 1975, General implementing provisions for granting the educational allowance, which were not however published until 2 May 1977 in No 153 of "Administrative Notices". Article 4 (5) of those provisions relating to primary and secondary schools provides:

"On presentation of supporting documents, the official shall be entitled to receive double the amount set out in the first paragraph of Article 3 of Annex VII of the Staff Regulations by way of reimbursement of the costs specified in Article 3 (that is to say, the actual costs of education, including costs incurred by children participating in courses in the open air), provided his place of employment is at least 50 km

— either from a European school

— or from a school teaching in his mother tongue and the child must attend such a school for imperative educational reasons, adequate proof of which must be provided.

These particulars have been incorporated in Article 20 of Council Regulation No 912/78 of 2 May 1978, which entered into force on 4 May 1978 and replaced the first indent of the third paragraph of Article 3 by the following:

"an official whose place of employment is at least 50 km from either:

— a European school, or

— an educational establishment working in his language which the child attends for imperative educational reasons duly supported by evidence".

The amount of Bfr 3 093 has been increased to Bfr 3 302 with effect from 1 July 1978 by Council Regulation No 3084/78 of 21 December 1978.

These repeated amendments show that the authors ot the Staff Regulations have for a long time sought an appropriate way of determining which cases justify a doubling of the maximum education allowance.

II — The applicant, who is a British national and an official of the Commission of the European Communities, receives the expatriation allowance; he has several children including a daughter Caroline, born on 11 February 1960, who attended the British School of Brussels in 1975-1976 where she obtained at the end of the first stage of secondary education provided by that establishment the General Certificate of Education at Ordinary Level.

That establishment, just like the European School in Brussels, provides academic education of a type which is appropriately called secondary education. In respect of his daughter's education the applicant only received the allowance at the single rate because the educational establishment working in his language, to which he had very justifiably preferred to send his daughter, was not more than 50 km from his place of employment.

At the beginning of the school year in September 1976 the applicant and his wife, who had been advised to put their daughter in for a different type of training better suited to her ability, sent her to Leith's School of Food and Wine in London to attend the courses of what Counsel assisting the Commission calls a school of cookery *(école de cuisine)* but which for my part I prefer to call a school of hotel catering *(école hôtelière)*. This private establishment after a one-year course issues a Diploma of Food and Wine. It therefore provides technical or vocational training.

Since the applicant still only received education allowance for his daughter at the single rate, even though the expenses incurred by his daughter's attending Leith School exceeded the prescribed maximum, he submitted a request to the Commission on 7 March 1971 under Article 90 of the Staff Regulations for an admission that for the school year 1976-1977, his daughter was attending an establishment of higher education within the meaning of the second indent of the third paragraph of Article 3.

In addition he objected to the fact that the administration confirmed to pay him the same education allowance at the single rate which it had paid him when his daughter attended the British School of Brussels. The latter objection seemed to imply that the applicant intended to avail himself in addition of the first indent of the third paragraph of Article 3.

On 19 July 1977 the head of the Individual Rights and Privileges Division, with reference to the "conclusions of the heads of the administration", replied to the applicant that he could only confirm that the course of education taken by [the applicant's] daughter at Leith's School of Food and Wine did not meet any of the criteria used by [the administration] in defining "higher education". This note did not however make known the head of the division's attitude to the applicant's additional request.

On the same day the applicant submitted a complaint within the meaning of Article 90 against the implied decision rejecting his request of 7 March 1977 in which he asked the Commission to accept that he was entitled to the doubling of the maximum education allowance for his daughter, either on the basis of Article 5 of the General implementing provisions of 2 May 1977 (that is to say on the basis of higher education) or of Article 4 (5) of those provisions (attending for imperative educational reasons an educational establishment teaching in the child's mother tongue which is at least 50 km from the official's place of employment).

On 27 February 1978 the Member of the Commission responsible for personnel questions rejected this complaint repeating in the main the arguments put forward on the same day by the head of the Individual Rights and Privileges Division: the course of education taken by Caroline at the school of hotel catering cannot be regarded as higher education.

The letter of 27 February 1978 did not express an opinion anymore than did the note of 19 July 1977 on the right to receive an education allowance under Article 4 (5) of the General implementing provisions or the first indent of the third paragraph of Article 3 of Annex VII, applicable from 1 March 1975.

On 16 June 1978 the applicant, after having consulted a "European" lawyer and after confirming that the Commission had on 27 February 1978 rejected his request for the allowance for his daughter's higher education to be doubled, submitted another request to the Commission under Article 90 based on the same facts with a view to obtaining payment of the doubled education allowance for his daughter's education in England during the school year 1976-1977.

This request was rejected on 6 October 1978 by the head of the Individual Rights and Privileges Division who has since then become Deputy Chef de Cabinet to the Member of the Commission responsible for personnel questions. The latter, on the strength of Article 4 (5) of the General im-

plementing provisions, regretted that he was unable to give a favourable reply to the applicant's request *"unless adequate proof is provided"* to show that imperative educational reasons obliged him to send his daughter to a school other than the European School or the British School in Brussels during the period in question".

On 6 or 8 December 1978 the applicant submitted, pursuant to Article 90 (2) of the Staff Regulations, to the Member of the Commission responsible for personnel questions a complaint against this refusal to grant the allowance under the first indent of the third paragraph of Article 3 of Annex VII in conjunction with Article 4 (5) of the General implementing provisions.

The reply dated 26 March 1979 of the Director-General for Personnel and Administration to this complaint was that additional arguments put forward in the applicant's second complaint of 8 December 1978 "were fully considered both by the Legal Service and Directorate-General IX when [he] introduced [his] initial complaint" on 19 July 1977 "and were not considered to justify the payment of the double education allowance."

By an application registered at the Court on 22 June 1979 the applicant requests the Court to annul the express decision of 6 October 1979 rejecting his request of 16 June 1978 and also the express decision of 26 March 1979 rejecting his complaint of 6 December 1978.

The Commission contends that the application should be dismissed as inadmissible and, in any event, as unfounded.

III — Assuming that the reply of the Director-General for Personnel and Administration of 26 March 1979 was formulated by the competent authority it is merely confirmatory and the application therefore appears to me to be inadmissible as far as this point is concerned.

This is not so in so far as the application is directed against the rejection of 6 October 1978 by the head of the Individual Rights and Privileges Division of the applicant's request. On that date that official for the first time expressed his opinion unambiguously on the additional request made by the applicant on 7 March 1977 by considering it on its merits; that rejection is not therefore a mere confirmation of the decision of 19 July 1977.

It is true that the request for the double education allowance for training in an establishment working in the child's mother tongue had been submitted, although the wording was not very clear, as far back as 7 March 1977. As the Head of Division had only defined his position on 19 July 1977 on the request for the allowance on the basis of attendance at an establishment of higher education, the request to be granted this allowance for the child's attendance at an educational establishment working in the mother tongue should have been deemed to have been rejected by implication on the expiry of a period of four months, that is to say on 7 July 1977, and it was for the applicant to submit a complaint against this implied decision rejecting the request within a period of three months, that is to say before 7 October 1977. This is what he did on 19 July 1977. Although no reply to this complaint had been received within a further period of four months, that is to say before 7 November 1977, he had a period of three months, that is to say until 9 February 1978, within which to bring the matter before the Court.

Instead of doing so, according to his own statement, he re-submitted on 16 June 1978, a request having the same objective. In strict law such a request would be out of time.

However, I shall not submit that the Court show such strictness. Moreover, the Commission has failed to raise the plea that the application is inadmissible by means of a separate pleading.

Although the applicant's letter of 16 June 1978 is unquestionably a repeated request as far as concerns the granting of the allowance for higher education, the view may be taken that the request based on the first indent of the third paragraph of Article 3 of Annex VII was not clearly formulated until that date. The Head of Division did not in fact consider this request until 6 October 1978. More importantly it was *not* rejected on that occasion and the dialogue remained open since this official, as I have said, invited the applicant to produce evidence of the educational reasons justifying his daughter's attending the London establishment.

That is an invitation by the competent authority dealing with individual rights which makes one think that the file had not been closed at that date. This decision provides a new factor: it was such that it kept in being the period within which a legal action must be brought and allowed the applicant to formulate another complaint within the meaning of Article 90 of the Staff Regulations. Since this new complaint was registered on 8 November 1978, the applicant had until 6 July to bring the matter before the Court if no reply had been given to this complaint before 6 April 1979.

I therefore propose to proceed with my examination of the substance of the case.

IV — The wording of the first indent of the third paragraph of Article 3 of Annex VII, which applied during the period 1976-1977, does not make any reference to the kind of training provided by the establishment working in the official's language which the child attends. The expression "educational establishment" cannot therefore be restricted to secondary establishments. The Staff Regulations do not draw any distinction, it seems to me with good reason, between academic education and technical, practical or vocational training.

Thus its authors have certainly done nothing to prevent any child from even being able to undertake vocational or technical training *in his own language.* It is perfectly legitimate for certain children, even if their parents are officials of the Communities, to be able to do vocational training, at least until the age of 18. (cf. Article 2 (3) of Annex VII), and attending an educational establishment providing such training, just like a secondary educational establishment, confers the right to the doubling of the maximum "education" allowance, provided that the training is given in an educational establishment, working in the language of the child concerned, which is at least 50 km from the official's place of employment.

The text in force at that time did not make any reference to the existence of any imperative educational reasons either. This condition, which is in itself lawful, was not expressly laid down until 1978. Therefore the applicant could not be asked to comply with a condition in a document which was not published until 2 May 1977, even if the document provides that it has retroactive effect from 1 March 1975 and that is why it was only mentioned for the first time in the note of 6 October 1978.

It is true that the competent authority has the right to amend the Staff Regulations at any time in the interests of the service provided always that such an amendment does not have *retroactive* effect to the detriment of the servants. If officials and agents do not rebel against the retroactivity of pay increases the reason is that they do not suffer any injury from the retroactive effect thereof; they indeed complain frequently that such retroactivity does not relate back far enough and only provides partial compensation for the increase in the cost of living. It is understandable that there would be a different reaction with a measure involving less favourable remuneration.

Nor can it be asserted that the cost of children's education is supposed to be offset by the grant of the expatriation allowance: that allowance is given to officials even if they are unmarried and even if they have no children.

Although the authors of Regulation No 711/75 of 18 March 1975 were certainly acquainted with the General implementing provisions adopted by the Commission, the text which they adopted on that date does not mention the existence of "imperative educational reasons, adequate proof of which must be provided". In this connexion I call attention to the fact that in a note bearing the reference IX/1674/76/F which was considered in Case 164/78 *Francis Woehrling* v *Commission of the European Communites* [1979] ECR 1961 *et seq.*, which the Court decided by its judgment of 31 May 1979, the President of the Commission confirms that the third paragraph of Article 3 of Annex VII (in the version after 18 March 1975) is "ambiguous" and that the Legal Department, after having stressed the difficulties which would result from a literal interpretation of that article, accepts the validity of an interpretation based on a comparison between the old (the wording of Regulation No 1473/72 of 30 June 1972) and the new text and on the intention of the authors of the latter text, which was not to restrict the financial advantages granted when a European School is far away but to extend those advantages to certain other situations (in particular to the establishment of the JRC [Joint Research Centre] at Geel where there is a European School).

Before 4 May 1978, the date when the present version of the third paragraph of Article 3 of Annex VII entered into force, the applicant did not have to prove that his daughter was unable to attend the European School any longer since the Commission had itself admitted that his daughter's attendance in 1975-1976 at the British School in Brussels gave him the right to receive the single education allowance. After having obtained the General Certificate of Education at Ordinary Level, his daughter at the age of 16, could no longer continue to attend that establishment since this certificate is in fact awarded to children, who, having completed the whole of one stage, corresponding to the first part of secondary education and usually ending when they reach the age of 16, can no longer for that very reason take advantage of the teaching provided by that school.

Even in connection with providing proof of imperative educational reasons the applicant has at least produced *prima facie* evidence. Counsel assisting the Commission asserts, for the purpose of

questioning whether these reasons are imperative, that the fact that the courses, which are mainly practical, of a school of cookery are in a language other than the child's mother tongue has scarcely any relevance. It seems to me on the contrary that the use of the mother tongue may be just as necessary in a school of hotel catering if only to enable the learner to understand the recipes or the directions for use: the language of food also has its subtleties.

It was therefore legitimate for certain children of European officials to be able to receive, at least up to the age of 18, vocational training conferring the right, subject to the conditions laid down in the first indent of the third paragraph of Article 3 of Annex VII (1975 version), to a double education allowance. The applicant was entitled to obtain for his daughter's training in London in 1976-1977, a double education allowance unless there was evidence that she could do this kind of training in an educational establishment *working in her language* within 50 km of Brussels.

Having regard to the ambiguity of the wording of the applicant's original request I nevertheless consider that there are no grounds for acceding to his view that interest should be paid at the rate of 8% on the amount corresponding to the double allowance from the date when it became due to the date of its actual payment.

I submit that the decision of 6 October 1978 should be annulled and the costs borne by the Commission.