On those grounds,

THE COURT (First Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the Commission to pay the costs.**

O'Keeffe Bosco Koopmans

Delivered in open court in Luxembourg on 11 July 1980.

For the Registrar

J. A. Pompe

Deputy Registrar

A. O'Keeffe

President of the First Chamber

OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 22 MAY 1980 [1]

Mr President,
Members of the Court,

I — The applicant, a Luxembourg national, was engaged on 1 October 1954 by the High Authority of the ECSC. A "note for the file", which was drawn up on 13 October 1978 in the presence of the applicant but which was not given to him, shows his place of origin as Luxembourg; in fact, at the time he took up his post he was living in Dudelange, a town situated less than 25 kilometres from the capital. He was established as an official of the ECSC on 10 September 1962. By a letter of 1 July 1968 from the Director-General for

1 — Translated from the French.

Personnel and Administration he was assigned to that directorate in Brussels. That "appointment" meant that his place of employment was changed as from 5 November 1968 at the latest and, as a result, that he was granted from the time of his removal to Brussels the expatriation allowance provided for in Article 4 of Annex VII to the Staff Regulations of the ECSC of 1 January 1962.

Approximately 10 years later, on 14 April 1978, the applicant informed the Head of the Individual Rights and Privileges Division in Brussels that he wished to be transferred to Luxembourg whilst continuing to receive the expatriation allowance. On 20 April the latter replied to the effect that, if that happened, the allowance would be withdrawn unless, in accordance with the combined provisions of Article 9 (b) of the General Regulations of the ECSC and the fourth paragraph of Article 97 of the Staff Regulations of Officials of the ECSC, which remained applicable to the applicant by virtue of the last paragraph of Article 2 of Regulation No 259/68 of the Council of 29 February 1968, he established his residence in a place more than 25 kilometres distant from the place where he resided prior to his engagement, that is to say, Dudelange.

On the basis of that information the applicant applied on 14 June 1978 for a vacant post in Luxembourg by way of a transfer under Article 29 (1) (a) of the Staff Regulations of Officials of the European Communities. In support of his application he included a memorandum dated 5 July 1978, which is not in the file on the case. On 8 August 1978 the Head of the Individual Rights and Privileges Division gave his consent to the applicant's taking up his duties in Luxembourg on 1 October 1978. On 21 August 1978 Directorate-General XX, Financial Control, recommended to the Head of the Personnel Division in Luxembourg that the applicant be transferred with effect from 1 October 1978, the approval of the Personnel Directorate of the Directorate-General for Personnel and Administration in Brussels having been obtained. With effect from that date the applicant was in fact transferred to the specialized department responsible for management of funds, buildings and procurement in Luxembourg.

The "note for the file" of 13 October 1978 referred to above states that he was entitled to neither the expatriation allowance nor the foreign residence allowance. On the same day the applicant sent a request to the Head of the Personnel Division in Luxembourg asking him to do what was required for him to be granted the expatriation allowance since, following his transfer to Luxembourg, he had established his "place of residence" at Ehnen, which is less than 25 kilometres as the crow flies from Luxembourg, but more than 25 kilometres from Dudelange and he considered, therefore, that he met the requirements set out in the note from the Head of the Individual Rights and Privileges Division of Brussels of 20 April 1978.

On 12 February 1979 his request was rejected by the Head of the Personnel Division in Luxembourg: in fact the applicant failed to qualify under either Article 4 (b) of Annex VII to the Staff Regulations, which lay down the conditions for granting the expatriation allowance, or the combined provisions of the fourth paragraph of Article 97 and Article 47 (3) of the former Staff Regulations of the ECSC and Article 9 (b) of the General Regulations of the ECSC, which concern the separation allowance. Under the rules in the ECSC Staff Regulations of 1956 that allowance was only granted to employees who, prior to taking up their duties, had resided continuously for a period of more than six months in a place more than 25 kilometres from the seat of the institution. Prior to his engagement the applicant resided in Dudelange, which is

less than 25 kilometres from the premises of the former High Authority of the ECSC. Moreover, Ehnen was the applicant's "private residence" [résidence privée] and not his "place of residence" [lieu d'habitation].

On 19 February 1979 the applicant submitted a complaint under Article 90 of the Staff Regulations against the rejection of his request and against what he termed the "decision to withdraw the expatriation allowance". He asserted in particular that, if his transfer to Luxembourg necessarily entailed the loss of the expatriation allowance, he would never have requested the transfer. He added that, because of his transfer, he had been obliged to sell his home in Belgium at a loss of Bfr 1 500 000 on its true value and that he had already invested the sum of Bfr 4 000 000 in a building under construction at Ehnen, the cost of which he said amounted to Bfr 9 200 000.

On 5 July 1979 the applicant sent a memorandum to the Director of Personnel in Brussels in which he stated, in particular, that all the steps he had taken in order to obtain a loan from the BHW [the Beamtenheimstättenwerk], in Hameln, so that he could buy the house in Ehnen in which he had lived since his return to Luxembourg as well as a building plot in the same locality had been arranged before his departure from Brussels when he was sure that he would retain the expatriation allowance. The withdrawal of that allowance had adversely affected the conditions of the loan — in German currency — which he had obtained from that body (which is an establishment which provides a large number of officials of the European institutions, irrespective of nationality, with savings and loan facilities for house purchase).

It is the formal rejection of his complaint adopted in the decision of 29 June 1979 by the member of the Commission responsible for staff problems which the applicant asks the Court to annul in the present action. In the alternative, he seeks an award of Bfr 5 250 000, with interest, as compensation for the damage he claims to have suffered as a result of the Commission's administrative mistake.

II — According to the fourth paragraph of Article 97 of the Staff Regulations of the ECSC of 1962, "where as a result of an alteration in his place of employment an official established under Article 93 no longer fulfils the conditions laid down in Article 4 of Annex VII for receiving the expatriation allowance he shall nevertheless continue to receive that allowance if the former Staff Regulations of Officials of the ECSC *entitled* him to the separation allowance".

1. As was clearly stated by Mr Advocate General Gand on 25 June 1970 in his opinion on the *Chuffart* case ([1970] ECR 657), the fourth paragraph of Article 97 is a transitional provision; such a provision, "issued on transition to a less generous system, does not normally aim to give employees more extensive rights than those they had under the system which is revoked".

It is not possible either to resurrect for a hypothetical moment Article 9 (b) of the General Regulations of 1956 or to derive from it, *a contrario,* a rule that the entitlement to separation allowance provided for in that provision continues to re-emerge, even after 29 February 1968, if, as the result of a new assignment, an official is led to establish his residence in a place more than 25 kilometres from that in which he resided prior to his entry into the service. The last paragraph of Article 2 of Regulation

No 259/68 of 29 February 1968 cannot be interpreted as allowing provisions which belong to two successive sets of staff regulations to be combined.

2. The Commission considers, moreover, that the applicant's transfer to Luxembourg did not "necessarily" cause him to establish his new residence more than 25 kilometres from the place where he lived prior to his first taking up his duties. I cannot be quite so dogmatic on that point: the freedom to choose one's place of residence applies equally to officials of the Community, provided that the place where they settle is compatible with the normal performance of their professional duties; that choice is often affected by the state of the housing market. However, the choice of a place in which to reside must not be influenced by speculating on the effect which it may have on continuance of the separation allowance. I should be prepared to accept that the applicant had found it necessary to establish his residence in Ehnen if the change of residence had occurred *in tempore non suspecto*, that is to say if, before he was transferred to Luxembourg, he had already settled at a distance of more than 25 kilometres from Dudelange. The first item of evidence indicating that the choice had been an objective one would be if the applicant had had his place of origin altered prior to the entry into effect of Regulation No 259/68. But the construction of the applicant's new residence was not even completed at the date of his complaint.

In any event, the applicant's belief that it would have been possible for him to retain the allowance subject to the sole requirement that he establish himself at a distance of more than 25 kilometres from the place where he resided prior to his taking up employment with the ECSC is mistaken: he never received the separation allowance and any entitlement to that allowance is unquestionably extinguished. The decision to withdraw the expatriation allowance from the date of his return to Luxembourg therefore appears to me to be in conformity with the Staff Regulations.

3. There remains the point that the information given to the applicant on 20 April 1978 was, to say the least, ambiguous and that that ambiguity was maintained as a result of the divided nature of the Directorate-General for Personnel and Administration, which is split between Brussels and Luxembourg, and the overlapping of the responsibilities of the Head of the Individual Rights and Privileges Division in Brussels and those of the Head of the Personnel Division in Luxembourg.

The Court has held that "the adoption of an incorrect interpretation [of the Staff Regulations] does not constitute *in itself* a wrongful act" *(Richez-Parise* [1970] ECR 339; *Fiehn* [1970] ECR 560); thus in certain circumstances the administration may be liable if it supplies wrong information.

That the Commission itself has accepted that the wrong information places some liability on its departments appears to me — although the Commission denies this — to follow from the fact that it decided finally not to pursue the reimbursement of the expatriation allowance which it sought during the month of October 1978. The statement made on 7 December 1979 (the action was lodged

on 29 October 1979) by a member of the Personnel Division that he informed the applicant as early as 13 October 1978 that "his personal position did not entitle him to the expatriation allowance despite the written information from Brussels" does not appear to me to invalidate that finding.

Even if that information in no way amounts to a "decision", it certainly emanates from the authorities who, according to the Staff Courier of 17 November 1977, are competent to make decisions relating to continuance of the separation allowance for officials established under Article 93 of the former Staff Regulations for Officials of the ECSC.

On the other hand the reliance placed by the applicant was, to say the least, excessive and it was for him to seek advice from the administration in *Luxembourg,* to which he would belong once he was transferred there. Moreover, I am not wholly convinced that he did not display excessive haste in making his property investments, which amounted to nearly Bfr 10 000 000. In that regard it is not possible to escape the observation that the loan contract concluded between the applicant and the lending body, produced by the defendant, is dated 9 April and 22 May 1979, whereas the applicant had been informed by the Head of the Personnel Division in Luxembourg as early as 12 February 1979 that the allowance in question was to be withdrawn. The responsibility is thus to a large extent a shared one.

In view of the month of grace which the applicant has been allowed, and the doubt as to the true existence of both the damage and the causal link between the wrongful act and that damage I consider it would be sufficient to order the Commission to pay all the costs of the action.

To conclude, I suggest that the action be dismissed and, for the reasons just given, that the Commission be ordered to pay the costs of the action.