OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 26 June 1986 *

Mr President,
Members of the Court,

1. Carmen De Fraye, née Trenti, a Community official of Italian origin, was granted the foreign residence allowance provided for in Article 4 (3) of Annex VII to the Staff Regulations of Officials by the Director General for Administration of the Economic and Social Committee solely for the period between 1 May and 30 June 1978. She requested the reconsideration of that decision, which was made on 3 April 1979; however, by a decision of 17 August 1984 the Secretary General of the Economic and Social Committee rejected her request. The application now before the Court, which was lodged at the Court Registry on 22 May 1985, seeks the annulment of that decision.

Article 4 (3), which came into force on 4 May 1978 by virtue of Council Regulation (Euratom, ECSC, EEC) No 912/78 (Official Journal 1978, L 119, p. 1), provides as follows: 'An official who has by marriage automatically acquired and cannot renounce the nationality of the State in whose territory he or she is employed shall be treated in the same way as an official' who is not and never has been a national of that State; such an official is therefore entitled to the foreign residence allowance, subject to the conditions laid down in Article 4 (2).

According to the applicant, the expression 'cannot renounce' does not refer solely to legal impossibility, since in such a case the legislature would have employed a different phrase such as, for example, 'has no legal right to renounce'; it must therefore be understood as referring to circumstances in which the official who marries cannot freely exercise the right of renunciation granted to him by the law applicable to his marriage. It follows that the applicant was wrongly refused the allowance. Renunciation of Belgian nationality, which she acquired as a result of her second marriage on 7 June 1978, would, in fact, have such serious practical and legal consequences for her as to leave her no choice.

The result is evident: since she had failed to obtain recognition in Italy of the judgment of the tribunal de première instance [Court of First Instance], Brussels dissolving her previous marriage she was, in the eyes of the Italian authorities, still married to her first husband. In such a situation, retention of Belgian nationality was her sole method of showing that she was lawfully married to her second husband, Mr De Fraye, and that her daughter by him was not a child of the first marriage.

2. In a preliminary objection, the Economic and Social Committee contests the admissibility of the application in so far as it is directed against a decision adopted on 3 April 1979 which became definitive and therefore incapable of being challenged some years ago. The fact that the administration subsequently and on several occasions provided the applicant, at her request, with further explanations did not cause the time for taking action to start

* Translated from the Italian.

running again, since those explanations were confirmatory and had no legal effect.

The applicant puts forward two arguments against that view. The first argument is based on the existence of a new fact. She states that in February 1982 the administraion submitted her case to an expert, Professor Vander Elst, whose opinion was that she could, in fact and in law, renounce Belgian nationality within six months of the date of her second marriage. However, the applicant adds that the Economic and Social Commititee did not provide the expert with all the information necessary for an objective examination of her case. She became aware of that only on 5 March 1984, when the administration provided her with the text of his report; she then decided to inform Professor Vander Elst personally and he, in a letter sent to her on 21 March 1984, acknowledged without hesitation the validity of her reasons. That second opinion constituted the new fact which induced the applicant to turn once more to the administration to assert her right to the allowance; in that respect there is no doubt that the time-limits for bringing her application have been complied with.

In her second argument the applicant maintains that the steps taken before 17 August 1984 and especially the letter of 3 April 1979 must be regarded merely as administrative information. They were not taken by the appointing authority, which in the case of officials in her grade is the Secreary General. Consequently, an application could be brought only against the first administrative act in the nature of a decision within the meaning of Article 90 (2) of the Staff Regulations, that is to say the communication of 17 August 1984. On that ground as well, therefore, it must be recognized that the application was lodged in due time.

3. I do not think those arguments can be upheld. Let me refer the Court first of all to its well established case-law according to which 'only those acts [of the administration] capable of directly affecting a precise legal position can be regarded as adversely affecting an official' (judgment of 11 July 1974 in Joined Cases 177/73 and 5/74 *Reinarz* v *Commission* [1974] ECR 819; judgment of 11 July 1985 in Joined Cases 66 to 68 and 136 to 140/83 *Hattet* v *Commission* [1985] ECR 2459). The letter of 3 April 1979 certainly falls within that category; by that letter the Director General acknowledged the applicant's right to receive the foreign residence allowance for the period between 12 May and 30 June 1978 but at the same time denied that she was entitled to it for the period after the latter date, on the ground that she no longer satisfied the conditions laid down in Article 4 of Annex VII.

Another fact which shows that the letter constitutes a decision within the meaning of Article 90 of the Staff Regulations is that the administration paid the aforementioned allowance every month until, but not after, the date referred to by the Director General, and the applicant made no protest.

With regard to the question whether the application was brought in due time, it is now trite law that the time-limits prescribed in Articles 90 and 91 of the Staff Regulations 'were laid down with a view to ensuring clarity and legal certainty'; they are therefore 'a matter of public policy and are not subject to the discretion of the parties or the Court' (judgment of 12 July 1984 in Case 227/83 *Moussis* v *Commission* [1984] ECR 3133, paragraph 12; see also the cases referred to by the Court in that judgment). The fact that on the applicant's

request the administration furnishes additional information with regard to a request which was made out of time and which was therefore 'inadmissible . . . cannot have the effect of derogating from the system of mandatory time-limits . . . and re-establishing a right of action which is definitively time-barred' (judgment in *Moussis*, paragraph 13).

Finally, the fact that the applicant obtained an opinion from a lawyer which was apparently different from the opinion which he had previously given to the Economic and Social Committee cannot cause the time for taking action to start running again. Such opinions are neither binding on the administration with regard to the decision to be adopted in relation to the official in question nor capable of directly affecting the official's legal position.

The objection raised by the Economic and Social Committee is therefore well founded.

4. On the basis of the foregoing considerations I propose that the Court should declare that the action brought by Mrs De Fraye, née Trenti, against the Economic and Social Committee is inadmissible and that in accordance with Article 70 of the Rules of Procedure the parties should be ordered to bear their own costs.