payable to the applicant shall bear interest at 6% from 27 July 1981 or from the date on which the pension became payable, if that date is later;

(c) It is not necessary to adjudicate on the claim for an orphan's pension;

(d) The Commission shall pay the costs.

2. *As regards Case 117/82:*

(a) The application is dismissed as inadmissible;

(b) The parties shall bear their own costs.

Mertens de Wilmars Koopmans Bahlmann Galmot

Pescatore Mackenzie Stuart O'Keeffe Bosco Everling

Delivered in open court in Luxembourg on 20 March 1984.

For the Registrar

H. A. Rühl

Principal Administrator

J. Mertens de Wilmars

President

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 14 FEBRUARY 1984

My Lords,

The widow of an official or a former official of the European Communities is normally entitled to a survivor's pension equal to 60 % of the retirement or invalidity pension which was or would have been paid to her husband. The survivor's pension is payable irrespective of the degree of dependence of the

widow on her husband, or of her fitness for work. Since 1972 she has been entitled to be paid the survivor's pension concurrently with any salary paid to her by a Community institution (Article 79 of the Staff Regulations and Chapter 4 of Annex VIII thereto in particular Article 17).

The position of the surviving husband of a female official is dealt with separately. Article 23 of Annex VIII provides, so far as relevant, as follows: "The husband of a deceased female official may, provided that he has no income of his own and subject to evidence that at his wife's death he was permanently incapacitated by invalidity or serious illness from engaging in gainful employment, receive:

(i) half the retirement pension which the official would have been paid if she had qualified, irrespective of length of service, for such pension at the time of death, provided that he had been married to her for at least one year at the time of her death; or

(ii) half the invalidity pension which the official was receiving at the time of her death, provided he was married to her when she became eligible for invalidity pension."

Mr Razzouk and Mr Beydoun were married to officials of the Commission. Their wives died and the two men applied for a survivor's pension pursuant to Article 79 of the Staff Regulations. They were refused a pension. They were told that they could only claim under Article 23 of Annex VIII and that they did not satisfy the prescribed conditions. So they got nothing. Had they been widows instead of widowers they would have received substantial pensions. They have brought these proceedings before the Court initially and primarily to annul the Commission's decision on the basis that this unequal treatment, based on their sex, is unlawful. Mr Beydoun in addition claims that the Commission has misinterpreted Article 23 and wrongly denied him a pension even under that Article. The two men claim as a subsidiary matter that if they are not entitled to a pension they are entitled to a return of contributions paid by their wives. In addition, claims are made for a pension in respect of children of the deceased.

The Commission says that Mr Beydoun's claim is clearly inadmissible; it was out of time. The Commission raises questions for the Court to decide as to whether Mr Razzouk's principal claim is admissible at all. It contends in either event that both applicants' claims for a return of contributions and for orphans' pensions are inadmissible. It is, therefore, necessary to consider the detail of the history of the claims before turning to the substantive issues, in regard to which the Commission maintains its position that no pension is payable to either man.

Mr Razzouk requested a survivor's pension by letter dated 3 April 1981. This request was rejected by letter dated 3 July. By letter dated 24 July, Mr Razzouk lodged a complaint within the meaning of Article 90 (2) of the Staff Regulations, relying on the same considerations as set out in his letter of 3 April 1981. The Commission gave its

reasoned decision rejecting the complaint by letter dated 25 November. Proceedings before the Court were commenced on 22 February 1982. The time limits set out in Article 90 of the Staff Regulations were thus observed and proceedings were brought before the Court in accordance with Article 91 (2) and (3).

Since, if he has a claim to a pension, it arises under the Staff Regulations, and accrues to him in his capacity as the widower of a deceased official (cf. Case 24/71 *Meinhardt* v *Commission* [1972] ECR 269 at para. 3), he is a person "to whom these Staff Regulations apply" within the meaning of Article 90 (1) and (2) thereof. He was, accordingly, right to proceed by way of a complaint rather than to bring proceedings under Article 173 of the Treaty within two months of the decision of 3 July 1981.

The Commission says, however, that Mr Razzouk's primary claim, which is expressed to be for the annulment of the decision contained in the letter of 25 November 1981 may be inadmissible because this decision simply repeated that of 3 July.

Article 91 (1) of the Staff Regulations provides that the Court has jurisdiction in disputes regarding the legality of an act adversely affecting the applicant within the meaning of Article 90 (2). In the present case, that act was the decision contained in the letter of 3 July. None the less, Article 91 (2) provides that an action against such an act cannot be brought directly before the Court: the applicant must first submit a complaint against the act adversely affecting him and can only commence proceedings before the Court if the complaint is rejected. Mr Razzouk complied with the requirements of Articles 90 and 91. The only problem is that, in the application commencing proceedings, he applied for the annulment of the decision rejecting the complaint, not the act adversely affecting him. This is not a defect of substance, the time limits set out in Articles 90 and 91 having been observed. It is only a defect in the pleading which is understandable given the wording of the Staff Regulations. The same situation arose in Case 186/80 *Suss* v *Commission* [1981] ECR 2041. For the reasons given in my Opinion in that case at p. 2058 and for the reasons given in the judgment of the Court in an analogous though different situation in Case 156/80 *Morbelli* v *Commission* [1981] ECR 1357, I do not think that such a defect justifies holding the action to be inadmissible.

Mr Razzouk also claims the grant of an orphan's pension on behalf of his son Michel. The Commission has said that this claim is pointless because such a pension was granted by a decision dated 3 April 1981. Although it is not entirely clear, it would seem that the object of this claim is to prevent the pension granted to Michel from being affected by Mr Razzouk's success in his primary claim since under Article 80 of the Staff Regulations the orphan's pension is halved if the surviving spouse of a deceased official is entitled to a survivor's pension. In consequence, it cannot be said that the claim is inadmissible because it has no purpose.

Lastly, the Commission says that an alternative claim for the reimbursement of Mrs Razzouk's pension contributions

is inadmissible because (1) it was not raised in Mr Razzouk's complaint and (2) Mr Razzouk has no title to claim them back. The purpose of the complaint made under Article 90 (2) and its relationship to the subsequent action before the Court was explained in Case 58/75 *Sergy* v *Commission* [1976] ECR 1139 at paras 32-33 as follows: "The object of that provision" (sc. the requirement that a complaint be submitted and rejected before proceedings before the Court can begin) "is to enable and encourage an amicable settlement of (the) difference which has arisen between officials or servants and the administration; in order to comply with this requirement it is essential that the administration be in a position to know the complaints or requests of the person concerned: On the other hand, it is not the purpose of that provision to bind strictly and absolutely the contentious stage of the proceedings, if any, provided that the claims submitted at that stage change neither the cause nor the subject matter of the complaint". As a result, the action before the Court may cover claims which were not raised in the complaint but which are ancillary or consequential to those mentioned in it: see, for example, Case 54/77 *Herpels* v *Commission* [1978] ECR 585 at para. 17 and Case 806/79 *Gerin* v *Commission* [1980] ECR 3515 at para. 7.

Mr Razzouk's claim for the repayment of his late wife's pension contributions is made in the alternative, in the event that his primary claim is rejected. It is based on the argument that, if he is not entitled to a pension on the same conditions as the widow of a deceased male official, the Commission has unjustly enriched itself as to a part of his wife's pension contributions which are calculated on the same basis as those of a male official but which, ex hypothesi, do not give rise to the same pension rights. In other words, the argument is that the obligation to repay is a consequence of a rejection of the primary claim. It is hardly surprising that it was not canvassed in the complaint because what Mr Razzouk really protests about is the failure to grant him a pension, not the repayment of his wife's contributions. The one arises only on the rejection of the other. As a result, it would in my view be unduly formalistic to declare the claim for repayment of the pension contributions inadmissible because it was not raised expressly in the complaint.

The Commission's second point should also be rejected. If the primary claim fails, there is a question to be decided as to whether, if a right to repayment of pension contributions exists and accrues to the official who made the contributions, that right devolves on the husband or the official's heirs. Accordingly in my view, Mr Razzouk's claim should be declared to be admissible.

Mr Beydoun applied for a survivor's pension by letter dated 16 July 1980. By letter dated 12 August 1981 the Commission rejected the request because, since he was over 65 and benefited from an old age pension, he

could not be considered as available for employment. He did not, therefore, fulfil the conditions set out in Article 23 of Annex VIII because he was not permanently incapacitated from engaging in gainful employment by invalidity or serious illness. By letter dated 9 September 1981 Mr Beydoun submitted a complaint against the Commission's decision. The Commission rejected the complaint by letter dated 9 March 1982 and the application commencing proceedings was lodged on 2 April.

So far as concerns the position *after* the lodgement of the complaint, no question of inadmissibility arises (Article 91 (3) of the Staff Regulations). The Commission's case is that the action is out of time because Mr Beydoun failed to submit the complaint timeously. Under Article 90 (1) the Commission's failure to reply to the request of 16 July 1980 within four months was deemed to constitute a rejection of the request by implied decision. Mr Beydoun then had three months in which to lodge the complaint, i.e. until February 1981. Instead he waited until the Commission had rejected the request by express decision in August 1981. Counsel for Mr Beydoun put forward two arguments to counter those of the Commission: (1) Mr Beydoun is not covered by the Staff Regulations and so was not bound to comply with Articles 90 and 91; (2) His request of 16 July 1980 was followed by a long exchange of correspondence and several meetings with the Commission so that the matter was, in effect, kept open until the express decision of 12 August 1981.

The first of those arguments should in my view be rejected. Mr Beydoun, like Mr Razzouk, is a person to whom the Staff Regulations apply within the meaning of Article 90 (1), so far as regards a claim for a survivor's pension. Even if he is not, that does not help him. His course of action would arise under Article 173 of the EEC Treaty, which imposes a two month period for the commencement of proceedings for the annulment of a decision. That decision, the act adversely affecting Mr Beydoun, was the rejection of the request for a pension contained in the Commission's letter of 12 August 1981.

Turning to the second argument relied on, Article 91 (2) of the Staff Regulations provides that proceedings can be brought before the Court only if a complaint has been submitted "pursuant to Article 90 (2) within the period prescribed therein ...", i.e. within a three month period commencing "on the date of expiry of the period prescribed for reply where the complaint concerns an implied decision rejecting a request" (Article 90 (2)). It is clear that in this case there was considerable discussion both internally and in communication with Mr Rogalla, on Mr Beydoun's behalf, as to what constituted a sufficient basis for an income above which no pension should be payable. On the other hand it does not seem to me that Mr Beydoun can say that he was in any way invited or encouraged to delay making a complaint within the time limit prescribed. Nor does it seem to me that this

was a case when it can be said that there was a definitive reconsideration of the matter as in the case of *Herpels* (supra) which allowed time to begin again. The case is nearer to Case 40/71 *Richez-Parize* v *Commission* [1972] ECR 73 where the Court said that merely to tell an applicant that the matter was under consideration did not extend the time. Moreover in Cases 122 and 123/79 *Schiavo* v *Council* [1981] ECR 473 at para. 22, the Court held that the period for lodging a complaint is mandatory and not subject to the discretion of the parties.

The adoption of an express decision rejecting Mr Beydoun's request did not cause time to start running again in this case.

The applicant contends that what he was really doing was to submit a request under Article 25 of the Staff Regulations. That Article seems to me to deal only with officials currently employed. Mr Beydoun was entitled to apply for a decision under the wider category of persons covered by Article 90, and the time limits imposed were applicable to him.

In consequence, Mr Beydoun's action should in my view be rejected as inadmissible.

Mr Razzouk's primary claim, like that of Mr Beydoun, is, in substance if not in form, for the annulment of the Commission's decision refusing to grant him a survivor's pension.

He accepts that he cannot rely directly on Article 119 of the Treaty, which imposes on Member States the obligation to apply the principle that men and women should receive equal pay for equal work. He claims, however, that that principle should be applied by analogy to officials of the Community: alternatively he says that there is a superior rule of Community law that officials should be treated equally in like or in comparable situations. The provisions of the Staff Regulations in relation to survivors' pensions violate each of those principles.

There clearly is discrimination between officials and, consequentially, between their spouses on the grounds of sex. Both male and female officials pay the same pension contributions on the basis of the same salary. A male official knows that, on his death, his surviving spouse will receive a pension whatever her means, whereas the female official knows that, on her death, her surviving spouse will not receive a pension unless he satisfies the conditions laid down in Article 23. This discrimination was accentuated in 1972 when the rules were changed to allow the widow to draw her survivor's pension even when she was drawing a salary from a Community institution, which until then she had not been allowed to do.

The Court has on a number of occasions sought to interpret the Staff Regulations in a way which does not produce inequality between officials. (e.g. Case 156/78 *Newth* v *Commission* [1979] ECR 1941, Case 21/74 *Airola* v *Commission* [1975] ECR 221 and Case 37/74 *Van den Broeck* v *Commission* [1975] ECR 235).

It does not seem to me possible to take that course in the present case. Article 79 refers to the "widow" of an official

being entitled to a pension calculated on the pension payable to her "husband". If that stood alone there would be no great difficulty in construing "widow" as including "widower" and "husband" as including "wife", particularly as neither in Article 79 nor elsewhere in Chapter 3 of Title V of the Staff Regulations is there any reference to the entitlement of a widower to a pension following the death of his wife who was an official. This seems to me to be so notwithstanding the fact that for example in Article 80 there is a reference to an official who dies leaving no "spouse".

Article 17 in Chapter 4 of Annex VIII refers to the death of an official and provides for a pension for the widow at the rate of 60% as mentioned in Article 79. Article 23 is, however, quite specifically related to the husband of a deceased female official; it provides for him a pension which even in the limited circumstances prescribed is fixed at the lower percentage of 50. It is thus impossible to say that the widower is included in Article 17.

On any view, however, the Annex is not consistent with Article 79. Article 79 lays down the basic rule that a widow shall be entitled to a 60% pension. That entitlement is to be met "in manner provided for in Chapter 4 of Annex VIII". The Annex is to lay down the machinery and the detail for dealing with the basic entitlement. It certainly does that for the widow but in addition it purports to provide a limited and lower pension for the surviving husband, whereas under the basic rule in Article 79 he either gets nothing or he is to be included within the intendment of the word "widow" and to get a 60% pension. However, it not being suggested that Article 23 of the Annex is void because it goes beyond the enabling provisions of Article 79 (perhaps because it was feared that the result might be that the husband got nothing), the question arises whether the discrimination is unlawful.

There is clear authority of the Court that the principle of equal treatment applies as between officials of the Community. This is said to be a general rule forming part of the law applicable to employees in the Community; in comparable or identical situations they must not be treated in an unequal way unless objective factors justifying the discrimination are established. (See for example Joined Cases 198-202/81 *Micheli* v *Commission* [1982] ECR 4145 at paras 5-6). A difference in treatment based on grounds of sex alone is accordingly prohibited (see Case 20/71 *Sabbatini* v *Parliament* [1972] ECR 345, Case 21/74 *Airola* (supra) and Case 149/77 *Defrenne* v *Sabena* [1978] ECR 1365 at para. 29).

The Commission has long been conscious that the situation in regard to the survivor's pension was discriminatory and has sought to remedy it at least since 1974, when it submitted a proposal to the Council to amend the Staff Regulations. The Parliament has taken the same view but it has not been possible to reach agreement in the Council, apparently because of different rules applying in some of the Member States.

The Commission's case in that this discrimination is not unlawful because it is based on an objective difference between the position of widows and

widowers. Although social attitudes are recognised to have changed and to be changing, the survivor's pension, it is said, reflects the traditional concept of the family (according to which family income is earned by the husband so that, at his death, his widow risks financial embarrassment) and is intended to compensate the widow and children of a deceased male official for the loss of support he gave them through his income. In consequence, the Staff Regulations presume that the widow was supported by the deceased official and does not have sufficient income to ensure her "survival". The surviving spouse of a deceased female official, on the other hand, is presumed to have his own means of support and can only obtain a pension if he proves that he is needy.

If that is the intention of the Regulation, then on the Commission's interpretation of Article 23 of Annex VIII it is not achieved, as Mr Beydoun's case shows. The Commission contends that a survivor's pension is not payable to the needy widower of a deceased female official if he is incapable of gainful employment for some reason other than invalidity or serious illness, e.g. because he has passed the normal retirement age and is accordingly at a stage when he may most need assistance, not least if any income whatever disqualifies him also from a survivor's pension.

I am not satisfied that in this day and age the Commission has established a sufficient objective justification for the difference in treatment. Many married women go out to work and thereby make a contribution to the family income. If they are employed full-time by the Community their contribution may be sizeable in comparison with total family income. In these circumstances, it is arbitrary to assume, as the Staff Regulations in effect do, that the spouse of one official is dependent on the official while the spouse of another official is not, simply on grounds of sex and without reference to the facts of each case. If, as I consider, a survivor's pension is to be regarded as deferred remuneration of the official, the lack of justification for the difference in treatment is even greater, since the discrimination is against the female worker as well as against the male survivor. To uphold the present rule of the Community in relation to its officials would, in my view, ignore the progress in removing inequality between men and women workers which has already been made.

Nor do I accept the Commission's argument that any change reflecting changed attitudes and practices can only be made by legislation. If, as I consider, there is unequal treatment here which is not objectively justified, then it is open to the Court to annul the Commission's decision on Mr Razzouk's application.

The Commission has contended that Article 119 of the Treaty, or as I understand it an analogous principle in regard to pay, is not applicable to the present case. In its view, the Court held in Case 80/70 *Defrenne* v *Belgium* [1971] ECR 445 at para. 7 that social security

benefits (and the Commission includes Community survivors' pensions under this heading) are not "pay" within the meaning of Article 119. The principle of equal treatment in matters of social security which was to be progressively implemented by provisions made under Council Directive 76/207 (OJ L 39, p. 40) has not so far been extended to survivors' pensions, which were expressly excluded from the scope of Council Directive 79/7 (OJ L 6, p. 24) (Article 3 (2)). The Commission concludes from this that the principle of equal treatment as between officials ought to be applied in step with the progress made under these directives. Since no progress has been made as far as survivors' pensions are concerned (apart from a Commission proposal for a Council Directive on the implementation of equal treatment in occupational social security schemes: OJ C 134, 21. 5. 1983, p. 7), this would mean that the application would have to be rejected.

In the first place I do not accept that the principle of equality of treatment as between officials, long recognized by the Court, is displaced so far as survivors' pensions are concerned by reference to Article 119 and the Directives relied on. The rule so far as Community officials are concerned has been put on a broader basis.

However, even if the applicant has to rely on a rule analogous to that contained in Article 119, it seems to me, that the Commission's argument goes too far. The judgment of the Court in Case 80/70 *Defrenne* v *Belgium* excluded from the scope of Article 119 "social security schemes or benefits, in particular retirement pensions, directly governed by legislation without any element of agreement within the undertaking or the occupational branch concerned, which are obligatorily applicable to general categories of workers". This description cannot, in my view, be applied to the benefits and pensions made available under pension schemes entered into by employers and employees outside a national system of social security. Nor does it in my view fit the benefits provided under the Staff Regulations. True, they are independent of and replace social security legislation for the officials concerned. On the other hand, although based on Community "legislation", i.e. a Council regulation, the scheme in the Staff Regulations applies only to persons employed by the institutions and is therefore closer to a scheme applicable to employees rather than to citizens or workers generally. In substance the official's entitlement to, for example, a retirement pension is part of the consideration (albeit deferred) which he receives in respect of his employment (cf. *Defrenne* v *Belgium* at para. 7 and, per Advocate General Dutheillet de Lamothe, at p. 458). The same can, in my view, be said of the survivor's pension even though it is not received directly by the official himself but is paid to his surviving spouse. It is still consideration received in respect of the official's employment for which in part he also makes general pension contributions.

Accordingly, even if a narrower principle than that laid down by the Court has to be relied on, in my view Mr Razzouk is entitled to rely on an analogous principle to that contained in Article 119. I prefer, however, to base his entitlement on the broader principle referred to above.

For the reasons I have given, it is, accordingly, my opinion that the claim for annulment should be upheld. On the other hand, it would not seem to me appropriate to make any order in respect of the claims for the grant of a survivor's pension and interest. It is for the Community institutions to take the steps necessary to remove the discriminative elements in the Staff Regulations. To grant these claims would prejudge the matter. At the hearing, counsel for Mr Razzouk asked that the Court fix a period of five months from the date of judgment for compliance with it. In my view, this would not be appropriate. As the Court pointed out in Case 266/82 *Turner* v *Commission*, 12 January 1984 [1984] ECR 1, at para. 5, the institutions are bound by the Treaties to comply with a judgment annulling a measure within a "reasonable time". What is "reasonable" depends on the circumstances and it would not seem right for the Court to define it in advance in this case.

If I had concluded that Mr Beydoun's claim was admissible, I should have come to the same result; the fact that his claim is inadmissible does not preclude the Commission from dealing with his position on the same basis as Mr Razzouk if the latter succeeds. If Mr Beydoun were not entitled to a pension because the present unequal position were maintained, then in my view the Commission was justified, under the present Article 23, in finding that he did not qualify because he was not prevented by invalidity or serious illness from engaging in gainful employment since, already in receipt of a retirement pension, he was in any event, it seems, unable to obtain gainful employment. That factor however only underlines the lack of justification for the inequality. In these circumstances it is not necessary to consider what is meant by the phrase "he has no income of his own" — i.e. whether it means any income at all, however small (other than *de minimis* or any sufficient income to maintain an acceptable minimum standard of living.

As for the other claims, that for an orphan's pension does not now need to be considered. Michel is receiving a pension. In the event that a survivor's pension is granted to Mr Razzouk the orphan's pension would, it seems, need to be halved in accordance with Article 80 of the Staff Regulations. The alternative claim for repayment of Mrs Razzouk's pension contributions also does not arise for consideration since Mr Razzouk, in my view, is entitled to succeed on his primary claim.

It is perhaps right to add by way of a footnote that the conclusion I have reached on the primary claim is consistent with the practice of several of the Member States, of certain international organisations and with the decision of the Supreme Court of the United States in the case of *Wengler* v *Druggists Mutual Insurance Company* (446US 142).

The Court has been told that in 1974 two women officials died leaving surviving husbands and that the number today has risen from two a year to 10 a year. The latter figure is regarded as the likely ceiling for such claims. In view of the fact that the application here is simply to annul a specific decision in respect of a specific individual and not to set aside the Staff Regulations themselves it would in my view be inappropriate to either comment or rule on the effect of the decision in reference to other cases.

In the circumstances, the Commission should pay the costs of Mr Razzouk's action. So far as Mr Beydoun is concerned, the position is more complicated. In staff cases, the rule is that, without prejudice to the second sub-paragraph of Article 69 (3) of the Rules of Procedure, institutions shall bear their own costs: Article 70 of the Rules of Procedure. This, however, applies "in proceedings under Article 95 (3)" of the Rules of Procedure, which refers expressly to "proceedings commenced by an official or other servant of an institution". Mr Beydoun is neither, even though his claim does arise under the Staff Regulations. Taking Article 95 (3) literally, Article 70 does not apply with the result that, since his action must be dismissed, Mr Beydoun would ordinarily have to bear all the costs. In several cases, however, the Court has applied Article 70 of the rules of Procedure where proceedings were brought under the Staff Regulations by a person who was not an official or other servant: e.g. Case 18/70 *X* v *Council* [1972] ECR 1205 (the widow of a deceased official), Case 23/64 *Vandevyvere* v *Parliament* [1965] ECR 157 and Case 34/80 *Authié* v *Commission* [1981] ECR 665 (unsuccessful candidates in a competition). It is therefore arguable that Article 95 (3) of the Rules of Procedure should be interpreted broadly so as to cover all persons to whom the Staff Regulations apply. At all events, it is my opinion that in this case the circumstances are sufficiently exceptional to justify an order that each party bears its own costs.

For these reasons, it is my opinion that the action brought by Mr Beydoun should be dismissed as inadmissible, each party bearing its own costs; in the action brought by Mr Razzouk, the Commission's decision of 3 July should be annulled and the costs of both sides should be borne by the Commission but no order should be made in respect of Mr Razzouk's other claims.