ation allowance Article 4 (2) of Annex VII to the Staff Regulation (inserted by Article 21 (2) of Regulation No 912/78) does not offend against the general principle of equality. As the foreign residence allowance is intended to compensate for the disadvantages which officials undergo as a result of their status as aliens, the Community legislature was entitled, in applying its discretionary judgment to that situation, to rely on the single criterion of nationality, which is uniform, objective and directly related to the purpose of the rules.

Although in border-line cases fortuitous problems must arise from the introduction of any general and abstract system of rules, there are no grounds for taking exception to the fact that the legislature has resorted to categorization, provided that it is not in essence discriminatory having regard to the objective which it pursues.

In Case 147/79

RENÉ HOCHSTRASS, an official of the Court of Justice of the European Communities, residing in Senningerberg, represented by G. Vandersanden of the Brussels Bar, and with an address for service in Luxembourg at the Chambers of E. Arendt, Rue Philippe-II, Boîte postale 39, Luxembourg,

applicant,

v

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, represented by the Registrar of the Court of Justice, Albert Van Houtte, with an address for service in Luxembourg at the Court, Plateau du Kirchberg,

defendant,

supported by

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by D. G. Gordon-Smith, Assistant Director-General of the Legal Department of the Council, with an address for service in Luxembourg at the office of D. Fontein, Director of the Legal Affairs Directorate of the European Investment Bank, 2 Place de Metz,

and

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by D. Sorasio, a member of the Commission's Legal Department, acting as Agent, assisted by R. Andersen of the Brussels Bar, with a address for service in Luxembourg at

the office of M. Cervino, Legal Adviser to the Commission, Jean Monnet Building, Kirchberg,

interveners,

APPLICATION for a declaration that Article 4 (2) of Annex VII to the Staff Regulations, as amended by Article 21 (2) of Council Regulation No 912/78 of 2 May 1978 (Official Journal L 119, p. 1), on the rules for granting the foreign residence allowance is void and, accordingly, for the annulment of the decision of the President of the Court dated 22 June 1979 rejecting the applicant's complaint,

THE COURT (Second Chamber)

composed of: A. Touffait, President of Chamber, T. Koopmans and O. Due, Judges,

Advocate General: H. Mayras
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions together with the submissions and arguments of the parties may be summarized as follows:

I — Facts and written procedure

Article 21 (2) of Regulation No 912/78 inserted in Article 4 of Annex VII to the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants a paragraph (2), which reads as follows:

"An official who is not and has never been a national of the State in whose territory he is employed and who does not fulfil the conditions laid down in paragraph (1) shall be entitled to a foreign residence allowance equal to one quarter of the expatriation allowance".

On the basis of that provision the Personnel Branch of the Court decided on 16 May 1978 which officials were entitled to that foreign residence allowance and the Finance Branch paid it to those concerned as from 4 May 1978.

René Hochstrass, born on 17 December 1927 in Athus (Belgium) has and has always had Luxembourg nationality. He entered the employment of the Court of Justice of the ECSC on 4 December 1952 and is at present an established official at the Court of Justice in Grade B 4, Step 8.

On finding that the foreign residence allowance was not paid to him, Mr Hochstrass submitted a request under Article 90 (1) of the Staff Regulation that he be granted that allowance. The request was rejected by a memorandum from the Registrar of the Court of Justice of 16 January 1979 which was communicated to the applicant on 7 March 1979.

On 11 May 1979 the applicant made a complaint against that rejection under Article 90 (2) of the Staff Regulations, which was rejected by the President of the Court by a decision of 22 June 1979, and the applicant then lodged this application against that rejection of his complaint. The application was received at the Court Registry on 21 September 1979.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court (Second Chamber) decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The *applicant* claims that the Court should:

"— Declare the application admissible;

— Declare that the provision in Point 2 of Article 21 (2) of Council Regulation No 912/78 is unlawful;

— Consequently, annul the decision of the Court dated 22 June 1979 rejecting the applicant's complaint;

— Order the Court to pay the costs."

The *defendant* contends that the Court should:

"— Declare the application inadmissible;

— Otherwise, reject the application as being unfounded in law;

— Order the applicant to pay the costs of the action which he has himself incurred."

The *Council*, intervening on behalf of the Court, contends that the Court should:

"— Declare the application inadmissible;

— Otherwise, reject the application as unfounded."

The *Commission*, intervening on behalf of the Court, contends that the Court should:

"— Reject the application as inadmissible, and in any event as unfounded;

— Order the applicant to pay the costs".

III — Summary of the submissions and arguments of the parties

A — Admissibility

The *defendant* maintains that the applicant has no legal interest in taking proceedings. That concept of "interest", which has been defined by the Court of Justice, implies the presence of three conditions:

(1) The individual interests of the official must be affected (Joined Cases 44, 46 and 49/74 *Acton and Others* v *Commission* [1975] ECR 383 at p. 394).

(2) Those individual interests must be actual or potential, but in any case certain (Case 90/74 *Deboeck* v *Commission* [1975] ECR 1123 at p. 1133).

(3) Such individual interests cannot be purely abstract (Case 15/67 *Bauer* v *Commission* [1967] ECR 397 at p. 402, and Case 37/72 *Marcato* v *Commission* [1973] ECR 361 at p. 368).

However, the defendant contends that the applicant has no real or even potential personal interest in bringing this action because, even if he obtains a declaration that the disputed provision is void, he will not be entitled to receive the foreign residence allowance. The only consequence of such a declaration would be that the foreign residence allowance would be abolished and, thus, withdrawn from all those who receive it at present.

The *applicant* claims that officials have the right to challenge by way of an objection of illegality "the validity of measures adopted under the regulations concerning the conditions of employment of public servants provided that their unlawfulness, if confirmed, is of at least potential benefit to the official concerned".

The applicant points out that an official has an interest in the annulment of a regulation concerning staff of which he is a member if that regulation disqualifies him from its advantages; he thus satisfies the requirement of a direct connexion between the act challenged and its effect on his individual position.

If the disputed provision is declared void, two possibilities arise:

(1) Either the Council will abolish the allowance, in which case the applicant has a non-material and direct interest in bringing proceedings because that will bring to an end a situation which is unjust and which is discriminatory as against him; or

(2) The Council will amend the provision in question so that either the applicant will be able to benefit from its provisions or the injustice will be brought to an end. In the first case the applicant's interest is certain, while the second case falls under the first possibility.

The applicant adds that in any case it is clear the the admissibility is closely connected with an examination of the substance of the application, so that, in his opinion, it is permissible to commence an examination of the substance of the case, for only judgment of that matter will determine whether or not the applicant has an interest in bringing an application before the Court of Justice.

In support of the defendant the *Commission* considers that for there to be an interest in bringing proceedings the reasonably foreseeable consequence of a declaration of invalidity must be that the appointing authority grants the applicant the allowance he seeks: a non-material interest is not sufficient, for that would open the way to mass applications.

As to the hypotheses contemplated by the applicant, the Commission is of the opinion that his chances of being able to obtain the foreign residence allowance "are not even purely hypothetical, but simply non-existent; the applicant will never, owing to the nature of that allowance, be entitled to receive it".

The Commission adds, furthermore, that the application is equally inadmissible on the ground that the applicant ought to have had recourse to Article 90 (2) of the Staff Regulations and not Article 90 (1), since the individual decision complained of "lies in the failure to pay the applicant the foreign residence allowance at the time the provision in question was implemented, an event of which the staff were notified by the Personnel Branch of the Court on 10 May 1978".

As a result, whether or not the complaint which the applicant made on 11 May 1979 was made within the legal time-limit depends on "the date on which the foreign residence allowance was first awarded to the recipients."

In his observations on the pleadings of the interveners the *applicant* considers he has the right to seek the annulment of a provision whereby an allowance is granted to a third party if it is based on a system which, as he claims, discriminates against him. He maintains further that his use of Article 90 (1) is correct because the interpretation advanced by the Commission would unreasonably restrict the remedies available to officials.

In it reply the *defendant* contends that an application based on a direct non-material interest is inadmissible because "it invokes the collective interest of a category of officials for the sole purpose of obtaining a declaration that the regulation in question is illegal".

However, many of the higher courts of the Member States (the French Conseil d'État, the Belgian Conseil d'État, the House of Lords) consider that "all those who are part of a group may act *ut singuli* on grounds of their individual interests but they may not act *ut universi* to defend general interest which they have no call to defend" (Debbasch, Contentieux Administratif, p. 297).

In addition, even if the provision in question were declared void the applicant's interest would not be satisfied *ipso facto* by that decision; it would depend on the position adopted by the Council, but "there is no indication what course would be adopted by the latter if the illegality were confirmed". Hence the defendant considers that a personal interest of that nature, "which would not immediately be followed by remedying the (irregularity) but which could only be so followed as a result of the interplay of a series of factors which are not automatically conditioned by each other, depending in part on decisions which are a matter of discretion and in any case uncertain, does not have the required direct and certain character" (Decision No 13882 of 9 January 1980 of the Belgian Conseil d'État, *Delbarre et Consorts* v *État Belge*, Recueil d'Arrêts et Avis du Conseil d'État 1970, p. 13).

B — Substance

The *applicant* first recalls that the expatriation allowance depends on both a nationality criterion and a residence criterion. The Court of Justice has held that in deciding whether to grant that allowance the residence criterion is the paramount consideration whereas the reference to nationality is only a subsidiary consideration (Case 21/74 *Airola* v *Commission*, [1975] ECR 221 at p. 228; Case 31/74 *Van Den Broeck* v *Commission*, [1975] ECR 235 at p. 244). Thus the foreign residence allowance, which is a sub-species of expatriation allowance, should follow the same legal requirements as the latter.

The suppression of any reference to residence would therefore run counter to the case-law of the Court in a manner amounting to an infringement of the Staff Regulations. That is borne out *a contrario* by the fact that the allowance granted to members of the Commission and of the Court in application of Regulation No 422/67/EEC of 25 July 1967 is based solely on the criterion of residence to the exclusion of that of nationality.

Article 21 (2), point 2 of Regulation No 912/78 also runs counter to the principle of non-discrimination based on nationality. That principle, laid down by Article 7 of the EEC Treaty and reflected in Article 27 of the Staff Regulations, is also a general principle and should, therefore, be observed in all Community measures. The foreign residence allowance, however, which is based solely on nationality independently of the length of residence, creates an unacceptable situation because it is "logical and reasonable to apply to members of staff who possess the nationality of the Member State in which they work and others the same rules, at least when the latter have habitually resided or carried on their main occupation within the territory of that State for more than five and a half years".

As a result the Council has failed to observe the general principle of equality between officials who are placed in comparable situations (judgment of 31 May 1979 in Case 156/78, *Newth* v *Commission* [1979] ECR 1941).

The *defendant* states, first, that in refusing the applicant the foreign residence allowance it applied a valid legal provision.

It contends that the assumption adopted by the applicant, which is that the case-law governing the foreign residence allowance also governs the expatriation allowance, is false if the legislature creates, in compliance with the Treaty and observance of fundamental rights, a new category with the purpose of compensating for the adverse effects of the difference in nationality. It likewise rejects the argument put forward by the applicant concerning discrimination, on the grounds that there can be discrimination only if the difference in treatment laid down by the contested regulation appears to be arbitrary. However, the difference provided for in this instance, has been laid down on the basis of objective criteria, as may be seen clearly in the reply given by the Commission to a Parliamentary Question (Written Question No 813/78 submitted by Messrs. Dondelinger, Glinne and Lezzi, Official Journal C 60 of 5 March 1979, p. 16) in which the Commission considers that nationality is an external factor over which it has no influence and that the only object and effect of the foreign residence allowance are to compensate for the additional constraints, both material and non-material, suffered by officials who do not have the nationality of the country in which they are employed.

They *applicant* observes in his reply that in examining the substance of the arguments put forward by the defendant three questions should be considered in turn.

First question: Is the situation of the officials who draw the foreign residence allowance objectively different from that of those who are excluded from it?

Whilst it is normal for those who are obliged to leave their country and move abroad to be entitled to an allowance — the expatriation allowance — it seems abnormal, on the other hand, to grant an allowance on the basis of a distinction between national and non-national officials and to draw a distinction between expatriation and foreign residence. Thus there are numerous examples which show, according to the applicant, that persons who do not have the nationality of, but are born in, the country of employment and who have always resided in that country, receive a foreign residence allowance whereas their situation is identical to that of persons who have the nationality of, and are born in, that country. That situation amounts to reverse discrimination against those who have the nationality of the country in which they are employed.

Second question: Is nationality an objective and uniform criterion enabling two situations to be distinguished so as to apply different rules to them?

The applicant repeats that by basing the foreign residence allowance exclusively on the criterion of nationality the Council has made it quite simply an allowance for having a different nationality, which is sufficient in itself to show the illegality of the measure. The applicant even wonders whether it is possible, in applying the EEC Treaty, to rely exclusively on nationality to justify the difference in treatment to be applied between two situations: he considers that at least in the field of the common agricultural policy, no such possibility exists. In the Staff Regulations the principle of non-discrimination on the grounds of nationality is an expression of the general principle of equality as regards taxation. Therefore although nationality is not excluded as such it must be considered in the light of its relationship with another rule (Case 15/63, *Lassalle*, [1964] ECR 3 and *Airola* and *Van Den Broeck*, cited above), which means that it is a subsidiary criterion..

In this instance by relying exclusively on the criterion of nationality the Council has made an improper use of it. Moreover, that criterion differs from one Member State to another and is not a uniform criterion capable of being applied as an objective criterion for differentiating between two situations.

Third questions: Has nationality a direct relationship with the purpose of the rules in question?

If it were found necessary to extend the expatriation allowance the additional allowance could not be other than a residence allowance — an allowance which does in fact exist in the European Communities, in particular for members of the Court — irrespective of nationality and, what is more, in keeping with the actual concept of removal inherent in taking up residence abroad or returning to the home country. The foreign residence allowance based on nationality is scarcely in keeping with European aims: the single market, not to mention European citizenship.

Intervening in support of the defendant, the *Council* considers, first, that an appearance of discrimination in form may correspond to an absence of discrimination in substance, and that discrimination in substance consists in

treating either similar situations differently or different situations identically (Case 13/63, *Italy* v *Commission* [1963] ECR 165).

As regards officials of the Communities that principle of non-discrimination is merely one way of expressing the principle of equal treatment. The latter excludes, it is true, all discrimination based on nationality but different treatment based on the criterion of nationality is not necessarily discriminatory because there may be even in such a case an apparent discrimination in form and yet no discrimination in substance.

As a result the Council's reply to the three questions which have been raised by the applicant is:

First question: Comparison of the situation of officials drawing the foreign residence allowance with that of officials who do not.

After reviewing the provisions in Article 4 of Annex VII to the Staff Regulations the Council argues that the purpose of the foreign residence allowance is to grant an allowance to certain officials who do not have and have never had the nationality of the country in which they are employed. It points out that those who draw the expatriation allowance, which is four times the amount, are excluded, such persons being those, with or without the nationality of the country, who fulfil the requisite conditions.

The Council considers that the applicant "appears to have difficulty in distinguishing the underlying object of the expatriation allowance from that which is served by the foreign residence allowance". The expatriation allowance is based essentially on the criterion of residence, as may be seen from the judgments in *Airola* and *Van Den Broeck*, already cited, whereas the foreign residence allowance compensates for the disadvantages resulting from the absence of links of nationality with the country of employment, since the situation of such a person is not comparable with that of a national of the country of employment because such nationality brings with it "rights" and "duties" od which the resident who is not a national is deprived. The latter is confronted with difficulties, moreover, which do not affect nationals: thus, for instance, he is not able to participate to the full in the political and civic life of the country in which he works, whilst his political rights in the country of which he is a national are affected by the fact that he is not a resident; his children may have difficulty in pursuing higher education or in starting their career in the country of his nationality; and his participation in social and cultural activities, both in the State of his nationality and in that in which he resides, is made more difficult.

Second question: Nationality as an objective and uniform criterion.

According to the Council the purpose of the foreign residence allowance is to ensure equal treatment for non-national officials residing in the country in which they are employed in order to compensate for the disadvantages to which they are subject and to which officials who have or have had the nationality of the country of employment are not subject.

Whilst there are differences of treatment between nationals and non-nationals in the Member States, nationality, as a link between the State and the individual,

constitutes an objective criterion. The objective nature of that criterion is not open to question where the provisions governing the official's situation are concerned.

As a result it appears that in introducing that provision the Council "wished to take into account, to a greater extent, all the disadvantages which may accrue from the necessity of working and living in a country which is not, for the officials in question, their own country". In order to distinguish such officials from other officials the Council maintains that nationality constitutes a criterion which is relevant and appropriate and, in the wider sense of the term, uniform.

Third question: The existence of a direct relationship between nationality and the aim of the rules.

The Council reiterates that the aim of the rules is to compensate for the disadvantages to which officials who are not nationals and who reside in the country in which they work are subject and that for that purpose recourse to the criterion of nationality, in order to circumscribe such a situation, is logical and bears a direct relationship with that objective.

The *Commission*, also intervening in support of the defendant, considers first that the basic assumption on which the applicant has based his reasoning, which consists in maintaining that the foreign residence allowance, like the expatriation allowance from which it derives, must be granted if not exclusively at least principally on the basis of the criterion of residence, is inaccurate and that no such assumption may be made because the question to be settled is precisely whether, in certain conditions, nationality might not provide grounds in law for different treatment.

In replying to that question the Commission maintains, first, that the expatriation allowance with its main criterion of residence is equally capable of giving rise in fact to situations which might appear arbitrary: that is so where two people, born in the same country but having different nationality, have worked for nine years in another country and return to the country in which they were born. One is entitled to the allowance and the other is not, and although such a distinction may appear arbitrary in fact it is not so in law because "under a system based on the rule of law, legislative provisions are always associated with categories. This is a consequence of the State based on the rule of law, and once the law has laid down the category, the law must be applied to all. To do otherwise would be to depart from the road which traditionally protects fundamental rights" (Opinion of Mr Advocate General Trabucchi in Case 21/74 and Case 37/74, [1975] ECR at p. 232). Hence, nationality which was held to be a subsidiary criterion in the *Airola* case, cited above, is an objective factor.

It is equally a uniform criterion in view of the fact that it is the same for all and serves to determine the extent of each person's rights in relation to the contested provision of the regulations. Furthermore, "by doubling, on the basis of nationality, the period of habitual residence outside the State in the territory in which the official's place of employment is situated which is required in order for him to be able to qualify for the expatriation allowance, the

Community legislature took the view, without being contradicted on this point by the Court of Justice, that the status of foreigner constitutes in itself an expatriation factor". It was on that basis that the foreign residence allowance was created, without any modification's being made in the rules relating to the expatriation allowance. The former is intended to compensate for the disadvantages — which the Commission analyses in the same way as the Council — brought about by the obligation imposed on officials who have never had the nationality of the State in which they are employed to live in that State, where their status is that of foreigners.

According to the Commission the criterion of nationality is also appropriate inasmuch as "it has a direct and immediate relationship with the objective and the purpose of Article 4 (2) of Annex VII to the Staff Regulations". The Commission recalls that this foreign residence allowance is a new allowance created to compensate for the disadvantages inherent in having the status of a foreigner: the criterion for differentiation based on nationality is the only one capable of serving that purpose, particularly as it already constitutes in itself an element of expatriation. Doubtless it is possible to envisage other types of allowance, as the applicant has done, but here the question is one of expediency which is for the Community legislature to decide.

Lastly, the Commission maintains that as the criterion of nationality fulfils the three conditions examined above, it conflicts neither with Article 7, which is not applicable as such to officials since they are subject to specific rules, namely the Staff Regulations, nor with the general principle of equality before the law, and therefore it is lawful. The Commission considers that in the development of an official's career a difference in treatment based on the criterion of nationality would constitute discrimination, but that criterion may none the less be applied to elements of his remuneration (judgment of 14 December 1979 in Case 257/78 *Devred,* née *Kenny-Levick).*

In his reply to the interveners the *applicant* takes the view that if there is justification for a foreign residence allowance it is not on the basis of nationality but on that of an effective connexion with a situation which places certain officials in less favourable circumstances than others and which, as a result, justifies a compensatory payment even if it is expressed at a flat rate. Analysing the disadvantages — as described by the Council and the Commission — experienced by a non-national living in the country in which he is employed, the applicant maintains in the first place that the non-national can easily exercise his voting rights in his embassy and that there is nothing which prevents him from pursuing a political career in his country of origin; he maintains likewise that the non-national does not have to undergo the registration formalities for aliens and that, moreover, nothing prevents him from participating in the cultural and social life in the country in which he is working. Finally, as regards family life, his children may go to special schools for primary and secondary education, whilst as for higher education that is organized in the host country without discrimination and is characterized by universalism; thus there is no need whatsoever for a child to return to his country of origin in order to pursue higher education. Even if such

a return were desired the Staff Regulations provide for education allowances up to the age of 26, thereby mitigating that disadvantage. Hence, the applicant says, the disadvantages are non-existent or insignificant and they are, above all, amply compensated for by the system of allowances guaranteed by the Staff Regulations. The applicant goes on to say that in his opinion such disadvantages as there may be do not justify the grant of a compensatory allowance. That is because, in the first place, an official who undertakes to live permanently in the host country should consider the advantages and disadvantages before entering the service and, in the second place, such an official also enjoys certain advantages, such as, for example, the monetary stability of a country such as Luxembourg compared with the inflation to be found in certain other countries.

As to the criterion of nationality the applicant emphasizes that the foreign residence allowance is nothing other than a sub-category of the expatriation allowance, as the Council has recognized itself in drawing a parallel between the two allowances. This confirms that the principle criterion is the place of residence and that the criterion is the place of residence and that the criterion of nationality plays merely a subsidiary rôle, so that "it is inexcusable to grant a foreign residence allowance to an Italian official born in Luxembourg and having passed all his life there whereas the same allowance is refused to officials who are Luxembourg nationals. Taken to the extreme it must be stated that in such conditions a person may very well feel himself an expatriate in his own country, and that consequently such feelings should be compensated for by an allowance". He concludes by repeating that nationality is not an objective criterion, as has always been recognized in the case-law of the Court.

In its rejoinder the *defendant* concurs in the interveners' conclusions and limits itself to replying to the arguments put forward by the applicant. The defendant maintains that the general principle of non-discrimination and Article 7 of the EEC Treaty do not always prevent a Community regulation from referring expressly to nationality when drawing up a special scheme dependent thereon. Thus it is possible to treat differently situations which are dissimilar if there are serious reasons based on factual circumstances which justify that difference.

Nationality is the result of a sovereign determination by the Member State of what constitutes a national. It is therefore imposed by factual circumstances. There is no discrimination either on the ground that that regulation "is based on actual differences between officials who do not have the nationality of the place in which they are employed and officials who are nationals of the host State and not on nationality *per se*".

The defendant also maintains that different treatment is not arbitrary if it is based on an objective and uniform criterion which is directly related to the purpose of the rules. In the present case the regulation in question is:

— *objective* because it takes into account an actual fact which is imposed in a general manner by the Member States without either preference or prejudice towards any particular nationality;

— *uniform* because it is designed to apply in an identical manner whatever the place of employment of the official;

— *directly related to the purpose of the rules* because it neutralizes the actual

inequalities brought about by the absence of the nationality of the host country.

IV — Oral procedure

At the sitting on 5 June 1980 the applicant, represented by G. Vandersanden of the Brussels Bar, the Court of Justice of the European Communities, represented by Mr Van Houtte and supported by the Commission of the European Communities, represented by R. Andersen of the Brussels Bar and by the Council of the European Communities, represented by D. Gordon-Smith, presented oral argument.

The Advocate General delivered his opinion at the sitting on 10 July 1980.

Decision

1 By an application lodged at the Court Registry on 21 September 1979 the applicant brought an action for a declaration that Article 4 (2) of Annex VII to the Staff Regulations, as amended by Article 21 (2) of Council Regulation No 912/78 of 2 May 1978 (Official Journal L 119, p. 1), is invalid. The provision in question is worded as follows: "An official who is not and never has been a national of the State in whose territory he is employed and who does not fulfil the conditions laid down in paragraph (1) shall be entitled to a foreign residence allowance equal to one quarter of the expatriation allowance". According to Article 4 (1) to which the above provision refers, the expatriation allowance is to be paid to officials, as referred to above, 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". The applicant further asks the Court to annul the decision of the administration of the Court of Justice dated 22 June 1979 rejecting the applicant's complaint relating to the memorandum from the Registrar of the Court of 16 January 1979 refusing to pay him the foreign residence allowance referred to in the above-mentioned provision.

Admissibility

2 The defendant and the parties which have intervened in support of it, the Council and the Commission, have raised an objection of inadmissibility based on the applicant's lack of interest in taking proceedings and on his failure to submit the complaint through official channels provided for in

Article 90 (2) of the Staff Regulations within the period prescribed by that provision. In fact, the defendant maintains, where a provision does not allow the administration any margin of discretion there are no grounds for applying the procedure laid down in Article 90 (1) of the regulations, as the decision adversely affecting the applicant consists in the refusal to grant him the foreign residence allowance at the time when the relevant provision of the regulation was implemented, an event of which all members of the staff of the Court were notified on 10 May 1978.

3 It should be emphasized that Article 90 (1) provides that any person to whom the Staff Regulations apply may submit to the appointing authority a request that it take a decision relating to him and it is the express or implied decision rejecting it which opens the way to a complaint through official channels under Article 90 (2) of the regulations. That two-stage machinery set up by the regulations means that, in the case of an act which is general in nature and which is intended to be implemented by means of a series of individual decisions affecting many officials in an institution, the non-application of that general measure to a particular case cannot be considered as a decision, even implied, rejecting a request of the kind envisaged by Article 90 (1).

4 Accordingly, as the applicant made a complaint against the decision rejecting his request within the period allowed by that provision his action is admissible on that point.

5 As regards the lack of any interest in taking proceedings, the intimate connexion between the arguments as to the substance of the case relied upon by the applicant, which challenge directly the validity of the disputed provision, and the objection of inadmissibility raised by the defendant and the interveners on its behalf makes it necessary to examine the substance of the case directly.

Substance

6 The applicant maintains that the provision in question, which refers solely and exclusively to the criterion of nationality for granting or refusing the foreign residence allowance, is a breach of the general prohibition on discrimination on grounds of nationality which is derived from the Community legal order and which finds expression, in particular, in Article 7 of the EEC Treaty and in the provisions of the Staff Regulations. The criterion which has been adopted for granting the foreign residence

allowance, it is alleged, is not an objective one from two aspects: on the one hand, nationality does not constitute an objective basis for differentiation directly related to the purpose of the rules in question, and on the other hand the situation of recipients of the said allowance is not objectively different from those who do not receive it. That argument shows that the alleged discrimination does not lie in the unequal treatment of recipients of the expatriation allowance and recipients of the foreign residence allowance, but in the inequality between the latter category of officials and the category of those who do not receive either of the two allowances.

7 According to the consistent case-law of the Court the general principle of equality, of which the prohibition of discrimination on grounds of nationality is merely a specific expression, is one of the fundamental principles of Community law. That principle requires that comparable situations should not be treated differently unless such differentiation is objectively justified. Clearly it requires that employees who are in identical situations should be governed by the same rules, but it does not prevent the Community legislature from taking into account objective differences in the conditions or situations in which those concerned are placed.

8 In order to test the validity of the contested provision in Regulation No 912/78 it is therefore necessary to consider whether the situation of officials who are not and have never been nationals of the State in whose territory the place where they are employed is situated has objective features which justify treatment different from that of officials who are or have been nationals of that State.

9 It must therefore be ascertained whether the features of the system introduced by Regulation No 912/78 have the effect of restoring the equality which there must be among officials or, on the contrary, give rise to inequality between them.

10 The Court and the interveners point out that officials who do not have the nationality of the country in which their place of employment is situated are subject, irrespective of the duration of their residence in that place, to a number of constraints and disadvantages both non-material and material which are not experienced by nationals of that country and that the purpose and effect of the foreign residence allowance is therefore to compensate for

those additional constraints and to restore a measure of equality between all the officials in the same place of employment irrespective of their nationality.

11 The applicant counters that argument by claiming that the disadvantages connected with nationality as such are, as far as officials of the Community are concerned, non-existent or insignificant, being largely compensated for by the system of allowances and grants already guaranteed by the Staff Regulations and in particular by the expatriation allowance, and even if such disadvantages were to be present to a small degree the applicant maintains that that situation does not justify the grant of an additional compensatory allowance and considers that it would be better to increase the amount of the existing allowances to compensate for those disadvantages.

12 The applicant's arguments must be rejected. It cannot be denied that an official who has not and has never had the nationality of the State in whose territory his place of employment is situated may be subject, by reason of his status as an alien, to a number of inconveniences both in law and in fact, of a civic, family, educational, cultural and political nature, which the nationals of the country do not experience. As the foreign residence allowance is intended to compensate for the disadvantages which officials undergo as a result of their status as aliens, the Community legislature was entitled, in applying its discretionary judgment to that situation, to rely on the single criterion of nationality, whereas in the case of the expatriation allowance, the object of which is "to compensate officials for the extra expense and inconvenience of taking up employment with the Communities and being thereby obliged to change their residence" (Case 21/74 *Airola*, paragraph 8 of the decision of 20 February 1975, [1975] ECR 221 at p. 228), the Community legislature adopted as the principle criterion that of the official's usual place of residence, considering nationality as of only secondary importance.

13 Whilst it is true that officials may experience the inconveniences of living abroad to varying degrees, the criterion of nationality has the merit of being: uniform, applying in an identical manner to all officials irrespective of the place in which they work, objective in nature and in its universality having regard to the average effect of the inconveniences arising from residence abroad on the personal situation of those concerned, and directly related to the purpose of the rules, namely to compensate for the difficulties and disadvantages arising from the status of an alien in the host country.

14 Although in border-line cases fortuitous problems must arise from the introduction of any general and abstract system of rules, there are no grounds for taking exception to the fact that the legislature has resorted to categorization, provided that it is not in essence discriminatory having regard to the objective which it pursues.

15 It follows from all those considerations that no factor has been disclosed of such a kind as to affect the validity of the provision in Point 2 of Article 21 (2) of Council Regulation No 912/78; consequently there is no ground for annulling the decision of the administration of the Court of Justice of the European Communities rejecting the applicant's complaint. In the circumstances it is not necessary to examine the objection of inadmissibility on the ground of lack of interest in taking proceedings.

Costs

16 Under Article 70 of the Rules of Procedure the institutions shall bear their own costs in the case of actions brought by officials and other servants of the Communities.

On those grounds

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the parties to pay their own costs.**

Touffait Koopmans Due

Delivered in open court in Luxembourg on 16 October 1980.

The Registrar by order

H. A. Rühl
Principal Administrator

A. Touffait
President of the Second Chamber