

OPINION OF MR ADVOCATE-GENERAL MAYRAS
DELIVERED ON 22 MARCH 1973 ¹

Mr President,
Members of the Court,

I — Subject of the action and facts of the case

Among the various items in the remuneration of officials of the European Communities, laid down by the Staff Regulations applicable to them, is an allowance known as the 'expatriation allowance', the amount of which is equal, in accordance with Article 69 of those Regulations, to 16 % of the basic salary.

This allowance, which has already given rise to several disputes brought before your Court, is granted in accordance with Article 4 (1) of Annex VII to the Regulations.

- first, under sub-paragraph (a), 'to officials who *are not and have never been* nationals of the State in whose European territory the place where they are employed is situated, and 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;' and,
- secondly, under sub-paragraph (b), 'to officials who *are or have been* nationals of the State in whose territory the place where they are employed is situated but who during the ten years ending at the date of their entering the service habitually resides outside the European territory

of that State for reasons other than the performance of duties in the service of a State or of an international organization'.

The right to the expatriation allowance is thus linked, in relation to the place where the official is employed, to two concepts: the present or former nationality of the party concerned and the place of his usual residence during a specific period before he entered the service.

The present case will lead us to apply these provisions in a case where an official has had a dual nationality.

Miss Gunnella was born on 12 August 1925 at Calais of an Italian father and a French mother.

Accordingly she had dual nationality:

- French, by virtue of the Law of 10 August 1927 which, adopting maternal ascent as the source of nationality, declares a legitimate child, born in France of a French woman, to be French (Articles 1—3);
- Italian, by virtue of the Law of 13 June 1912 (Article 1), relating to the nationality of that State, which provides that a child born of an Italian father is Italian, whatever the place of its birth.

However, Article 7 of the same Law provides any Italian subject born and residing in a foreign State whose nationality he has by birth with the right to renounce Italian nationality when he is declared of full age or when he attains his majority.

Making use of this authority, Miss Gunnella declared, upon attaining her majority, that she renounced Italian nationality.

¹ — Translated from the French.

The applicant, after passing the major part of her youth in Italy where she states that she resided from 1930 to 1945, returned to live in that country in 1949. She was recruited for the Allied High Commission for Germany and was employed at Rome by that organization until August 1951. During the next 10 years she continued to live in that town where she worked as a secretary at the French Embassy.

Then, on 1 April 1961, she was engaged by the Commission of the European Atomic Energy Community and was posted to Brussels. She remained there for less than two years since, having obtained special leave on 15 November 1962, she returned to Rome to work for the French Ministry of Finance.

On 20 September 1965 at her own request she was taken back into the service of the Commission of the European Communities and posted, not to Brussels, but to the Ispra establishment of the Joint Research Centre in Italy.

Nearly five years later, by letter dated 30 August 1971 addressed to the Directorate of Personnel of the Commission, she asked for payment of the expatriation allowance, invoking the provisions of Article 4 of Annex VII to the Regulations. This request was rejected on 9 March 1972 on the grounds that having had, up to the age of 21, not only French nationality but also Italian nationality, her position was governed by the provisions of paragraph (1) (b) of that Article which makes the grant of the expatriation allowance subject to residence, for a period of 10 years preceding entry into the service of the Communities, outside the territory of the State in which the official is employed. As the applicant had resided in Italy from 1949 to 1961, that is, for 12 years prior to her appointment as an official of the Commission, she did not satisfy this condition.

Miss Gunnella requests you to annul this decision, to acknowledge her right to the expatriation allowance as from 30

September 1965 and, accordingly, to direct the Commission to pay her the sums due on that count as from the said date.

II — Admissibility of the application

Although it did not formulate, 'in limine litis', any plea of inadmissibility, the defendant felt that at the time of the oral procedure it could put forward two pleas of inadmissibility arising from the belated nature of the application.

Periods for appeal are according to your decisions, a matter of public interest (Judgment of 12 December 1967, Case 4/67, Anne Collignon — Muller, Rec. 1967, page 479; Judgment of 14 April 1970, Case 24/69, Theo Nebe, Rec. 1970, page 151). Accordingly, the expiry of these periods may be pleaded at any time and you will consider, even of your own motion, whether an action is belated (Judgment of 7 July 1971, Case 79/70, Mullers, Rec. 1971, page 696).

In the case in point, therefore, it is necessary to examine this matter, in particular in relation to two distinct points.

In the first place, was not the position of the applicant settled, in so far as the right to the expatriation allowance is concerned, by a decision prior to that forming the subject of the action? You have been reminded at the bar that Miss Gunnella, having been granted special leave in 1962, was taken back at her own request. This re-engagement, decided upon on 6 September 1965, was followed on 5 October by a decision in which in particular the various components of her remuneration were fixed. A copy of this decision was filed in her personal file and according to a note at the foot of this document, another copy was sent to the applicant.

This administrative document contains an assortment of information relevant to the determination of the individual status of the official: category, grade, incremental step and seniority and also

the basic remuneration and the allowances which may lawfully be claimed.

An examination of this document reveals that, under the symbol 'ID', that is 'indemnité de dépaysement' (expatriation allowance), appears the word 'no'. Thus on 5 October 1965 the administration took the decision not to grant this allowance to the applicant. The latter, having received a copy of this decision at that time, should either have approached the Court of Justice direct within a period of three months, or, within the same period, sent the Commission a complaint within the meaning of Article 90 of the Regulations and appealed in due course against the rejection, express or implied, of this complaint.

Miss Gunnella was even less justified in claiming that she was not aware of this decision since she was able to see from the salary slips which she received each month that the expatriation allowance had not in fact been paid to her; she furthermore acknowledged this in her claim of 30 August 1971. Thus the original decision, having become final, is no longer open to dispute.

This argument seems to us to be valid. The document whereby the remuneration of the applicant was fixed at the time of her re-engagement expressly denied her the right to the expatriation allowance; it had the nature of an act adversely affecting her which was notified to her and which, furthermore, was implemented.

It is established that the applicant did not contest the same within the period for contested actions.

Moreover, a second plea of inadmissibility is put forward against the application. This, in our view, is likewise justified. The representative of the Commission has pointed out in fact that, in accordance with the provisions of Article 91 of the Regulations then in force, the request submitted on 30 August 1971 by Miss Gunnella for the restoration of the allowance in dispute must be deemed to have been rejected by

implication two months after its receipt by the Administration.

By virtue of that same Article, the applicant should have appealed within a period of two months following such implied decision. She did not do so. Her application is directed against the express rejection of her claim which took place on 9 March 1972. You have decided on several occasions that appeals against express decisions merely confirming implied decisions which have become final by reason of not having been contested within the period for contested actions, are inadmissible (Judgment of 24 June 1971, Case 53/70, *Vinck v Commission*, 2nd Chamber, Rec. page 609).

These decisions are applicable in the case in point. The express decision which is the subject of the action only confirmed the implied rejection resulting from the silence preserved for more than two months by the Administration in respect of the request by the applicant.

Therefore, Members of the Court, you could limit yourself to establishing on one ground or the other, the belated nature of the application.

However, if, without dwelling on the inadmissibility, you were to decide to examine the merits of the action, we believe that you would likewise be led to reject the appeal.

For this reason we feel it worth while to give you our opinion in this connection.

III — Discussion of the merits

In her first and principal plea the applicant maintains that she is entitled to the expatriation allowance by virtue of Article 4 (1) (a) of Annex VII to the Regulations.

Without disputing the fact that she indeed had dual nationality, Italian and French, until the age of 21, she states that a strict and purely literal interpretation of this provision would be contrary to the spirit of the Community legislature and the aims which it pursued.

She maintains that the condition imposed by that Article, that the official *is not and has never been* a national of the State in whose European territory the place where he is employed is situated, had the sole purpose of preventing an official from obtaining an expatriation allowance by voluntary change of nationality either by marriage or naturalization. On the other hand, this provisions could not be advanced when the party concerned had dual nationality either involuntarily or by the sole effect of domestic laws.

This was the case of the applicant, who received Italian nationality at birth by her paternal descent. But she points out that, as soon as this was legally possible, she terminated this situation by expressly renouncing the said nationality and retaining French nationality only.

Thus, in order to interpret the Article in question, it would be appropriate to concern oneself only with the sole effective or dominant nationality.

In our view, this argument cannot be accepted.

Although it is true that, in order to obtain the meaning or scope of a Community enactment it is appropriate if occasion should arise to consider the objective and spirit of its provisions in the light of the general arrangement of the legislation in which they are contained, it is not necessary to resort to this method of interpretation when one is concerned with a text which in itself is clear and the meaning of which cannot, bearing in mind the rules of grammar, semantics and syntax, give rise to any discussion.

This is the case with the requirements under the Regulations governing the right to the expatriation allowance.

Among the conditions for the grant of the allowance, Article 4 (1) of Annex VII attaches to the present or previous nationality of the official the value of a statutory presumption of expatriation or non-expatriation.

Under sub-paragraph (a), the Article envisages the case in which the party

concerned is not and never has been a national of the state in which he is employed. In such instance the Community legislature has supposed in principle that, in the presumed absence of any bond of allegiance, present or past, with such state, the right to the expatriation allowance is admitted on the sole condition that the official has not resided or carried on his main occupation on that same territory for a period twice as long, namely ten years before he entered the service.

In the second case, under sub-paragraph (b), the authors of the Regulations, on the contrary, have attached to present or previous possession of the nationality of the State in which the official is employed the consequence that, in order to benefit from the expatriation allowance, he must have habitually resided outside that same territory for a period twice as long, namely ten years prior to his entering the service.

The primary criterion for the right to the allowance is accordingly based on the habitual residence of the official, prior to his appointment.

Secondarily, the condition of nationality enters into the matter in connection with the determination of the duration of this residence outside the territory in which the official is employed.

Furthermore, the present or previous nationality of the official is taken *as a fact* determined solely by the domestic legislation applicable. It excludes any distinction as to the method of acquisition or loss of that nationality.

The Community legislature rightly refrained from granting the institutions any discretionary powers in this connection. Whilst the concept of habitual residence might possibly give rise to interpretation, the condition of nationality must be derived from a pure and simple finding, proof regarding which is governed exclusively by the law of each state. Therefore it is not possible to retain here the concept of dominant or effective nationality.

It is clear that in the case in point the applicant in fact possessed Italian nationality until her majority; as the place in which she was employed after her re-engagement was located on Italian territory, it follows *ipso facto* that her situation cannot but be governed by the provisions of subparagraph (b) of Article 4 (1).

In truth, her argument involves the very condition laid down by the Regulations and not its application to her, which was required by those Regulations. But it is futile for her to think that in this connection she can put forward the plea of infringement of the principle of equality between officials. The criterion of nationality adopted is in fact the same for all staff; in law, it does not introduce any discrimination between them. We are not therefore in a situation comparable to that which you criticized in your Judgments of 7 June 1972, Berton-Sabbattini, and Bauduin-Chollet, when you judged that the Regulations could not give different treatment to officials according to whether they were of the masculine or feminine sex, since the cessation of the state of expatriation must comply, for both of these, with uniform criteria, independent of the difference in sex.

The fact that the criterion of nationality adopted by Article 4 (1) is, in application, somewhat crude and may, in certain cases, entail inequitable consequences is another question which is not within the competence of the Court, which is bound by a clear text, but within that of the Community legislature which alone might remedy the situation by basing the right to the expatriation allowance on other criteria, such as the distance between the place of employment and the place of habitual residence prior to engagement of the official.

The second plea of the application, put forward as an alternative, is based on an alleged infringement of Article 4 (1) (b).

By virtue of this provision, the right to the expatriation allowance is subject as has been seen, to habitual residence

outside the territory of the State in which the official is employed for a period of 10 years ending at the date of his entering the service. This expression, according to the applicant, should be understood as being entry into service at a specific place of employment, in the case in point at Ispra, and thus on Italian territory; Miss Gunnella commenced her duties at Ispra only on 20 September 1965, the date of her re-engagement. She points out that, during the period of ten years preceding this re-engagement, she did not reside habitually and constantly in Italy because, from 1 April 1961 to 15 November 1962 she had been posted to Brussels and had in fact resided in that town.

But, Members of the Court, the concept of entry into service adopted by Article 4 (1) can only be understood as meaning the first entry into the service of the Communities. What is essential for the concept of expatriation within the meaning of this Article is the fact that, before becoming a Community official, a person was established outside the territory of the State in which he was employed for the first time.

Successive transfers which an official may subsequently undergo do not have the effect of bringing into question once more a criterion laid down once and for all in terms of his place of residence prior to appointment.

The text itself defies any other interpretation. Indeed, it excludes in particular the taking into account of any period in which the party concerned, during the ten years before his entering the service, has resided outside the territory of the State in which he is employed by reason of the performance of duties in an international organization. The European Communities are just such an international organization and, accordingly, periods spent in their service cannot be taken into account in order to assess the right to the expatriation allowance.

To decide otherwise would be tantamount to confusing 'entry into

service' with a simple change of employment.

The solution cannot be different in the event of re-engagement after a period of special leave. The sole factor which may be adopted to determine the right to the expatriation allowance is the habitual residence prior to first appointment.

In the case in point Miss Gunnella resided in Italy from 1949 to 1961, that is to say for the twelve years before she entered the service of the European Communities. When she was appointed on 1 April 1961 to Brussels she received the expatriation allowance by virtue of

Article 4 (1) (a) because, on the one hand, she did not have and never had had Belgian nationality and, furthermore, she had not resided in Belgium prior to her appointment.

If, in 1965, she had been re-instated in the departments of the Commission in Brussels, she would again have been entitled to such allowance. But she was posted to Ispra. Accordingly, the combination of her previous Italian nationality and her entry into the service of the Communities had the legal consequence of causing her to forfeit this right. The second plea of the application is therefore unfounded.

Our final opinion therefore is:

- that the application should be rejected;
- and that, in accordance with the provisions of Article 70 of the Rules of Procedure, each of the parties should bear its own costs.