2. Orders each party to bear its own costs.

Kutscher Pescatore Sørensen

Delivered in open court in Luxembourg on 15 June 1976.

A. Van Houtte
Registrar

H. Kutscher
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 26 MAY 1976 [1]

Mr President,
Members of the Court,

At the present stage of this procedure my remarks will be brief.

The failure to pay the expatriation allowance provided for in Article 4 of Annex VII to the Staff Regulations of Officials and which adversely affects the applicant is clear from the salary statement which is blank at this heading.

The Court has conceded that in certain circumstances a mere accounting slip without any explanation does not constitute an act adversely affecting a person: this was the case both as regards a statement making a deduction because of a payment which was not due (Judgment of 27 June 1973, *Kuhl* [1973] ECR 711) and of a salary statement whereby the Administration at a specific point ceased to pay an allowance theretofore granted (Judgment of 15 July 1970, *Chuffart and others* [1970] ECR 641). I entirely endorse the observations delivered at the time by Mr Advocate-General Gand in his opinion on that case ([1970] ECR at pp. 655 and 656).

Nevertheless in the present case the applicant could not have been unaware from the very outset, very shortly after taking up her duties, that is to say since November 1972, on examining her first monthly salary statement that she had not been granted the expatriation allowance.

It is true that the reasons for the refusal of this payment varied at different times. One may think, as did the applicant, that under the Staff Regulations as they were at the time this refusal was due to her marriage to a Luxembourg national and to the fact that since she did not have the status of head of household she could not benefit from this allowance. Subsequently, when the Court found the Staff Regulations of Officials to be unlawful in this respect, the Administration founded its continued refusal on the fact that the applicant had during the five years ending six months before she entered the service habitually carried on her main occupation within the European territory of the State where her place of employment was situated. In the ultimate analysis, the Administration appears to be relying on the fact that the applicant lived permanently in Luxembourg throughout this same period. Furthermore I consider that it would be justified in relying on such a reason, in fact because it is true that the applicant

1 — Translated from the French.

had her principal residence in the Grand Duchy throughout this entire period, and in law because the concept of habitual residence within the territory of the State where an official is employed is *one* of alternative conditions for refusing the expatriation allowance. Nevertheless those variations in the reasoning do not appear to me, on any view of the case, to have any bearing on the very existence and on the continuance of this refusal.

In those circumstances it is appropriate first of all to apply the judgment of the Court in the *Schots (nee Kortner)* case (Joined Cases 15 to 33/73 Judgment of 21 February 1974 [1974] ECR 189) in accordance with which communication of the salary statement has the effect of starting the time for appeal running, where it *clearly* shows the decision taken, which appears to me to be the case. Whilst setting out in detail the factors of which it had taken account the communications which the Administration sent in 1975 to the applicant merely *confirmed* the previous decision whereby the Commission had decided that the applicant was not entitled to the expatriation allowance. Such communications accordingly connot have the effect of setting a fresh time-limit for appeal, in the applicant's favour (Judgment of 8 May 1973) *Gunnella* [1973] ECR at p. 481).

On this ground alone the application is inadmissible as out of time under Article 91 (2) of the Staff Regulations.

In those circumstances it seems to me pointless to consider the second ground of inadmissibility on which the Commission relies. This ground is based on the fact that the applicant's letter of 16 January 1975 constitutes fairly and squarely a 'request' within the meaning of Article 90 (1) of the Staff Regulations and not a mere inquiry. Although I have some doubt as to the definition thus drawn by the Administration it seems to me that its arguments are more than sufficient.

With regard to the divorce of the applicant which took effect on 25 June 1974 this cannot constitute a new fact with regard to the alleged right to the expatriation allowance. First, it is impossible for the dissolution of the marriage to have retroactive effect to the date when the applicant entered the service of the Commission; secondly, the Administration justified its refusal on the grounds of 'habitual residence' or 'habitually carrying on the main occupation' and not on refusal to recognize her status as head of household owing to the marriage. Thus the subsequent alteration in the applicant's family situation can only affect the recognition in her favour of her status as head of household and the grant of allowances for the two dependent children in her custody.

Finally it seems to me clear that the submission based on the objection of illegality which the applicant invokes against the system of time-limits laid down by the Staff Regulations could only be considered by the Court if the application itself were admissible. If, as I suggest, the Court holds that the application is inadmissible because it is out of time it cannot consider whether any of the submissions made are well-founded even if one of those submissions is based on the alleged irregularity of provisions of the Staff Regulations. The only circumstances on which it might be possible to take such a submission into consideration would be, in the very words of the Commission, 'in the context of an application against a wrongful act or omission deliberately perpetuated by the Administration through its refusal to rectify the clear error vitiating its measure.'

I am of the opinion that the application should be dismissed and that the parties should each bear their own costs.