In Case 1322/79

GAETANO VUTERA, an official of the Commission of the European Communities, residing at 187 Rue du Progrès, 1030 Brussels, assisted and represented by Léon Goffin, Michel Mahieu and Roland Dupont of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, Rue Philippe II, boîte postale 39,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Denise Sorasio, acting as Agent, assisted by Daniel Jacob of the Brussels Bar, with an address for service in Luxembourg at the office of Mario Cervino, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of the decision notified to the applicant on 25 September 1979, whereby the Commission rejected the complaint lodged by the applicant on 19 June 1979 with the object of obtaining payment of the expatriation allowance provided for by Article 4 of Annex VII to the Staff Regulations,

THE COURT (Second Chamber)

composed of: P. Pescatore, President of Chamber, A. Touffait and O. Due, Judges,

Advocate General: G. Reischl
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, submissions and arguments of the parties may be summarized as follows:

I — Facts and written procedure

Mr Vutera, who was born in Italy in 1944, emigrated in 1947 to Belgium, where his father was living. He resided in that country without break, was educated there and held various jobs there until his recruitment as a member of the local staff by the Commission on 17 March 1975.

On 1 April 1979 he was appointed as a probationary official in Grade D 3 by decision of the Head of the Recruiting, Appointments and Promotion Division and became an established official in that grade on 1 October 1979.

He has retained his Italian nationality, his wife is also Italian, his children attend the Italian school in Brussels and he is enrolled on the Italian register of electors.

At the time of his appointment he noticed that a sum of BFR 1 930 in respect of the foreign residence allowance appeared amongst the items making up his salary, and since he considered that he ought to be entitled to the grant of the expatriation allowance, he submitted a complaint pursuant to Article 90 of the Staff Regulations; that was rejected and he then lodged this application, which reached the Court Registry on 21 December 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 and well-founded;

Consequently, annul the decision notified to the applicant on 25 September 1979, whereby the Commission rejected the complaint lodged by the applicant on 19 June 1979 pursuant to Article 90 (2) of the Staff Regulations of Officials of the European Communities with the object of obtaining payment of the expatriation allowance provided for by Article 4 of Annex VII to the Staff Regulations;

Order the Commission to pay the costs.

The *defendant* contends, subject to all necessary reservations, that the Court should:

Dismiss the application as unfounded;

Order the applicant to pay the costs.

III — Summary of the submissions and arguments of the parties

Following the applicant's abandonment of the submission based on the infringement of Articles 7 and 189 of the EEC Treaty and Article 24 of the Treaty

of 8 April 1965 establishing a Single Council and a Single Commission of the European Communities, there remains only the submission based on the breach of the general principle of equality and non-discrimination.

(a) The *applicant* maintains that the principle of equal treatment and non-discrimination was breached by the fact that in its explanation of the grounds on which it refused to recognize the applicant's entitlement to the expatriation allowance the Commission relied upon Article 4 (1) of Annex VII to the Staff Regulations, whereas "that provision creates an unwarranted difference of treatment between officials who are in fact placed in comparable situations".

That provision grants the expatriation allowance:

"(a) to officials:

— Who are not and have never been nationals of the State in whose 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 . . ."

According to the applicant, the "special expenses and disadvantages" which are the reason for the existence of the expatriation allowance (judgment of 7 June 1972 in Case 20/71, *Sabbatini* v *European Parliament* [1972] ECR 345) exist even where the official has already resided in the State in which he is employed for five years and six months before entering the service; such is particularly the case as regards family and cultural ties with the country of origin, the exercise of rights and obligations under public law which derive solely from the laws of the State of origin, the difficulty encountered by the children in finding employment in the country of origin owing to the fact that the diplomas obtained in the host country are not equivalent, the lack of access to posts in the public service in the host country and more generally the absence of political rights in the host country.

Moreover, an official recruited after residing in his host country for less than five years continues to receive the expatriation allowance throughout his career, even though the objective circumstances of expatriation are the same for an official who had resided there for more than five years and six months. The same applies with regard to the situation of an official who, although residing in the State in which he is employed for more than five years and six months, performed duties in the service of another State or an international organization.

It is not the principle itself of expatriation that the applicant is calling in question, but the conception of it. It is wrong to rely on the notion that only a change of residence resulting from entry into the service of the Communities gives rise to the expatriation allowance. Whilst that notion may be appropriate in the case of officials who effectively leave their own country, it is not so for those who had resided in the host country for more than five years, because such a period of residence does not of itself imply the absence of expatriation; on the contrary, expatriation exists in such cases and may be ascribed to employment in the service of the Communities. It is "the

same in nature and intensity as the expatriation — not in dispute — experienced by officials who, as foreigners in the host State, have worked there in the service of the Communities for at least five years".

On the other hand, there exists no sufficient ground for discriminating between foreign officials who have been employed in the service of another State or an international organization for a period exceeding five years and "officials who left their own country for economic reasons and, under conditions which were often difficult, performed modest duties in the private sector in the State where they are employed, but are considered not to come within the concept of expatriation".

The applicant claims that "the contested provision is arbitrary inasmuch as it is not objectively justified and is discriminatory". It is thus "contrary to the principles cited and therefore illegal". It follows that since the contested decision is based on "an illegal regulation" it is *ultra vires* and that since such illegality may be invoked pursuant to Article 184 of the EEC Treaty the decision should be annulled.

(b) The *defendant* emphasizes first of all that the two comparisons presented by the applicant concern officials who are not nationals of the State in which they are employed and whose position, with regard to the grant of the expatriation allowance, is principally determined by reference to the length of their residence within the territory of that State and, secondly, by reference to the nature of the occupation which necessitated their residence within the territory of the said State, before they entered the service.

Thus, any discrimination would in any event not be based on nationality since "an examination of the cases set out clearly establishes that the nationality of the official does not constitute a criterion for the grant or refusal of the expatriation allowance".

According to the defendant, both the wording of Article 4 (1) of Annex VII to the Staff Regulations and the guidance provided by the Court [1] indicate that "the primary criterion for the grant of the expatriation allowance is the habitual residence of the official before his recruitment". That criterion prevails over that of nationality, since the allowance may be granted to an official who is a national of the State in which he is employed, provided that he resided in another State during the ten years preceding his recruitment.

The fact that a foreign official who has performed duties in the service of another State or an international organization is nevertheless entitled to the expatriation allowance does not constitute an exception, but rather a refinement of the principle of the prime importance of habitual residence, because it is reasonable to consider that the occupations referred to in those two cases by no means imply that a person engaging therein has severed his ties with his country of origin. Consequently, the residence which he is required to adopt as a result of his duties in the service of the Community does not constitute his habitual residence.

Likewise, in comparing his situation with that of an official recruited in a foreign country who continues to receive an expatriation allowance, the applicant failed to point out that the change of residence of an official who happens to be living in a foreign country is due to his recruitment, whereas the residence of foreign officials who have habitually

1 — Judgment of 7 June 1972 in Case 20/71 *Sabbatini* v *European Parliament*, cited above; judgment of 7 June 1972 in Case 32/71 *Bauduin* v *Commission* [1972] ECR 363; judgment of 20 February 1975 in Case 21/74 *Airola* v *Commission* [1975] ECR 221; judgment of 20 February 1975 in Case 37/74 *Van Den Broeck* v *Commission* [1975] ECR 235.

resided for more than five years in the State in which they are employed does not have any connexion with the new duties performed by them in the service of the Communities.

As regards the disadvantages referred to by the applicant, the defendant maintains that:

(1) Having decided to retain his Italian nationality even though he had the opportunity to acquire Belgian nationality, the applicant cannot derive support for his arguments from the fact that he is unable to exercise certain political rights in his host country, because "the submission relating to the breach of the principle of equal treatment cannot be founded solely on disadvantages, the existence of which is not entirely independent of the applicant's volition". (The Commission bases this submission on the judgment of 14 December 1979 in Case 257/78, *Devred, née Kenny-Levick* v *Commission* [1979] ECR 3767).

(2) The existence of family and cultural ties with the country of origin, although beyond dispute, may not be taken into consideration because "the taking of such into account would amount to replacing the objective concept of expatriation defined by the Staff Regulations with a subjective concept which would vary from one individual to another", as was suggested in the opinion of Mr Advocate General Warner (judgment of 17 February 1976 in Case 42/75 *Delvaux* v *Commission* [1976] ECR 167) and in the opinion of Mr Advocate General Trabucchi (judgment of 20 February 1975 in the *Airola* case cited above).

In conclusion, the Commission considers that the criteria governing the grant of the expatriation allowance, "far from being of an arbitrary nature, are based on objective factors and consequently apply in the same manner to all officials who are in identical situations"; those criteria are also consistent with the purposes which the allowance in question is intended to fulfil and cannot therefore be of a discriminatory nature.

Finally, whilst there is no doubt that the applicant is subject, owing to the fact that he resides in a State which is not his country of origin, to "certain special disadvantages" which are in no way connected with his entry into the service of the Commission, those disadvantages are compensated for by the grant of the foreign residence allowance provided for by Article 4 (2) of Annex VII.

(c) In his reply the *applicant* observes first of all that the relevance of the submission put forward is not disputed by the defendant. It follows from that, in his opinion, that in so far as provisions of secondary Community law, such as for example Article 4 of Annex VII to the Staff Regulations of Officials are contrary to the general principle cited, which belongs to primary Community law, those provisions are tainted with illegality and consequently vitiate in turn the individual decisions which implement them.

Having recalled and developed his submission, the applicant repeats that there is discrimination owing to the fact that, on the pretext that he had resided for more than five years and six months in the State in which he is employed, he is denied the expatriation allowance, whereas it is granted to an official whose circumstances are the same but who was employed in the service of another State or an international organization, or who was in the service of the Community, and whereas it is also granted to an official who resided for less than five years and six months in the State in which he is employed. However, there is no objective difference with regard to expatriation between the applicant and the other three officials.

This discrimination was acknowledged by the Council itself when, by

Article 4 (2) of Annex VII to the Staff Regulations, it provided for a foreign residence allowance, which admittedly reduced the inequality without, however, removing it.

Having thus recalled and enlarged upon the submission relied on, the applicant addresses himself to the task of refuting the Commission's arguments, maintaining first of all that it seems to him that "the real significance of the submission put forward by the applicant escaped the Commission. As a result, its arguments are irrelevant and do not counter the arguments put forward in the application".

(1) The applicant did not maintain that the contested provision was contrary to the principle of equal treatment on the basis of nationality, but that it was contrary to the principle of equality because it treats differently, without any objective reason, officials who are in identical, or at least comparable, situations.

(2) The Commission's argument, based on the cases cited by it, to the effect that the essential test for the grant of the expatriation allowance is the change of residence of the official is "clearly erroneous" because that allowance is also payable even when at the time of his recruitment the official has already been in the country in which he is employed, either for a period of less than five years and six months, or even for a longer period where he has been employed in the service of the Community.

The applicant does not perceive the inference which the Commission purports to draw from this premise, which he considers incorrect, since it does not refute the argument that the contested provision treats identical or comparable situations differently.

(3) Returning to those comparisons through which he endeavoured to establish the discrimination of which he claims to be a victim, the applicant asserts that his argument has not been "countered by the Commission" since it has not suggested any objective reason capable of justifying such unequal treatment.

(4) The Commission's argument regarding the possibility of changing nationality is "as untenable as it is irrelevant to the dispute", because it implies that an official who has been in the country in which he is employed for a time has no other solution in order to overcome one of the disadvantages of expatriation, namely the loss of political rights, than to apply for naturalization in the country in which he is employed.

(5) Contrary to the assertion of the Commission, the applicant never claimed that expatriation was a subjective concept. Certainly, the contested provision creates different categories and applies to all the officials belonging to each category, but that is not the point in issue, the Commission still "failing to justify the difference in treatment between officials who are in fact placed in comparable situations" (judgment in the *Airola* case, cited above).

The applicant observes in addition that the cases cited by the Commission [1] "are not relevant", because the views expressed by the Court in those cases are unconnected with the solution of this case.

With regard to the judgment in the *Devred* case, from which the Commission purports to draw a general rule applicable to the present case, not only is that case essentially different

1 — The judgments in the *Airola*, *Van Den Broeck*, *Gunnella*, *Sabbatini* and *Bauduin* cases, cited above.

from this one, but the principle put forward by the Commission can by no means be inferred from the dicta of the Court in the *Devred* case, and even if there were such a principle, it would not apply to the case of the applicant.

Finally, with the exception of the judgment in the *Devred* case, all the other judgments cited by the Commission were delivered before the entry into force of Regulation No 912/78 of 2 May 1978, which added paragraphs (2) and (3) to Article 4 of Annex VII.

Consequently, "the guidance which the Court was able to provide concerning the former text may not be transposed to the present text".

(d) The *defendant* replies to those arguments point by point:

(1) It notes that the applicant, making a complete change of direction from his arguments contained in the application, "claims that for the purposes of the grant of the expatriation allowance the nationality of the official should be the essential, or indeed the sole, factor to be taken into account".

(2) The defendant repeats that the criterion of change of residence for the grant of the expatriation allowance was defined by the Court of Justice. The defendant's argument is in no way invalidated by the fact that this allowance is also payable to an official who has already been living in the country in which he is employed, but for a period of less than five years and six months, and to an official who has resided there for more than five years and six months and was in the service of a Community institution or other international organization. As regards the first category of officials referred to, the grant of the expatriation allowance arises from the deliberate generosity of the Community legislature, which did not wish to penalize officials who arrived recently in the territory of the State in which they are employed, since they "have not yet established an habitual and lasting residence in the place where they are employed". As far as the second category of officials is concerned, the grant of the expatriation allowance is justified by the fact that, since the cause of the previous stay in the State where they are employed was their entry into the service of an international organization, the officials concerned cannot be regarded as having already established an habitual and lasting residence in the place where they are employed.

(3) The defendant repeats that it has already refuted in its defence the applicant's argument that there exists no objective difference, in respect of expatriation, between his personal situation and that of the various categories of officials which he enumerates. Nevertheless, it repeats that it is not a question of granting this allowance to any official who considers that he is an expatriate in the country in which he is employed, and that "the possible existence of unequal treatment must therefore be determined not by reference to a general concept of 'expatriation', which is undefined and moreover to a large extent undefinable, but rather on the basis of the criterion of expatriation as defined by the Community regulations". Those regulations provide that in order to qualify for the expatriation allowance the official must have been led to change his residence as a result of his recruitment by a Community institution. That principle was merely supplemented by two provisions which, without reducing its scope, ensured a liberal application thereof.

Consequently, "since the criteria thus defined are general, objective and appropriate to the intended purpose, they cannot give rise to discrimination".

(4) With regard to the argument that the applicant could change his nationality, the defendant maintains that that argument was only put forward as an alternative and repeats that it is nevertheless relevant, since the Commission merely observed that a factor which may vary according to the volition of the person concerned constitutes by its nature a criterion which is less objective than the criteria over which an official has no control.

(5) In spite of the denials by the applicant, the defendant "adheres to the view that the applicant's argument amounts to replacing the objective concept of expatriation with a subjective concept which varies from one individual to another".

(6) With regard to the applicant's submission that the cases cited by the Commission are not relevant, the defendant repeats that, whilst it is correct that the Court did not have occasion to consider the precise question which is the subject of this case, it none the less had occasion in the various cases cited to define in general terms the purpose of the expatriation allowance and the criteria for granting it. The defendant also maintains that the case of *Devred, née Kenny-Levick* v *Commission* (cited above) may properly be relied on in this case.

Furthermore, the fact that the judgments relied upon by the Commission were delivered before Regulation No 912/78 came into force is immaterial, since the insertion of paragraph (3) into the text of Article 4 of Annex VII relating to the foreign residence allowance cannot in any way invalidate the guidance provided by the previous cases, because the applicant does not establish or "even claim that the insertion of that provision has in any way altered the purpose of the expatriation allowance or the conditions for granting it".

In conclusion, the defendant repeats that in his opinion the applicant has substituted for the criteria laid down by the Staff Regulations a vague, indefinable and essentially subjective concept of expatriation without showing that the conditions for the grant of the expatriation allowance are arbitrary, treat differently officials who are placed in similar or comparable situations or are incompatible with the object of the said allowance.

IV — Oral procedure

The applicant, represented by L. Goffin, M. Mahieu and R. Dupont, all of the Brussels Bar, and the Commission, represented by Denise Sorasio, assisted by D. Jacob, of the Brussels Bar, presented oral argument at the sitting on 9 October 1980.

The Advocate General delivered his opinion at the sitting on 20 November 1980.

Decision

1 By an application lodged at the Court Registry on 21 December 1979, Gaetano Vutera, an official of the Commission of the European Communities in Brussels, brought an action for the annulment of the

decision notified to him on 25 September 1979 whereby the Commission rejected the complaint which he lodged on 19 June 1979 with the object of obtaining payment of the expatriation allowance provided for by Article 4 of Annex VII to the Staff Regulations.

2 The applicant, who was born in Italy in 1944, emigrated to Belgium in 1947; he lived in that country without break, was educated there and held various posts there until his recruitment by the Commission on 17 March 1975 as a member of the local staff. He has retained his Italian nationality, his wife is also Italian, his children attend the Italian school in Brussels and he is enrolled on the Italian register of elector. As an Italian national, he is in receipt of the foreign residence allowance pursuant to Article 4 (2) of Annex VII to the Staff Regulations; however, he considers that he is entitled to the expatriation allowance provided for by paragraph (1) of the said article.

3 That provision states as follows:

"An expatriation allowance shall be paid, equal to 16% of the total amount of the basic salary plus household allowance and the dependent child allowance paid to the official,

(a) to officials:

Who are not and have never been nationals of the State in whose 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;

(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 resided 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."

4 The applicant maintains that that provision is contrary to the principle of equality and of non-discrimination because it creates an unwarranted difference of treatment between officials who are in fact placed in comparable situations. Indeed, in his opinion, there is no objective difference as far as expatriation is concerned between his situation as a foreigner who at the time of his recruitment had resided for more than five years and six months in the country in which he is employed, and that of an official who had resided there for a shorter time, or who, although having also resided for more than five years and six months in the country in which he is employed, performed duties in the service of another State or of an international organization. Moreover, he says, the Council had itself acknowledged this discrimination vitiating the contested provision by granting a foreign residence allowance to an official who is not and never has been a national of the State in whose territory the place where he is employed is situated and who does not fulfil the conditions laid down by Article 4 (1) of Annex VII to the Staff Regulations; but that allowance merely reduced the inequality without removing it. In addition, the applicant is of the opinion that it is wrong to contend that the expatriation allowance depends essentially on the criterion of residence since it is also payable even when at the time of his recruitment the official has already been in the country in which he is employed either for less than five years and six months or for a longer period, provided that he performed duties in the service of another State or an international organization. This breach of a superior rule of law must lead to the inapplicability of Article 4 (1) of Annex VII to the Staff Regulations and consequently to the annulment of the Commission's decision of 26 September 1979.

5 In order to deal with that submission it is necessary to examine the system set up by the Community legislature.

6 The provisions of Article 4 considered as a whole indicate that, whilst the Community legislature made the fact of foreign origin the sole basis for the grant of the foreign residence allowance, for the purposes of the grant of the expatriation allowance it adopted actual change of residence as the primary criterion and regarded nationality as merely of secondary importance.

7 This primacy of the criterion of residence over that of nationality is confirmed by Article 4 (1) (b), whereby the expatriation allowance is even granted to officials who are nationals of the country in which they are employed, provided that they resided in another State during the ten years preceding their recruitment.

8 For the purpose of applying that criterion the regulations established specific categories with figures, resulting necessarily in the need to fix appropriate limits. In fact, the condition of non-residence takes into account a period of five years ending six months before entry into the service; in this regard an exception is provided for in favour of officials who during that period resided in the country in which they are employed, where they were in the service of another State or of an international organization, account having been taken of the fact that under those circumstances they cannot be deemed to have established a lasting tie with the country in which they are employed.

9 The application of those categories may doubtless give rise to marginal cases in which officials find that payment of the expatriation allowance is denied to them when their circumstances are close to those defined by Article 4 of Annex VII; nevertheless, it cannot be inferred from that circumstance that those provisions contain arbitrary differentiation, when, based on objective factors, they apply in the same manner to all officials who are placed in the situation contemplated by the Staff Regulations.

10 From all of those considerations it follows that Article 4 (1) of Annex VII to the Staff Regulations does not contain any factor of such a kind as to give rise to a difference in treatment between officials who are in fact placed in comparable situations; therefore the applicant was wrong in his submission that there was a breach of the principle of equal treatment and of non-discrimination.

11 Consequently, the validity of those provisions cannot be called in question, and since the applicant does not come within the terms of Article 4 (1) of Annex VII to the Staff Regulations, there are therefore no grounds to annul the Commission's decision rejecting the applicant's complaint.

Costs

12 Under Article 70 of the Rules of Procedure, in proceedings brought by officials and other servants of the Communities the institutions are to bear their own costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application;**

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

Pescatore Touffait Due

Delivered in open court in Luxembourg on 15 January 1981.

J. A. Pompe
Deputy Registrar

P. Pescatore
President of the Second Chamber