In Joined Cases 152, 158, 162, 166, 170, 173, 175, 177 to 179, 182 and 186/81

W. FERRARIO, A. BORELLA, U. CUCCHIARA, A. M. FEDERICO, C. GIOVANNINI, M. MANZOTTI, R. MIRA CATO, E. PERUCCIO, V. PRAOLINI, M. PUCCIA, G. STIVALA, F. VIOLIN, who are all officials or temporary staff employed at the Joint Research Centre, Ispra branch, Italy, represented and assisted by M. Slusny, of the Brussels Bar, with an address for service in Luxembourg at the residence of F. Avena, 29 Rue de la Libération, Strassen,

applicants,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, J. Griesmar, acting as Agent, assisted by D. Jacob, of the Brussels Bar, with an address for service in Luxembourg at the office of O. Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

supported by

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, J. Carbery, acting as Agent, with an address for service in Luxembourg at the office of H. J. Pabbruwe, a director in the Legal Affairs Directorate of the European Investment Bank, Kirchberg,

APPLICATIONS for

A declaration that the second indent of the third paragraph of Article 3 of Annex VII to the Staff Regulations of Officials is inapplicable in so far as it restricts the doubling of the education allowance to officials who are entitled to the expatriation allowance;

A declaration and order that the Commission shall rectify the applicants' accounts in respects of the expenses indicated in their applications, the education allowance being doubled,

THE COURT (Second Chamber)

composed of: P. Pescatore, President of Chamber, O. Due and K. Bahlmann, Judges,

Advocate General: S. Rozès
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 — Relevant provisions

1. The provisions of the Staff Regulations of Officials with regard to the education allowance and the various amendments thereto may be summarized as follows:

2. Article 3 of Annex VII to Regulation Nos 31 (EEC) and 11 (EAEC) of the Council of 18 December 1961 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (Official Journal, English Special Edition 1959-62, p. 135) stated:

"An official shall receive an education allowance equal to the actual education costs incurred by him up to a maximum of BFR 900 per month for each dependent child within the meaning of Article 2 (2) who is in regular full-time attendance at an educational establishment.

Entitlement to this allowance shall commence on the first day of the month in which the child reaches the age of six years and shall cease at the end of the month in which the child reaches the age of twenty-one years."

3. By Regulations Nos 30/65/EEC and 4/65/Euratom of the Councils of 16 March 1965 amending the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community (Official Journal, English Special Edition 1965-66, p. 43), Article 3 of Annex VII, referred to above, was amended to read as follows:

"An official shall receive an education allowance equal to the actual education costs incurred by him up to a maximum of BFR 1 000 per month for each dependent child within the meaning of Article 2 (2) above who is in regular full-

time attendance at an educational establishment.

Entitlement to this allowance shall commence on the first day of the month in which the child begins to attend a primary school and shall cease at the end of the month in which the child reaches the age of 25 years.

The maximum referred to in the first paragraph of this article shall be raised to BFR 2 000 per month for an official in receipt of expatriation allowance whose place of employment is at least 50 km from a European School."

4. Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 (Official Journal, English Special Edition 1968 (1), p. 30) introduced a single set of regulations governing the officials and other servants of the European Communities. The third paragraph of Article 3 of Annex VII to those Staff Regulations was replaced by the following provision by Article 52 of Regulation (Euratom, ECSC, EEC) No 1473/72 of the Council of 30 June 1972 (Official Journal, English Special Edition 1972 (III), p. 703):

"The maximum prescribed in the first paragraph shall be raised to BFR 3 129 for officials in receipt of expatriation allowance whose place of employment is at least 50 km:

From a European School; or

From an educational establishment of university level of his country of origin, provided that the child actually attends an educational establishment of university level at least 50 km from the place of employment."

5. In 1974 the Commission submitted to the Council a proposal to substitute the following provisions contained in Article 28 of its Proposal of 13 June 1974 (Official Journal 1974, C 88, p. 25) for the provisions in question:

"The maximum prescribed in the first paragraph shall be doubled for:

An official whose place of employment is at least 50 km from a European school or an educational establishment working in his language, provided that the child actually attends an educational establishment at least 50 km from the place of employment; and

An official whose place of employment is at least 50 km from an educational establishment of post-secondary level in the country of which he is a national or working in his language, provided that the child actually attends an educational establishment of post-secondary level at least 50 km from the place of employment."

6. Subsequently the Staff Regulations were amended by Regulation (Euratom, ECSC, EEC) No 711/75 of the Council of 18 March 1975 (Official Journal 1975, L 71, p. 1). The Council, in Article 1 thereof, accepted the Commission's proposal with regard to the first indent of the third paragraph of Article 3 but amended the wording of the second indent which relates to post-secondary education to read as follows:

"An official whose place of employment is at least 50 km from an establishment of higher education in the country of which he is a national or working in his language, provided that the child actually attends an establishment of higher education at least 50 km from the place of employment and the official is entitled to the expatriation allowance; the latter condition shall not apply if there is no such establishment in the country of which the official is a national."

7. Article 4 (1) of Annex VII to the Staff Regulations provides that an expatriation allowance shall be paid:

"(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 10 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 10 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."

II — Facts and procedure

1. The applicants, Wanda Ferrario and others, are all officials or temporary staff employed at the Joint Research Centre, Ispra branch, Italy. They are not in receipt of the expatriation allowance. Their children attend an establishment of higher education situated in Italy more than 50 kilometres from their place of employment.

2. At the end of 1980 the applicants submitted requests to be granted the double education allowance under the second indent of the third paragraph of Article 3 of Annex VII to the Staff Regulations. The appointing authority rejected the requests and reminded the applicants that the provision of the Staff Regulations on which they relied provided that receipt of the double education allowance was subject to the requirement that the recipient was entitled to the expatriation allowance.

3. As a result of that rejection the applicants submitted complaints to which, however, they received no reply. They therefore instituted the present proceedings on 15 June 1981.

4. On 15 July and 9 December 1981 the applicants' complaints were expressly rejected.

5. By an order of 29 October 1981 the Second Chamber of the Court decided to join the cases for the purposes of the procedure and judgment. By a second order of the same date the Council was allowed to intervene in support of the defendant. By an order of 25 May 1982 certain other cases in respect of which the Commission raised an objection of inadmissibility were disjoined from these cases.

6. 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.

III — Conclusions of the parties

The *applicants* claim that the Court should:

Declare that the second indent of the third paragraph of Article 3 of Annex VII to the Staff Regulations of Officials is inapplicable in so far as it restricts the doubling of the education allowance to officials who are entitled to the expatriation allowance;

Declare null and void the defendant's express rejection of the applicants' complaints;

Declare and order that the defendant shall be required to rectify the applicants' accounts in respect of the expenses indicated in their applications, the education allowance being doubled;

Order the defendant to pay the costs.

The Commission (the *defendant)* contends that the Court should:

Reject the applications as unfounded;

Order the applicants to pay the costs.

IV — Submissions and arguments of the parties

1. The *applicants* base their action on a single submission alleging discrimination between themselves and the officials or other servants who are in receipt of the expatriation allowance in respect of the application of the second indent of the third paragraph of Article 3 of Annex VII to the Staff Regulations.

They state that it is no doubt possible to take the view that with the final amendment the text in question was intended to take into account the special position of officials who are entitled to the expatriation allowance and who wish to send their children to an establishment of higher education in their country of origin where that is different from the country in which the officials are employed. But in that case the provision should have been drafted differently since, on the one hand, there are officials and other servants who are not entitled to the expatriation allowance but whose country of origin is not the same as that in which they are employed and, on the other hand, the scheme creates a new discriminatory situation inasmuch as it prevents officials from having a free choice as to establishments of higher education, even those situated abroad.

The discrimination arising from the provision in question is contrary to the general principles of law and there is no objective justification for it. Discrimination may be accepted if it is not arbitrary and if its purpose may be regarded as preserving the interests of the service, but that is not the case in the present circumstances: the fact that the situations of the officials in question are the same is recognized inasmuch as the level of education allowance in respect of education other than higher education does not depend on receipt by the official of the expatriation allowance. Moreover, the costs incurred as a result of studies where the educational establishment is situated more than 50 kilometres from the official's place of employment are the same whether or not the official is in receipt of the expatriation allowance. In addition it cannot be supposed that the children of officials who are in receipt of the expatriation allowance are in a particularly difficult position as a result of their language and nationality. Many of those children have already completed their primary and secondary education in the country where the official is employed and know the language of that country as well as their mother tongue; as regards nationality that ought to be irrelevant since on the one hand qualifications have been

assimilated whilst, on the other hand, every person has freedom of establishment at least within the European Communities.

Furthermore the scheme which has been adopted is incomprehensible since the official or other servant, for example one employed at the Joint Research Centre at Ispra, who is in receipt of the expatriation allowance and who sends one of his children to an establishment of higher education in Italy receives the double education allowance whilst his colleague who is not in receipt of the expatriation allowance and who sends his child to the same establishment does not receive the double allowance.

The scheme is, moreover, irrational since it affects the decision of parents, after the transfer of an official, as to whether to allow their children to continue their studies at the original university. The applicants draw attention to the specific case of one of the officials at Ispra who was originally employed in Belgium, and who, being entitled to the double education allowance, sent his daughter to a Belgian university. When he was reassigned to a post in Italy he continued to send his daughter to that university but the allowance was no longer doubled.

In reply to the Commission's argument that the number of officials affected by the discrimination is limited they emphasize that the injustice exists regardless of the number of persons affected by it.

The applicants maintain that to make the double education allowance depend on entitlement to the expatriation allowance is tantamount to giving that criterion a general validity, whereas it is only an exception which should be interpreted narrowly and which is therefore not capable of giving rise without any objective reason to the grant of other benefits which should be granted to all persons in comparable situations.

Finally, in view of the Council's observations the applicants state that it is impossible to show that the expenses incurred abroad are higher than those incurred in the country in which the official is employed. Furthermore, they disagree that the provision in question evinces a European spirit, as is alleged by the Council, since it denies to officials who are not in receipt of the expatriation allowance the free choice, in respect of their children, as to establishments of higher education in any country.

2. The *Commission* contends that the applicants are mistaken in their view that the scheme in question is discriminatory.

In adopting the provision in question the Council assumed that an official who is entitled to the expatriation allowance comes from a country other than that in which he is employed and that, in the majority of cases, the child of such an official pursues his higher education in the official's country of origin. The Commission emphasizes that 97.4 % of all officials employed at Ispra who are entitled to the expatriation allowance are not of Italian nationality. Only 31 of a total of 569 officials have children (36) who are pursuing higher education in Italy. Yet 147 children of officials falling within that category are pursuing higher education outside Italy, namely in their country of origin.

The intention of the draftsmen of the Staff Regulations was to enable officials to send their children to engage in higher education in their country of origin without thereby being penalized financially. In general it is incontestable that the expenses incurred by a child

pursuing studies in the country of origin are higher than in the case of education in the country in which the official is employed. The fact that in certain marginal cases the travel costs are just as high for a child studying in the country where the official is employed is due, in general, to the deliberate choice by the parents of an educational establishment situated far from the place of employment. Accordingly such marginal cases should not be taken into account.

Furthermore, an official who is forced to send his child to study outside the country where he is employed for reasons of language and nationality is not in the same position as an official who freely chooses to send his child abroad when there is available an educational establishment working in his language in the territory of the country where he is employed. The two situations are objectively different and may therefore legitimately be the subject of different provisions. As was indicated above, only 36 children of officials who are not Italian nationals and who are in receipt of the expatriation allowance are pursuing higher education in Italy, whilst 147 children belonging to the same category are pursuing their studies in the countries of origin. Moreover, of the children of Italian officials not one whose father is in receipt of the expatriation allowance is studying abroad whilst only four of those whose father is not in receipt of that allowance are studying abroad. Those sociological facts show that the applicants' argument that language and nationality are irrelevant does not correspond to the facts. Furthermore, in a number of disciplines (for example law) only the possession of a degree awarded by the country of residence in fact permits a person to follow certain pursuits in that country.

The defendant emphasizes the very small number of officials in an allegedly discriminatory situation. The number of officials who are in receipt of a double education allowance in respect of children studying in Italy and who do not have Italian nationality is not high in comparison to the total number of officials whose children are pursuing higher education in Italy. Equally insignificant is the number of officials (six) of Italian nationality at Ispra who are in receipt of the double education allowance in respect of their children (nine) pursuing higher education in Italy. The defendant states that of the officials who are employed at Ispra and are not in receipt of the expatriation allowance only four children of Italian officials are pursuing higher education abroad and that no children of an official who is not Italian are undertaking similar studies abroad. The case of the official originally employed in Belgium, referred to by the applicants, is an exceptional case since it involves an official transferred from Belgium to Italy during the higher education of his child.

With regard to the relationship between the double education allowance and the expatriation allowance the defendant observes that a similar relationship exists in other areas, for example in relation to the receipt of the installation allowance. It goes on to state that although it must be agreed that the wording of Article 3 of Annex VII to the Staff Regulations is not perfect, nevertheless it does not follow that the wording of the provision must be regarded as a source of discrimination since account must also be taken of its purpose.

Finally the defendant maintains that the Council will have to amend the provision

in question if the Court should declare it inapplicable on the ground of discrimination. In fact the Council might decide, in substitution for the present provision, that the double education allowance shall be limited to officials and other employees whose children undertake studies outside the country where they are employed, provided that a given distance separates the educational establishment from the parents' residence. Consequently the interest which the applicants are able to claim would, in the present case, be of an abstract nature such that it would not seem admissible for them to request the Court to declare the contested provision of the regulations inapplicable.

3. The *Council*, intervening, supports the conclusions of the Commission. It emphasizes that the contested requirement was included in the provision as a result of an analysis of the position of the vast majority of officials who, finding themselves in a country which is not and never will be their own, send their children to their country of origin in order to ensure the best possible prospects for their future. Consequently the appropriate comparison to be made is with the normal case of the official who sends his children to his country of origin or to an establishment working in his mother tongue.

An official who is assigned to a post in a country which is not his country of origin cannot be regarded as being in the same position as an official who is employed in his country of origin. The former official is automatically at a disadvantage in comparison to the latter. For example, the former does not have the social and family connections with the country which the latter has. Consequently the former will often have higher expenses in particular with regard to the education and maintenance of his children.

The Council maintains that by giving the official the choice of sending his child to his country of origin or to an establishment in the country in which he is working it is demonstrating a more generous and more European spirit since to require the official to send his child to an establishment in his country of origin or working in his mother tongue in order to receive the double allowance would lead to an emphasis being placed on questions of nationality.

Furthermore, there is no discrimination with regard to the applicants even if account is taken of certain exceptional cases in which officials whose country of origin is not Italy send their children to establishments of higher education in Italy, because such officials may incur higher expenses as a result of integrating their children into a foreign educational system.

V — Oral procedure

At the sitting of 17 March 1983 oral argument was presented by the applicants, represented by M. Slusny and O. Slusny, by the Commission, represented by D. Jacob and by the Council, represented by J. Carbery, and replies were given to the questions put by the Court.

As a result of a question put by the Court during the sitting the Commission replied in writing that there were 437 officials and temporary staff employed at Brussels who were not Belgian nationals and who were not in receipt of the expatriation allowance. Of the officials and

temporary staff who fell within that category 22 were in receipt of the education allowance in respect of their children undertaking higher education whilst the number of children giving rise to that allowance as a result of their studies was 26. Of those, 24 were studying in the country of employment and two were studying in another country which was not the country of origin.

The Advocate General delivered her opinion at the sitting on 30 June 1983.

Decision

1 By applications lodged at the Court Registry on 15 June 1981, the applicants, officials or members of the temporary staff of the Commission of the European Communities, brought actions for a declaration that the second indent of the third paragraph of Article 3 of Annex VII to the Staff Regulations of Officials, which applies by analogy to other servants of the Communities, is inapplicable in so far as it restricts the doubling of the education allowance to officials who are entitled to the expatriation allowance. The applicants also request the Court to declare and order that the Commission shall rectify their accounts in respect of the expenses indicated in their applications, the education allowance being doubled.

2 The second indent of the third paragraph of Article 3 of Annex VII to the Staff Regulations was introduced by Article 1 of Regulation No 711/75 of the Council of 18 March 1975 (Official Journal, L 71, p. 1). That provision states that the basic education allowance is to be doubled in the case of:

"An official whose place of employment is at least 50 km from an establishment of higher education in the country of which he is a national or working in his language, provided that the child actually attends an establishment of higher education at least 50 km from the place of employment and the official is entitled to the expatriation allowance."

3 All the applicants are employed at the Joint Research Centre at Ispra, Italy. They fulfil all the conditions laid down by the aforementioned provision except the requirement that they must be in receipt of the expatriation allowance. At the end of 1980 they submitted requests to be granted the double education allowance.

4 The Commission rejected the applicants' requests on the ground that the statutory provision on which they relied makes the grant of the double education allowance subject to the requirement that the receipient is entitled to the expatriation allowance. As the complaints made against that rejection received no reply the applicants brought the present actions.

5 They base their actions on a single submission, namely arbitrary discrimination between themselves and the officials and other employees who are in receipt of the expatriation allowance in respect of the application of the second indent of the third paragraph of Article 3 of Annex VII to the Staff Regulations. They maintain that the scheme adopted is incomprehensible, irrational and devoid of any objective justification and that it affects parental freedom of choice with regard to the establishment of higher education to which to send their children. They state that the expense incurred as a result of studying more than 50 kilometres from the place of the official's employment is the same for all persons, whether or not they are in receipt of the expatriation allowance and that justice should be done regardless of the fact that the number of officials suffering discrimination is limited.

6 The Commission, supported by the Council, intervening, states that the purpose of the provision in question is to enable those officials who are employed in a country other than their country of origin to send their children to the country of origin to pursue higher education in order to ensure the best possible prospects for their future without the officials' thereby being penalized financially. The Commission emphasizes the very small number of officials who are in the position described by the applicants.

7 According to the Court's consistent case-law the general principle of equality is one of the fundamental principles of the law of the Community civil service. That principle requires that comparable situations shall not be treated differently unless such differentiation is objectively justified. Clearly it requires that employees who are in identical situations shall 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 it is therefore necessary to consider whether the situation of employees entitled to the expatriation allowance has objective features which justify a difference in treatment with regard to the education allowance as against that of officials not entitled to the allowance.

9 According to Article 4 (1) of Annex VII to the Staff Regulations payment of the expatriation allowance depends on conditions relating first to the employee's place of residence before his entry into his present employment and secondly on his nationality. In its judgment of 15 January 1981 in Case 1322/79 (*Vutera* [1981] ECR 127) the Court has already accepted that those criteria are based on objective factors and are, in general, an appropriate manner in which to limit the category of persons whose origin and lack of a close link with the country in which they are employed may give rise to expenses and disadvantages for which compensation ought to be given in the form of the said allowance.

10 The object of the scheme of education allowances is to ensure that every employee, wherever he is employed, is able to provide for his children's upbringing and education. There is no doubt that it is a considerable advantage for any person to be able to pursue his higher education in his own language and at an establishment where he is able to obtain qualifications which are fully recognized in his country of origin. Similarly there is no doubt in that respect that the children of employees who fulfil the conditions for the grant of the expatriation allowance are, as a general rule, at a disadvantage in comparison with those of employees who have a close connection with the country in which they are employed.

11 The objective relationship between, on the one hand, the entitlement to the expatriation allowance and, on the other hand, the need for an official to send his children to his country of origin to pursue their higher education is, moreover, confirmed by the statistics collected by the Commission. According to those figures, in the vast majority of cases, children of employees who are in receipt of the expatriation allowance pursue their higher education at an establishment in the country of origin of the official, whilst children of employees who are not entitled to that allowance almost always pursue their studies in the country in which the parent is employed.

12 The applicants were therefore quite correct to concentrate their argument on cases in which children of employees entitled to the expatriation allowance also pursue their higher education in the country in which the parent is employed. Regardless of the fact that, according to the statistics, such cases are of a somewhat marginal nature, the Community legislature cannot be criticized for having left that option open for such employees. As a general rule such children are compelled to become integrated into a university environment which is foreign to them and to carry out their studies in a language which is not their own. Such a situation also entails expenses and disadvantages in comparison with the children of employees who have a close connection with the country in question.

13 It follows from all those considerations that the second indent of the third paragraph of Article 3 of Annex VII to the Staff Regulations, in so far as it provides for a difference of treatment between employees according to whether they are or are not entitled to the expatriation allowance, is based on objective criteria and has a direct relationship with the purpose of the scheme of education allowances. It is therefore incorrect for the applicants to allege that those criteria result in arbitrary discrimination.

14 Consequently, the applicability of the said provision cannot be called in question. Since the applicants are outside the field of application of that provision there are no grounds for rectifying their accounts in respect of the expenses indicated in their applications. It follows that the applications must be dismissed in their entirety.

Costs

15 Article 69 (2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs. Nevertheless, under Article 70 of those rules in proceedings brought by employees of the Communities the institutions are to bear their own costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the applications;**

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

Pescatore Due Bahlmann

Delivered in open court in Luxembourg on 14 July 1983.

J. A. Pompe
Deputy Registrar

P. Pescatore
President of the Second Chamber

OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 30 JUNE 1983 [1]

Mr President,
Members of the Court,

A series of actions was brought against the Commission on 15 June 1981 by officials and temporary staff in relation to the conditions for the grant of the double educational allowance in respect of attendance at an establishment of higher education by their children.

The cases on which I give my opinion today are only a part of those originally brought. They do not include those cases which the Court on 25 May 1982 ordered to be disjoined on the ground that the Commission raised an objection of inadmissibility in respect of them by reason of delay in the presentation of the complaint through official channels. In those cases the proceedings were

1 — Translated from the French.