In those circumstances, such a letter constitutes a mere request for information regarding the statutory rights of the person concerned.

2. Article 4(1)(a) of Annex VII to the Staff Regulations is to be interpreted as giving entitlement to an expatriation 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, during the reference period referred to in that provision, has resided permanently outside that State, even if he resided there prior to that period; it is not necessary to enquire in clear cases whether, in reintegrating himself into the environment of his place of employment, the person concerned is subject to precisely the same extra expense and inconvenience as an official who has never resided there.

The fact that the person concerned resided as a student outside the Member State where he is employed does not preclude him from receiving the expatriation allowance.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
8 April 1992 *

In Case T-18/91,

Nadia Costacurta Gelabert, an official of the Commission of the European Communities, residing in Mexico, represented by Nicolas Decker, of the Luxembourg Bar, with an address for service in Luxembourg at his Chambers, 16 Avenue Marie-Thérèse,

applicant,

v

Commission of the European Communities, represented by Sean van Raepenbusch, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Roberto Hayder, representing its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: French.

APPLICATION for the annulment of a decision of the Commission to withdraw the expatriation allowance from the applicant and to deduct from her remuneration the sums overpaid as a result and for an order that the Commission pay to the applicant that expatriation allowance together with interest thereon,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
(Third Chamber),

composed of: B. Vesterdorf, President, C. Yeraris and J. Biancarelli, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 5 February 1992,

gives the following

Judgment

Facts

1 The applicant, Mrs Nadia Costacurta Gelabert, of Italian and French nationality, was born in 1962 in Thionville (France). In 1968 her parents settled with her in Luxembourg, her father being an official of the Commission of the European Communities. She lived in Luxembourg until October 1980, after which she studied law, first at Strasbourg from October 1980 to June 1984 and then in Paris from July 1984 to May 1987.

2 The applicant took up her duties at the Commission as a member of the auxiliary staff on 1 September 1987 and was assigned to the Commission in Brussels. She was appointed as a probationer with effect from 1 December 1987. On 16 February 1990 she was transferred to the Commission in Luxembourg.

3 During her posting in Brussels the applicant received the expatriation allowance provided for in Article 4(1) of Annex VII to the Staff Regulations of Officials of the European Communities (hereinafter 'the Staff Regulations'). On the other hand, when she was posted to Luxembourg, the expatriation allowance was withdrawn. The applicant was informed of this by a note dated 23 May 1990. Subsequently, in June 1990, the Commission recovered the sums already paid for the period from 16 February 1990 to 31 May 1990 by way of deductions from the applicant's remuneration. The recovery made in respect of the sum paid for the period from 16 February 1990 to 1 March 1990 was repaid by a salary amendment of 13 July 1990.

4 In the note of 23 May 1990, referred to above, drawn up by the personnel division and headed 'file note', various information concerning the applicant is set out in outline form together with a summary in tabular form setting out the rights and allowances provided for by the Staff Regulations with a statement 'granted' or 'not granted'.

5 Having received that file note, the applicant sent the following letter on 19 June 1990 to the Commission's personnel division in Luxembourg:

'Note for the attention of Mr D. Stefanidis, Head of the Personnel Division in Luxembourg

Re: Expatriation allowance

Ref: File note dated 23 May 1990 (No 3657)

In the file note referred to above, the administration has drawn to my attention the fact that I am no longer entitled to the expatriation allowance that was granted and paid to me from 16 February 1990 to 31 May 1990.

From my salary statement for the month of June it is apparent that not only has the expatriation allowance been withdrawn from my salary for June but the allowance for the period from 16 February 1990 to 31 May 1990 has been recovered.

At this stage, and without prejudging the substance of the case, I must point out that pursuant to Article 25 of the Staff Regulations two decisions adequately stating the grounds on which they are based ought to have been addressed to me:

— the first with regard to the refusal to grant the expatriation allowance: since the file note adversely affects me in so far as I lose the right to that allowance, it ought to have been accompanied by a reasoned decision;

— the second with regard to the recovery of the undue payment: the latter is contrary to Article 85 of the Staff Regulations. I was unaware that there was no due reason for the payment, and the fact of the overpayment was not patently such that I could not have been unaware of it. The personnel division in Luxembourg first of all granted that allowance, and in no way was it stated that my salary and the allowances relating thereto were only being paid to me on a provisional basis: as evidenced by the fact that the salary statements do not make reference to an "advance on salary" (implying "until your rights have been finally determined").

Consequently, I consider that the recovery of the overpayment is completely unlawful and that, in any event, that act required a reasoned decision by the administration.

With regard to the period from 16 February 1990 to 28 February 1990, the allowance was owed to me in any event pursuant to the Staff Regulations (Article 16 of Annex VII concerning the payment of sums due). I have mentioned that point to Mr Llansò who indicated to me that that error would be rectified.

With regard to the substance of the matter and to the refusal to grant the expatriation allowance, I believe that I am entitled to it for several reasons: I was born in France of an Italian father and French mother; I have "habitually resided", within the meaning of Article 4 of Annex VII to the Staff Regulations:

— in France from October 1962 to September 1968 and from October 1980 to March 1987;

— in Luxembourg from September 1968 to October 1980;

— in Belgium from March 1987 to February 1990.

When I took up my duties as a member of the auxiliary staff in September 1987, I provided the administration with documents showing that I had habitually resided in France from October 1980 to March 1987 (those documents have been returned to me, because they were not relevant to determine my place of origin but I can provide them for you on request).

Following enquiries made in the last few days regarding recent cases similar to mine (child or spouse of an official), it appears to me that the decision adopted in my case breaches the principle of the protection of legitimate expectations and the principle of equality of treatment.

In this respect I cite two cases: ... (recruited in 1986) and ... (recruited in 1987) which appear to me to be revealing: those persons, like myself, have attended the European School, have even carried on an occupation in Luxembourg (which is not so in my case) and they have been entitled to the expatriation allowance. Unless I am mistaken, the Staff Regulations and/or the rules applying them have not been amended between their recruitment and mine.

Consequently, I request that you reconsider my case taking into account the above and repay the sums that have been recovered as overpayments, and, should you confirm the refusal to grant the allowance and the recovery of the overpayment, to

send to me the two decisions, with an adequate statement of reasons, in accordance with Article 25 of the Staff Regulations.

I remain at your disposal for any additional information which you consider relevant.

cc: Mr Llansò.'

6 As that letter received no written reply, the applicant submitted a complaint under Article 90(2) of the Staff Regulations on 22 August 1990. In that complaint, registered by the General Secretariat of the Commission on 23 August 1990, the applicant alleged that Articles 25 and 85 of the Staff Regulations and Article 4 of Annex VII to the Staff Regulations had been infringed. As she received no reply to that complaint within the prescribed period, the applicant commenced the present action before the Court of First Instance on 22 March 1991.

Forms of order sought by the parties

7 The applicant claims that the Court of First Instance should:

— declare the application admissible;

— declare it to be well founded in substance;

— declare that through its administrative measures, the Commission of the European Communities has infringed Article 25 of the Staff Regulations on two occasions, and also Article 4(1)(a) of Annex VII and Articles 26 and 85 of the Staff Regulations;

— declare that the administration has, moreover, breached the principle of the protection of legitimate expectations and the principle of equality of treatment;

and consequently:

— annul file note No 03657 of 23 May 1990;

— order the Commission of the European Communities to grant her the expatriation allowance with effect from 16 February 1990 and to pay that allowance to her together with interest at the rate prescribed by law from 15 June 1990 until the date of payment;

— order the defendant, whatever may be the decision of the Court of First Instance on the merits as regards entitlement to the expatriation allowance, to reimburse the sum recovered on 15 June 1990 together with interest at the rate prescribed by law from 15 June 1990 until the date of payment;

— order the defendant to pay the entire costs of the proceedings.

The Commission contends that the Court should:

— dismiss the application as inadmissible, or in any event, unfounded;

— make an order as to costs as provided in the Rules of Procedure.

Admissibility

Arguments of the parties

8 The Commission contends that the application is inadmissible on the ground that it was not made within three months of the implied decision rejecting the complaint in accordance with Article 91(2) of the Staff Regulations. It considers that the applicant's letter of 19 June 1990, cited above, which was received by the Commission on 20 June 1990, constitutes a complaint within the meaning of the Staff Regulations. According to the Commission, that complaint is deemed to have been the subject of an implied rejection upon the expiry of the four-month period prescribed for a reply under Article 90(2). Consequently, the action ought to have been commenced prior to 21 January 1991.

9 According to the Commission, the complaint of 22 August 1990, registered by the Commission's General Secretariat on 23 August 1990, was a second complaint, also deemed to have been rejected at the end of the four-month period prescribed for reply. However, the Commission states further that that decision rejecting that complaint cannot be an actionable measure since it only confirms the prior implied decision of 21 October 1990, the decision was not, according to settled case-law, of such a nature as to adversely affect the applicant.

10 The Commission contends in that respect that there is a complaint within the meaning of Article 90(2) of the Staff Regulations from the moment when the official protests in precise terms against the measure adopted concerning him or clearly indicates his intention to contest that decision. In the present case, the applicant's letter of 19 June 1990 indicated her intention to contest not only the withdrawal of the expatriation allowance but also the recovery made in respect of sums paid by way of that allowance between 16 February 1990 and 31 May 1990. In her application the applicant herself ascribes such a meaning to her letter by stating that through that letter she has 'indicated her disagreement with the position adopted by the administration, both procedurally and substantively'.

11 Finally, the Commission contends that the fact that the complaint was neither submitted through her immediate superior nor using the form required, but had been addressed directly to the competent department, is irrelevant. The same is

true as regards the fact that the letter was not registered at the Commission's General Secretariat, nor allocated to the 'Staff Regulations and Discipline' unit of DG IX. A complaint is in practice very frequently made directly to the department concerned, even to the immediate superior, without any particular formality.

12 In answer to those arguments the applicant claims that in her letter of 19 June 1990 she only requested that her case be reconsidered in order to bring about an amicable settlement of the disagreement. At that time the applicant had no intention of having recourse to the procedure provided for in Article 90 of the Staff Regulations. She merely requested 'two reasoned decisions in accordance with Article 25 of the Staff Regulations' if the withdrawal of the expatriation allowance and the deduction of the overpayments were to be confirmed.

13 The applicant's intention not to submit a complaint under Article 90 of the Staff Regulations was also apparent from the formal aspects of the letter of 19 June 1990, since:

— the applicant did not submit it through her immediate superior;

— the applicant did not address it to the competent authority for complaints, namely the Commission;

— she did not use the form for submission of complaints required by the Commission;

— she sent the letter by internal post and not by registered post.

14 In the applicant's opinion, it is also clear that the administration did not treat the letter of 19 June 1990 as a complaint within the meaning of Article 90(2) of the Staff Regulations. The procedure prescribed for that was never followed, since:

— the letter was not registered by the Commission's General Secretariat;

— the matter was not submitted to the 'Staff Regulations and Discipline' unit and no official was appointed to prepare the file of the case;

— the interservices meeting did not take place.

Moreover, the date on which the personnel division received the letter of 19 June 1990 was never notified to the applicant. However, the whole of that procedure was complied with, according to the applicant, when she submitted her complaint of 22 August 1990.

Findings of the Court

15 It should be noted at the outset that the acts adversely affecting the applicant are the note of 23 May 1990, headed 'file note', with regard to the withdrawal of the allowance in question, and the salary statement for June 1990, with regard to the deduction of allowances already paid for previous months. It is in those documents that the administration indicated its decision not to grant to the applicant the expatriation allowance in her new place of employment and to recover the amounts which, in the administration's opinion, had been wrongly paid to her.

16 In the event of an act adversely affecting him, an official must, pursuant to the scheme instituted by Article 90 of the Staff Regulations, submit a complaint against that act to the appointing authority. In the present case it must be stated that the applicant submitted her complaint against the above decisions on 22 August 1990 and, thus, within the three-month period prescribed by Article 90.

17 However, before submitting that complaint, the applicant had sent to the administration the letter of 19 June 1990, cited above, which the Commission has characterized as a complaint within the meaning of the Staff Regulations. The Court must therefore consider whether the letter in question, having regard to its contents and taking into account the circumstances in which it was sent, is to be regarded as a complaint, or as a mere request for information or reconsideration of the applicant's situation (see, most recently, the order of the Court of First Instance in Case T-14/91 *Weyrich* v *Commission* [1991] ECR II-235).

18 The Court considers that the said letter does not constitute a complaint within the meaning of the Staff Regulations, as alleged by the Commission. First, from a formal point of view, the letter makes no mention of the word 'complaint' or any similar expression and makes no reference to Article 90 of the Staff Regulations. Secondly, with regard to its content, the Court finds that, although it is true that in the above letter the applicant expresses her disagreement with the measures taken by the administration, it is also undisputed that in that letter she begins her presentation of the facts with the words 'at this stage, and without prejudging the substance of the case'. In addition, there is the fact that in the letter in question the applicant, relying on Article 25 of the Staff Regulations, expressly requests that 'two adequately reasoned decisions' be addressed to her, if the administration were to confirm 'the refusal to grant the allowance and the recovery of the overpayment' after reconsidering her case. Finally, from a procedural point of view, the letter was not sent to the administration through her immediate superior and in accordance with the rules laid down by the Commission's internal regulations with regard to complaints, and was also not treated by the administration as a complaint within the meaning of the Staff Regulations. In the circumstances in question, the Court considers that in reality the letter in question constitutes a mere request by the applicant for information concerning her rights under the Staff Regulations.

19 That interpretation of the letter in question is confirmed by the fact that before the expiry of the period referred to in Article 90, the applicant actually submitted a complaint in good and due form in accordance with the Commission's internal regulations in force.

20 Since the complaint of 22 August 1990 was submitted within the prescribed period, the application is admissible.

Substance

21 In support of her application, the applicant puts forward five pleas in law based, firstly, on a twofold infringement of Article 25 of the Staff Regulations in so far as there was no proper statement of the reasons on which the note of 23 May 1990 was based and the deduction of allowances already paid was carried out without a prior decision having been adopted and thus without any statement of reasons; secondly, the applicant alleges an infringement of Article 4(1)(a) of Annex VII to the Staff Regulations concerning the requirements for the grant of the expatriation allowance; thirdly, she claims that the Commission infringed Article 85 of the Staff Regulations because she was not aware that there was no due reason for the payment in question and any irregularity was not so patent that she could not have been unaware of it; fourthly, the applicant is of the opinion that there has been an infringement of Article 26 of the Staff Regulations because the communication of the note of 23 May 1990 was not evidenced by her signature or, failing that, effected by registered letter; fifthly, the applicant claims that there has been a breach of the principle of the protection of legitimate expectations and of the principle of the equality of treatment because colleagues in an identical situation to hers received the allowance in question.

22 The Court is of the opinion that it is appropriate, first of all, to consider the plea based on the alleged infringement of Article 4(1)(a) of Annex VII to the Staff Regulations.

The plea based on the infringement of Article 4(1)(a) of Annex VII to the Staff Regulations

23 Article 4(1)(a) provides 'an expatriation allowance shall be paid . . . to officials:

— who are not and have never been nationals of the State in whose territory the place 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 . . . '.

Arguments of the parties

24 The applicant states that she has never been a national of Luxembourg. Given that she was employed in Brussels by the Commission on 1 September 1987, the period to be taken into account pursuant to Article 4(1)(a) of Annex VII to the Staff Regulations to determine whether she is entitled to the expatriation allowance is that from March 1982 to March 1987. In that respect, she has submitted various attestations from the Universities of Strasbourg and Paris certifying that she regularly attended courses and lectures within the framework of a programme of continuous assessment with a view to obtaining various university degrees and that she was resident in Strasbourg and Paris respectively. Moreover, she states that she has not carried on an occupation in the territory of the Grand Duchy of Luxembourg during the relevant period.

25 According to the applicant, the case-law of the Court of Justice shows that an official has been refused the expatriation allowance only in cases where he did not satisfy the objective conditions laid down in Article 4(1)(a) of Annex VII to the Staff Regulations. No judgment of the Court of Justice has upheld the refusal of the expatriation allowance in circumstances where the person concerned had not habitually resided or carried on his main occupation within the territory of the State of employment during the reference period. In that context the applicant refers to the judgment of the Court of Justice in Case 211/87 *Nuñes* v *Commission* [1988] ECR 2791. According to the applicant, if the legislature has chosen to draw up simple and objective criteria to determine the conditions for the grant of the expatriation allowance, it is to be assumed that it has done so in order that those criteria be observed and applied as such. On the other hand, if the legislature had chosen to make the grant of that allowance dependent on the administration's assessment of the extra expense and inconvenience for the person concerned of taking up employment and of his level of integration in the State of employment, it would have then made an express reference to that effect. The rule contained in Article 4(1)(a) of Annex VII grants certain rights to persons satisfying the conditions which it lays down. A rule of that nature can not and should not be interpreted restrictively; in that respect it is significant that the Court of Justice has never interpreted it in such a way; on the contrary, it has sometimes given it a broad interpretation by enquiring whether the extra expense and inconvenience of taking up employment could result in the grant of the allowance even though the person concerned did not satisfy the conditions set out in Article 4(1)(a).

26 The applicant is of the opinion that the Staff Regulations do not authorize the Commission to make the grant of the expatriation allowance dependent on the official's level of integration when he fulfils the conditions laid down in Article 4(1)(a). In the present case, the defendant has not claimed, and still less proved, that the applicant has habitually resided or carried on her main occupation in Luxembourg during the reference period.

27 With regard to the factors advanced by the Commission to show the applicant's high degree of integration in Luxembourg, the applicant claims that they merely show that her parents live in Luxembourg and that, for practical reasons, she has given their address on several occasions; that she has visited them during university vacations; and that she has made use of that fact to undergo practical training periods in Luxembourg. With regard to the fact that her French identity card refers to 'Luxembourg' as her habitual residence, the applicant states that that card was drawn up prior to the reference period and that French law does not require the holder of an identity card to have his changes of address entered on it during its 10-year period of validity. With regard to the fact that she has never effected a removal, the applicant explained at the hearing that she has always lived in furnished flats and that she has accordingly never had to relocate any furniture.

28 Moreover, according to the applicant, there are other subjective matters which ought to be taken into consideration:

— until her recruitment at the age of 25, the applicant had lived for thirteen and a half years in France, and during the entire period when she lived in Luxembourg she was a minor. Since coming of age she has lived in France and in Brussels;

— her father is Italian and her mother is French;

— her years at school were spent in the French section of the European School at Luxembourg;

— she neither speaks nor understands Luxembourgish;

— a large part of her family lives in France;

— she exercises her civic rights in France.

According to the applicant, it is clear that her transfer to Luxembourg has given rise to extra expense and inconvenience due to the fact that she had not lived there during the nine and a half years before she took up employment.

29 With regard to the Commission's argument that the reason for her stay in France was essentially to pursue her studies, the applicant disputes the proposition that the place of study ought not to be a determining factor with regard to the concept of habitual residence within the meaning of Article 4(1) of Annex VII to the Staff Regulations. In her view, it follows from the consistent case-law of the Court of Justice that the place to be taken into consideration is that where the person has actually and habitually lived, namely the place where he was physically to be found. According to the applicant, the position adopted by the Commission in the present case conflicts with that defended by it in Case 201/88 *Atala-Palmerini* v *Commission* [1989] ECR 3109 and also the answer given by the Court of Justice in that case, where it held that 'the fact that the applicant was in Belgium merely as a student during the first part of the reference period is not sufficient to preclude her having habitually resided there'.

30 Finally, the applicant states that in the case of the grant of the expatriation allowance there is no exception made such as that provided for in the general provisions for giving effect to Article 7(3) of Annex VII to the Staff Regulations concerning the place of origin (pursuant to which residence as a student is not to be taken into account when determining the place of origin).

31 The applicant concludes that she satisfies the conditions laid down in Article 4(1)(a) of Annex VII to the Staff Regulations. If it were necessary to consider the extra expense and inconvenience caused by her transfer to Luxembourg as well as her degree of integration in that State, she considers that such additional expense and inconvenience do indeed exist because of the fact that she has not been resident in Luxembourg since the age of 18 and she is not at all integrated in that State; the fact that her parents are resident there does not imply that she is integrated in Luxembourg.

32 The Commission responds by saying that in the present case, having regard in particular to the objective of the expatriation allowance as defined by the case-law of the Court of Justice, the applicant does not satisfy one of the conditions laid down in Article 4(1)(a) of Annex VII because, despite her studies in France, she continued to 'habitually reside', within the meaning of that provision, in Luxembourg during the period under consideration, namely from October 1980 to March 1987. The whole point is whether the applicant has or has not habitually resided in Luxembourg during the reference period. When considering that question, the Commission cannot disregard the very object of the expatriation allowance which the Court of Justice has held 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 from their country of habitual residence and move to the country of employment and integrate themselves in new surroundings.

33 The Commission states that it does not seek to make the grant of the expatriation allowance depend on the official's level of integration, but that it has merely considered whether the person concerned satisfies the condition laid down in Article 4(1)(a) of Annex VII to the Statute, namely that she has not habitually resided in Luxembourg during the reference period so that her return to Luxembourg resulted in her incurring particular extra expense and inconvenience for which the expatriation allowance was intended to compensate.

34 In that respect, the applicant has not put forward any conclusive evidence which could negate the administration's conclusion or in particular establish that the nature of her stay in France was of a kind which gave rise to particular extra expense and inconvenience at the time of her posting to Luxembourg in February 1990.

35 On the contrary, several aspects of the applicant's personal file showed a high degree of integration in that country of employment notwithstanding the pursuit of university studies in France. Those factors are as follows:

— the fact that the applicant, born in 1962, settled with her parents in the Grand Duchy of Luxembourg in 1968 and habitually resided there, in any event until 1980;

— the reference in her application form of 15 October 1984 to the address of her parents in Luxembourg as both permanent address and as address for correspondence, a factor which was considered as significant by the Court of Justice in its judgments in Case 61/85 *Von Neuhoff von der Ley* v *Commission* [1987] ECR 2853 and in Case 330/85 *Richter* v *Commission* [1986] ECR 3439;

— the statement on the French identity card, issued to her by the French Embassy in Luxembourg on 8 April 1981, that her habitual residence was in Luxembourg;

— the reference to her parents' address made in a letter sent on 7 January 1987 by the applicant to Mr G. Junior, Head of Recruitment, in order to complete her file with a view to her possible recruitment;

— the regular trips by the applicant to Luxembourg, in particular during the university vacations from 1982 to 1986;

— the periods of practical training at the Banca Nazionale del Lavoro at Luxembourg during the university vacations from 1982 to 1986;

— conversely, the lack of evidence establishing a break in the applicant's social links with Luxembourg following her departure to pursue her studies.

36 According to the Commission, it cannot be disputed that the determination of the place where the person concerned 'habitually resided' is based not merely on an objective factor, such as physical presence in a given place during a given period, but above all on a subjective factor, which attests to that person's intention to regard that place as a durable base.

37 In addition to the indicators referred to above, the Commission refers to the fact that, on taking up her employment in Brussels, the applicant never carried out a removal from France, which would have been paid for by the Commission, as well as the fact that the applicant settled in her parents' home when she was transferred to Luxembourg.

38 The Commission goes on to state that 'it appears natural to choose France having regard to the applicant's origin. Moreover it is very frequently the case that, at least for linguistic and cultural reasons, the children of officials go to their parents' State of origin to pursue higher education. But that fact alone is no ground for concluding that there had ceased to be any habitual residence in the State where the parents live. Such a notion would be tantamount to instituting an almost hereditary right for the children of officials who were themselves recruited within the Community to the expatriation allowance having regard to the length of university studies and the fact that recruitment is likely to occur shortly after completion of those studies.'

39 According to the Commission, the facts relied on by the applicant to show that she has habitually resided in France during the reference period are not relevant because they relate more to the foreign nationality of the applicant than to her place of habitual residence.

Findings of the Court

40 Given such a difference of opinion, it must be noted that Article 4(1)(a) of Annex VII to the Staff Regulations provides unambiguously that the expatriation

allowance is to be paid 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.

41 The Court observes that by laying down simple and objective, and at the same time clear and unconditional criteria, the Community legislature has adopted a period of five years ending six months before the official entered the service as the reference period in order to ascertain the habitual residence of officials who are required to change their place of residence and to integrate or re-integrate themselves in the place to which they are posted when taking up employment. It is clear from the wording of that provision that the fact that an official has habitually resided before the reference period in the territory of the State where his place of employment is situated cannot be the determining factor in deciding the question whether he is entitled to the allowance in question.

42 In that context, reference must be made to the extensive and consistent case-law of the Court of Justice (see in particular the judgment in Case 211/87 *Nuñes*, cited above, paragraphs 9 and 10), from which it is apparent that the object of granting an expatriation allowance 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 and move to the country of employment and to integrate themselves in their new environment. According to that same case-law, although, in order to determine expatriation, that provision adopts the concepts of the official's habitual residence and main occupation for a given reference period within the territory of the State where he is employed, this is done with a view to establishing simple and objective criteria. It also follows from that case-law that the provision in question must be interpreted as adopting the official's habitual residence prior to taking up employment as the essential criterion for the grant of the expatriation allowance (see the judgments of the Court of Justice in Case 21/74 *Airola* v *Commission* [1975] ECR 221 and in Case 37/74 *Van den Broeck* v *Commission* [1975] ECR 235), and that the concept of expatriation depends on the personal position of the official, that is to say on the extent to which he is integrated in his new environment, which may be demonstrated, for example, by habitual residence or by the prior pursuit of a main occupation (see most recently the judgment of the Court of Justice in Case 201/88 *Atala*, cited above).

43 It must next be pointed out, with regard to the above case-law of the Court of Justice, that the Court of Justice has had to deal with various cases in which the officials concerned had sought to bring themselves within the provision in question even though they did not satisfy, for various reasons, the objective conditions laid down in that provision with regard to the place where they had habitually resided during the reference period.

44 The Court of First Instance considers that it follows from an analysis of the wording of Article 4(1)(a) of Annex VII and of the case-law of the Court of Justice that that provision is to be interpreted as meaning that it gives a right to the grant of the expatriation allowance to an official who, during the reference period, has resided permanently outside the State in whose territory the place where he is employed is situated, even if that official has resided in that State prior to that period and that it is not necessary to inquire, in clear cases, whether, in reintegrating himself into the environment of his place of employment, the person concerned is subject to precisely the same extra expense and inconvenience as an official who has never resided within the territory of that State.

45 In the applicant's case, it has been established, as the Commission has admitted, that she resided continuously in France during the whole of the reference period, in which she pursued her legal studies. The links that she maintained with Luxembourg were limited to regular contact with her parents, occasional visits to that country and some practical training periods completed during the university vacations at a bank based in Luxembourg. After completing her studies, she was offered employment by the Commission in Brussels. It was only subsequently, in February 1990, that she was posted to Luxembourg.

46 In view of those facts, the Court finds, first, that the applicant in fact resided in France during the entire reference period and, secondly, that during that same period she maintained only ordinary family and social links with the country where her parents resided and where she had resided for more than 10 years before reaching her majority.

47 The extra expense and inconvenience resulting from the applicant's taking up her duties in Luxembourg are thus those which are in any event to be expected in the case of a person who has not habitually resided within the territory of the State in question during the five years ending six months before he took up his duties. It is precisely that situation which is covered by Article 4 of Annex VII to the Staff Regulations, analysed above.

48 With regard more particularly to the various arguments raised by the Commission, it must be stated, first, that the applicant's status as a student during the reference period could in no way preclude her from having habitually resided in France during that same period because the documents before the Court establish that that is indeed the case (see the judgment of the Court of Justice in Case 201/88 *Atala*, cited above). Secondly, the Commission has not put forward any legal or factual elements which could demonstrate how the applicant's position during that period differed appreciably, with regard to the place where she resided or carried out her activities, for example, from a person who was in salaried employment in similar circumstances. It follows that, in reality, the Commission's argument would amount to depriving of the expatriation allowance any person who has lived within the territory of the country of his subsequent employment prior to the reference period if that person maintains ordinary family and social contact in that country. Consequently, such an interpretation cannot be adopted.

49 With regard to the other factors put forward by the Commission in support of its argument (see paragraphs 35 and 37 above), it should be stated that during the procedure the applicant has sufficiently explained those circumstances, which are moreover not in themselves of such a kind as to demonstrate that the applicant habitually resided in Luxembourg during the reference period.

50 It follows from the foregoing, and without its being necessary to rule on the other pleas put forward in the application, that the Commission has misapplied Article 4 of Annex VII to the Staff Regulations by refusing to grant the expatriation allowance to the applicant with effect from 1 March 1990 and that its decisions on this matter must therefore be annulled. It follows that the Commission must be ordered to pay to the applicant the sums corresponding to that allowance with effect from that date.

51 With regard to the period from 16 to 28 February 1990, it is common ground that the expatriation allowance for that period, namely BFR 7 928, which had been recovered on 15 June 1990, was reimbursed to the applicant on 13 July 1990. Accordingly, the Court must find that the applicant's claims have become devoid of purpose in so far as they relate to that period and must, therefore, be rejected.

52 In order to place the applicant in the position to which she is entitled, the Commission must, moreover, be ordered to pay to the applicant default interest:

— from 15 June 1990 until 13 July 1990 on the sum of BFR 7 928, referred to above;

— from 15 June 1990 until their actual payment on the other sums recovered on 15 June 1990;

— on the amounts subsequently falling due, from the dates on which they respectively fall due until actual payment.

The Court considers that an interest rate of 8% per annum is appropriate having regard to the circumstances of the present case.

Costs

53 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Annuls the decisions by which the Commission withdrew the expatriation allowance from Nadia Costacurta Gelabert from March 1990 and recovered amounts already paid for March, April and May 1990;**

2. **Orders the Commission to pay to the applicant, with effect from 1 March 1990, the sums corresponding to the expatriation allowance;**

3. **Orders the Commission to pay to the applicant interest at the rate of 8% per annum:**

   — **from 15 June 1990 until 13 July 1990 on the sum of BFR 7 928;**

   — **from 15 June 1990 until actual payment on the other amounts recovered on that date;**

   — **on the amounts subsequently falling due, from the dates on which they respectively fell due until actual payment;**

4. **Dismisses the remainder of the application;**

5. **Orders the Commission to pay the costs.**

Vesterdorf Yeraris Biancarelli

Delivered in open court in Luxembourg on 8 April 1992.

H. Jung
Registrar

B. Vesterdorf
President