2. Although the Community institutions may, pursuant to their power of internal organization, establish a procedure relating to leave, that procedure cannot deprive an employee of the right to prove by any means — in the event of a dispute concerning the carrying over of annual leave from one calendar year to the next — that his leave accumulated for reasons relating to the requirements of the service, since the existence of such requirements constitutes the decisive criterion for carrying over annual leave.

REPORT BY THE JUDGE-RAPPORTEUR
in Joined Cases C-348/90 P*

I — Facts and procedure before the Court of First Instance

The following appears from the judgment of the Court of First Instance of 26 September 1990 in Case T-139/89 *Gabriella Virgili-Schettini* v *European Parliament* [1990] ECR II-535 (published in summary form only):

'(1) Until her contract expired on 31 January 1989, the applicant was a member of the temporary staff of the European Parliament ("the Parliament") where she was assigned to the Group of the European People's Party ("the Group") and classified in Grade C 2.

(2) By letter dated 16 January 1989, the applicant asked the Secretary-General of the Group to confirm that her leave would be settled together with her other entitlements when her notice expired. By letter dated 1 February 1989, Mr Colling, the head of the Group's administrative management department, informed the applicant that her outstanding leave came to -5 days and that she could not therefore claim payment for leave untaken. The following calculation was appended to that letter:

"Leave entitlement of Mrs Gabriella Schettini — Situation at 31 January 1989

Carried over from 1987	12 days
Leave for 1988	24 days
Travelling time	5 days
Age	1 day
Total for 1988:	+42 days

* Language of the case: French.

Maternity leave

Birth of child on 22 August 1988

6 weeks before confinement = 11 July

10 weeks after confinement = 30 October

NB: The person concerned did not send in the medical certificate notifying the expected date of confinement.

Special leave for the birth of a child: 2 days. 3 and 4 November 1989 were taken as those days.

Deduction of unjustified absences between 7 November and 21 December 1988 — 33 days

Carried forward from 1988	9 days
Leave for 1989	2 days
Travelling time	5 days
Age — (age is not taken into account in respect of one month)	
Total for 1989	+16 days

Deduction of unjustified absences from 3 to 31 January 1989 — 21 days

Outstanding leave at 31 January 1989: — 5 days".

(3) On 25 April 1989, Vic Elvinger, counsel for the applicant, who represented her during the written proceedings in this case, sent a letter, signed by him, to Mr Colling in which he was asked to "reconsider his position and accept his client's request, which should be accepted to the extent of at least 75 days". He contested the 12-day limit applied by the administration in respect of leave carried over from 1987 to 1988. He further argued that the applicant's maternity leave could not have begun until after she had been hospitalized, the period of which had lasted until 4 September 1988, resulting in an eight-week difference compared with the calculation made by the administration. He ended his letter as follows: "The present communication is to be deemed to be a complaint under Article 90(2)".

(4) No reply was received to that letter.'

In those circumstances, by application of 2 October 1989 Mrs Virgili-Schettini brought an action in which she asked the Court of First Instance:

(a) to amend Mr Karl Colling's decision of 1 February 1989 refusing to confirm her accumulated leave and therefore to

amend the implied decision rejecting her complaint of 25 April 1989;

(b) to order the Parliament to pay compensation to her in respect of the days of leave not taken, that is to say 75 days, calculated at LFR 282 347 or any other amount, even as may be determined by experts, and to appoint an expert, if necessary, to assess the amount of the compensation due to her;

(c) to order the Parliament to pay the costs.

The Parliament asked the Court of First Instance:

(a) to take note that it left it to the Court to decide as it thought fit whether the application was admissible;

(b) to dismiss the substance of the application;

(c) to rule on the costs in accordance with the relevant provisions.

In its rejoinder the Parliament asked the Court of First Instance to order the applicant 'to pay the costs in view of the audacity of the application, which was in flagrant breach of the relevant provisions'.

Mrs Virgili-Schettini put forward two arguments in support of her application. First, she maintained that she was entitled to carry 44 days of annual leave over from 1987 to the following year. Secondly, she considered that because she was in hospital until 4 September 1988 her maternity leave could not have commenced until that date.

With regard to the question of *admissibility*, the Court of First Instance reached the following conclusions:

'15. Although it leaves it to the Court to determine the matter as it thinks fit, the Parliament maintains that since the letter of 25 April 1989 was signed by the applicant's lawyer and not by her, with no authority appended, it does not constitute a complaint within the meaning of Article 90(2) of the Staff Regulations. It maintains that in the absence of the prior complaint required by Article 91(2) the application is inadmissible.

16. . . .

17. . . .

18. . . .

19. . . . It must be observed that the Court of Justice has consistently held that no form is prescribed for administrative complaints submitted by officials and that their content

must be interpreted and understood by the administration with all the care which a large and well-equipped organization owes to those having dealings with it, including members of its staff. In its judgment in Case 54/77 *Herpels* v *Commission* [1987] ECR 585, the Court expressly stated that the interested parties could not be prohibited from seeking legal advice during the period prior to the litigation. It inevitably follows that an official is completely at liberty to instruct a lawyer to formulate the complaint, which is, moreover, in the interests of the administration, since the lawyers' fees in connection with that stage are not charged to it.

20. In the present case, it is not disputed that the initiative for the complaint came from the official, who also determined its scope. In those circumstances, to demand that the official should sign the complaint prepared by her lawyer would constitute completely excessive formalism, devoid of any legal basis and contrary to the case-law of the Court of Justice.

21. It should further be observed that, even in the case of proceedings before the Community Court, a lawyer assisting or representing a party is not required to produce a duly executed authority to act, subject to proof if challenged that he is so authorized (see the judgment in Case 14/64 *Gualco (née Barge)* v *High Authority* [1965] ECR 51).

22. Consequently, the application is admissible.'

With regard to the *first plea in law*, the Court of First Instance stated as follows:

'26. It should be observed, first, that according to the first paragraph of Article 4 of Annex V to the Staff Regulations, which is applicable to temporary staff by virtue of Article 16 of the conditions of employment of other servants of the European Communities, an official is entitled to carry over to the following year 12 days of annual leave not used up before the end of one calendar year, and where an official has not used up all his annual leave for reasons relating to the requirements of the service to which he is assigned, he is entitled to carry forward more than 12 days. However, the manner in which and the time at which a "reason relating to the requirements of the service" must be proved are not specified anywhere in the relevant provisions. Moreover, there is no provision requiring prior authorization or prescribing any similar procedure.

27. Consequently, on this point, the only question to be determined by the Court is whether the applicant's carrying over more than 12 days' leave is justified on grounds relating to the requirements of her service (see the judgment of the Court of Justice in Case 32/69 *Tortora* v *Commission* [1970] ECR 593).

28. In the answers that she gave to the questions put to her by the Court during the oral hearing, the applicant expressly mentioned reasons relating to the requirements of the service, connected in particular with the preparation of sittings of the Parliament, in order to explain the accu-

mulation from one year to another of unused days of leave. Moreover, it appears from the case-file that the administration did not at any time ask her to use up the days that she had accumulated (see the judgment in *Tortora* v *Commission*, cited above).

29. The Parliament's representative merely mentioned a statement that the former head of the applicant's service had made to her, to the effect that he had had to make different arrangements because of her lengthy absences owing to illness.

30. In that respect, it must be observed that the administration cannot invoke absences due to an official's illness as a ground for depriving him of the full benefit of his annual leave. The administration must either accept the illness, duly proved, or take the steps laid down in the Staff Regulations in order to resolve any problems. In any event, the administration is not entitled to suppress an official's rights upon his departure.

31. Moreover, in her statements and arguments before the Court of First Instance the applicant gave credence to her submission that the accumulation of her leave was due to the requirements of the service, and the Parliament was unable to shake those claims.

32. The Court must therefore hold that the accumulation of unused leave by the applicant over the years was due to the requirements of the service to which she was assigned and that the Parliament's decision of 1 February 1989 must be annulled to the extent that it conflicts with the applicant's rights, as defined.

33. According to the second paragraph of Article 4 of Annex V to the Staff Regulations, "where an official at the time of leaving the service has not used up all his annual leave, he shall be paid compensation equal to one-thirtieth of his monthly remuneration at the time of leaving the service for each day's leave due to him". Consequently, in the exercise of the unlimited jurisdiction appertaining to it in this case, the Court will order the Parliament to pay the applicant compensation in respect of the days' leave to which she was still entitled when she left the service.'

With regard to the *second plea in law* the Court of First Instance stated as follows:

'34. With regard to the calculation of maternity leave, the Parliament maintains that the applicant's argument makes meaningless the six weeks' leave before confinement mentioned in Article 58 of the Staff Regulations and the reference therein to "pregnant women". It also argues that there was a direct connection between the applicant's absences and her pregnancy, as witness the medical certificates produced by the applicant at the time.

35. In this respect it should be observed *in limine* that, according to the terms of Article 58 of the Staff Regulations, "Pregnant women shall . . . be entitled on production of a medical certificate to leave starting six weeks before the expected date of confinement shown in the certificate and ending ten weeks after the date of confinement; such leave shall not be for less than 16 weeks". The purpose of this provision is therefore to protect pregnant women and new-born children.

36. It appears from the medical certificates referred to by the Parliament that the cause of the applicant's absence during the period of six weeks preceding confinement on 22 August 1988 was closely connected with her pregnancy. In those circumstances and in view of the fact that it appears from the case-file that the applicant did not provide the medical certificate required by Article 58, the Parliament was entitled to regard the six weeks preceding confinement as forming part of the maternity leave. With regard to the ten weeks' leave after confinement, that is to say the period from 22 August to 30 October 1988, it is manifest that this could only have been taken immediately after confinement.

37. This second argument must therefore be rejected.

38. Consequently, the applicant's claim that the Parliament should be ordered to pay her compensation for the 75 days' leave not used up must be granted solely to the extent of 27 days and rejected as regards the remainder.'

II — Object of the appeal and form of order sought

By a document lodged at the Court Registry on 27 November 1990, the Parliament brought an appeal against that judgment of the Court of First Instance, which had been notified on 27 September 1990, on the ground that it was in breach of Community law.

The *Parliament* claims that the Court should:

(i) annul the contested decision, namely the judgment of the Court of First Instance of 26 September 1990 in Case T-139/89 *Gabriella Virgili-Schettini* v *European Parliament*;

(ii) grant the form of order sought by the Parliament at first instance;

(iii) make an appropriate order as to the costs on appeal.

Mrs Virgili-Schettini claims that the Court should:

(i) confirm the contested decision, namely the judgment of the Court of First Instance of 26 September 1990 in Case T-139/89 *Gabriella Virgili-Schettini* v *European Parliament*;

(ii) reject all of the Parliament's submissions and order it to pay the costs of the appeal.

III — Summary of the parties' pleas and arguments

The Parliament bases its appeal on three pleas in law: inadmissibility of the application, lack of reasons and infringement of Article 4 of Annex V to the Staff Regulations.

(a) *Admissibility*

The *Parliament* argues that the submission of an administrative complaint by a lawyer alone is in breach of Article 90 of the Staff Regulations and conflicts with the relevant case-law of the Court of Justice. It argues that paragraphs 19 and 20 of the judgment of the Court of First Instance substantially alter the nature of the pre-litigation procedure, which, according to the case-law (in particular the judgment in Case 54/77 *Herpels* [1978] ECR 585), is an exchange between the official unassisted by a lawyer and the administration. The requirement of the applicant's signature cannot be regarded as 'completely excessive formalism', but is a minimum and therefore necessary formal requirement which is in the interests of both the complainant and the institution.

The exchange between the official and the administration would in this way become a direct exchange between the lawyer and the administration.

Mrs Virgili-Schettini refers to her written submissions to the Court of First Instance and states that the complaint required by Articles 90 and 91 of the Staff Regulations is not subject to any particular formal requirements and that it is sufficient that the complaint should emanate from the official and should seek to obtain a decision from the authority on the specific point at issue.

With regard to the appellant's claim that the exchange would become a direct exchange between the lawyer and the administration, she maintains that it must be borne in mind that the lawyer always represents the person who is his client and even when a party secures the advice of a lawyer, the lawyer as a person fades into the background, as it were, since, in fact, he merely represents his client. There is therefore still an exchange between the official and the administration.

(b) *Absence of reasons*

The *European Parliament* argues that it is clear neither from the judgment nor from the Report for the Hearing what legal criteria were established by the Court of First Instance as the basis for the calculations which resulted in the Parliament's being ordered to pay Mrs Virgili-Schettini for 27 days' untaken leave.

Mrs Virgili-Schettini contends that in order to determine the number of days' leave, which had originally been calculated by her as 81, the Court of First Instance first found that reasons of service had prevented her from taking leave, thus entitling her to carry it forward, and, secondly, rejected her

arguments on the question of the calculation of maternity leave. Thus its reasoning was perfectly clear, as it was based on a straightforward set-off between the claims of each of the parties (81 days claimed by her less 54 days of unjustified absences claimed by the Parliament).

(c) *The interpretation of Article 4 of Annex V to the Staff Regulations*

The *Parliament* maintains that Article 4 of Annex V to the Staff Regulations was infringed in so far as the interpretation given to that provision by the Court of First Instance disregards the internal rules of the institution concerning leave and thereby disregards previous decisions of the Court of Justice (in particular, the judgment in Case 32/69 *Tortora* v *Commission* [1970] ECR 593 and of the Court of First Instance Case T-46/89 *Pitrone* [1990] ECR II-577) recognizing that the institutions have the power of internal organization. The Court of First Instance contests the justification of the need for a certificate from the official's superiors in order to carry over more than 12 days' leave, establishing that the abnormal accumulation was due to 'reasons relating to the requirements of the service', since the Court of First Instance states that there is no provision requiring prior authorization or prescribing any such procedure. However, the Parliament maintains that, pursuant to the provisions of the Staff Regulations, it has established rules regarding leave which provide, *inter alia*, for a specific procedure for carrying over annual leave. The conditions laid down in those rules, which were completely disregarded by the Court of First Instance, manifestly were not observed by Mrs Virgili-Schettini. Consequently, it had been unable to accede to her claim for compensation for leave not taken.

Finally, the Parliament maintains that the interpretation given to Article 4 of Annex V of the Staff Regulations by the Court of First Instance requires it to prove a negative, namely that there were no reasons of service which could have prevented Mrs Virgili-Schettini from taking her leave, which is obviously impossible. It contends that there is therefore a reversal of the burden of proof, which seems to be contrary to the principles of a fair trial and of the rights of the defence.

Mrs Virgili-Schettini maintains that the Court of First Instance did not call in question the Parliament's power of internal organization, since, in its view, the Parliament's internal rules cover only the case where leave is carried over by an official who was unable to use up his annual leave for reasons which are not attributable to the requirements of the service. Since the Court of First Instance held that she had carried over leave for reasons of service, the rules relating to Article 4 of Annex V to the Staff Regulations were irrelevant.

She maintains further that the internal rules did not indicate the manner in which it had to be determined whether or not reasons of service had prevented the employee from taking all the leave to which he was entitled in a particular year. She claims that the Court of First Instance therefore had the widest discretion in its approach to the facts adduced before it in order to prove the existence of reasons relating to the requirements of the service. The Court of Justice, which must deal solely with the

alleged breach of Community law, should not deal with this question of fact.

Finally, she contends that the Parliament is not required to prove a negative, but to provide positive proof of the existence of 'reasons not relating to the requirements of the service'. She maintains that it has failed to do so, as it has merely referred to a vague problem regarding some of her illnesses which prevented her from using up her leave.

G. C. Rodríguez Iglesias
Judge-Rapporteur