In Case 60/80

JACOBUS KINDERMANN, an official of the Commission of the European Communities, of 60 Avenue de l'Emeraude, 1040 Brussels, assisted and represented by Georges Vandersanden of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Nico Edon, 2 Rue Goethe,

applicant,

v

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

defendant,

APPLICATION for the annulment of the Commission's decision of 4 October 1979 to transfer the applicant from Directorate-General IX-D-3 to Directorate-General IX-D-8 as from 2 January 1980,

THE COURT (First Chamber)

composed of: T. Koopmans, President of Chamber, A. O'Keeffe and G. Bosco, Judges,

Advocate General: G. Reischl
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

The facts and the arguments of the parties during the course of the written procedure may be summarized as follows:

I — Facts and written procedure

The Commission's translation departments were reorganized in 1973. The various translation sections forming part of the former Division IX-D-3, the Translation, General Matters Division, which was elevated to the rank of Directorate (IX-D, the Translation, Documentation, Reproduction and Library Directorate), were transformed into six divisions (IX-D-4 to 9). The structure of the Language Department thus became as follows:

— The new Division IX-D-3, the General Division, comprises:
  — The planning office,
  — The typing pool,
  — The terminology office;

— Translators placed at the disposal of the various directorates-general and in particular translators placed at the disposal of the Administrative Commission for Social Security for Migrant Workers (hereinafter referred to as the "Administrative Commission") are directly answerable to the head of the above division;

— The six language divisions (IX-D-4 to 9) are placed, as regards the performance of administrative tasks, under the authority of Division IX-D-3, the General Matters Division, acting, in regard to such tasks, on the orders of and by way of delegation by the Director of Directorate IX-D.

Mr Kindermann was employed as an auxiliary translator on 15 June 1959 and established as an official in Grade L/A 6 by decision of 3 December 1962 with effect from 1 January 1962 and assigned to a post in the Dutch Translation Section. During his career the applicant has been placed at the disposal of various departments including in particular the Directorate-General for Competition (DG IV) and, as from 1 February 1970, the Administrative Commission.

On 22 August 1979 Mr Ciancio, Director of the Directorate-General for Personnel and Administration, the authority under which the applicant came for administrative purposes, called all the translators assigned to the Administrative Commission to an information meeting and told them that "seconded" translators who had been in the service of a particular department for ten years would be sent back to the translation division corresponding to their mother tongue. The applicant was away at the time of that meeting.

On 4 September 1979 Mr Kindermann received a circular from Mr Ciancio dated 22 August 1979 informing him of his new posting to Directorate-General IX-D-8 (Translation Division: Dutch Language) as from 2 January 1980. That

circular referred to the Commission's concern "as far as is at all possible and in the interests of the service" to assign its staff who "after spending a considerable time performing the same duties in the same departments, to other duties corresponding to their status under the Staff Regulations" and thus "to enrich their experience".

In a note dated 29 August 1979 sent to Mr Ciancio, Mr Schneider, Secretary-General of the Administrative Commission and Head of the Social Security for Migrant Workers Division (DG V-D-3) under which the applicant came as regards the assessment of his work, had expressed his concern about the change of assignment of the translators "seconded" to his department and about the effect on the functioning of the department which the change would have. He asked Mr Ciancio to reverse his decision and if that were not possible at least to grant him "sufficient time to obtain other staff and to train them for the particularly thankless duties which they will have to perform".

On 17 September 1979 Mr Kindermann sent Mr Ciancio a note challenging for various reasons the decision of 22 August 1979. In the absence of an answer from the administration the applicant lodged a complaint against the decision on 3 October 1979.

On 4 October 1979 the applicant received the decision signed by Mr Tugendhat transferring the L/A 5— L/A 4 post and its holder, Mr Kindermann, "in the interests of the service" from Division IX-D-3 to Division IX-D-8. On 12 October 1979 the applicant lodged a complaint pursuant to Article 90 (2) of the Staff Regulations against that decision.

After that complaint had remained unanswered for the prescribed period of four months the applicant lodged an appeal at the Court Registry on 21 February 1980.

The written procedure followed the normal course.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court (First Chamber) decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The *applicant* claims that the Court should

— Recognize the admissibility of his action and annul the decision taken by Mr Tugendhat on 4 October 1979 to transfer the applicant from DG IX-D-3 to DG IX-D-8 as from 1 January 1980;

— Order the defendant to pay the costs.

The *defendant* contends that the Court should

— Dismiss the action as inadmissible and in any event as unfounded:

— Order the applicant to pay the costs;

— Subject to all necessary reservations.

In his reply the *applicant* claims that the Court should summon Mr Schneider as a witness.

III — Submissions and arguments of the parties

1. Admissibility

The *defendant* alleges that the contested decision did not, as a matter of organization, alter the applicant's posting or *a fortiori* his status under the Staff Regulations. The decision, for practical purposes, means nothing more than putting an end to his being placed at the disposal of the Administrative Commission and retransferring him along with his post from Division IX-D-3 to Division IX-D-8. Similarly, the nature and level of the translation duties carried out by the applicant have not been changed. Accordingly, the decision is a simple measure of internal organization not capable of having adverse effect and thus not having the character of a measure which can be annulled under Article 91 of the Staff Regulations.

The applicant observes in his reply that even if it were necessary, which he denies, to distinguish a decision of transfer from a decision changing an assignment, "a change in the assignment of an official along with his post, as in the present case, must satisfy the same basic conditions as a transfer", as the Commission's representative admitted at the hearing in a previous case (cf. Opinion of Mr Advocate General Mayras in Joined Cases 33 and 75/79 *Kuhner*).

The contested measure alters the posting of the applicant. If moreover it were only a simple placement at disposal, why was a decision by the member of the Commission responsible for staff matters necessary? A decision terminating a placement at disposal may constitute a measure against which an appeal lies: in the present case the contested measure involves adverse effects exceeding those normally arising from an internal measure.

In its rejoinder the *Commission* states that the contested decision cannot constitute a transfer since there is no vacant post as is shown by the fact that the applicant was reassigned along with his post. Further, the alteration in the administrative structure of the Translation Department which took place in the meantime required from a formal point of view the decision to be taken by the member of the Commission responsible for staff matters. Finally, the "circumstances" surrounding the decision by virtue of which the applicant ceased to be placed at the disposal of the Administrative Commission are not such as to make a measure relating to the internal organization of the department in question a measure adversely affecting the applicant.

2. Substance

The applicant's main contention is that the decision to transfer him is not in accord with the objectives of staff mobility or with the procedure governing it as laid down in the provisions adopted by the Commission in relation thereto on 24 November 1976 (Administrative Information No 134) and consequently cannot be lawfully taken on that ground. In fact:

— The applicant was not aware of any "provisions for staff mobility" drawn up by the Directorate-General;

— He is in Career Bracket L/A 5—L/A 4 and mobility concerns primarily officials in Career Brackets A 7—A 6 and B 5—B 4;

— There was no invitation to apply for transfers making it possible for the mobility contemplated to be achieved on a voluntary rather than on a compulsory basis;

— The applicant had already been the subject of previous mobility measures which he had accepted voluntarily: this shows that there was no reason to make him a primary target for a decision concerned with mobility;

— The department from which the applicant comes is specialized and his "removal" raises serious problems; moreover, the applicant needs time to settle down to his new duties in order to ensure a normal output.

In the alternative the applicant maintains that if the "removal" had to be regarded as a transfer or secondment, it would be necessary to concede that the requisite conditions for such measures had not been satisfied in the present case and that the Commission was guilty of misusing its powers.

The decision at issue infringes Article 7 (1) of the Staff Regulations in that it was taken in disregard of the interests of the service. Since the applicant did very specialized translation work, requiring a relatively long period of training and adaptation, at the Administrative Commission, his departure cannot but have an adverse effect upon the functioning of the department (cf. the note from Mr Schneider). The applicant, moreover, was unaware of the need to increase the translation staff working in Directorate-General IX-D-8. Finally, he challenges the Commission's opinion concerning his interest in so far as his prospects of promotion acquired in the Administrative Commission may be jeopardized if he is transferred.

In addition, the procedural provisions governing transfers were not complied with. The decision was not posted in the premises of the institution or published in the Monthly Staff Bulletin (third paragraph of Article 25 of the Staff Regulations): nor was there a vacant post (Article 29 (1)).

The procedure for secondment was disregarded since the applicant was not seconded within the meaning of Article 37 of the Staff Regulations. He has found himself in a position in every respect comparable to that of the "legal revisers" put at the disposal of the Legal Department who, as regards the special instructions relating to their work, came under the permanent and exclusive authority of the Director-General of that department. Accordingly, the procedure leading in the present case to the decision to transfer the applicant should have been set in motion, if necessary, on the initiative of Directorate-General V under which he came in regard to the performance of his daily duties and not, as was the case, on that of Directorate-General IX.

The applicant concludes from this that there is another case, alien to the interests of the service, for his new assignment. That case may, in his opinion, be found in a disagreement between an official and the head of the Translation Section working for the Administrative Commission, a specialized department, following which other translators were also "transferred". In that context the sole purpose of the measure

taken in respect of the applicant is to lend an apparent air of objectivity to a disguised disciplinary decision taken against another person.

The *Commission* replies that the measure taken in regard to the applicant and certain of his colleagues is in no way an application of the provisions on staff mobility adopted by the Commission on 14 November 1976, since, as the applicant himself points out, they concerned primarily officials in Career Brackets A 7—A 6 and B 5—B 4. Apart from the application of those provisions the administration is concerned, in the interests of the service and that of its officials, that the latter should from time to time and so far as is possible, be entrusted with different duties.

No measure involving a transfer is at issue in the present case since there was no vacant post and therefore it was not necessary to follow the procedure required in the event of transfer. That follows from the decision of the Court in Case 61/70 *(Vistosi* [1971] ECR 535) in which it was held that "where the post is transferred without any substantial change in the duties attaching to it, it does not amount to the creation of a new post ... where the official who occupied the transferred post is transferred together with it there is no vacancy, nor consequently is there an obligation to implement the procedure provided for in such a case." In the present case there was no alteration in the duties of the applicant who continues, in the Dutch Translation Division, to occupy himself with translation duties corresponding to his grade.

Further the applicant has not established that the decision in question was taken in disregard of the interests of the service. The note from Mr Schneider is not capable of reinforcing that argument since it recognizes that "the question of the advisability of altering the assignment of translators and revisers is ... a matter for the appreciation" of Mr Ciancio, Director of Directorate IX-D. In addition, the interests of the service require, as is apparent from the Practical Guide for Translators published in October 1975 by Directorate-General IX, that translators do not spend the whole of their career with the same employing department. Finally there is no reason to think that any promotion of the applicant would be prejudiced by the fact that he is now working for the Dutch Translation Division.

As regards compliance with the procedure for secondment the applicant himself points out that he has never been the subject of a measure falling within Article 37 of the Staff Regulations. Accordingly, there was no cause to follow the procedure referred to in Article 38. It is irrelevant for the applicant to liken the position of translators put at the disposal of the Administrative Commission to that of lawyer-linguists who have no connexion with Directorate IX-D and are assigned permanently to the Legal Department, which governs their administrative situation. In contrast, translators placed at the disposal of any department remain assigned to the Translation (General Matters) Division.

There is no objective, relevant and consistent evidence establishing the existence of a misuse of powers in the present case. There is no connexion between the incident which occurred in June 1979 between two officials of the Translation Department working at the

Administrative Commission and the decision at issue. If the proper authority had thought it ought to reassign an official in order to preserve good working relations it would have had the power to do so and such action would in no way constitute a disguised disciplinary sanction, without also having to reassign other officials who had no connexion with the incident.

The *applicant*, in his reply, requests that Mr Schneider be summoned as a witness in order to answer the question whether the departure of the applicant and other translators has not caused problems for the functioning of his department, which would show whether the transfer had been made in accordance with Article 7 (1) of the Staff Regulations, that is to say in the sole interest of the service.

He further observes that although it is true that it is desirable to facilitate staff mobility as far as possible, it is still more necessary to have regard to the specific nature and effectiveness of the tasks of a translator. In the Practical Guide for Translators the accent is placed on specialization, which is an indispensable factor for the quality of the translation (example p. 34):

"For 16 years the various language groups of the Translation Section of the Administrative Commission have worked side by side simultaneously on the same subjects in close and immediate collaboration with the experts of Directorate General V (Social Matters). The problems of documentation and terminology are as a result rendered much easier. The translations gain in accuracy and the work in effectiveness and quality".

The applicant alleges that there has been an infringement of Article 5 (3) of the Staff Regulations in that his transfer, in the circumstances in which it took place, has interrupted his career and discriminated against him in relation to his colleagues who have worked for the same number of years in specialized departments.

The applicant also claims that there has been a breach of the duty to have regard to the welfare of officers, which is incumbent on every administration, since the change in his assignment has disturbed his career, and the Commission has led him to believe that the change in his assignment was decided for reasons of mobility following the measures taken in 1976.

The applicant contends that he was absent from the meeting called on 22 August 1979 by Mr Ciancio during which the translation staff of the Administrative Commission was informed of the measures taken with regard to them. There was, therefore, disregard of the rights of the defence.

As regards misuse of powers, the applicant maintains that for removals carried out as they have been since the incident between two women translators assigned to the Administrative Commission not to be contrary to the interest of the service it would be necessary that they should affect only the persons directly concerned to the exclusion of every other witness or other person.

The *Commission* considers that the application to hear Mr Schneider should be dismissed. It is obvious that any change in the composition of an administrative unit is likely to cause temporary difficulties in the functioning of the department.

The Practical Guide for Translators makes it clear that "the mobility of translators and the possibility of integration within groups must be ensured as far as possible". The accent is therefore not put solely upon specialization. Moreover the organization plan of the Dutch Translation Division shows that the so-called "specialized" groups in that division are required to deal with very diverse matters since the same group is required to deal with social matters, administration and information whereas another deals with development, regional policy and transport.

There is no reason to think that the promotion prospects of the applicant may be adversely affected by the fact that he is now working in the Dutch Translation Division, since the promotion procedure for officials belonging to the Language Department is prepared by a single Promotion Committee which compares the merits of all the officials whether or not they are placed at the disposal of a particular branch.

The applicant is confusing "duties" with "post". There has been no change in post as that term is defined in Annex I A to the Staff Regulations since he still holds a post of Principal Translator corresponding to his grade.

As regards the breach of the principle of non-discrimination the Commission stresses that by virtue of Article 42 (2) of the Rules of Procedure the submission of this fresh issue cannot be allowed. Alternatively it contends that since the duties at present entrusted to the applicant correspond to his grade and post and since they are in no way such as to affect adversely his promotion prospects, the comparison between his position and that of translators who have stayed with the Administrative Commission does not reveal any discrimination.

The issue raised concerning a breach of the duty to have regard to the welfare of officers is also submitted for the first time and should, like the previous one, be disregarded. In any event there is no foundation for it. It was in no way stated at the meeting called on 22 August 1979 that the measures relating to the applicant and certain of his colleagues were adopted in the context of measures taken in the interests of mobility. The letter sent on 22 August 1979 to Mr Kindermann moreover contains no mention of those measures.

Like the two previous issues, that based on disregard of the rights of the defence must also be disregarded. As a matter of principle the fact that the administration does not hear an official prior to adopting a decision likely to have a serious effect upon his interests cannot be looked upon as disregard of the rights of the defence. As the case-law of the Court reveals,

"This case cannot be said to concern 'the rights of the defence' but only a general principle of good administration" (Joined Cases 33 and 75/79, paragraph 25 at p. 1698).

A fortiori that is so where what is at issue is, as in the present case, a measure terminating the placing of the applicant at the disposal of another department and there is nothing to show that that

measure is likely adversely to affect to however small a degree the interests of his career.

As to the allegation of misuse of powers the defendant reaffirms that the incident between certain translators assigned to the Administrative Commission had no connexion with the measure which is the subject of the present proceedings. It is moreover paradoxical to find that the applicant is arguing that he had nothing to do with that incident and that yet it was the cause of his reassignment to the Dutch Translation Division.

The parties presented oral argument at the sitting on 22 January 1981.

The Advocate General delivered his opinion at the sitting on 19 March 1981.

Decision

1 By application lodged at the Court Registry on 21 February 1980 Mr Kindermann, an official of the Commission of the European Communites, brought an action for the annulment of the Commission's decision of 4 October 1979, signed by Mr Tugendhat, the member of the Commission responsible for matters relating to personnel and administration, reassigning him from Division IX-D-3, the Translation, General Matters Division to Division IX-D-8, the Dutch Language Translation Division, as from 1 January 1980.

2 The applicant entered the service of the Commission on 15 June 1959 as an auxiliary translator, was established with effect from 1 January 1962 and assigned to a post in the Dutch Translation Section of the new Translation, Reproduction and Printing of Documents Division of the Internal Matters Directorate of the Directorate-General for General Administration. During his career Mr Kindermann was placed at the disposal of various departments and in particular the Directorate-General for Competition. Since 1 February 1970 he has performed his duties in the Translation Department of the Administrative Commission for Social Security for Migrant Workers (hereinafter referred to as "the Administrative Commission").

3 On 1 January 1973 the translation departments of the Commission were reorganized. The various translation sections comprising the former

Translation, General Matters, Division IX-D-3, which itself was elevated to the rank of a Directorate (IX-D Translation, Documentation, Reproduction and Library) were transformed into six divisions (IX-D-4 to 9), and the translation section to which Mr Kindermann belonged thus became the Dutch Language Translation Division IX-D-8.

4 On 22 August 1979 the translators assigned to the Administrative Commission were summoned to a meeting by Mr Ciancio, the Director of Directorate IX-D, who informed them of the decision of the Commission to send those "seconded" translators, who had worked for ten years in a particular department, back to the central Language Divisions. He told the meeting that the principle which he had explained would apply first, *inter alia*, to Mr Kindermann who was on leave on the day of that meeting and therefore did not take part in it, and that in due course a personal letter would be sent to each translator in the Administrative Commission.

5 The letter sent to Mr Kindermann and dated 22 August 1979 reached him on 4 September 1979. It stressed the value which the Commission attached to the "possibility for its staff, so far as is at all possible and having regard to the interests of the service, to be assigned, after spending a considerable time performing the same duties in the same departments, to other duties corresponding to their status under the Staff Regulations and thus to enrich their experience." The letter continued in the following words: "I should therefore be grateful if after contacting your Head of Division, Mr Pignot, you would present yourself on 2 January 1980 to Mr Dallinga, the Head of the Dutch Translation Division, who will inform you of your new duties."

6 On 17 September 1979 Mr Kindermann sent to Mr Ciancio a letter in which he challenged the decision of 22 August 1979. The following 3 October he lodged a complaint against that decision. The next day he received the decision signed by Mr Tugendhat against which he lodged a complaint on 12 October 1979 which remained unanswered during the prescribed period of four months.

Admissibility

7 The Commission challenges the admissibility of the action on the ground that the decision of 4 October 1979 did not, as a matter of organization, change the applicant's posting or *a fortiori* his position under the Staff Regulations. In practice, it meant nothing more than that the applicant ceased to be placed at the disposal of the Administrative Commission and was reassigned along with his post from Division IX-D-3 to Division IX-D-8. Further, the nature and level of the translation duties carried out by Mr Kindermann were not changed. It was therefore only a simple measure of internal organization of the department not capable of having adverse effect and thus not the kind of measure capable of being annulled pursuant to Article 91 of the Staff Regulations.

8 Even if a decision such as that in the present case does not affect the material interests or the rank of an official it may, having regard to the nature of the duties in question and the circumstances, adversely affect the non-material interests and future prospects of the officer concerned. In those circumstances it is not possible to assume in advance that it is not capable of adversely affecting the person concerned.

9 The action must therefore be held to be admissible.

Substance

10 During the oral procedure the applicant put forward ultimately only two submissions against the contested decision, the first alleging infringement of Article 7 (1) of the Staff Regulations in so far as on the one hand the procedure for which that provision provides in the case of transfer was not complied with and on the other that the decision in question was not in the interests of the service. The second submission alleges that there has been a misuse of powers.

11 It is apparent from a consideration of those submissions and the arguments of the defence that the parties disagree as to the description of the measure in question. The applicant takes the view that he was transferred within the meaning of Article 7 of the Staff Regulations whereas according to the Commission what was done was, in formal terms, to reassign the applicant along with his post and, in practical terms, to terminate a measure placing him at the disposal of the Administrative Commission.

12 It is as well to observe from the outset that under the system of the Staff Regulations there is a transfer properly so called only where an official is transferred to fill a vacant post. It follows that every transfer properly so called is subject to the formalities laid down in Articles 4 and 29 of the Staff Regulations. On the other hand those formalities do not apply in the case of reassignment of an official, as this does not give rise to a vacancy.

13 An analysis of the file on the case shows that because the holder of a post is transferred with it, the decision taken with regard to the applicant does not give rise to a vacancy and does not therefore constitute a transfer within the meaning of the Staff Regulations. For that reason the terminology employed by the applicant is inappropriate.

14 That does not however detract from the burden of the argument put forward by the applicant. As the Commission itself acknowledges by its consistent practice, as reflected by the measure in question, decisions to reassign are subject, just as transfers, as regards the protection of the rights and legitimate interests of the officials concerned, to the rules of Article 7 (1) of the Staff Regulations inasmuch as in particular the reassignment of officials may take place only in the interests of the service and in conformity with the principle of equivalence of posts. It is thus in the light of the principles of Article 7 (1) that the submissions put forward by the applicant must be considered.

15 Having regard to the foregoing it only remains, so far as the first submission is concerned, to consider the complaint based on disregard of the interests of the service.

16 The applicant maintains that the decision in question was taken in disregard of the interests of the service. Since this decision had nothing to do with any reorganization of the service there is nothing to prove that the post transferred is more useful to the interests of the service in the new division to which the applicant has been assigned (in the present case IX-D-8) than in his original division (namely IX-D-3).

17 That argument must be rejected since the case-law of the Court has recognized that the institutions of the Community have a wide discretion in

the organization of their departments in accordance with the tasks entrusted to them and in the assignment, with those tasks in view, of the staff placed at their disposal. It has not been established that, in taking the decision in question, the Commission has exceeded that power.

18 For the same reason the alternative arguments put forward by the applicant in relation to the negative effects of his departure on the function of the Translation Department of the Administrative Commission and the fact that he was not aware of the need to increase the translation's staff working for Division IX-D-8 must also be rejected.

19 The first submission must therefore be rejected.

20 The second submission must be rejected on the ground that the Commission's decision to reassign the applicant has been shown above to be in conformity with the interests of the service so that it cannot give rise to a misuse of powers.

Costs

21 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs.

It is apparent from the file that the applicant was informed of the decision of 22 August 1979 altering his assignment by his colleagues in the Administrative Commission who had themselves learned of it at the meeting from which he was absent. In view of the fact that the Commission might have taken care to inform the applicant first it is proper to order the Commission to bear one half of the applicant's costs.

Furthermore, under Article 70 of the Rules of Procedure, in proceedings commenced by servants of the Communities, institutions shall bear their own costs.

On those grounds

THE COURT (First Chamber)

hereby:

1. **Dismissed the application;**

2. **Orders the Commission to bear its own costs and one half of the applicant's costs.**

Koopmans O'Keeffe Bosco

Delivered in open court in Luxembourg on 21 May 1981.

J. A. Pompe
Deputy Registrar

T. Koopmans
President of the First Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 19 MARCH 1981 [1]

Mr President,
Members of the Court,

The case in which I am giving my opinion today is brought by Mr Jacobus Kindermann against the Commission. Mr Kindermann is a Principal Translator of Dutch mother-tongue and was employed from 1 February 1970 to 31 December 1979 by the Translation Section of the Administrative Commission on Social Security for Migrant Workers (hereinafter referred to as "the Administrative Commission"), an international body which is provided for by Articles 80 and

1 — Translated from the German.