OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 22 JANUARY 1975 [1]

Mr President,

Members of the Court,

1. After having, of his own accord and free will, abandoned a ship in distress, a sailor asks to be put on board again in order to get into a more comfortable lifeboat; this is how I should be tempted to describe the situation of Mr Geerlings, the applicant in the present case. After having served nine years as a scientific officer of Euratom and having, without success, sounded out the possibilities of the provisions of Article 41 of the Staff Regulations, which deals with assignment to non-active status, being applied to him — his letter of 17 April 1969 to the administration and its reply of 9 June 1969 — the applicant decided of his own accord to leave the service Euratom with effect from 1 July 1969 (the applicant's memorandum of 14 June 1969). When announcing his departure, he reiterated in more general terms the request for financial compensation, which was not available under the normal resignation procedure. In a letter of 24 December 1973 addressed to the Commission, the applicant confirmed what he had stated in his memorandum of 17 April 1969, referred to above, and declared that he had decided to leave the Community because changes in the Euratom research programme no longer allowed him to carry out any work of importance and that, in consequence, he could for all intents and purposes be regarded as redundant.

In consequence of the letter of 14 June 1969, the administration of the Commission had, rightly, regarded the applicant as having resigned. Subsequently, however Mr Geerlings explained in a letter of 18 July 1969, that he had not intended purely and simply to resign but had wished to secure 'the application of a different Staff Regulation' in accordance with a request for compensation, in equally vague terms, with which he had concluded the letter mentioned. In a letter on 7 February 1970, the applicant explained that in calculating the amount of compensation to offset the termination of his service, when it occurred, he was working on the basis of the amount which would be produced by application of Article 4 et seq. of Regulation No 259/68 of the Council instituting special measures temporarily applicable to officials of the Commission in connexion with measures reducing staff complements as the result of the merger of the Executives. As is well known, these special provisions were applicable only until 30 June 1968.

The Commission administration, having regard to the fact that, meanwhile, a large number of scientific officers in the same situation as the applicant had, during 1969, sought and obtained leave on personal grounds, decided, almost a year after the applicant's departure, to revoke, on grounds of equity, the decision terminating his service and to give him the benefit of Article 40 of the Staff Regulations dealing with leave on personal grounds.

2. In letters of 14 June 1970 and 13 December 1971, the applicant had requested to be reinstated in employment pursuant to Article 40 of the Staff Regulations. The Commission rejected both requests on the ground that the research budget approved by the Council had removed any real possibility of reinstating scientific staff at the end of a period of leave on personal grounds. The Commission pointed out that there were a number of scientific officers on

1 — Translated from the Italian.

the staff who were to all intents and purposes supernumerary and who must, if an appointment had to be made to a vacancy in the scientific section, be recognized as having priority over officials such as Mr Geerlings, who were not at that time in the service.

The applicant contends that this rejection cannot be justified in view of the right conferred by Article 40 (4) (d) on an official of being, on expiry of his leave, reinstated in the first post corresponding to his grade which falls vacant in his category or service. The applicant contends that as, moreover, the post he previously occupied has never been filled and as it still appears in the staff complements table, the Commission had no right to refuse to restore him to active employment.

The object of the application for annulment is, however, not the refusal of reinstatement but the Commission's rejection, by letter of 10 December 1973, of the applicant's request to be allowed to take advantage of a measure terminating his service pursuant to Article 2 of Regulation No 1543/73 of the Council, and of the special financial benefits associated therewith; the applicant's claim for a direct order to the Commission to apply Regulation No 1543/73 to him must be re-cast in that sense. The regulation introduced special measures temporarily applicable to officials of the European Communities paid from research and investments funds 'in order to deal with exceptional problems arising from the adoption of research programmes involving a reduction in the number of posts provided in the plan of staff' paid for out of such funds, to enable 'officials affected by such measures to overcome the serious financial difficulties resulting from loss of employment'.

This regulation does not therefore have the same purpose as that, of Regulation No 2530/72 which, as we saw in a previous case *(Giry v Commission*, 1/74), was designed to make room for nationals of the new Member States by encouraging the vacation of posts occupied by officials paid out of credits under Title 1 of the section of the budget relating to the Commission.

Regulation No 1543/73, on which the applicant relies, was basically intended to be applied to officials who became supernumerary. If the applicant had remained in employment, he would probably have been able to take advantage of it but, as he was on leave, the Commission objected that it could not apply the regulation to him, an attitude which, as we have already seen, the institution took up in respect of Regulation No 2530/72.

Though, in its judgment of 21 November 1974 in *Giry,* this Chamber decided that Regulation No 2530/72 was in principle intended to apply to officials who actually held a post at the material time, it did not completely rule out the possibility that it might apply to officials on leave on personal grounds. The Advocate-General expressed the same view. In the present case, however, which deals with a different regulation, the same Advocate-General is unable to regard it as applicable, even in exceptional cases, to officials who do not actually occupy a post.

One could, though not as a general rule, envisage the possibility that, because they would have been entitled to be reinstated in a post which was available and actually due to be filled, officials on leave could also take advantage of Regulation No 2530/72 in view of the fact that, in such circumstances, the post could not have been reserved for an official from one of the new Member States. Because, however, the regulation with which we are now dealing was essentially concerned with a different objective, viz. a reduction in the number of supernumerary posts, it could not conceivably have been applied to an official who was not actually filling one of the posts which were due to be abolished. It is, of course, conceivable that, in the case of a post intended for another official, an official on leave has a prior right to it and that it may

therefore be consistent with its objects to apply Regulation No 2530/72 to that official in such a way that the post is assigned differently; in the present case, however, we are concerned with a regulation designed not to enable a different appointment to be made but to ensure the definite abolition of the posts which the regulation helps to make vacant, and the possibility that an official on leave might have the right to occupy one of the posts involved cannot even arise. Nor, therefore, would there be any justification for allowing an official who had left his Community post sometime previously to continue his career elsewhere to avail himself of the advantages of Regulation No 1543/73 which, to enable them to 'overcome the serious financial difficulties resulting from loss of employment' were provided exclusively for the benefit of officials who lose their present employment as a result of reduction in the number of posts in the staff plan.

Against this background, there is no need for me to go over the various considerations which I referred to in the *Giry* case relating to the use made by the Commission of the power generally to limit the scope of the special rules on voluntary resignation in the interests, as it saw them, of the service; in the context of Regulation No 2530/72, these considerations justify the non-application of these special legislative provisions to officials who, at the time they submitted application for termination of their employment, no longer occupied a post.

3. This conclusion adverse to the applicant could, however, be avoided if there were substance in the objection he has against the Commission's repeated refusal to reinstate him during the period previous to entry into force of the regulation with which we are concerned.

For reinstatment on this basis to be effected Article 40 assumes that a post is vacant. But this condition requires not merely that there should be a post on the table of staff complements which is not at the material time occupied but also that there is every intention that it should be, and can, therefore, be actually used within the framework of departmental organization and in the light of the institution's programmes of work which, especially in the case of a scientific research organization whose activities make heavy financial demands, cannot fail to take account of the actual financial resources available. If, as a result of changes in general policy concerning the work of the organization concerned, a post becomes supernumerary to the requirements of the service, an official having non-active status, however much he may, in theory, be qualified to fill it, cannot claim to do so if this would not be in the interests of the service. The administration cannot be compelled to squander public money on taking back an official in a post for which it has no longer any use. The right which Article 40 confers on a person on leave gives him priority over others in the matter of appointment. The creation of an effective right to reinstatement is dependent on a decision by the competent authority to fill the vacancy. The applicant regards the negative attitude of the Commission as a misuse of powers due to the alleged intention of the Commission to secure the termination of the applicant's service as an official without having to make the payments provided for under Regulation No 1543/73. What I on the other hand would be tempted to regard as a misuse of powers would be a decision which reinstated an official on leave in a post which had become supernumerary and was due to be abolished, especially if the intention of such reinstatement was really that of enabling the official concerned to take advantage of the special privileges provided for by the regulation to meet different situations and purposes.

The refusal to reinstate the applicant could be challenged only if it were established that subsequent to his

request for reinstatement the Commission had had available a vacancy for which the applicant was suitable and had otherwise disposed of it.

This does not appear to have been the case. A decision by the competent authority not to fill a vacancy could be challenged only if it were vitiated by misuse of powers, such as would be the case if, for example, it was clear that the decision was contrary to the interests of the service.

But, in the present case, the applicant himself has more than once recognized that the post that he occupied had already become supernumerary; indeed it was because his responsibilities had largely disappeared that he decided to leave and fill a post elsewhere.

There does not appear to be any foundation for the objections raised by the applicant against the Commission's refusal to reinstate him in his previous post in which, in any case, it could not have been in the interests of the service to employ him.

If, therefore, there was justification for the earlier refusal of the applicant's request to be reinstated, there are no grounds for annulling the decision not to let him take advantage of Regulation No 1543/73 which, as has been seen, could be applied only to someone who was actually employed.

I am therefore of opinion that the appeal should be dismissed, with appropriate order as to costs.