OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 22 MARCH 1984 [1]

Mr President,
Members of the Court,

In this case the Court is once again confronted with the consequences of the accession of three new Member States in 1973 for the officials of the Community institutions. Even now, so long after their accession which resulted in the adoption of Regulation (Euratom, ECSC, EEC) No 2530/72 of the Council of 4 December 1972 introducing special and temporary measures applicable to the recruitment of officials of the European Communities in consequence of the accession of new Member States, and for the termination of service of officials of those Communities (Official Journal, English Special Edition, 1972 (1-8 December), p. 11), it seems that the measures adopted were not entirely satisfactory in human terms. For that reason the Court's judgment in this case may be important with regard to the drafting of similar measures which are likely to be adopted in connection with the accession of Spain and Portugal.

1. The most important facts

The applicant, who was born in 1926, entered the service of the Commission in 1959. His last post was that of Principal Administrator in Grade A 4 in the Spokesman's Group of that institution. In 1967 he suffered a cardiac infarction. The certificate issued by the applicant's doctor, which is included in the file on the case as evidence, emphasized that, in view of that occurrence, the applicant's timetable should not exceed normal working hours. Apparently, that advice was not heeded since neither the Commission nor the applicant saw any reason for the application of the procedure provided for by the Staff Regulations to establish invalidity. Moreover, it is clear from the documents before the Court that the applicant was a conscientious official and was considered for promotion to Grade A 3. In that connection, I would refer to the copies of the letters dated 1 March 1968 and 24 February 1973 from Mr von der Groeben and Mr Dahrendorf resepectively which are included in the file. It seems however that it proved impossible to promote the applicant in the Spokesman's Group as a result of the accession of the three new Member States on 1 January 1973. That was evidently the reason which induced the applicant to request, by letter of 23 February 1973 (Annex I to the Commission's defence), the application of Article 2 (1) of Regulation No 2530/72. The Commission acceded to the applicant's request by letter of 29 May 1973 (Annex III to the Commission's defence). The date on which the applicant was to leave the service was 1 July 1973. With effect from that date the applicant was granted the allowances provided for by the aforementioned regulation. In accordance with its provisions the allowance was replaced by a retirement pension as from 1 November 1982.

In 1980 the applicant suffered a further cardiac infarction which made him totally unfit for work and in need of constant medical attention. On 27 July

1 — Translated from the Dutch.

1981 the applicant sent a letter to the Commission (Annex V to the Commission's defence) in which he requested the application of the procedure to establish invalidity, as provided for by Article 78 in conjunction with Article 13 of Annex VIII to the Staff Regulations. By letter of 7 September 1981 (Annex VI to the Commission's defence) the Commission, in the person of its Director of Personnel, rejected that request on the ground that the applicant's connection with the service had definitively come to an end on 1 July 1973 and therefore the provisions in question were no longer applicable to him. By letter of 21 May 1982 (Annex VII) the applicant lodged an objection to that decision, which the Commission treated as a complaint within the meaning of Article 90 (2) of the Staff Regulations and which it rejected by letter of 19 October 1982 (Annex VIII). On 31 January 1983 the applicant brought an action before the Court.

2.1. The application

In his application the applicant claims that the Court should:

1. Annul the Commission decision of 1 October 1982, communicated to the applicant on 21 October 1982, refusing to award him an invalidity pension pursuant to Articles 53 and 78 of the Staff Regulations in conjunction with Articles 13 to 16 of the Annex VIII thereto;

2. (a) Primarily, award the applicant an invalidity pension with effect from 1 July 1973, or, in the alternative, from 10 February 1980;

   (b) In the alternative, order the Commission to apply the appropriate procedures to award the applicant an invalidity pension with effect from 1 July 1973, or, in the alternative, from 10 February 1980;

3. Order the Commission to pay the costs.

2.2. Admissibility

The Commission lodged two objections contesting the admissibility of the application.

In the *first* place, the Commission contends that the applicant's principal claim for the award of an invalidity pension is inadmissible on the ground that invalidity may be established only by an Invalidity Committee pursuant to Article 78 of the Staff Regulations in conjunction with Article 13 of Annex VIII thereto. That is undoubtedly correct but makes very little difference since the applicant's alternative claim is to the same effect. According to the Commission, that part of the alternative claim which is concerned with the establishment of invalidity with retroactive effect from 1 July 1973 must be regarded as inadmissible on the ground that it was put forward only in the application. The latter statement is correct. However, since the applicant's complaint was concerned with the Commission's failure to initiate the procedure to establish invalidity, in my view the specification in the application of the temporal effect of the rights resulting from the establishment of invalidity sought by the applicant cannot in itself render this part of the application inadmissible.

Secondly, the Commission contends that the applicant did not object until 21 May 1982 to the Commission decision of 7 September 1981 refusing to initiate the procedure to establish invalidity, by which time the period of three months

referred to in Article 90 (2) of the Staff Regulations had expired. However, I am inclined to reject that argument. The Commission treated the applicant's letter of 21 May 1982 as a complaint within the meaning of the relevant provision of the Staff Regulations and considered it admissible as such. In my view, it is contrary to the principles of proper administration to qualify as inadmissible in a later stage of the proceedings a complaint lodged by a former official which was initially regarded as admissible.

To summarize, in my view, the applicant's alternative claim, as set out in paragraph 2 (b) of his application, must be considered admissible. Moreover, the Commission also proposes that the substance of the case should be examined, since it considers that the application should be dismissed out of hand.

3. The submissions relied upon

The submissions relied upon by the applicant are not very conveniently arranged. In my view they may be summarized as follows:

1. The Commission failed to discharge its duty of assistance (Fürsorgepflicht) in relation to its officials inasmuch as it did not initiate a procedure to establish invalidity following the applicant's first cardiac infarction in 1967.

2. The applicant's second infarction in 1980 is connected with the first, which he suffered when he was still an official, and was accordingly connected with his duties.

3. Article 78 of the Staff Regulations in conjunction with Articles 13 to 16 of Annex VIII are applicable and, in connection therewith, Regulation No 2530/72 does not preclude their application, in which case the Commission is required to apply them by virtue of its duty of assistance.

3.1. First submission

Article 53 of the Staff Regulations provides that an official to whom the provisions concerning total permament invalidity contained in Article 78 of the Staff Regulations apply is to be retired and such retirement is, pursuant to Article 47 (f) of the Staff Regulations, a cause of termination of service. The wording of Article 78 makes it clear that invalidity is established by a decision adopted primarily in the interests of the service. Accordingly, a request to that effect by the official is not required. An official suffering from invalidity is no longer (entirely) capable of performing his duties in a satisfactory manner. His personal interest lies in retirement from the service which is connected with the establishment of invalidity. Against that background, it cannot be stated that the Commission, by failing to initiate the procedure to establish invalidity after the applicant's first infarction in 1967, failed to discharge its duty of assistance to its officials. According to the judgment of the Court in Joined Cases 33 and 75/79 *Kuhner* v *Commission* [1980] ECR 1677, it follows from that duty (paragraph 22 of the decision) that when the official authority takes a decision — for instance refusing to initiate a procedure to establish invalidity as in this case — it should take into consideration all the factors which may affect its decision. That means not only the interests of the service but also the interests of the

official concerned. It has not been established that at the time the initiation of a procedure to establish invalidity would have been in the interests of the applicant since the medical certificate adduced as evidence did not expressly require the establishment of invalidity but merely the observance of normal working hours. Nor may it be inferred from the certificate that the applicant was considered totally or partially unfit for work. Accordingly, it is extravagant to state that the duty of assistance of an institution invariably requires it to initiate a procedure to establish invalidity following certain medical occurrences. In my view, that is necessary only in certain specific circumstances, such as where the doctor responsible for treatment or the patient himself makes a request to that effect. There is nothing to suggest that the applicant disagreed with the continuance of his administrative status. Moreover, I would add that the applicant was even considered, both by his superiors and clearly also by himself, to be capable of occupying a higher post. That is difficult to reconcile with the applicant's contention that he should in fact have been recognized to be suffering from total or partial invalidity.

3.2. Second submission

If, as the applicant maintained in reply to certain questions put to him by the Court, there was a causal connection between his first and second cardiac infarctions, it follows in *his view* that it would be possible to speak of an occupational disease, in which case Article 78 of the Staff Regulations provides for the award of a pension amounting to 70 % of the last basic salary of the official. To begin with, however, it has not been established on the basis of the medical certificate referred to earlier that the applicant's first infarction may be regarded as an occupational disease leading to invalidity wihtin the meaning of Article 78. Moreover, it has not been unequivocally established that the second infarction was an unavoidable consequence of the first. Not only does the intervening period of 14 years cast doubts on the existence of a causal connection but also there is not the slightest medical evidence for that view.

3.3. Third submission

In my view, the submission concerning the interpretation of Article 78 of the Staff Regulations in conjunction with article 13 of Annex VIII, in which the applicant contends that Regulation No 2530/72 does not preclude the applicability of those two provisions, is more important than the two preceding submissions which I consider must be rejected on substantive grounds alone. This submission seems, on closer scrutiny, to raise two connected questions.

In the *first* place, the relationship between Regulation No 2530/72 and Articles 35 and 47 of the Staff Regulations is significant. The five administrative "statuses" provided for by Article 35 clearly apply to an official who has been appointed to an established post within the meaning of Article 1 of the Staff Regulations. The relevant status may be terminated only in the manner provided for by Article 47. It is clear from the wording of Article 2 (1) of Regulation No 2530/72 that two possibilities were created by that provision: the adoption of a measure establishing the non-active status of an official, within the meaning of Article 41 of the Staff Regulations, which implies, in connection with Article 35 of the Staff Regulations, the retention of his administrative status, and the adoption

of a measure terminating the service of an official, as provided for by Article 47 of the Staff Regulations. It is common ground that the applicant requested the adoption of the latter measure and therefore no longer possesses an administrative status within the meaning of Article 35 of the Staff Regulations. However, he remains an "official" within the meaning of the Staff Regulations and of the regulation in question, which indicates that not all legal relations between him and his institution have been severed. That is also clear from a number of subparagraphs of Articles 3 and 4 of the regulation. The third subparagraph of Article 3 (7) even makes express provision for the possibility that the official may be reinstated.

The *second* question is who may be recognized to be suffering from invalidity, as provided for by Article 78 of the Staff Regulations in conjunction with Article 13 of Annex VIII. The wording of Article 78 does not seem to preclude the application of the procedure to establish invalidity to an official who has had recourse to Regulation No 2530/72 in the manner prescribed. In particular, the criterion that the official is prevented (owing to total permanent invalidity) "from performing the duties corresponding to a post in his career bracket" does not it would seem, in view of the possibility of reinstatement expressly provided for by the regulation, constitute an obstacle to the application of that procedure. Nor is it possible to infer from the wording of Article 78 that the official concerned must possess an administrative status of the type referred to in Article 35 of the Staff Regulations. On the other hand, the phrase "is obliged on these grounds to end his service with the Communities" contained in Article 13 of Annex VIII, which is referred to by the Commission in its defence, seems to constitute an express obstacle to the recognition of invalidity which the applicant seeks. In contrast to the wording of Article 78 of the Staff Regulations the wording of Article 13 is thus clearly restricted in scope to officials within the meaning of Article 35 of the Staff Regulations. If it were possible to establish a causal connection between the applicant's first and second cardiac infarctions and if there had not been such a long interval between the two infarctions, it would perhaps have been unreasonable to ascribe such far-reaching consequences to a phrase of a provision contained in an annex. In the circumstances of this specific case, however, I consider such an outcome to be acceptable. It would in my view have been more equitable if the regulation had made it possible to derogate from Article 78 of the Staff Regulations and from Article 13 of Annex VIII with regard to invalidity resulting from an occupational disease contracted by an official in the performance of his duties.

4. Conclusion

To summarize, I consider, as regards this case that the application must be dismissed and that the parties must be ordered to bear their own costs.