JUDGMENT OF THE COURT
5 October 1994 *

In Case C-404/92 P,

X, represented by Gérard Collin, Thierry Demaseure and Michel Deruyver of the Brussels Bar, with an address for service in Luxembourg at the offices of Myson SARL, 1 Rue Glesener,

appellant,

supported by

Union Syndicale, Brussels, represented by its Legal Adviser, Jean-Noël Louis, of the Brussels Bar, with an address for service in Luxembourg at the offices of Myson SARL, 1 Rue Glesener,

and

Fédération Internationale des Droits de l'Homme, represented by Luc Misson, of the Liège Bar, and Eric Balate, of the Mons Bar, with an address for service at the Chambers of Jean-Paul Noesen, 18 Rue des Glacis,

interveners,

* Language of the case: French.

APPEAL against the judgment of the Court of First Instance of the European Communities (Third Chamber) of 18 September 1992 in Joined Cases T-121/89 and T-13/90 between X and the Commission, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by Jörn Pipkorn, Legal Adviser, and Sean van Raepenbusch, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, also of its Legal Service, Wagner Centre, Kirchberg,

THE COURT,

composed of: O. Due, President, G. F. Mancini, J. C. Moitinho de Almeida and M. Diez de Velasco (Presidents of Chambers), C. N. Kakouris, F. A. Schockweiler, G. C. Rodríguez Iglesias, F. Grévisse, M. Zuleeg (Rapporteur), P. J. G. Kapteyn and J. L. Murray, Judges,

Advocate General: W. Van Gerven,
Registrar: D. Loutermann-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 8 February 1994, at which the Fédération Internationale des Droits de l'Homme was represented by

Luc Misson, Eric Balate and by Marc-Albert Lucas, of the Liège Bar,

after hearing the Opinion of the Advocate General at the sitting on 27 April 1994,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 2 December 1992, Mr X brought an appeal under Article 49 of the Protocol on the Statute of the Court of Justice of the EEC, and the corresponding provisions of those of the ECSC and EAEC, against the judgment of 18 September 1992 in Joined Cases T-121/89 and T-13/90 *X* v *Commission* ([1992] ECR II-2195), in so far as the Court of First Instance dismissed his application for the annulment of the Commission decision of 6 June 1989 refusing to recruit the applicant as a member of the temporary staff for a period of six months by reason of his being physically unfit, and for compensation for non-material damage.

2 It appears from the judgment under appeal that the facts of the case are as follows:

'1. The applicant worked for the Commission of the European Communities on a free-lance basis from 29 August 1985 to 30 March 1986 and from 1 May 1986 to 31 August 1987, and as a member of the auxiliary staff from 1 September 1987 to 31 January 1988. Having been admitted to Competition No COM/C/655 for typists, he was informed on 4 July 1989 that he had not passed the written tests.

2. With a view to the possibility of his being employed for a period of 6 months as a member of the Commission's temporary staff, the applicant was invited, by letter from the Careers Division of the Directorate-General for Personnel and Administration of 14 February 1989 to undergo a medical examination in accordance with Articles 12(2)(d) and 13 of the Conditions of Employment of other Servants of the European Communities (hereinafter 'the Conditions of Employment').

3. That examination was carried out on 15 March 1989 by Dr S, a medical officer of the Commission. The applicant underwent a clinical examination, supplemented by biological tests. However, he declined the suggestion of the Medical Service that he should be screened for HIV antibodies (Aids).

4. By letter of 22 March 1989 the medical officer, after informing the applicant that he could not issue a medical opinion favourable to his recruitment, asked him to give the name of his own doctor so that the latter could be informed of the abnormalities found.

5. By letter of 28 March 1989, the Head of the Careers Division informed the applicant that, following the medical examination, the medical officer had concluded that he was physically unfit to carry out the duties of typist in the Commission and that there was therefore no possibility of his being recruited.

6. On 5 April 1989, the medical officer telephoned Dr P, the applicant's doctor in Antwerp, and informed him of the results of the applicant's medical examination. At the request of Dr P, the Commission's medical officer also sent him, by letter of 12 April 1989, a copy of the results of the laboratory analyses relating to the applicant.

7. In response to the abovementioned letter from the Head of the Careers Division, the applicant, by letter of 9 April 1989, requested that his case be referred for an opinion of the Medical Committee provided for in the second paragraph of Article 33 of the Staff Regulations of Officials of the European Communities, which applies to temporary staff by virtue of Article 13 of the Conditions of Employment.

8. By letter of 26 April 1989 the applicant's doctor informed the President of the Commission that a diagnostic error had been made by the Commission's medical officer, who had concluded that his patient was suffering from an opportunist infection, constituting a case of "full blown Aids", and also objected to the fact that the applicant had, without his consent, been subjected to a dissimulated Aids screening test.

9. By letter of 27 April 1989 the Head of the Commission's Medical Service informed the applicant that a Medical Committee had been convened to consider his case on 26 May 1989 and invited him to forward all relevant medical reports and documents.

10. By letter of 19 May 1989, the applicant replied to the Head of the Medical Service that he possessed no medical documents because he had never been seriously ill. He also stated that he had been treated for minor medical problems by Dr P.

11. By letter of 6 June 1989, the Director-General for Personnel and Administration informed the applicant that the Medical Committee, convened at his request, had met on 26 May 1989 and had confirmed the opinion issued on 22 March 1989 by the Commission's medical officer. On that basis, the Commission considered that the applicant did not meet the physical fitness requirements for recruitment to its staff.

12. By letter of 3 July 1989, the applicant lodged a complaint under Article 90(2) of the Staff Regulations against the decision of 6 June 1989 and, so far as necessary, against the opinion of the medical officer of 22 March 1989 and the decision of 28 March 1989. In that complaint, he requested the annulment of the abovementioned measures and sought compensation for the non-material damage which he had allegedly suffered, although he did not specify the cause of such damage or quantify it.

13. In response to the letter from the applicant's doctor dated 26 April 1989, the Director-General for Personnel and Administration stated, by letter of 26 July 1989, on behalf of the President of the Commission, that systematic and compulsory HIV screening had been abandoned in the Community institutions more than a year earlier, in conformity with the conclusions of the Council and of the Ministers of Health of 15 May 1987 and 31 December 1988, and the decisions of the Commission. In the same letter, it was stated that the applicant had not been subjected to a disguised Aids screening test but to a biological examination — a T4/T8 lymphocyte count — which was intended to evaluate the state of the patient's immune system and was not in any way specific to investigation for viral or bacterial infection.

14. By letter of 4 September 1989, which was received at the Secretariat-General on 8 September 1989, the applicant lodged, under Article 90(2) of the Staff Regulations, a "supplemental" complaint, seeking payment of a lump sum of BFR 10 million in respect of material and non-material damage caused to him by Commission officials.

15. Both of the applicant's complaints were rejected by decision of the Commission of 27 November 1989, which was notified by a memorandum from the Director-General of Personnel and Administration of 28 November 1989.'

3 By application lodged at the Registry of the Court of Justice on 4 July 1989, Mr X brought a first action before the Court of Justice (Case T-121/89), essentially seeking annulment of the Commission decision of 6 June 1989 refusing to recruit the applicant to the temporary staff as a typist for a period of six months by reason of his being physically unfit.

4 By order of 15 November 1989, the Court of Justice referred the case to the Court of First Instance pursuant to Article 14 of Council Decision 85/591/ECSC, EEC, Euratom, of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1989 L 319, p. 1).

5 By application lodged at the Registry of the Court of First Instance on 3 March 1990, Mr X brought a second action (Case T-13/90) for an order requiring the Commission to pay him BFR 10 million by way of lump-sum damages.

6 Both actions were dismissed by the contested judgment.

7 In support of his appeal, the appellant advances three pleas in law based on infringement of Article 8 of the European Convention on Human Rights (hereinafter 'the EHRC'), a contradiction vitiating the grounds of the contested judgment and breach of the right to a fair hearing.

Sobre el motivo basado en la violación del derecho al respeto de la vida privada

8 El recurrente reprocha al Tribunal de Primera Instancia haber considerado erróneamente que el modo en que fue sometido a reconocimiento médico y declarado no apto físicamente no constituye una violación de su derecho al respeto de su vida privada, tal como está garantizado por el artículo 8 del CEDH.

9 El primer motivo del recurrente está dirigido especialmente contra el apartado 58 de la sentencia impugnada, en el cual el Tribunal de Primera Instancia declaró que

«[...] que una extracción de sangre que tiene por objeto determinar la posible presencia de anticuerpos VIH atenta contra la integridad física del interesado y que ningún candidato puede ser sometido a la misma sin su consentimiento expreso. [...] en el caso de autos, el demandante no ha demostrado que fue sometido, sin saberlo, a una prueba específica de detección del SIDA, ni que la Comisión le propusiese efectuar tal prueba como condición previa a su contratación. El demandante tampoco ha demostrado que fue sometido a una prueba indirecta de detección de anticuerpos VIH, puesto que las partes están de acuerdo en que la prueba hematológica de que se trata, a saber, el recuento de los linfocitos T4 y T8, no es apropiada para determinar la existencia de una posible seropositividad. Por último, es necesario añadir que en el caso concreto, habida cuenta de las anomalías puestas de relieve con ocasión de la anamnesis y del examen clínico, el médico asesor podía legítimamente solicitar que se practicase dicha prueba».

10 A este respecto, el recurrente alega que, en contra de lo que afirma el Tribunal de Primera Instancia, está demostrado que él fue sometido a una prueba indirecta de detección que se utiliza normalmente para vigilar la evolución de la enfermedad en las personas que padecen el SIDA.

11 He also criticizes the Court of First Instance for not finding that the taking of blood in order to carry out a T4/T8 lymphocyte count without the aspiring official's knowledge constitutes interference with his physical integrity, whereas at the beginning of paragraph 58 of the judgment it expressed the view that the taking of blood in order to investigate the possible presence of HIV antibodies constituted such interference and could be carried out on a candidate only with his informed consent. It was therefore contrary to Article 8 of the EHRC for the Court of First Instance to find, in the same paragraph, that 'having regard to the abnormalities found in the anamnesis and clinical examination, the medical officer was entitled to request that such a test be carried out'.

12 According to the Commission, the first plea is inadmissible since the rejection by the Court of First Instance of the appellant's argument that he had been subjected, against his will and without his knowledge, to a dissimulated HIV screening test constitutes an appraisal of fact which cannot be challenged by the appellant before the Court of Justice.

13 As to whether a candidate's informed consent was required in order for the carrying out of a lymphocyte count not to constitute interference with his physical integrity, the Commission contends that a candidate who presents himself for a pre-recruitment medical examination tacitly, but unequivocally, gives his consent for the medical officer to perform the tasks required of him, carrying out, if necessary, certain additional tests to enhance the reliability of his medical assessment. It considers that a distinction must be drawn between the various stages of infection by the Aids virus.

14 Accordingly, the Commission points out that the fact of being an asymptomatic carrier of the virus is not in itself a cause of unfitness since there is no risk of trans-

mission in normal working relations. It follows that the HIV test, which enables any seropositivity to be detected, is not necessary for the medical officer to be able to carry out the tasks described in Article 12(2)(d) of the Conditions of Employment and that, for it to be carried out, the prior informed consent of the candidate is required.

15 According to the Commission, the situation is different, however, where, as a result of the emergence of certain clinical signs, it is possible to establish medically that a person who is seropositive is bound to have the disease and that symptoms are foreseeable in the relatively near future.

16 In the present case, the Commission observes that the medical officer considered a T4/T8 lymphocyte count necessary for the proper discharge of his duties. Both the anamnesis and the clinical assessment undertaken during the medical examination suggested that the immune system had been adversely affected, which in itself and regardless of its origin, is an important factor to be taken into account in assessing a person's suitability for employment, in view of his greater susceptibility to infection: he might at any time become seriously ill. Since the examination was necessary to enable the medical officer to carry out his duties, the appellant must be regarded as having tacitly given his consent to it.

17 The Court of Justice has held that the right to respect for private life, embodied in Article 8 of the EHRC and deriving from the common constitutional traditions of the Member States, is one of the fundamental rights protected by the legal order of the Community (see the judgment in Case C-62/90 *Commission* v *Germany* [1992] ECR I-2575, paragraph 23). It includes in particular a person's right to keep his state of health secret.

18 However, the Court of Justice has held that restrictions may be imposed on fundamental rights provided that they in fact correspond to objectives of general public interest and do not constitute, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the right protected (see *Commission* v *Germany*, cited above, paragraph 23).

19 Article 13 of the Conditions of Employment provides that, before being engaged, a member of the temporary staff is to be examined by one of the institution's medical officers in order that the institution may be satisfied that he fulfils the requirements of Article 12(2)(d) as to physical fitness. By virtue of the latter provision, no one may be engaged as a member of the temporary staff unless he satisfies the conditions as to physical fitness laid down for the performance of his duties.

20 However, although the pre-recruitment examination serves a legitimate interest of the Community institutions, which must be in a position to fulfil the tasks required of them, that interest does not justify the carrying out of a test against the will of the person concerned.

21 If the person concerned, after being properly informed, withholds his consent to a test which the medical officer considers necessary in order to evaluate his suitability for the post for which he has applied, the institutions cannot be obliged to take the risk of recruiting him.

22 The Court of First Instance interpreted the provisions mentioned above as imposing an obligation to respect a refusal by the person concerned only in relation to

the specific test for Aids but as allowing any other tests to be carried out which might merely point to the possible presence of the Aids virus, such as the T4/T8 lymphocyte count, whilst at the same time finding that the results of that test prompted the medical officer to inform the appellant's doctor that the immune deficiency established might be linked with the presence of the Aids virus, which would justify an additional screening test not only for the HIV-1 virus but also for the HIV-2 virus (paragraph 47 of the contested judgment).

23 However, the right to respect for private life requires that a person's refusal be respected in its entirety. Since the appellant expressly refused to undergo an Aids screening test, that right precluded the administration from carrying out any test liable to point to, or establish, the existence of that illness, in respect of which he had refused disclosure. However, it is apparent from the findings made by the Court of First Instance that the lymphocyte count in question had provided the medical officer with sufficient information to conclude that the candidate might be carrying the Aids virus.

24 In those circumstances, the contested judgment must be annulled to the extent to which it held that, in view of the abnormalities found in the anamnesis and clinical examination, the medical officer was entitled to request that a T4/T8 lymphocyte count be carried out and therefore dismissed the applicant's claim that the Commission decision of 6 June 1989 be annulled, without its being necessary to consider the other pleas in law advanced by the applicant.

25 Since the state of the proceedings so permits, pursuant to the first paragraph of Article 54 of the Protocol on the Statute of the Court of Justice of the EEC, it is appropriate in the light of the foregoing to annul the Commission decision con-

tained in the letter of 6 June 1989 in which the Director-General for Personnel and Administration informed the appellant that he did not satisfy the conditions as to physical fitness for recruitment.

The claim for compensation for non-material damage

26 In Case T-13/90, the appellant sought compensation for the non-material damage suffered by him as a result of the accusations made against him by the Commission's medical officer, which could have had serious consequences for him both morally and psychologically. Moreover, the Commission published in the *Official Journal* a notice summarizing the claims and pleas advanced by him in his application for annulment. Since the preamble to that notice contained the appellant's initials and place of residence, the Commission, he claimed, had breached both the principle of strict confidentiality which it should have observed in such a delicate case and also its duty to have regard for the welfare of officials.

27 In paragraph 75 of the contested judgment, the Court of First Instance dismissed that claim on the ground, *inter alia*, that the correct administrative procedure under Article 90 of the Staff Regulations had not been followed in relation to it. Since the appellant does not challenge that finding, the appeal must be dismissed as regards the claim for compensation.

Costs

28 Article 70 of the Rules of Procedure provides that in proceedings between the Communities and their servants the institutions are to bear their own costs. How-

ever, pursuant to Article 122 of those rules, that provision is not applicable to appeals brought by officials or other servants of the institutions. It is therefore appropriate to apply Article 69(2) of the Rules of Procedure, according to which the unsuccessful party is to be ordered to pay the costs. Since the Commission has been largely unsuccessful in its submissions, it must be ordered to pay the costs at both instances. Pursuant to Article 69(4) of the Rules of Procedure, the interveners must bear their own costs.

On those grounds,

THE COURT

hereby:

1. **Annuls the judgment of the Court of First Instance of 18 September 1992 in Joined Cases T-121/89 and T-13/90 *X* v *Commission* to the extent to which it dismissed the applicant's claim that the Commission decision of 6 June 1989 should be annulled;**

2. **Annuls the Commission decision of 6 June 1989 refusing to engage Mr X as a member of the temporary staff for a period of six months on the ground of physical unfitness;**

3. **Dismisses the appeal as regards the claim for compensation;**

4. Orders the Commission to pay the costs at both instances and orders the interveners to bear their own costs.

Due Mancini Moitinho de Almeida

Diez de Velasco Kakouris Schockweiler

Rodríguez Iglesias Grévisse Zuleeg

Kapteyn Murray

Delivered in open court in Luxembourg on 5 October 1994.

R. Grass O. Due

Registrar President