OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 2 JUNE 1983

My Lords,

The applicant in this case, Mr Jean-Jacques Charles Geist, is an official of the Commission who occupies a post in the Scientific and Technical Services. In this action, he claims

1. annulment of a decision notified to him by a note dated 5 December 1980, which required him to be present at his post in the Joint Research Centre ("JRC") establishment at Ispra;

2. annulment of a decision notified to him by letter dated 12 January 1981 informing him that his remuneration would cease to be paid as from 1 January 1981;

3. payment of the arrears of remuneration due, or BFR 1 000 000, and interest;

4. annulment of a decision notified to him by letter of 21 January 1981 (the letter of 12 January appears to be meant) so far as it concerns his request to remain at his home in the Netherlands during his illness;

5. payment of all costs incurred in the course of the proceedings before the Invalidity Committee in 1978, including the fees of his own doctor,

6. costs.

The fifth claim was conceded by the Commission in the course of proceedings and needs no further consideration.

The background to the case can be stated briefly. Mr Geist was appointed as a Scientific Officer by the Commission in 1962. In 1967, after the disbanding of the research group which he then headed, he seems to have performed a number of other duties. In 1975 he was posted to the JRC establishment at Ispra with effect from 1 March 1976. He brought an action before the Court challenging the posting. His claim for annulment was dismissed (see Case 61/76 *Geist* v *Commission* [1977] ECR 1419). He was on holiday from 1 to 7 March 1976 but worked at Ispra from 8 March to 22 June. Thereafter he was absent from work on grounds of ill-health. The period from 22 June 1976 to 31 August 1978 is covered by medical certificates but after the latter date Mr Geist did not produce a document which the Commission's Medical Service accepted as constituting a medical certificate of his incapacity to work. In September 1977 the administration at Ispra referred the matter to the Invalidity Committee under Article 59(3) of the Staff Regulations and the Committee produced a report dated 26 July 1978 in which it found that Mr Geist was capable of performing his duties at Ispra. Mr Geist, nonetheless, did not return to his post.

In December 1979 and January 1980 he was offered two posts in Brussels, attached to DG XII. In response to the first offer, he wrote to the Commission's mediator on 10 January 1980 explaining that he was surprised at the proposal made because it related to an area with which he was totally unacquainted whereas he was perfectly qualified for a post in another directorate of DG XII dealing with nuclear energy. The letter ends with a request that a subsequent meeting be postponed to enable the mediator to intervene and give Mr Schuster, the Director-General of DG XII, time to reflect. As a result of this, the second offer was made, that of a post in Directorate D "Research, Development and Nuclear Policy". In the application commencing proceedings, it is said that this offer was accepted by Mr Geist in a letter to the mediator dated 9 March 1980. What appears to have happened is this. At the time of the offer there were several meetings between Mr Geist and Mr Schuster and his colleagues. On 14 February Mr Geist suggested to Mr Schuster a number of scientific matters which needed to be studied. Mr Schuster wrote to Mr Geist on 21 February 1980 indicating that he could not offer him a post which met his desires. By letter of 3 March 1980 Mr Schuster explained that he had no intention of extending the activities of his directorate-general to cover the field of molten-salt reactors and, to his regret, saw no necessity of a further meeting with Mr Geist. In the letter of 9 March, Mr Geist writes that he is disposed to accept the post in so far as it is appropriate for a person of his qualifications, experience, ability, level of responsibility, age and seniority.

In November 1980 Mr Geist was examined by a Doctor De Geyter, an expert consulted at the time the 1977 Invalidity Committee had made its report, apparently at the request of the head of the Commission's Medical Service. On 15 November Doctor De Geyter wrote to the latter saying that the conclusions reached by the Invalidity Committee in 1978 were still valid and that Mr Geist's absence from work was not attributable to any medical reasons. Following this the head of the Commission's Medical Service discussed the matter with the head of the Medical Service at Ispra and, on 25 November, wrote to Mr Villani, the Director-General of the JRC, to say that they were of the same opinion as Doctor De Geyter. By letter of 5 December 1980 Mr Villani wrote to Mr Geist requiring him to take up his post at Ispra immediately. On 14 December Mr Geist's own doctor wrote to the Head of the Medical Service at Ispra to say that, on his advice, Mr Geist would not be taking up his post there.

It seems that, on 15 December, Mr Geist wrote to the Establishment Director at Ispra to the same effect. By letter dated 22 December he applied for permission under Article 60 of the Staff Regulations to spend his sick leave at his residence in the Netherlands rather than at Ispra, the place of his employment. Power to grant such permission is exercised by the Establishment Director at Ispra but may be delegated to the Head of the Personnel and Administration Division. By letter of 12 January 1981 the latter

informed Mr Geist, apparently after consulting Mr Villani, that his doctor's letter was not considered to be sufficient to justify him ceasing work and that instructions had been given for the payment of his salary to be stopped under Article 60. By letter dated 11 February 1981, received by the Commission on 13 February, Mr Geist submitted a complaint under Article 90 of the Staff Regulations which the Commission rejected by a letter dated 27 July. The application commencing proceedings was lodged on 3 November. It is not stated in the pleadings when the letter of 28 July was received by Mr Geist but there is no reason to doubt that the application was lodged in time.

The first claim made on behalf of Mr Geist is that the decision requiring him to take up his post at Ispra is unlawful and should be annulled because

1. it is based on facts and matters which are wrong or inexact; and

2. once the Commission had decided to look for a post for Mr Geist outside the JRC, it was bound by Article 24 of the Staff Regulations not to act arbitrarily towards him and Mr Geist had a legitimate expectation that it would not do so; it should therefore have carried out its promises and could not reproach Mr Geist for not going to Ispra as long as it had not done so.

The errors of fact relied on are that the letter of 5 December 1980 wrongly states that Mr Geist refused the posts offered to him in December 1979 and January 1980 and wrongly suggests that he showed a lack of interest, goodwill and realism.

Neither argument can be sustained. Mr Geist had been lawfully posted to Ispra. Article 55 of the Staff Regulations provides that "Officials in active employment shall at all times be at the disposal of their institution",

and Article 60 states that

"except in case of sickness or accident, an official may not be absent without prior permission from his immediate superior".

None of the alleged errors of fact in the decision affect the applicability of these provisions. Mr Geist's second argument, in essence, is that, by the conduct of the Commission through certain of its officials, he was led to believe that he would not be required to go to Ispra but would instead be given a position elsewhere. Put in the terms of the Staff Regulations, his point is that the conduct of the Commission towards him amounted to implied permission to absent himself from his post at Ispra.

Even if, which I doubt, this were so, the decision can be annulled only if it can be said that such permission was irrevocable. There is nothing in the documents before the Court which could have led Mr Geist to believe that it was. Moreover, while a certain measure of discretion is implied in the granting of permission under Article 60, account must nevertheless be taken of the interests of the service and this, in my view, excludes the possibility of

permission being irrevocable: otherwise, permission given when the interests of the service allowed it could not be withdrawn if there were a change of circumstances which made it no longer convenient for the official to be absent from his post. Mr Geist could, therefore, have had no legitimate expectation that any implied assent to his absence from Ispra would continue indefinitely.

In addition, while the Commission may, having regard to Mr Geist's personal circumstances, be under a duty to assist him by taking reasonable steps to find another assignment for him, it is under no obligation to find a post which meets every one of his personal requirements or to permit him to be absent from his post indefinitely while alternative solutions are being sought. In consequence, it cannot be said that the Commission, in the person of Mr Villani, acted unlawfully in instructing Mr Geist to return to Ispra.

Moreover, it seems to me that, on all the facts shown, and not least in the light of the difficulties about the posts offered to him which Mr Geist introduced, the Commission was entitled to proceed no further with the offers of work it made in December 1979 and January 1980.

If the Commission had behaved unreasonably in regard to his reassignment, he could have submitted a complaint against it: indeed the complaint of 11 February 1981 did contain a claim made against the Commission's alleged failure to perform its promise to transfer Mr Geist to a post outside Ispra but no such claim was included in the application commencing proceedings before the Court. In the reply it was argued that any decision concerning the post offered in January 1980 should have been made by the appointing authority and not by Mr Schuster. This may be a ground for challenging the Commission's apparent refusal to consider Mr Geist's acceptance of the post, contained in the letter to the mediator of 9 March 1980, but such a claim is quite distinct from a claim for the annulment of the decision ordering Mr Geist back to Ispra.

The second claim made is for the annulment of the decision to halt the payment of his salary. The grounds relied on are:

1. the decision contained in the letter of 12 January 1981 was not made by a person with authority to make it;

2. the decision contravened Article 59 (1) and (3) of the Staff Regulations; and

3. the decision contravened the second paragraph of Article 60 of the Staff Regulations.

The first ground is based on the fact that, in the letter of 12 January 1981, the Head of the Personnel and Administration Division at Ispra says that he has given instructions for stopping the payment of Mr Geist's salary pursuant to the first paragraph of Article 60. This provides: "any unauthorized absence which is duly established shall be deducted from the annual leave of the

official concerned. If he has used up his annual leave, he shall forfeit his remuneration for an equivalent period." At the material time, the persons in the JRC authorized to exercise the powers conferred on the appointing authority by the Staff Regulations were defined by a decision of the Director-General of the JRC dated 20 November 1979. Article 2 provides that the powers conferred by the Staff Regulations on the appointing authority are, so far as concerns staff assigned to the JRC establishments, exercised under the conditions laid down in Annex I. Article 2 goes on to say that the Establishment Director at Ispra may delegate his powers over staff assigned to that establishment under the conditions set out in Annex II. Neither annex mentions the first paragraph of Article 60 although it is provided in Annex I that the power to give permission, pursuant to the second paragraph of Article 60, for an official to spend his leave other than at the place where he is employed, is to be exercised by the Establishment Director at Ispra so far as officials in grades A 3 to A 8 are concerned and, in Annex II, it is said that this power may be delegated to the Site Director and the Head of the Personnel and Administration Division.

The reason for this appears to be that the text of Article 60 mentions the appointing authority only in connection with the permission required by an official who wishes to spend his leave other than at the place where he is employed; the first sentence of Article 60 says that the official's immediate superior is entitled to give him leave of absence but no person or body is specified as having the power to deduct a period of unauthorized absence from the official's annual leave and to withhold the official's remuneration, pursuant to the second and third sentences of the first paragraph. The decision of 20 November 1979 has in consequence no application because it was made under Article 2 of the Staff Regulations and therefore applies only in the case of powers conferred on the appointing authority.

The drafting of the second and third sentences of the first paragraph of Article 60 suggests that this part of the Article applies automatically, without the need for a decision of the appointing authority or any other designated person. To put it more correctly, deduction of a period of unauthorized absence from the official's annual leave and forfeiture of the official's remuneration are consequences flowing from the combined effect of the official's own act and the mandatory terms of Article 60. This does not mean that the official concerned cannot submit a complaint against the act of the administration which implements Article 60 by, as in this case, halting the payment of his remuneration; it does, however, mean that the official cannot rely on the decision determining who shall exercise the powers conferred by the Staff Regulations on the appointing authority in order to show that the act was made by a person lacking the power to make it. For these reasons, the first argument must be rejected.

The second argument is, in substance, that his absence was not unauthorized

because he was on sick leave. Article 59 (1) of the Staff Regulations states:

"An official who provides evidence of incapacity to perform his duties because of sickness or accident shall automatically be entitled to sick leave. The official concerned shall notify his institution of his incapacity, as soon as possible and at the same time state his present address. He shall produce a medical certificate if he is absent for more than three days. He may be required to undergo a medical examination arranged by the institution."

It appears to be said in the written pleadings that every certificate produced by a doctor which affirms that his patient is incapable of performing his duties constitutes a medical certificate within the meaning of Article 59 (1) and the Commission was wrong to discount those produced by Mr Geist's doctor. Alternatively it is said that the certificates produced were not merely adequate, but ones which could not be seriously challenged or rejected. If the Commission's Medical Service had had doubts about the accuracy of his diagnosis, it should have arranged for Mr Geist to undergo a medical examination and, in case of dispute, referred the matter to the Invalidity Committee under Article 59 (3).

Sick leave is granted automatically under Article 59 (1) only if the official produces evidence of incapacity to perform his duties. As Mr Advocate General Mayras pointed out in Cases 42 and 62/74 *Vellozzi* v *Commission* [1975] ECR 871 at p. 887, a medical certificate does not constitute conclusive proof of incapacity, even where it states that the official is unfit to work, if it ascribes incapacity to a complaint which an Invalidity Committee has already considered and found not to make the official incapable of performing his duties. In such circumstances, the official must produce better evidence.

Mr Geist has relied on three medical certificates dated 13 November 1980, 14 December 1980 and 27 February 1981, all emanating from his doctor, Doctor Willeboordse. The first is a letter to Doctor De Geyter and in it Doctor Willeboordse states that he is in agreement with the medical opinions given earlier by three other doctors (two of whom had been members of the Invalidity Committee which had found Mr Geist to be capable of performing his duties in 1978); Mr Geist is in perfect mental and physical health and is capable of performing his duties. But not in Ispra. The working conditions there are frustrating and do not correspond to his qualifications, experience, ability, responsibilities, age and seniority. Such conditions may, it is said, cause undesirable reactions. The second certificate simply says that Mr Geist is not fit to work at Ispra and that the signatory thinks it best if he does not go there. No reasons are given. It is suggested that Doctor De Geyter be approached for further information. This certificate was not considered by the Commission to justify sick leave because, according to Doctor De Geyter, Mr Geist was not absent from work for medical reasons. The third certificate is similar to the second: reference is also made to the situation which had been in existence since 1966 and to the letter of 13 November 1980.

In my opinion the Commission was entitled to take the view that none of

these documents constituted adequate proof that Mr Geist was incapable of performing his duties. They are wholly lacking in detail or sufficient explanation. The furthest they go is to suggest that conditions at Ispra are likely to affect his health adversely. Even the statement in the certificate of 14 December that Mr Geist is incapable of working at Ispra is insufficient to justify sick leave when read in the light of the letter of 13 November and the information given by Doctor De Geyter. Furthermore, none of the medical opinions given at this time shows that Mr Geist's condition was worse than or different from his previous condition: in his letter to the head of the Commission's Medical Service, dated 15 November 1980, Doctor De Geyter was able to say that the opinion of the Invalidity Committee, given in 1978, remained valid. Counsel for Mr Geist sought to weaken the force of Doctor De Geyter's assessment by alleging that the examination of Mr Geist which he carried out on 6 November 1980 was inadequate because it was hurried and superficial. I am not persuaded that that was so but, in any event, it still does not make the statements of Doctor Willeboordse any more convincing of Mr Geist's incapacity.

A number of medical opinions or certificates were submitted to the Commission in the course of 1981 and 1982. The earliest of these is dated 15 October 1981, i.e. eight months after the submission of the complaint and less than three weeks before the commencement of proceedings before the Court. It says that the signatory has the "impression" that Mr Geist suffers from a condition making it impossible for him to establish himself at Ispra. The Commission's Medical Service rejected this because it was not in the form of a certificate of incapacity and because it only gave the signatory's "impression". The Commission wrote asking why Mr Geist's state of health made it impossible for him to perform his functions at Ispra rather than elsewhere. No reply was received even though the request for further information was repeated in a letter of 9 December 1981. The Commission's Medical Service seem to have taken the view that Mr Geist's doctors did not feel sufficiently sure of their diagnosis to certify it in formal terms.

Since the evidence produced by or on behalf of Mr Geist was not *ex facie* evidence of incapacity to perform his duties, the Commission was not, in my view, required to refer the matter to the Invalidity Committee under Article 59 (3): this is only necessary where there is a difference of opinion concerning the official's state of health. Here no dispute could arise because no evidence of incapacity was ever produced. It remains to be seen whether such evidence was produced subsequently.

Doctor Willeboordse wrote to the Commission by letter of 23 May 1982 protesting that the course of proceedings was subjecting Mr Geist to nervous strain which might cause severe physical and mental injury; in the circumstances it was impossible for him to work at Ispra or elsewhere. The Commission's Medical Service rejected this because it did not consitute a diagnosis and the alleged incapacity to work (whose date and duration were not specified) could not be dependent on the dispute over the

administrative procedures then taking their course. This appears to be an allusion to the disciplinary proceedings which had been commenced and also to the referral of the matter to the Invalidity Committee under Article 59 (3), of which Mr Geist had been informed by letter dated 19 April 1982. By letter of 14 June 1982 the Commission's Medical Service told Doctor Willeboordse that his letter could not be considered a formal certificate authorizing Mr Geist to cease work because it gave no details of the dates, probable duration and the condition in question. Doctor Willeboordse was asked to complete and sign a form enclosed in the letter but he does not appear to have done so. Instead, on 9 August 1982, he wrote another letter to the Commission confirming that Mr Geist could not be considered capable of working under the then existing conditions for an indeterminate period beginning in 1980. No other information was given. By letter of 17 October he informed the Commission that Mr Geist was suffering from a state of exhaustion rendering him incapable of going to Ispra; he was subjected to severe mental strain which made it impossible for him to perform his duties efficiently.

The Invalidity Committee delivered a report dated 25 October at Ispra in which it found that Mr Geist was fit to perform his duties. The report also states that the Commission could reasonably expect that Mr Geist's assignment to Ispra would bring about a deterioration in his health. On 4 January 1983 the Commission wrote to the Committee saying that, in the absence of any opinion to the contrary, the medical certificates produced by Mr Geist would be considered insufficient to justify his absence from work since 5 December 1980. The Invalidity Committee then produced a second report on 31 January 1983 in which it confirmed its previous opinion and said (though the doctor nominated by Mr Geist refused to sign this part of the report) that it considered that the medical certificates declaring Mr Geist to be in a good state of health were not such as to justify his absence from work from May 1980 to the date of the second report. Even so, the Committee added in both the October and the January reports, that the certificates did confirm the existence of a psychological incompatibility with the posting to Ispra and in effect recommended that a post should be found for Mr Geist elsewhere. At the hearing counsel for Mr Geist challenged the lawfulness of the Committee's second report.

Given the circumstances, the Commission was, in my view, justified in concluding that Mr Geist did not produce evidence of incapacity to perform his duties, because of sickness or accident, entitling him to automatic sick leave. Counsel for Mr Geist placed great weight on the similar terms used in the opinions and certificates drawn up before and after 1978, arguing that, if the Commission was prepared to accept the certificates produced before then, it had no ground for rejecting those produced afterwards. The similarity of these certificates is, however, the crucial point. Once the first Invalidity Committee had found that Mr Geist was fit to perform

his duties in 1978, certificates evidencing that he was still suffering from the same condition as at the time of its report could be rejected as evidence of incapacity unless they established a marked deterioration. They did not and Mr Geist's continued fitness for his work was confirmed by the report of the second Invalidity Committee.

So far as can be seen, the fact was that Mr Geist was not incapable of performing his duties although he was suffering from a depressive condition which would probably have worsened if he went to work at Ispra. In Cases 58 and 75/72 *Perinciolo* v *Council* [1973] ECR 511 the Court held:

"When an official considers that the post to which he has been appointed is not suitable for him due to his state of health, he is obviously entitled to request another assignment but while awaiting such a transfer he is still obliged to present himself at his post and perform the duties pertaining thereto. In any event, it cannot be admitted that in such circumstances the official may take the law into his own hands by considering that the submission of medical certificates dispenses him from appearing at his employment and allows him to absent himself while awaiting the offer of a post which he considers suitable." (Paragraphs 15 to 16 of the judgment.)

If an official is not, apparently, to be permitted to escape the occurrence or aggravation of illness by avoiding the circumstances which may be its cause, harsh results could in some cases follow. However, the provision of the Staff Regulations under consideration is that granting an official sick leave *automatically* and such a provision is, understandably, subject to strict conditions which, in this case, were not, in my opinion, complied with. An official may also take leave under Article 59 (2) if the institution's medical officer so requires after examining his state of health. If need be, had he gone to Ispra, he could have been granted sick leave under this provision. Instead, Mr Geist chose to absent himself from his place of work and his decision to do so, however understandable in the light of the family problems he has had to face, has been the cause of many of the difficulties in this case.

The third argument relied on is that the Commission acted unlawfully in refusing to permit Mr Geist to remain in the Netherlands during his illness. The decision contained in the letter of 12 January 1981 appears to have been made in response to a request from Mr Geist to spend his sick leave other than at his place of employment, pursuant to the second paragraph of Article 60 of the Staff Regulations. (I observe in passing that the English version refers simply to "leave" but the other language versions make clear that "sick leave" is meant.) Permission had been given before, and, it is said, Mr Geist was entitled to consider that, since his condition had not changed, he would not be required to go to Ispra. This argument must be rejected. The fact that permission had been given before does not lead to the conclusion

that the appointing authority's discretion under the second paragraph of Article 60 was fettered for the indefinite future. At the time Mr Geist's request was considered and rejected, the appointing authority was in possession of a medical opinion from Doctor De Geyter which indicated that the findings of the first Invalidity Committee were still valid. As has been seen, the medical certificates produced by Mr Geist at that time did not consitute adequate proof of incapacity entitling him to automatic sick leave. In consequence, he was not on sick leave and there was no ground for the appointing authority to act under the second paragraph of Article 60.

At the hearing counsel for Mr Geist submitted to the Court certain documents and his written comments on evidence which had been produced by the Commission pursuant to a request made by the Court after the close of the written procedure. Article 45 (4) of the Rules of Procedure provides that evidence may be submitted in rebuttal of evidence elicited by a measure of inquiry ordered by the Court. On the other hand, unless the Court asks the parties for their written observations under Article 54 of the Rules of Procedure, which it did not in this case, the proper time for making *observations* on evidence produced after the close of the written procedure is at the hearing, where the parties, in principle, present oral but not written submissions. This does not, in my opinion, mean that, in this case, the Court should reject Mr Geist's written comments as inadmissible for this reason. However, they also introduced two additional claims, for the annulment of the report of the second Invalidity Committee, dated 31 January 1983, and the hearing of evidence from certain named persons.

The former is clearly inadmissible. The relief sought in an action is defined in the application commencing proceedings and a substantial change which is made at a later stage, such as the addition of an alternative claim, is inadmissible (see, for example, Case 17/68 *Reinarz* v *Commission* [1969] ECR 61 at paras. 46 to 48 of the judgment). The latter claim is in part a repetition of a request made in the reply. To that extent it has already been considered and rejected by the Court. Nothing has happened since which makes it in my view either necessary or appropriate for deciding this case to hear the testimony of the persons named.

In the result, it is my opinion that, for the reasons I have given,

1. no order should be made in respect of the fifth claim;

2. the remaining claims should be dismissed;

3. each party should bear its own costs.

Two points in this case in my view justify further comment.

(a) The documents have come in piecemeal, some appear more than once and they are scattered throughout a substantial dossier in a way which protracts the tasks of following them and getting an overall picture. It seems to me that in future cases of this kind it would greatly assist the Court if the defendant, in agreement with the applicant, could prepare a bundle of the relevant documents in chronological, or at least in some, order.

(b) Even though this claim in my view fails, it is satisfactory, in the light of the Committee's and the doctor's comments, and of the obvious difficulties the applicant has had and does feel about working at Ispra, that even late in 1982 efforts were being made to find suitable employment. It is hoped that both sides will look at the position to try to find a solution rather than further difficulties.