ORDER OF THE COURT (Third Chamber)
30 April 2002 *

In Case C-181/01 P,

N, an official of the Commission of the European Communities, residing in Brussels (Belgium), represented by G. Durazzo, avvocato,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities in Case T-2/00 *N* v *Commission* [2001] ECR-SC I-A-37 and II-135, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by J. Currall, acting as Agent, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: French.

THE COURT (Third Chamber),

composed of: F. Macken, President of the Chamber, C. Gulmann (Rapporteur) and J.-P. Puissochet, Judges,

Advocate General: L.A. Geelhoed,
Registrar: R. Grass,

after hearing the Advocate General,

makes the following

Order

1 By application lodged at the Court Registry on 25 April 2001, N brought an appeal under Article 49 of the EC Statute of the Court of Justice and the corresponding provisions of the ECSC and the EAEC Statutes of the Court of Justice against the judgment of the Court of First Instance in Case T-2/00 *N* v *Commission* [2001] ECR-SC I-A-37 and II-135 ('the contested judgment'), by which the Court of First Instance dismissed his action for annulment of the Commission's decision refusing to treat as an accident, within the meaning of Article 73 of the Staff Regulations of Officials of the European Communities (the 'Staff Regulations') and Article 2 of the Rules on the Insurance of Officials of the European Communities against the risk of Accident and Occupational Disease (the 'Accident Rules'), his infection by the human immunodeficiency virus ('HIV') and secondly, damages for moral injury.

Facts and background to the proceedings

2 The facts and background to the proceedings are set out in paragraphs 10 to 30 of the contested judgment:

'10 The applicant, an official of the Commission, informed the administration by letter of 9 February 1996 that recent medical examinations showed that he had been infected by the human immunodeficiency virus (HIV). He included with the letter an accident declaration dated 6 February 1996 and a medical certificate from Dr Vandercam.

11 In that letter, considering that his infection should be treated as an accident within the meaning of Article 2 of the Accident Rules, he requested that the provisions of Article 73 of the Staff Regulations be applied and that pursuant to Article 10 of the Accident Rules his medical costs be reimbursed at 100 per cent, or, until the accidental nature of his illness was recognised, that he be reimbursed on the basis of the provisions of the first subparagraph of Article 72(1) of the Staff Regulations relating to serious illnesses.

...

16 By a decision of 4 June 1996 he was granted reimbursement of his medical expenses at 100 per cent under Article 72(1) of the Staff Regulations.

17 By letter of 17 June 1996 the Head of Unit IX.B.5 (Unit 5, Sickness and Accident Insurance, of Directorate B, Rights and Obligations, of the Directorate General for Personnel and Administration (DG IX) of the Commission) informed him that his application concerning Article 73 of the Staff Regulations could not be granted.

18 On 29 August 1996 the applicant made a complaint against that decision.

19 By letter of 7 November 1996 the appointing authority informed him that the decision of 17 June 1996 had been set aside.... It also mentioned that a draft decision concerning the possible recognition of the accidental origin of the event in question would be notified to him, and in those circumstances the complaint that he had made now had no purpose.

20 A draft decision refusing to treat the applicant's HIV infection as an accident within the meaning of Article 73 of the Staff Regulations and the Accident Rules was sent to him on 18 November 1996. It was based on the opinion of Dr Dalem dated 18 October 1996.

...

22 By letter of 10 January 1997, the applicant requested that the Medical Committee be consulted.

...

24 The Medical Committee's report dated 4 December 1998 states inter alia as follows:

"Given that these were sexual relations between consenting adults engaging in behaviour known to carry the risk of HIV infection, even though the infection could have been the result of a condom failure during passive sexual relations in February 1995, two members of the Medical Committee consider that from a medical point of view that infection cannot be considered to be an 'accident' for the following reasons:

— a consensual sexual act cannot be regarded as an 'occurrence or external factor of a sudden, violent or abnormal nature adversely affecting an official's bodily or mental health'. Where the issue is the sexual transmission of pathogens, only rape comes into that category;

— since [the applicant] had had other sexual partners during the same period, it is impossible, even if a condom was used, to be sure that the disease does in fact result from (and only from) the sexual contact with the partner in question. Another condom failure (which went unnoticed or was not reported by the patient) could have occurred on another occasion and led to his infection.

In order to link the infection to the incident in question, it would have been necessary, in the hours that followed, to test for HIV (the result of which would have to be negative) and then to check at regular intervals for a minimum of three months for the appearance of seropositivity. That is the procedure applied in the case of accidental contamination by needle.

Since the relationship of cause and effect between the incident in question and the infection [by] HIV cannot be established with certainty it is *a fortiori* impossible to treat this incident as an 'accident'."

25 In conclusion, the Medical Committee found:

"After hearing [the applicant] and having examined all the documents before it,... including the copies of the various medical reports and letters to his doctor, the Medical Committee takes the view by a majority of two members out of three (Prof. N. Clumeck and Dr J. Dalem) that the HIV (-related) illness suffered by the applicant cannot be treated as an 'accident'. It is an incident pertaining to the applicant's private life, which took place during sexual relations between consenting adults, of the same type as the other sexually-transmitted diseases the patient has had in the past.

One member of the Committee (Dr P. Joppart) considers that the infection [by HIV] is well within the definition of an accident and arose from a sudden, abnormal external factor adversely affecting [the applicant's] bodily or mental health."

...

28 By letter of 15 March 1999, the AIPN notified the applicant of its decision to treat as final its draft decision of 18 November 1996 (the "contested decision"). The opinion of the Medical Committee was attached to the letter together with a copy of its report in full.

29 On 10 June 1999, the applicant lodged a complaint against the contested decision under Article 90(2) of the Staff Regulations. On 15 June 1999 his legal advisers lodged a complaint on his behalf. The Commission took the view that the complaint of 15 June 1999 supplemented that made on 10 June 1999.

30 An interdepartmental meeting took place on 22 September 1999. The complaint was rejected by a decision communicated to the applicant on 7 January 2000.'

The contested judgment

3 By application lodged at the Registry of the Court of First Instance on 10 January 2000, N requested, *inter alia*, that the contested decision be annulled and that the Commission be ordered to reimburse the medical expenses that he had incurred as a result of that decision and to pay damages for non-physical injury.

4 At paragraphs 36 to 70 of the contested judgment, the Court of First Instance dismissed the action to have the contested decision set aside, *inter alia* for the following reasons:

'36 The applicant relies, in support of his application, on a single plea, infringement of Article 2 of the Accident Rules. The plea is divided into three parts, alleging (i) error of law in relation to the required causal link between the event giving rise to the damage and the external factor responsible, (ii) error of law in relation to the definition of the criteria for an accident and (iii) manifest error of assessment in its application of the criteria

for an accident. The parties also made observations as to how the Medical Committee's report was to be interpreted.

...

The sole plea of infringement of Article 2 of the Accident Rules

45 Before dealing with the various parts of the plea put forward by the applicant, the interpretation of the Medical Committee's report must be considered.

46 The applicant claims, essentially, that the accident he suffered was the condom failure which occurred in the course of sexual relations in February 1995 and which resulted in his coming into contact with the HIV-infected sperm or blood. In that respect he asserts that, in its report, the Medical Committee did in fact consider his infection to be the result of condom failure, whether or not the one that occurred in February 1995.

47 It must be noted that the Medical Committee's report on the circumstances leading to the applicant's infection includes the following remarks:

"[The applicant] puts the date of the incident when he was infected by HIV as the beginning of 1995 (probably in February) when, during a passive sexual encounter with a casual partner, the condom broke. In the same period the

patient mentions sexual encounters, active, passive and oral, with other casual partners. He did not use condoms systematically for oral sex."

48 This information was gathered by the Medical Committee during a meeting on 11 August 1998 at which the applicant gave evidence as to the precise circumstances leading to his infection. In this regard, the Court of First Instance considers that there are no grounds on which to allow the applicant's request to adduce evidence, in particular witness evidence, to show that after the hearing and after receiving his explanation as to the circumstances leading to the infection, the Medical Committee failed to take account of the fact that his accident declaration had been incomplete.

49 The Medical Committee's report also mentions the following:

"Given that these were sexual relations between consenting adults engaging in behaviour which is known to carry a risk of HIV infection, even though the infection could have been the result of a condom failure during passive sexual relations in February 1995, two members of the Medical Committee consider that from a medical point of view that infection cannot be considered to be an 'accident' for the following reasons:

...

— since [the applicant] had had other sexual partners during the same period, it is impossible, even if a condom was used, to be sure that the disease does in fact result from (and only from) the sexual contact with

the partner in question. Another condom failure (which went unnoticed or was not reported by the patient) could have occurred on another occasion and could have led to the infection."

50 It is clear from those passages that, contrary to the applicant's assertion, the Medical Committee did not consider that only condom failure could have been the cause of the infection; it merely considered that to be a possible cause.

51 Whilst the Medical Commitee mentions, in response to the applicant's account of the circumstances of his infection according to which the condom failure occurred in February 1995, the possibility that another failure could have occurred during other sexual relations, the fact remains that, according to the Medical Committee and given the applicant's sexual history, the precise circumstances of his infection cannot be determined.

52 Since the Medical Committee was unable to establish that an accident had been the cause of the applicant's infection, the Commission was justified in confirming the Committee's legal assessment, which was that "since the relationship of cause and effect between the incident in question and the infection [by] HIV cannot be established with certainty, it is *a fortiori* impossible to treat this incident as an 'accident'".

The first part of the plea, alleging error of law as to the necessary causal link

53 The applicant argues that, since the Medical Committee held that the infection arose from a condom failure, it was unnecessary to identify precisely during which sexual relations that occurred.

54 However, it was noted above that the Medical Committee did not conclude that his infection necessarily arose as a result of a condom failure.

55 Since the premiss on which he founds his complaint is wrong, the first part of the plea is invalid.

56 The first part of the plea must therefore be dismissed.

The second part of the plea, alleging error of law as to the criteria for an accident

57 The applicant argues that the notions of assumed risk and negligence in Articles 4 and 7 of the Accident Rules fall outside the definition of accident in Article 2(1) of those Rules, and that consequently the Medical Committee ought not to have applied them in this case.

58 It should be recalled that the Medical Committee also refers in its report to the fact that at issue in these proceedings are "sexual relations between consenting adults engaging in behaviour known to carry the risk of HIV infection" and confirms that a "consensual sexual act" cannot be regarded as an accident (see paragraph 24 above).

59 It is true that, as the applicant alleges, the terms acceptance of risk or negligence are not used in the definition of an accident in Article 2(1) of the Accident Rules. Therefore their application to a particular case cannot preclude an event or external factor from being classed as an accident, but could only serve to exclude an accident within the meaning of the Accident Rules laid down by Article 73 of the Staff Regulations.

60 However, it must be remembered that since the Medical Committee held that the exact circumstances of the applicant's infection could not be determined, in the absence of an identifiable accident the question of "at risk" behaviour or recklessness by the applicant is immaterial. Consequently, the applicant's argument is not relevant.

61 In any event, in using the expressions "assumed risk" and "consensual sexual act" the Medical Committee was making a general assessment which merely emphasised the voluntary nature of the sexual relations referred to by the applicant.

62 The second part of the plea must, consequently, be dismissed.

Third part of the plea, alleging manifest error of assessment in the application of the criteria for an accident

63 The applicant pleads in the main that his infection during sexual relations during which a condom broke is an accident within the meaning of Article 2(1) of the Accident Rules. During the hearing, he nevertheless argued

that the condom failure could not in itself be treated as an accident within the meaning of Article 2(1) of the Accident Rules. It was the condom failure together with the infection which constituted the accident.

64 As has been pointed out above, the Medical Committee noted that it was impossible to conclude that the applicant's infection was necessarily the result of a condom failure.

65 Therefore, it cannot validly be argued that the condom failure during sexual relations meets the requirements for an accident laid down in Article 2(1) of the Accident Rules.'

5 In addition, in paragraphs 71 to 80 of the contested judgment, the Court of First Instance dismissed the applicant's request for damages.

The appeal

6 In the appeal, in which the appellant relies on four grounds, N asks the Court to set aside the contested judgment and to grant the relief sought at first instance.

7 The Commission asks the Court to dismiss the appeal and to order N to pay the costs in full.

8 It should be recalled at the outset that under Article 119 of the Rules of Procedure, the Court may at any time dismiss an appeal by reasoned order where it is clearly inadmissible or clearly unfounded.

The first ground

9 In the first part of the first ground of appeal, N argues that, in the light of the documents before it, the Court of First Instance's interpretation of the Medical Committee's report at paragraphs 50 to 52 of the contested judgment is manifestly flawed, with materially inaccurate findings which distort the contents of the report. Contrary to the statements of the Court of First Instance, it is clear from the Medical Committee's report that it excluded all causes of infection other than condom failure, whether the one notified by N or another, hypothetical, one mentioned by the Committee.

10 In this respect, it must be recalled that, at paragraphs 45 to 52 of the contested judgment, the Court of First Instance interpreted the Medical Committee's report in order, *inter alia*, to examine the appellant's argument that the Commission had in fact held that his infection resulted from condom failure, whether or not this occurred in February 1995.

11 The Court of First Instance interpreted that report as meaning that

— the Medical Committee merely envisaged condom failure as one of the possible causes of the infection, and that

— according to the Committee, given the appellant's sexual history, the precise circumstances of the infection during sexual relations cannot be determined.

12 The Court of First Instance can certainly not be accused of having distorted the contents of the report by interpreting the relevant paragraphs in the Medical Committee's report (cited at paragraphs 47 and 49 of the contested judgment) in this way.

13 It follows that the first part of the first ground of appeal must be dismissed as clearly unfounded.

14 In the second part of the first ground of appeal, N argues that the Medical Committee should have considered the relative risks of infection as between oral and penetrative sexual relations during which a condom broke. The Committee's report cannot be regarded as establishing a comprehensible link between the medical findings and its conclusions, as is required by the case-law of the Court.

15 It must be observed that that plea, in so far as it criticises the Medical Committee's report, was not put forward by the appellant at first instance and is therefore a plea relied on for the first time on appeal.

16 The Court has consistently held that, under Articles 113(2) and 116(2) of the Rules of Procedure of the Court of Justice, fresh submissions, not contained in the original application, cannot be raised in an appeal (see, *inter alia*, Joined Cases C-280/99 P to C-282/99 P *Moccia Irme and Others* v *Commission* [2001] ECR I-4717, paragraph 67).

17 Accordingly, the second part of the first ground of appeal is inadmissible.

The second ground

18 In the second ground of appeal, the appellant challenges the interpretation given by the Court of First Instance at paragraphs 57 to 62 of the contested judgment of the term accident for the purposes of Article 2(1) of the Accident Rules.

19 He claims that it follows from those paragraphs that if the Court of First Instance had held, as it ought to have, that the accident at the origin of the infection was identified by the Medical Committee's report, it would have had to hold that the fact that he had voluntarily engaged in sexual relations involving risk was a reason to exclude him from insurance cover. Such an interpretation cannot be based on either Article 4 or Article 7 of the Accident Rules, which both lay down exceptions to the cover provided for in Article 73 of the Staff Regulations.

20 In this respect, it must be observed first that that ground of appeal presupposes that the first ground of the appeal has been upheld. That is not the case.

21 Secondly, the plea is based on a reading of the contested judgment which is manifestly flawed. At paragraph 59, the Court of First Instance adopted the appellant's argument, declaring that 'acceptance of risk' and 'negligence' are not used in the definition of accident in Article 2(1) of the Accident Rules and that their application to a particular case could not therefore preclude an event or external factor being treated as an accident, but could only serve to exclude an accident within the meaning of the rules on insurance cover laid down in Article 73 of the Staff Regulations.

22 However, given that the Medical Committee held that the precise circumstances of the infection could not be ascertained, the Court of First Instance was right to hold that whether the appellant had engaged in behaviour which placed him at risk, or had been reckless, was irrelevant. Thus, contrary to the appellant's claim, the Court of First Instance did not rule on the question of whether his behaviour was a reason for exclusion from the cover provided for in Article 73.

23 Consequently, the second ground of appeal must be rejected as clearly unfounded.

The third ground

24 In the third ground of appeal, the appellant argues that the Court of First Instance should have decided whether condom failure was an accident within the meaning of Article 2(1) of the Accident Rules. Referring to the first ground of appeal, according to which the Court of First Instance distorted the conclusions of the Medical Committee, he argues that there is no foundation for the statements made by the Court of First Instance at paragraphs 64 and 65 of the contested judgment to the effect that the argument that condom failure during sexual relations fulfils the test for an accident set out in Article 2(1) of the Accident Rules is invalid.

25 It is sufficient to recall here that, as held at paragraphs 11 and 12 of this order, the Court of First Instance did not distort the Medical Committee's report when it held, at paragraph 51 of the contested judgment, that the precise circumstances of the appellant's infection could not be determined.

26 Therefore the Court of First Instance rightly held that, in view of those circumstances, there was no need to decide whether condom failure met the accident criteria set out in Article 2(1) of the Accident Rules.

27 Consequently, the second ground of appeal must be rejected as clearly unfounded.

The fourth ground

28 In the fourth ground of appeal, the appellant challenges the Court of First Instance's dismissal of his claim for damages. He argues that the conduct of the appointing authority and the irregularities for which it was responsible, if only because of the resulting delay in completing the procedure, have led to more psychological damage and stress than that which would be suffered by a person in perfect health or in proceedings in an ordinary staff case.

29 It is settled case-law that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside, and also the legal arguments specifically advanced in support of the appeal (see, in particular, the order of 11 December 2001 in Case C-301/00 P *Meyer* v *Commission,* not published in the ECR).

30 Since the error of law that the Court of First Instance is alleged to have made in dismissing the claim for damages has not been identified, the appellant has not clearly indicated the contested elements of the judgment which he seeks to have set aside.

31 Therefore the fourth ground of appeal must be dismissed as clearly inadmissible.

32 It follows from all the preceding observations that the appeal must be dismissed in its entirety.

Costs

33 Under Article 69(2) of the Rules of Procedure, applicable to the procedure on appeal by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has asked for costs and the appellant has been unsuccessful in the appeal, he must be ordered to pay the costs.

On those grounds,

THE COURT (Third Chamber)

hereby orders:

1. **The appeal is dismissed.**

2. **N shall bear the costs.**

Luxembourg, 30 April 2002.

R. Grass

Registrar

F. Macken

President of the Third Chamber