OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 18 NOVEMBER 1982

My Lords,

The applicant in this case is a former official of the Council. Between 10 January 1977 and 11 January 1980 he was on sick leave for some 390 days. In consequence, the Council referred his case to the Invalidity Committee, pursuant to the last sentence of Article 59 (1) of the Staff Regulations. In accordance with Article 7 of Annex II thereof, the Committee was composed of one doctor appointed by the Council, one appointed by the applicant and a third appointed by the other two doctors. After examining the applicant, the Committee concluded that his health problems were "principally, if not exclusively" neuro-psychic and arranged for him to be examined by a specialist. On the basis of the specialist's assessment, the Invalidity Committee came to the conclusion that the applicant was suffering from total permanent invalidity preventing him from performing his duties and reported to this effect on 24 November 1980.

The report does not expressly state the cause of this condition. It does, however, refer to the fact that his neurosis reveals itself, *inter alia,* in difficulties in relations with other people, above all in professional relationships "et surtout dans un contexte hiérarchique" the origin of which may perhaps be found in the difficulties between the applicant and his father.

On the basis of the Committee's report, the Council on 28 November 1980 retired the applicant pursuant to Article 53 of the Staff Regulations with effect from 1 December 1980.

The Council's decision was sent to the applicant under cover of a letter which said that he was "obliged to retire early on grounds of ill health" and that he would be entitled to draw an invalidity pension as from 1 December. The amount of the pension is not stated but he would know the basis on which it was calculated when he received the December payment pursuant to Article 14 of Annex VIII to the Staff Regulations.

By letter dated 10 February 1981, the applicant submitted a complaint against the decision, more particularly, against the amount of the invalidity pension which he had been granted. He claimed that the second sentence of Article 78 of the Staff Regulations applied because the deterioration in his state of health was the direct result of difficulties and harassment he had met in the performance of his work and that his pension should be 70 % of his basic salary.

By letter dated 13 July 1981, the Council rejected the complaint on the ground that the Invalidity Committee did not find that the applicant's total permanent invalidity was due to an occupational disease, so that his pension fell under the

third sentence of Article 78 and was accordingly equal to the retirement pension he would have received had he worked until age 65. On 21 September the present application was lodged at the Court. The relief sought is annulment of the Council's decision dated 13 July 1981, refusing to grant the pension on the basis that invalidity arose from an occupational disease.

In the face of this application, the Council referred the matter once more to the Invalidity Committee, which produced two further reports, dated 21 December 1981 and 25 January 1982. The first states that there is a causal connection between the applicant's work or his conditions of work and the worsening of his state of health. The second reveals a difference of opinion between the doctors: two members of the Committee say that the applicant's invalidity does not result from, *inter alia*, an occupational disease; the third member (the doctor nominated by the applicant) says that he is not suffering from a condition mentioned in the list of recognized occupational diseases (MOD 503).

Article 78 of the Staff Regulations provides that an official shall be entitled "in manner provided for in Articles 13 to 16 of Annex VIII to an invalidity pension in the case of total permanent invalidity preventing him from performing the duties corresponding to a post in his career bracket". Where the invalidity arises from, *inter alia* "an occupational disease" the amount is 70% of the basic salary; where it is "due to some other cause", unless deliberately brought about, it is equal to the retirement pension the official would have received had he worked to age 65.

Article 13 of Annex VIII provides: "Subject to the provisions of Article 1 (1) an official aged less than 65 years who at any time during the period in which he is acquiring pension rights is recognized by the Invalidity Committee to be suffering from total permanent invalidity preventing him from performing the duties corresponding to a post in his career bracket, and who is obliged on these grounds to end his services with the Communities shall be entitled, for so long as such incapacity persists, to invalidity pension as provided for in Article 78 of the Staff Regulations. Invalidity pension and retirement pension shall not be paid concurrently."

On behalf of the Council it has been contended that the application is inadmissible because the Invalidity Committee is not competent to decide whether or not the cause of invalidity was an occupational disease; the proper procedure to follow is that set out in the Rules on the Insurance of Officials of the European Communities against the Risk of Accident and of Occupational Disease (hereafter "the Insurance Rules"). Instead of seeking the annulment of the Council's decision, the applicant should therefore have submitted to it a statement specifying the nature of the disease so that the Council could hold an enquiry in order to determine its nature (Article 17 of the Insurance Rules) and, if the applicant asked for it, the matter could have been submitted to the Medical Committee of three doctors. His failure to follow this procedure is fatal to his present claim.

The Insurance Rules were made under Article 73, which is in Chapter 2, "Social

Security Benefits" of Title V of the Staff Regulations: Article 78 is in Chapter 3, "Pensions". The former provides that an official is insured against the risk of occupational disease "subject to rules drawn up by common agreement of the Institutions of the Communities", and the benefits payable under the article may be paid in addition to the benefits provided for in Chapter 3.

A claims procedure is laid down in the Insurance Rules. A claim in respect of an accident must normally be submitted within 10 days of the accident; and in respect of an occupational disease within a reasonable period following the onset of the disease or the date when it was diagnosed (Articles 16 and 17 of the Insurance Rules). Clearly under this procedure the initiative lies with the official, both to make a claim and to ask for a medical committee. It is the appointing authority which takes the decision recognizing the occupational nature of a disease, and assessing the degree of permanent invalidity, on the basis of the doctors' findings or after consulting the medical committee.

Under Article 78 the position is different. It is for the institution to initiate the reference to the Invalidity Committee under Article 59. It is, however, that Committee which has to "recognize" that the official is suffering from total permanent invalidity preventing him from performing his duty (Article 13 of Annex VIII). If the Committee does so the Institution must retire the official under Article 53 of the Staff Regulations.

The time scale is different under the two procedures. Since under Article 78 an official is entitled to payment of a pension the first day of the month following recognition of his permanent incapacity, the institution must decide in a short time whether he is to have 70% of his basic salary or the equivalent of a retirement pension. In the procedure under Article 73, the final decision cannot be made for 60 days following notification of the draft decision unless a medical committee is asked for and its opinion given. It seems to me that it cannot possibly have been intended that a decision under Article 78 should be held up pending the procedure under Article 73.

The procedures are thus different and separate. Article 25 of the Insurance Rules expressly provides that recognition of permanent invalidity under Article 73 and those Rules "in no way prejudice application of Article 78 of the Staff Regulations and vice versa". The Court's judgment in Case 731/79, *B.* v *Parliament* [1981] ECR 107 clearly recognizes the independence of the two procedures. There is no express requirement that an issue arising under one article must be decided by the procedures prescribed for a claim under the other. The question is therefore whether under Article 78 and Annex VIII there is provided a means for deciding the question whether an invalidity arises from an occupational disease.

Article 13 of Annex VIII refers only to recognition by the Invalidity Committee of "total permanent invalidity"

preventing the official from performing his duties. There is no express provision that it shall find whether the invalidity "arises from" e.g. an occupational disease or "is due to some other cause". Such an inquiry involves issues of law as well as fact, but it is essentially a medical question. It seems to me that it must have been intended that doctors rather than the appointing authority should decide this question. If that is right then, in my view, it follows that it is for the Invalidity Committee to decide the cause and not for the medical committee under a separate procedure.

This conclusion is reinforced by Case 29/71, *Vellozzi* v *Commission* [1972] ECR 513, at paragraph 8 of the judgment, where the Court accepted that the Invalidity Committee was competent to determine whether the cause of invalidity was an occupational disease for the purpose of Article 78 of the Staff Regulations. At that time the Insurance Rules had not been adopted. There is no reason to accept that the Invalidity Committee ceased to be competent when those Rules came into force; unlike Article 73, which refers expressly to "rules drawn up by common agreement of the Institutions", Article 78 refers only to Articles 13 to 16 of Annex VIII.

As a result, the Invalidity Committee should, in its first report, have considered and made a finding as to whether the total permanent invalidity "arose from" one of the matters mentioned in the second sentence of Article 78, or was "due to some other cause" and whether it was "deliberately brought about", since these are all matters which affect the decision as to the pension which the institution must pay. It did not make such a finding. There is the reference to the origin of part of the trouble being possibly the difficulties with the applicant's father, but this is partial, tentative and does not in any event consider the question of aggravation. There is, pointing in the opposite direction, a reference to the "hierarchical context" but this is not clear enough as a finding of invalidity resulting from an occupational disease.

The Council seeks to construe the lack of a finding on these matters as a finding that the invalidity was not attributable to an occupational disease. It was not, in my opinion, possible to do this. It is not evident from the first report that the Invalidity Committee really considered the cause of invalidity or regarded it as part of its remit. It is not open to the Council to assume that the report contained an implied finding. Nor is it possible for the Council to conclude from the terms of the report that the cause was not an occupational disease, since that would involve in this case a finding by the Council rather than by the Invalidity Committee as to a matter which must be decided by the latter.

I do not consider that it can be said that any defects in the first report are cured by the later reports. In the first place the Council itself contends that the second two reports were not in any sense decisions, but merely the result of a request for clarification with no binding effect. In the second place, there is, in my opinion, an inconsistency between the finding of a causal link in the second

report and the majority opinion expressed in the third report. Moreover, and particularly in the light of this inconsistency, no reasons or explanation are given for the bare statement that the invalidity does not result from an occupational illness.

Accordingly in my view this application is admissible and the Council's decision awarding a pension under the third paragraph of Article 78 should be set aside, since the Invalidity Committee's report does not deal with an essential matter, without a conclusion on which the Council cannot properly decide the appropriate pension.

Even if it is right that the Insurance Rules do apply, and that the procedure laid down there must be followed, it seems to me that the decision of the Council should be set aside. The Council has reached a decision and paid the pension without giving the applicant the opportunity to consider a draft decision or to ask for a medical committee. The Invalidity Committee was not such a committee. Moreover, if the Insurance Rules only apply where the cause of invalidity is an accident or occupational disease, there has been no finding by the Invalidity Committee on the question of causation and no adequate material in the report upon which the Council could itself take a decision whether the invalidity was caused by either of these factors.

It is not, of course, for the Court to decide the question, but in view of the uncertainty appearing from the second and third reports it is perhaps desirable to comment on one or two of the matters which have been canvassed as to what, as a matter of law, is capable of being an occupational disease and on the question of causation.

It is common ground that the concept of "occupational disease" figuring in Articles 73 and 78 of the Staff Regulations is the same. It is defined in article 3 of the Insurance Rules as follows:

"1. The diseases contained in the "European List of Occupational Diseases" annexed to the Commission recommendation of 23 July 1962 and to any supplements thereto shall be considered occupational diseases to the extent to which the official has been exposed to the risk of contracting them in the performance of his duties with the European Communities.

2. Any disease or aggravation of a pre-existing disease not included in the list referred to in paragraph 1 shall also be considered an occupational disease if it is sufficiently established that such disease or aggravation arose in the course of or in connection with the performance by the official of his duties with the Communities."

There also seems to be general agreement that the concept of occupational disease covers mental as well as physical illness. In the present case, Counsel for the applicant concedes that the disease in question is not included in the European List of Occupational Diseases but maintains that it can be considered an occupational disease if it is sufficiently established that the disease, or its aggravation, arose in the course of or in connection with the performance of the applicant's duties. This does not seem

to have been disputed on behalf of the Council, which has merely argued that the performance of the applicant's duties must be a necessary condition of the appearance or aggravation of the disease.

This is right in the sense that the performance of the applicant's duties must have given rise to the disease or its aggravation; it is not sufficient if the two merely coexist in time. On the other hand, it is not necessary that the disease or its aggravation could only have arisen in the course of or in connection with the performance of the official's duties. The test is whether it is sufficiently established that the disease or aggravation did arise, in the course of or in connection with performance of those duties. Mr. Advocate General Roemer said in the *Vellozzi* case (at page 523), that it must be established "that the performance of those duties was the principal or the predominant cause of the disease or of the aggravation of an existing disease. At the very least reliable proof must be required that the performance of the duties is a cause and of course the proper judgment can only be made by qualified doctors". In my view, the occupation must be a cause of the origin or the aggravation of the disease which leads to the invalidity.

In my opinion, when a reference is made in future to an Invalidity Committee for the purposes of Article 78, the committee should be asked not only to say whether there is a total permanent invalidity but also to state whether it arises from any of the factors referred to in the second sentence of Article 78, or whether it is due to some other and what cause. They should also give reasons for their opinion.

The relief sought in this case was specified in the application to be annulment of the Council's decision of 13 July 1981. This was in fact the decision rejecting the applicant's complaint. Article 91 (1) of the Staff Regulations makes it clear that it is the act adversely affecting the official which is the subject of proceedings for annulment. In this case, it seems to have been the decision fixing the rate of the applicant's invalidity pension. The applicant would have been informed of it when he received the payment slip, although this is not expressly stated in the pleadings.

For the reasons I have given, it is my opinion that this decision should be annulled and that the Council should be ordered to pay the costs of the action.