OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 2 July 1987 *

Mr President,
Members of the Court,

I — Subject and delimitation of the dispute

1. These proceedings fall within the context of the procedure for recognition of an occupational disease as laid down in Article 17 *et seq.* of the Rules on the insurance of officials of the European Communities against the risk of accident and of occupational disease (hereinafter referred to as 'the Rules') adopted in implementation of the provisions of Article 73 of the Staff Regulation of Officials of the European Communities relating to the benefits assured in such a case. That procedure involves either two or three successive phases.

2. In the first phase, after the submission by an official of a statement to the administration of the institution to which he belongs requesting application of those rules on grounds of an occupational disease, the administration first holds an inquiry 'in order to obtain all the particulars necessary to determine the nature of the disease, whether it has resulted from the official's occupation and also the circumstances in which it arose'.[1] After seeing the report drawn up following the inquiry, the doctor or doctors appointed by the institutions state his or their findings[2] on the basis of which the administration will define its position.

3. The second phase of the procedure enables the person concerned to acquaint himself with the reasons for the decision which the appointing authority proposes to adopt. Before taking a final decision, the appointing authority 'shall notify the *draft* decision and the *findings* of the doctors appointed by the institution'.[3] Furthermore, the official or those entitled under him are given the option of requesting 'that the *full medical report* be communicated to a doctor chosen by them'.[4]

4. Finally, a third phase may be opened if the person concerned requests 'within a period of 60 days' that the Medical Committee provided for in Article 23 deliver its opinion'.[5]

5. Following that procedure the appointing authority takes its decision whether or not to recognize the occupational nature of a disease 'on the basis of the findings of the doctors appointed by the institutions' and, where the official so requests, after consulting the Medical Committee.[6]

6. In the present case the dispute has arisen in the context of the second phase. In the course of the procedure for recognition of an occupational disease commenced by her husband, who is now deceased, Mrs Strack discovered that there were omissions in her late husband's personal file and, by letter of 24 May 1985, later confirmed, formally requested the Commission that she be allowed *personally* to consult the *complete* personal file concerning her husband, in particular the documents concerning the

* Translated from the French.

1 — First subparagraph of Article 17 (2) of the Rules.

2 — Third subparagraph of Article 17 (2) of the Rules.

3 — First sentence of the first paragraph of Article 21 of the Rules (emphasis added).

4 — Second sentence of the first paragraph of Article 21 of the Rules (emphasis added).

5 — Second paragraph of Article 21.

6 — Article 19 of the Rules.

contamination accident of which he had been the victim in 1970 and the results of the experts' reports and medical examinations relating to that accident. The Commission, which had sent a draft negative decision to the applicant on 13 June 1985, did not accede to that request. In letters dated 2 and 30 July 1985 the Commission expressed the view that, pursuant to Article 26 of the Staff Regulations, Mr Strack's personal file could be consulted by his widow and that the documents of a medical nature including those concerning the radiation to which he had been exposed could, in accordance with the Rules, be communicated to a doctor chosen by her. The applicant proceeded to appoint a doctor on 31 July 1985.

7. Mrs Strack's action is directed against that refusal, as expressed in the abovementioned letters of the Commission. It is apparent from the documents before the Court that the object of these proceedings is to obtain recognition, by virtue of provisions of Article 26 of the Staff Regulations, of the right, during the procedure for recognition of an occupational disease, of the person entitled under a deceased official to personal and direct access to the complete personal file of the deceased, after the communication of the draft decision by the appointing authority and even before appointment of the doctor. Thus, the Court must determine, on the one hand, whether all the information relating to an official, whatever its nature, must appear exclusively in the personal file referred to in Article 26 of the Staff Regulations which specifies that 'there shall be only one personal file for each official' and, on the other hand, if the first question be answered in the negative, whether the medical information is directly accessible or only under the conditions laid down by Article 21 of the Rules. I will deal with those two questions in succession.

II — The personal file within the meaning of Article 26 of the Staff Regulations

8. Although, according to the wording of Article 26, there is to be only one personal file for each official, that principle of a single file does not, contrary to the applicant's submission, preclude particulars concerning the health of an official from being treated separately in view of their nature, not only for reasons of administrative management, but also — and this is the essential point — for ethical reasons.

9. Article 26 of the Staff Regulations establishes the following principle:

'The personal file of an official shall contain:

(a) all documents concerning his administrative status and all reports relating to his ability, efficiency and conduct;

(b) any comments by the official on such documents'.

The 'reports' concern the official's performance in the service and form the basis of the decisions as to his advancement taken by the appointing authority pursuant to Articles 43 and 45 of the Staff Regulations. The definition of the other documents appears to me sufficiently wide to cover any document, whether its author be the administration or the person concerned, drawn up, like the foregoing documents, in accordance with the provisions of the Staff Regulations. The

content of the personal file cannot be understood in a narrow sense by limiting it only to documents affecting the career of the official concerned as described in Title III of the Staff Regulations. Any document which has its source in the application of a provision of the Staff Regulations, whatever the authority from which it emanates, must form part of the personal file since it is relevant to and may affect the administrative status and career of the official.[7]

That broad view is called for in particular on the part of the administration, because of the rule set out in Article 26 according to which

'the documents referred to in subparagraph (a) may not be used or cited by the institution against an official unless they were communicated to him before they were filed'

in such a manner as to enable the official to make comments on those documents pursuant to Article 26 (b). That rule, which is an application of the *audi alteram partem* principle,[8] must cause the administration to adopt a broad view as to the content of the personal file. The official, who has free access to the file, may use any document with which he thereby becomes acquainted against the administration, even if such document has not been communicated to him.

10. In view of the broad scope of Article 26 one may wonder whether medical documents concerning an official, which have been drawn up in accordance with the Staff Regulations by the relevant department of the institution, such as those concerning the compulsory medical examination required before recruitment,[9] must not form an integral part of the personal file, as the applicant maintains they should. The fact that Article 26 is silent on the point and the position of that provision in the Staff Regulations where it appears under Title II, devoted to 'Rights and Obligations of Officials', which necessarily makes reference to the following titles, point, at first sight, in this direction. In that respect, a literal interpretation of the provisions of Article 26 may not be adopted as a basis for isolating the documents 'concerning the administrative status' of the official from the other documents of a medical nature. It is plain that findings concerning the health of an official may affect his administrative status: the personal file cannot be confined exclusively to documents of a strictly administrative nature.[10] Two observations lend support to this view:

The confidentiality which attaches to information appearing in the personal file is expressly guaranteed by Article 26 according to which 'the personal file shall be confidential and may be consulted only in the offices of the administration';

The principle of the single file resulting from the fact that according to that same provision 'there shall be only one personal file for each official'.

11. The principle of the single file is, however, qualified as a result of the requirements relating to medical confidentiality. As Mr Advocate General Capotorti

7 — Case 88/71 *Brasseur* [1972] ECR 499, paragraph 11 of the decision and the Opinion of Mr Advocate General Roemer at p. 509.

8 — Case 88/71 *Brasseur, supra*, paragraphs 7 *et seq.* of the decision.

9 — Articles 28 (e) and 33 of the Staff Regulations.

10 — Case 74/72 *di Blasi* [1973] ECR 847, paragraphs 10 and 11 of the decision, implied solution.

points out in his Opinion in Case 155/78 *Miss M*

'medical confidentiality seeks essentially to protect the interests of the patient'

as its purpose is to

'avoid the risk that those who are in need of treatment may decline to seek assistance from a doctor for fear that he may reveal to others facts learned on the occasion of a consultation and to ensure, further, that there will be no disclosure to the patient of his condition such as might upset his health and cause him harm.' [11]

The special confidentiality which attaches to information concerning the official's state of health applies first of all *vis-à-vis* the appointing authority itself. Proof of that may be found in the fact that, even under the procedure for recognition of an occupational disease, Article 21 of the Rules allows the appointing authority only limited access to the medical *opinions* since only the findings of the doctors appointed by the authority and 'not the full medical report' on which those findings are based are sent to the authority. As Mr Advocate General Capotorti points out, medical confidentiality may sometimes apply *vis-à-vis* the patient himself, since the institution's doctor may prefer to maintain a certain discretion if he considers that the health of the person concerned might be adversely affected if he were aware of all the medical findings concerning him. In such circumstances the confidential nature of the file as guaranteed by Article 26 is not sufficient to ensure adequate protection of medical confidentiality. Medical confidentiality therefore requires that neither the administration nor the official shall have direct access to the information protected by it. The safest way of guaranteeing that medical confidentiality is respected is ultimately for information of a medical and administrative character to be dealt with separately, both in the organic sense (processing of the information by the Medical Service) and in the material sense (establishment of a medical 'sub-file' within the personal file).

12. Contrary to what is maintained by the applicant, the principle of the single personal file must therefore be regarded as not precluding the separate treatment of documents of a medical nature in the file, since the maintenance of an individual medical file for each official for ethical reasons based on the scope of medical confidentiality constitutes for the institutions not only a right but a duty. The Commission therefore rightly and in the actual interests of Euratom employees abandoned, from 1968 onwards, the practice whereby all medical and administrative documents concerning such employees were filed indiscriminately. Although it is a matter for regret that Mr Strack's personal file did not mention that the medical documents were the subject of a separate file, which would have helped to enlighten the applicant, the appointing authority cannot be criticized for having applied the principle of separate treatment since this is explained by the scope of the confidentiality in question. It is none the less true that under the rule expressly set out in Article 26,

'an official shall have the right, even after leaving the service, to acquaint himself with all the documents in his file'.

One is therefore entitled, along with the applicant, to ask whether in the case of medical information this rule must undergo

11 — Case 155/78 *Miss M* [1980] ECR 1797 at p. 1820.

some modification as regards the official himself. To do so is to pose the second question raised by these proceedings, namely that of the *means of access* which an official has to his own medical file.

III — Access to the medical data

13. In the circumstances of this case this question must be resolved by reference both to the requirements of medical confidentiality and compliance with the rules of the procedure for recognition of an occupational disease commenced by the applicant's late husband.

14. As regards decisions of refusal to engage a person because of physical unfitness the Court has stressed that

'the requirements of professional secrecy, save in exceptional circumstances, leave the individual doctor to decide whether to communicate to those whom he is treating or examining the nature of the condition from which they may be suffering'. [12]

Even if medical confidentiality is, for the medical officers of the Community institution, the rule as regards third parties — the foremost of these being the Community administration itself — it must none the less remain the exception with regard to the person concerned. More generally, it is apparent that the doctor, who is the judge of the extent of medical confidentiality, is the indispensable channel for access to medical findings. With certain exceptions, every official must be therefore acknowledged as having a right of direct and personal access to his medical file under the general principle laid down in the penultimate paragraph of Article 26. Must one however deduce from this that by refusing to allow the spouse of an official to have access to that file other than through a doctor chosen by her, the Commission has breached this principle, especially since Mr Strack — and this is not disputed — had expressly waived the medical confidentiality attaching to the information relating to the procedure for recognition of an occupational disease which he had commenced? The answer must be in the negative.

15. Article 21 of the Rules allows the official or those entitled under him to dispute the conclusions which the appointing authority proposes to draw on the basis of the findings of the medical officials of the institution following the inquiry. To that end, the Rules provide for review of the medical reasons on which the appointing authority bases its draft decision by conferring on the person concerned the right to have communicated to a doctor chosen by him the full medical report on the basis of which the medical findings of the doctors appointed by the institution have been drawn up. Contrary to what is maintained by the applicant and without in any way prejudging the content of the report in this case, I take the view that this 'mediatization' of access to the medical report is necessary.

16. The interposition of a doctor reconciles medical confidentiality and the obligation to state reasons. As the Court has stressed as

12 — Case 121/76 *Moli* [1977] ECR 1971 at paragraph 14 of the decision; Case 75/77 *Mollet* [1978] ECR 897, paragraph 15 of the decision; Case 155/78 *Miss M*, *supra*, at paragraph 16 of the decision.

regards refusals to engage a person on account of physical unfitness, this reconciliation is adequately effected

'through the ability of the person concerned to request and ensure the communication to the doctor of his choice of the grounds on which he has been declared unfit; this information should enable him, *either himself or through his doctor*, to judge whether the decision setting aside his appointment conforms with the requirements of the Staff Regulations'. [13]

It is at the draft decision stage that the second sentence of the first paragraph of Article 21 of the Rules imposes the same requirement on the official or the person entitled under him. However, it should be pointed out, as the abovementioned judgments of the Court expressly indicate, that that requirement will normally enable the official to acquaint himself directly with the full medical report sent to the doctor chosen by him. Medical confidentiality, as we have seen, applies *vis-à-vis* officials only exceptionally, when this is necessary to protect their health. Although it is conceivable that the scope of medical confidentiality might be understood as being broader in the case of the person claiming under the official, having regard to respect for the privacy of the deceased, we know that in this case medical confidentiality had been expressly waived by Mr Strack. Therefore nothing prevented the applicant from directly and personally consulting the full medical report, unless the doctor chosen by her took the view that she should not.

17. Furthermore, the fact that the full medical report is sent to the chosen doctor makes it possible for the official, on the basis of the specialist's view as to whether the conclusions of the medical officials are well founded, to draw the inferences from the fact that he disagrees with the draft decision and to bring the matter before the Medical Committee. He can therefore, having regard in particular to the expenses which he may incur under Article 23 (2) of the Rules, decide in full knowledge of the facts to bring about a meeting of the Committee. In other words, Article 21, in order to ensure that the *audi alteram partem* principle is observed, allows the person concerned to set the findings of his doctor against those of the medical officials of the institution, both sets of findings being derived from the same document.

18. Finally, to consult the medical documents before the official or those entitled under him have appointed a doctor would be premature, quite apart from rendering the procedure provided for under Article 21 of the Rules wholly ineffective. It is apparent from the documents before the Court that the purpose of the applicant's action is, quite rightly, primarily to satisfy herself that the medical report is in fact complete and thus that any intervention by the Medical Committee will be effective. Such a determination necessarily presupposes the prior communication of that report and, for the two reasons mentioned above, the intervention of a specialist. In order to determine whether or not any given medical document is relevant for the

13 — Case 121/76 *Moli*, *supra*, at paragraph 15 of the decision; Case 75/77 *Mollet*, *supra*, at paragraph 16 of the decision, and Case 155/78, *supra*, at paragraph 17 of the decision (emphasis added).

establishment of the report a comparison must be made between the latter and the former. The applicant therefore has no interest in obtaining direct access to the medical documents at that stage of the procedure for recognition, in other words *after* the draft decision of the appointing authority and the findings have been communicated to the official but *before* he has appointed a doctor, since Article 21 of the Rules guarantees that all the relevant documents will be communicated to that doctor.

19. The Commission was therefore entitled to refuse the applicant's request to consult *immediately* the medical documents upon which the findings of the Commission's medical officers were based. By expressly stating in its letter of 2 July 1985 that it was for Mrs Strack

'under the Rules to request that the medical reports on which the draft decision is based be transmitted to a doctor chosen by her'

and in its letter of 30 July that

'the medical documents may be sent to the doctor appointed by Mrs Strack',

the Commission thus correctly applied the second sentence of the first paragraph of Article 21 of the Rules.

20. Certainly one is entitled to wonder whether, by referring to that formality, the Commission did not delay the applicant's access to certain documents of an *administrative* nature. The question arises in particular as regards the documents concerning the incident of contamination of which Mr Strack was the subject on 9 September 1970, documents which the Commission produced to the Court after the hearing. They comprise certain findings of a factual nature which describe the circumstances of the contamination and the results of analyses, in particular medical analyses, carried out to determine the doses to which the victim was exposed. In fact the question raised does not have to be decided in these proceedings since the Commission

> *immediately*, as regards the administrative documents appearing in the personal file of her late husband as it was when the events which gave rise to the dispute occurred, and
>
> *after she had appointed a doctor of her choice*, as regards the documents of a medical nature which she associated with the contamination incident,

acknowledged the applicant's right to acquaint herself with all the data relevant to the assessment to be made as to the occupational origin of her husband's illness. In short, it is therefore sufficient to note that at the stage following Mrs Strack's submission of her request, in other words before she had appointed a doctor of her choice, the Commission's response was in conformity with the provisions of Article 26 of the Staff Regulations and Article 21 of the Rules. Finally, the implicit reference by the Commission to the full medical report to be communicated to the doctor chosen by the person concerned presupposes, if it is not to be simply formal, that two conditions are fully and concurrently satisfied.

21. On the one hand it must be sent *in good time*. As soon as the request has been made the administration must ensure that the report is sent as quickly as possible since

the person concerned only has a period of 60 days from the notification of the draft decision to examine the report, compare it with the findings on which the appointing authority has based its draft decision and finally to decide whether or not to request a meeting of the Medical Committee. Secondly, strict respect for the adversary nature of the procedure provided for by Article 21 of the Rules requires that the medical report be *complete*. As is confirmed by the reply given by the Commission to the questions put to it by the Court, all examinations, expert reports or medical reports on the basis of which the doctor or doctors appointed by the institution have based their own findings must therefore appear in it. In this respect neither the relatively short period at the disposal of the official nor the limited sphere in which the doctor treating him at this stage can only advise his patient as to the desirability of convening the Medical Committee, can justify the administration's sending a report which does not contain *all the medical or other documents* which led the doctor or doctors appointed by itself to reach their findings and in particular the reports concerning the 1970 incident and the medical analyses made immediately thereafter. The administration under which the official comes must therefore construe *in the widest possible manner* the right to information which the official has via his doctor. Administrative confidentiality may not be confused with the medical confidentiality of which that doctor is ultimately the sole judge.

22. Given the uncertainties which appeared in this respect during the proceedings before the Court, it should be stressed that both the *delay* in the communication of the medical report and the *incomplete* nature of that report might substantially affect the recognition of the rights conferred by Article 73 of the Staff Regulations and by the Rules on the official or the person entitled under him, to the extent of rendering unlawful the decision ultimately to be adopted by the administration. It would be for the Court, which has jurisdiction to review the ways and means whereby the doctor appointed by the institution and the Medical Committee reached their conclusions, to assess the seriousness of such a procedural irregularity if the applicant brings an action against the decision of the appointing authority.[14] Be that as it may, that is not the purpose of the present action which is wholly concerned with the Commission's refusal to allow the applicant immediately to consult, even before the appointment of the doctor of her choice, the documents in Mr Strack's medical file which relate to the illness, the origin of which is at issue, and not with the refusal to send to her doctor certain of the documents which should appear in the complete medical report.

IV — Conclusion

23. In drawing a distinction between the means of access to the personal file according to whether the documents which make it up are of an administrative or a medical nature, the Commission has therefore, in its letters of 2 and 30 July 1985, observed the principles governing the separate treatment of those two types of data. The action is therefore unfounded.

14 — Case 156/80 *Morbelli* [1981] ECR 1357 at paragraph 20 of the decision; Case 189/82 *Seiler* [1984] ECR 229 at paragraph 15 of the decision and the Opinion of Mrs Advocate General Simone Rozès at p. 246.

24. It none the less remains that the complexity and particularly sensitive nature of Mr Strack's case required more from the administration than a purely formal and insufficiently precise reference to the abovementioned provisions, particularly since the course of the procedure has shown the applicant's claims to be legitimate since, after the hearing, seven documents which did not appear in the full medical report and one relevant to the radiation to which Mr Strack was exposed have been sent to the Medical Committee.

25. Although, as has already been said, the appraisal of such an irregularity does not fall to be made in these proceedings, it is appropriate, by way of exception, to take account of it in the order as to costs, having regard to the applicant's need to be assured by the administration that the file submitted to the Medical Committee was complete.

26. I therefore consider that the Court should:

Dismiss the application;

Order none the less that the Commission bear the costs.