ORDER OF THE COURT (First Chamber)
19 November 1998 *

In Case C-149/98 P,

Anne-Marie Toller, a former official of the Commission of the European Communities, residing in Brussels, represented by Benoît Lombart and Éric Boigelot, both of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Louis Schiltz, 2 Rue du Fort Rheinsheim,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fourth Chamber) of 19 February 1998 in Case T-142/96 *Toller* v *Commission* [1998] ECR-SC II-179, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by Julian Currall, Legal Adviser, and Christine Berardis-Kayser, of its Legal Service, acting as Agents, assisted by Denis Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

* Language of the case: French.

THE COURT (First Chamber),

composed of: D. A. O. Edward, acting for the President of the First Chamber, L. Sevón (Rapporteur) and M. Wathelet, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

after hearing the Opinion of the Advocate General,

makes the following

Order

1 By application lodged at the Court Registry on 17 April 1998, Mrs Toller brought an appeal under Article 49 of the EC Statute of the Court of Justice and the corresponding provisions of the ECSC and EAEC Statutes of the Court of Justice against the judgment of the Court of First Instance of the European Communities of 19 February 1998 in Case T-142/96 *Toller* v *Commission* [1998] ECR-SC II-179 ('the contested judgment'), in which the Court held inadmissible her action for, first, annulment of the Commission decision of 16 November 1995 expressly rejecting her request of 15 September 1995 for review of the Commission's decision of 1 July 1993 removing her from her post without reduction or withdrawal of entitlement to retirement pension, and secondly, re-examination of her position by the Invalidity Committee.

2 By application lodged at the Court Registry on 2 July 1998, Mrs Toller applied for legal aid pursuant to Article 76(1) of the Rules of Procedure of the Court of Justice.

3 The contested judgment shows that, by decision of 1 July 1993, Mrs Toller was removed from her post for incompetence. The Court of First Instance states at paragraph 4 that, in ordering her removal, the appointing authority took account, first, of the existence of two prior disciplinary measures and, secondly, of her incompetence consisting of disputed absences in 1990 and 1991.

4 The disciplinary proceedings leading to that measure were initiated on 4 September 1990. In those proceedings, an Invalidity Committee was set up to give an opinion as to the total permanent invalidity alleged by Mrs Toller and the medical origin of her absences in 1990 and 1991. The Court states in paragraph 2 of the contested judgment that the committee delivered its unanimous opinion on 25 May 1992 that 'no medical reason providing grounds for total permanent invalidity [had] been found', 'there [was] no evidence of any seriously incapacitating pathology' and 'consequently, there was no medical justification for the prolonged periods of absence (in particular in 1990 and 1991)'.

5 On 15 September 1995 Mrs Toller submitted a request to the Commission for a review of the decision removing her from her post. She argued that she should not have been declared capable of carrying out her duties and that neither the Invalidity Committee nor the appointing authority had an exact and precise knowledge of all the illnesses from which she was suffering at the time of her removal. She attached to her request a number of medical reports and certificates drawn up between 1 August 1994 and 17 May 1995.

6 The Commission expressly rejected Mrs Toller's request on 16 November 1995.

7 On 13 February 1996 Mrs Toller submitted a complaint against that decision, which was the subject of an implied rejection.

8 By application lodged at the Registry of the Court of First Instance on 13 September 1996, Mrs Toller brought an action against the Commission's decision of 16 November 1995.

9 The Commission raised an objection of inadmissibility to the action, which the Court of First Instance decided to join to the substance of the case.

The contested judgment

10 In its examination of the objection of inadmissibility, the Court of First Instance found, at paragraph 46 of its judgment, that, since the decision of 1 July 1993 to remove Mrs Toller was not challenged within the time-limits, it had become final. It concluded, in paragraph 48 of its judgment, that only the existence of new material facts might justify the submission of a request for review of that decision.

11 The Court pointed out in paragraph 49 that Mrs Toller's criticisms of the opinion of the Invalidity Committee and of the decision of 1 July 1993, on the basis of what she described as material new facts, were relevant only in so far as they related to 1990 and 1991, the years in which the disputed absences occurred.

12 The Court examined each of the various matters relied upon by Mrs Toller in support of her request of 15 September 1995 for the purpose of verifying whether they were capable of establishing the existence of a material new fact justifying a review of the decision of 1 July 1993 removing her from her post.

13 It thus examined in turn the psychiatric problems (paragraph 53), the progressive rheumatoid polyarthritis (paragraph 54), the fibromyalgia (paragraph 55), the chronic fatigue syndrome (paragraphs 56 and 57), three decisions concerning accidents which occurred before 1993, each acknowledging a partial permanent disability of, respectively, 2%, 3% and 1% (paragraphs 58 to 60), the 'spasmophilic substratum' (paragraph 61), the somatisation linked to hysterectomy (paragraph 62), the tetany attacks (paragraph 63), the mononucleosis (paragraph 64), the decalcification (paragraph 65) and the chondromalacia (paragraph 66).

14 The Court found that all the matters relied upon had either already been referred to the Invalidity Committee or were irrelevant in explaining the disputed absences in 1990 and 1991.

15 It concluded, in paragraph 67, that Mrs Toller had not established the existence of a single material new fact justifying reconsideration of the decision of 1 July 1993 to remove her, and that, as her request was out of time, the action was inadmissible.

16 Furthermore, and for the sake of completeness, the Court held at paragraph 72 that Articles 90 and 91 of the Staff Regulations of Officials of the European Communities ('the Staff Regulations') concerning time-limits for complaints and actions applied in the case of a request for review of a decision of the appointing authority, and, at paragraph 74, that the point at which time begins to run in the case of such a request for review must correspond to the date on which the material new fact on which the applicant relies to justify reconsideration of the decision adversely affecting him occurred or the date on which he actually became aware of the existence of that fact.

17 Having noted that the most recent matter on which Mrs Toller relied when submitting her request of 15 September 1995 was a medical report drawn up on 17 May 1995, the Court found, at paragraph 76 of the judgment, that more than three months had elapsed between the time when she became aware of the alleged mate-

rial new facts relied upon and the submission of her complaint, and it therefore declared the action inadmissible.

The appeal

18 In her appeal, Mrs Toller requests the Court of Justice to set aside the contested judgment and, granting her original application, to annul the decision of 16 November 1995 rejecting her request for review of the decision of 1 July 1993 removing her from her post, to annul the implied decision rejecting her complaint of 13 February 1996 and, consequently, to rule that the decision of 1 July 1993 is to be withdrawn by the appointing authority.

19 Mrs Toller relies on two grounds in support of her appeal. The first alleges infringement by the Court of First Instance of the duty to state reasons and the second alleges an error of law as to the classification of the request for review.

Findings of the Court of Justice

20 Under Article 119 of its Rules of Procedure, where an appeal is clearly inadmissible or clearly unfounded, the Court of Justice may at any time dismiss it by reasoned order.

21 Moreover, the Court has consistently held that, under Article 168a of the EC Treaty and the first paragraph of Article 51 of the EC Statute of the Court of Justice, an

appeal may be based only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts (see, in particular, Case C-283/90 P *Vidrányi* v *Commission* [1991] ECR I-4339, paragraph 11, and the order in Case C-19/95 P *San Marco* v *Commission* [1996] ECR I-4435, paragraphs 39 and 40).

The first ground of appeal

22 In the first part of her first ground of appeal, the applicant alleges that in the contested judgment the Court of First Instance was inconsistent in its reasoning, in that it criticises her for failing to challenge in good time the findings of the Invalidity Committee on which the appointing authority based its decision of 1 July 1993, whilst at the same time acknowledging that it was not until subsequently that the various incapacitating ailments relied upon were diagnosed.

23 She argues that the inconsistency in the Court's reasoning appears in paragraph 53 of the contested judgment, where the Court holds, on the one hand, that 'the applicant merely claims in that respect that [her] psychiatric problems existed in 1990 without however having been diagnosed' and, on the other, that 'it follows that the existence of those psychiatric problems has already been submitted to the assessment of the Invalidity Committee which gave its opinion on 25 May 1992. The Invalidity Committee's findings concerning the psychiatric problems relied on by the applicant must therefore be regarded as final'.

24 She claims that that inconsistency is also apparent in paragraph 56 of the contested judgment, in that the Court refuses to acknowledge the existence of material new facts even though it found that matters relied on by the applicant could not have been diagnosed at the time when the Invalidity Committee gave its opinion, and in particular that '... the other two medical reports submitted by the applicant referring to the existence of a fibromyalgia (those of Dr Pelc of 9 November 1994 and

Dr Houssiau of 8 May 1995) do not diagnose the existence of that chronic fatigue syndrome'.

25 In the second part of her first ground of appeal, Mrs Toller acknowledges that certain matters which made it possible objectively to identify incapacitating ailments after her removal from her post were submitted to the Invalidity Committee. She maintains, however, that it cannot be deduced therefrom that the Invalidity Committee took the ailments currently relied upon into account in making its findings, since at the time it did not use those matters as a basis for any diagnosis.

26 In its response, the Commission argues that Mrs Toller's reading of the contested judgment is one-sided and erroneous, and that there is no inconsistency in the judgment.

27 It further points out that Mrs Toller did not challenge the lawfulness of the composition and functioning of the Invalidity Committee, and that the fact that the latter did not determine the presence of certain incapacitating ailments which were submitted to it in the form of medical reports and analyses forms part of the medical assessments which are to be regarded as final.

28 Paragraph 53 of the contested judgment is worded as follows:

'53 ... It is moreover clear that the applicant does not challenge in her reply the comparisons made by the Commission in its defence between the psychiatric problems diagnosed by Dr Pelc and those emphasised by the applicant or her doctor before the Invalidity Committee. The applicant merely claims in that respect that those psychiatric problems existed in 1990 without however having been diagnosed. It follows that the existence of those psychiatric problems has

already been submitted to the assessment of the Invalidity Committee which gave its opinion on 25 May 1992. The Invalidity Committee's findings concerning the psychiatric problems relied on by the applicant must accordingly be regarded as final (see paragraph 50 above). This cannot therefore be a new fact capable of justifying reconsideration of the decision of 1 July 1993.'

29 It is clear that Mrs Toller's reading of paragraph 53 of the contested judgment was one-sided and erroneous.

30 It is Mrs Toller herself who considers that her psychiatric problems were not diagnosed in 1990, the finding of the Court of First Instance being that the psychiatric problems mentioned in Dr Pelc's medical report of 9 November 1994, drawn up at the request of counsel for the applicant, are one and the same with those referred to by the applicant at her hearing before the Invalidity Committee on 6 January 1992.

31 The Court of First Instance was thus right and did not contradict itself in holding that the psychiatric problems did not constitute a new fact capable of justifying reconsideration of the decision of 1 July 1993.

32 Paragraphs 56 and 57 of the contested judgment are worded as follows:

'56 Fourth, as regards chronic fatigue, there are two circumstances to which reference must be made. First, it was only Dr Marichal, in his report of 17 May 1995, who diagnosed the existence of that ailment since 1990, although that diagnosis was not based on any objective factor capable of justifying it, only the statements of the applicant being mentioned in that respect. The possibility cannot therefore be excluded that, in that respect, the medical report is merely setting forth an assertion by the applicant. Moreover, as the Commission rightly

remarks, even if Dr Marichal does link chronic fatigue and fibromyalgia, the other two medical reports submitted by the applicant referring to the existence of fibromyalgia (those of Dr Pelc of 9 November 1994 and of Dr Houssiau of 8 May 1995) do not diagnose the existence of that chronic fatigue syndrome. What is more, those two medical reports diagnose only the presence of fibromyalgia in 1993, that is to say outside the period to be taken into account on a possible reconsideration of the decision of 1 July 1993.

57 Moreover, apart from the fact that neither the applicant nor Dr Antoine, whom she had designated to represent her on the Invalidity Committee, referred to that ailment at the time of the committee's examination, the applicant has not given reasons as to why that alleged chronic fatigue was capable of explaining the disputed absences in 1990 and 1991, merely claiming in that respect the existence of a direct causal link without any other kind of explanation. Therefore, the information supplied by the applicant cannot in any event lead to the finding that the diagnosis made by Dr Marichal in his medical report of 17 May 1995 constitutes a material new fact capable of justifying reconsideration of the decision of 1 July 1993'.

33 It is clear that Mrs Toller's reading of paragraph 56 of the contested judgment as well was one-sided and erroneous.

34 The Court of First Instance finds in that paragraph that there is no substantive proof of the existence of chronic fatigue in 1990 since, first, Dr Marichal's report of 17 May 1995 merely sets forth statements made by the applicant, and secondly, in so far as chronic fatigue is linked to fibromyalgia, the presence of the latter ailment was not diagnosed until after 1993.

35 The Court goes on to find, in paragraph 57, that neither the applicant nor the doctor representing her on the Invalidity Committee referred to that ailment before

the committee, and that Mrs Toller did not specify the reasons why that alleged chronic fatigue could have explained the disputed absences in 1990 and 1991.

36 The Court was thus right and did not contradict itself in holding that chronic fatigue syndrome did not constitute a material new fact capable of justifying reconsideration of the decision of 1 July 1993.

37 As for the allegation that the Invalidity Committee could not have taken into account the ailments giving rise to Mrs Toller's invalidity since, even if it was aware of certain aspects of those ailments, it did not use them as a basis for any diagnosis, this Court finds that, where the Court of First Instance considered that certain matters or ailments had been taken into account by the Invalidity Committee at the time of its examination and in the findings it made, and that these were therefore medical assessments which had to be regarded as final, that Court was clearly carrying out a factual assessment that is not subject to review by the Court of Justice.

38 It follows from the above that the first part of the first ground of appeal is clearly unfounded and that the second part is clearly inadmissible.

The second ground of appeal

39 Mrs Toller's second plea alleges that her request for review was erroneously classified as a 'complaint' within the meaning of Article 90(2) of the Staff Regulations, whereas that request should have been regarded as having been made under Article 90(1).

40 This ground of appeal is, however, directed against reasoning that was not essential to the judgment, the Court of First Instance having already decided that the action was inadmissible on completion of its examination of the Commission's first objection of inadmissibility and on the basis that the action against the decision of 1 July 1993 was out of time, regard being had to the absence of any new fact capable of calling that decision into question.

41 In those circumstances, this ground of appeal is inoperative and there is no need to consider it.

42 It follows from the above considerations as a whole that the appeal must be dismissed as being in part clearly unfounded and in part clearly inadmissible.

43 Finally, as regards Mrs Toller's application for legal aid, Article 76(3) of the Rules of Procedure of the Court of Justice provides that, before deciding whether to grant legal aid in full or in part or to refuse it, the Chamber dealing with the case is to consider whether there is manifestly no cause of action.

44 The application must be dismissed.

Costs

45 Under Article 69(2) of the Rules of Procedure, made 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 applied for costs to be awarded against Mrs Toller, and the latter has been unsuccessful, she must be ordered to pay the costs.

On those grounds,

THE COURT (First Chamber)

hereby orders:

1. The appeal is dismissed.

2. Mrs Anne-Marie Toller's application for legal aid is dismissed.

3. Mrs Anne-Marie Toller is ordered to pay the costs.

Luxembourg, 19 November 1998.

R. Grass

Registrar

D. A. O. Edward

For the President of the First Chamber