ORDER OF THE PRESIDENT OF THE COURT
12 February 2003 *

In Case C-399/02 P(R),

Luigi Marcuccio, official of the Commission of the European Communities, residing in Tricase (Italy), represented by L. Garofalo, avvocato,

appellant,

APPEAL against the order of the President of the Court of First Instance of the European Communities of 27 September 2002 in Case T-236/02 R *Marcuccio* v *Commission* [2002] ECR-SC I-A-181 and II-941, seeking to have that order set aside,

* Language of the case: Italian.

the other party to the proceedings being:

Commission of the European Communities, represented by C. Berardis-Kayser and E. De March, acting as Agents, assisted by A. Dal Ferro, avvocato, with an address for service in Luxembourg,

defendant at first instance,

THE PRESIDENT OF THE COURT

after hearing Advocate General F.G. Jacobs,

makes the following

Order

1 By application lodged at the Court Registry on 11 November 2002, Mr Marcuccio brought an appeal, under Article 225 EC and the second paragraph of Article 50 of the EC Statute of the Court of Justice, against the order of the President of the Court of First Instance of 27 September 2002 in Case T-236/02 R *Marcuccio* v *Commission* [2002] ECR-SC I-A-181 and II-941 ('the order under appeal'), dismissing his application for suspension of the operation of the Commission's decision of 18 March 2002 reassigning an A 7/A 6 post, and its

holder Mr Marcuccio, in the Directorate-General for Development, Delegation of the Commission in Luanda (Angola) to the Directorate-General for Development in Brussels (Belgium) ('the contested decision'), and for an order immediately reassigning him to the duties for which he was previously responsible in the delegation.

2 By document lodged at the Court Registry on 5 December 2002, the Commission submitted its written observations.

3 The facts are set out in the order under appeal in the following terms:

'1 The applicant, a Grade A 7 official, was assigned to the Commission's delegation to Luanda (Angola) from 16 June 2000.

2 His difficult relationship with the head of the delegation led the applicant to inform the central administration of the antagonistic situation in which he found himself. He reported it, first of all, during a mission to Brussels on 30 January 2001, then by electronic mails sent on 23 and 24 April 2001 and, finally, during further interviews in Brussels in June 2001.

3 The applicant has been on sick leave at his habitual residence in Tricase (Italy) since 4 January 2002.

4 During this period of absence owing to illness, the applicant was requested, by letter dated 22 January 2002 signed by Dr Simonnet, the medical adviser responsible for checking absences owing to illness, to go to Brussels for a medical examination. Since the applicant did not go to Brussels, the Commission's Directorate-General for Development notified him, by letter of 13 February 2002, that his absence had been regarded as unjustified from 31 January 2002 and that he was invited to attend a medical examination in Brussels on 18 February 2002. By letter dated 20 February 2002, Dr Simonnet notified the applicant that, following another statement from his psychiatrist which clearly showed that he was wholly unfit to travel, it was acknowledged that he had been absent for medical reasons since the beginning of his sick leave. On 20 June 2002, it was again established that the applicant was unfit for work and that he was not expected to resume his activities in the short term.

5 On 11 January 2002, the Commission adopted a decision reassigning the applicant to Brussels with effect "from the beginning of 2002".

6 That decision was annulled and replaced by the [contested] decision. [This decision] states that it takes effect on 1 April 2002.'

4 By application lodged at the Registry of the Court of First Instance on 8 August 2002, Mr Marcuccio brought an action under Article 91(4) of the Staff Regulations of officials of the European Communities ('the Staff Regulations') for annulment of the contested decision and an order against the Commission requiring it:

— to pay compensation of EUR 100 000 for his non-material, existential, biological, physical and mental damage, or of a higher or lower sum to be determined *ex aequo et bono*;

— to pay the allowances connected with his duties in Angola which have not been paid since the date the contested decision took effect and, more specifically, since 1 April 2002, those allowances together with interest;

— to pay the costs and fees connected with the proceedings.

5 By separate document lodged at the Registry of the Court of First Instance on the same day, Mr Marcuccio also made an application for suspension of operation of the contested decision and for an order immediately reassigning him to the duties for which he was previously responsible in the Commission's delegation to Angola.

6 By the order under appeal, the President of the Court of First Instance dismissed the application for interim relief on the ground that the condition as to urgency was not satisfied.

7 As regards the first type of harm invoked by the applicant, consisting in the adverse effect on his image and on his professional career, the President pointed out that a decision reassigning to Brussels an official previously assigned to a delegation in a third country does not cause professional harm, where it is not disciplinary in nature. The President also considered that, even if such harm were proved, an annulment in an application on the merits would enable it to be suitably repaired and, furthermore, it is possible that the applicant, as the consequence of that annulment, would be reassigned to his former post (paragraph 35 of the order under appeal).

8 As regards the second type of harm alleged, relating to the applicant's psychological and physical condition, the President of the Court of First Instance

stated that Mr Marcuccio has been medically unfit for work since the beginning of January 2002 because his state of health has prevented him since then from travelling to Brussels for medical examinations. The President therefore found that the applicant's psychological and physical condition cannot be regarded as originally caused by the contested decision, since it predated it, nor *a fortiori* as the unavoidable consequence of that decision. He considered that the documents in the case show that it was the official's antagonistic relationship with the head of the Commission's delegation to Angola during several consecutive months which led to the change in his state of health (paragraph 37 of the order under appeal).

9 In those circumstances, the President considered that, as there was no adequately substantiated causal link between the contested decision and the alleged harm, there were no grounds for concluding that the applicant's psychological and physical problems could be avoided by the granting of suspension of operation of that decision (paragraph 38 of the order under appeal).

10 The President also held that, 'in any event, there is room to doubt the applicant's interest in obtaining the suspension of operation requested, the specific effect of which would be to put him back into a professional situation identical to that which caused the deterioration in his health. The suspension of operation of the contested decision would not therefore resolve the problems identified' (paragraph 39 of the order under appeal).

11 The President concluded that Mr Marcuccio had not proved that the contested decision produces effects justifying the suspension of its operation until the Court of First Instance gives a ruling on the substance of the case (paragraph 40 of the order under appeal). Holding, therefore, that the condition relating to urgency was not satisfied, he rejected the application for suspension of operation without examining the condition concerning a prima facie case. He also held that that rejection inevitably involved the rejection of the claim for the applicant's immediate reassignment to his previous duties, since that claim is ancillary to the application for suspension of operation (paragraph 41 of the order under appeal).

12 In his appeal, the appellant claims that the Court should set aside the order under appeal, order suspension of the operation of the contested decision and his immediate reassignment to the duties he previously carried out, — or, in the alternative, refer the case back to the Court of First Instance — and order the Commission to pay the costs.

13 In support of his appeal, the appellant puts forward eight pleas, some of which are broken down into several limbs, which he claims constitute an infringement of Community law. These various pleas should therefore be examined separately.

14 The Commission contends that the Court should dismiss the appeal and order the appellant to pay the costs.

15 By his first plea, which is broken down into six limbs, the appellant complains that the President of the Court of First Instance showed a 'lack of logic' in the order under appeal. The first limb of this plea calls into question, in particular, paragraph 39 of the order, on the ground that, if the President had had reasonable doubt as to the appellant's interest in obtaining the interim measures requested, he should have declared the claim for interim relief inadmissible. The second limb of this plea, which also concerns paragraph 39 of the order under appeal, criticises the connection made therein between that 'reasonable doubt' and urgency, since those two concepts have no logical link.

16 In that regard it should be pointed out that paragraph 39 of the order under appeal clearly contains considerations which are stated merely for the sake of completeness, since the conclusion of the President of the Court of First Instance was the necessary consequence of paragraph 38 of the order. It is settled case-law that, in appeal proceedings, pleas directed against grounds which do not provide the necessary basis for the operative part of the judgment or order under appeal

are inoperative (see *inter alia* judgment in Case C-244/91 P *Pincherle* v *Commission* [1993] ECR I-6965, paragraph 31; order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 47, and judgment in Case C-82/01 P *Aéroports de Paris* v *Commission* [2002] ECR I-9297, paragraph 41).

17 For the same reason it is necessary to reject the sixth limb of the first plea, in which the appellant complains that a passage in paragraph 32 of the order under appeal is obscure and illogical. It is also important to note that that paragraph contains only a reminder of the aims of interlocutory proceedings, supported by textual references to settled case-law. Admittedly, the order contains an obvious clerical error in the authentic language (Italian), which originates in the Italian translation of paragraph 62 of the order in Case C-65/99 P(R) *Willeme* v *Commission* [1999] ECR I-1857. However, the fact remains that that error, which consists in the omission of several words, does not seem seriously to jeopardise an understanding of the order under appeal.

18 The third, fourth and fifth limbs of the first plea refer to paragraphs 37 and 38 of the order under appeal, and complain that they too lack logic. The appellant considers in particular that it is illogical to consider that the worsening or continuation of a previously existing illness cannot in themselves constitute serious and irreparable harm. The order under appeal is also illogical and discriminatory in that it disregards the medical report annexed to the application for interim measures ('the medical report'), which should be presumed lawful and is authentic and which unmistakably shows a causal link between the contested decision and the worsening of the appellant's state of health.

19 In so far as those arguments should be taken as complaining that the President of the Court of First Instance did not examine the plea alleging possible serious and irreparable damage consisting in the worsening of the appellant's illness

following the contested decision, it need only be pointed out that, in paragraph 29 of the order under appeal, the President did consider the scope of the appellant's arguments, inasmuch as they refer to the premiss that his state of health deteriorated. In paragraph 38 of the order, the President assessed the foreseeable effect of the suspension of operation requested on 'the applicant's psychological and physical problems'. He did not therefore rule out the possibility of harm consisting in a worsening of the appellant's illness, contrary to the appellant's argument.

20 Since those arguments call into question the assessment made by the President of the Court of First Instance of the evidence presented to him, they must be rejected.

21 It should be pointed out in that regard that, under Article 225 EC and Article 58 of the Statute of the Court of Justice, any appeal is to be limited to points of law and must lie on the grounds of lack of competence of the Court of First Instance, a breach of procedure before it which adversely affects the interests of the appellant or infringement of Community law by the Court of First Instance. The Court of First Instance alone has jurisdiction to make findings of fact, except where the documents before it caused it to make a material error in so doing, and to assess the facts as so found (order in Case C-361/00 P(R) *Cho Yang Shipping* v *Commission* [2000] ECR I-11657, paragraph 73). Furthermore, the Court of Justice does not in principle have jurisdiction to examine evidence which the Court of First Instance has accepted in support of its finding or assessment of the facts. Where the general principles of law and rules of procedure governing the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the weight to be attributed to the evidence adduced before it (judgment in Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 66; orders in Case C-30/96 P *Abello and Others* v *Commission* [1998] ECR I-377, paragraph 53, and Case C-159/98 P(R) *Netherlands Antilles* v *Council* [1998] ECR I-4147, paragraph 68).

22 The first plea must therefore be rejected in its entirety.

23 By his second plea, the appellant complains of a lack of a statement of grounds in the order under appeal. However, in that regard, he merely refers to the arguments raised in support of his first plea, considering that the lack of a statement of grounds is the 'natural corollary' to that plea.

24 Since the first plea has been rejected, it inevitably follows that the second plea must be rejected.

25 By his third plea, which also contains six limbs, the appellant maintains that the order under appeal is vitiated by an error of law and that it is based on a misinterpretation and misapplication of Community legislation. Firstly, the President of the Court of First Instance was wrong to examine, for the purposes of assessing whether or not there was urgency, the causal link between the contested decision and the illness suffered by the appellant. According to the latter, the existence of that causal link is a sufficient but not necessary condition for establishing urgency. Secondly, the President was required to determine whether there were other circumstances establishing urgency. That error arose out of a confusion between the meaning of the Community's liability (Article 288 EC) and that of urgency in connection with a claim for interim relief.

26 As regards the first limb of the plea, the appellant cannot criticise the order under appeal for confusing the conditions for granting interim measures and the condition for establishing Community liability under Article 288 EC. In interlocutory proceedings which seek, as in the present case, the suspension of operation of an act of an institution, the existence of a causal link between the contested act and the alleged harm is relevant evidence for the purposes of assessing urgency. It is settled case-law that, for a claim for interim measures to be upheld, it is necessary for the measures requested to be urgent in so far as, in order to avoid serious and irreparable damage to the applicant's interests, they

must be made and produce their effects before a decision is reached in the main action (see *inter alia* the order in Case C-393/96 P(R) *Antonissen* v *Council and Commission* [1997] ECR I-441, paragraph 27). Interim measures which would not serve to prevent the serious and irreparable harm feared by the applicant cannot *a fortiori* be necessary for that purpose (order in Case C-89/97 P(R) *Moccia Irme* v *Commission* [1997] ECR I-2327, paragraph 44). Consequently, the President of the Court of First Instance did not err in law by examining, as he had a duty to do, whether the grant of suspension of operation of the contested decision was appropriate for the purpose of avoiding the alleged harm.

27 As for the question whether the President of the Court of First Instance was required to ascertain whether there were other circumstances establishing urgency, it need only be pointed out that, in the order under appeal, he did not merely find that there was no causal link between the contested act and the appellant's state of health. He also stated, in paragraph 38 of the order, that 'there are no grounds for concluding that the applicant's psychological and physical problems may be avoided if the President of the Court orders suspension of operation of the contested decision'. He also expressed his conviction, following an assessment of all the evidence before him, that it did not establish the urgency invoked by the applicant.

28 That assessment by the President, according to which the applicant did not prove to the requisite legal standard that the adverse effect on his health could be avoided by the grant of suspension of operation of the contested decision, cannot be called into question in an appeal.

29 By the second and third limbs of his third plea, the appellant maintains that the President of the Court of First Instance took no account of the fact that the contested decision caused the continuance, even the worsening, of his illness and

that he cannot be required to prove beyond all possible doubt that the harm would necessarily be caused if the interim measures requested were not adopted. The appellant need only prove the facts on the basis of which he states that such harm is foreseeable, and he has done this in the present case by relying on the medical report.

30 In essence, these arguments match those put forward in the first plea. They must be rejected for the same reasons as those set out in paragraphs 19 to 21 of this order.

31 By the fourth and fifth limbs of the third plea, the appellant maintains that the President of the Court of First Instance failed to consider whether the alleged harm was foreseeable with a sufficient degree of probability and whether it was irreparable or reparable only with difficulty.

32 In that regard, it need only be stated that the President did not base his reasoning on the lack of continuance, or even worsening, of the state of the applicant's psychological and physical health but considered that suspension of operation would not avoid the harm alleged. Therefore, he was not required to consider whether the harm was more or less foreseeable nor whether or not it was reparable.

33 As regards professional harm and harm to the appellant's reputation, since, in paragraph 35 of the order under appeal, the President had found that a decision to assign to Brussels an official previously assigned to a delegation in a third country cannot cause professional harm where such a measure is not disciplinary

in nature, nor was he required to examine whether that alleged harm was foreseeable or reparable.

34 By the sixth limb of the third plea, the appellant maintains that the President of the Court of First Instance wrongly omitted to assess whether the immediate operation of the contested decision was not disproportionate to the interest of the institution in question.

35 In that regard, it should be noted that that argument concerns, in essence, the balancing of the appellant's interest in obtaining suspension of operation of the contested decision and the Commission's interest in preserving the effects of its acts.

36 However, since the President considered that the condition for urgency had not been established, he was no longer obliged to balance the various interests at stake (see to this effect the order in Case C-364/99 P(R) *DSR-Senator Lines* v *Commission* [1999] ECR I-8733, paragraph 61).

37 It follows that the sixth limb of the third plea cannot be upheld and that the third plea must be rejected in its entirety.

38 By his fourth plea, the appellant claims that the President of the Court of First Instance seriously misinterpreted the medical report when he stated that, according to that report, the contested decision was, from the outset, the cause of the appellant's illness, whereas the medical report shows that the decision was the cause not of the appearance but of the worsening of his health problems.

39 Since the appellant's arguments seek to criticise the President for not having expressly assessed a specific piece of evidence, they must be rejected for the reasons set out in paragraph 21 of this order.

40 In so far as, by those arguments, the appellant is calling into question the reasoning of the order under appeal on this point, it must be remembered that a judge hearing an application for interim measures cannot be required to reply explicitly to all the points of fact and law raised in the course of the interlocutory proceedings (orders in Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 58, and *Antonissen* v *Council and Commission*, cited above, paragraph 25). It is sufficient that the reasons given validly justify that order in the light of the circumstances of the case and enable the Court of Justice to exercise its powers of review (orders in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 52; Case C-248/97 P(R) *Chaves Fonseca Ferrão* v *OHIM* [1997] ECR I-4729, paragraph 20, and *Netherlands Antilles* v *Council*, cited above, paragraph 70).

41 In the present case, the President of the Court of First Instance clearly set out his assessment of the situation in paragraph 38 of the order under appeal.

42 It follows that the fourth plea cannot be upheld.

43 By his fifth plea, the appellant complains that the President of the Court of First Instance distorted the facts and that some of his findings are factually incorrect. He criticises, in particular, paragraph 29 of the order under appeal, in which the appellant's statements on the link between his anxio-depressive syndrome and the events complained about had been distorted, and paragraph 39, in which it is

wrongly stated that the effect of the requested suspension would be to reinstate the appellant in a professional situation identical to that which gave rise to the deterioration in his state of health, whereas the departure of his former head of unit had radically changed the situation.

44 As regards paragraph 29 of the order under appeal, it must be stated that, contrary to what the appellant claims, the words used by the President in essence reproduce those which he himself used in his application for interim relief. He cannot therefore complain that the President distorted the facts.

45 So far as concerns the criticism of paragraph 39, it need only be stated that it relates to a point made only for the sake of completeness in the grounds of the order under appeal (see paragraph 16 above), so that that plea is, in any event, inoperative.

46 The appellant also complains that the President failed to mention, in paragraph 4 of the order under appeal, a series of facts which he then lists in detail and which matter for the purposes of a correct statement of the events, since the lack of those facts prevented the Commission's conduct from being properly assessed and declared unlawful.

47 In that regard, it should be pointed out that the President of the Court of First Instance is not in any way required to reproduce in his order the detailed description of the facts as stated in the written pleadings of the parties.

48 Furthermore, since the appellant has not established that the omission of certain facts, in that part of the order under appeal devoted to the presentation of the case, led to the distortion of the findings made by the President, that omission, even if established, cannot have the effect of invalidating the order under appeal.

49 Accordingly, the fifth plea must be rejected.

50 By his sixth plea, the appellant complains that the President of the Court of First Instance infringed the principle of equality, since, in paragraph 35 of the order under appeal, he relied on the orders of the President in Case T-82/95 R *Gómez de Enterría* v *Parliament* [1995] ECR-SC I-A-91 and II-297, and Case T-52/01 R *Schaefer* v *Commission* [2001] ECR-SC I-A-115 and II-543, although the appellant's personal circumstances are considerably different from the circumstances dealt with in those cases.

51 In that regard, it need only be stated that the references to the aforementioned orders in *Gómez de Enterría* v *Parliament* and *Schaefer* v *Commission* concern only the finding that the appellant's assignment to Brussels is not a disciplinary measure and that, for that reason, any annulment of the contested decision in the proceedings on the merits would, in any event, enable the professional harm allegedly suffered by the party concerned to be repaired. This reasoning may be applied to the appellant's situation, notwithstanding the factual differences between it and the situations which gave rise to the two aforementioned orders.

52 The sixth plea must therefore be rejected.

53 By his seventh plea, the appellant complains that the President of the Court of First Instance infringed his right to health and to physical and mental integrity, in that he refused to acknowledge the existence of a risk of harm in spite of the submission of medical certificates proving that such a risk existed.

54 This plea seeks, in actual fact, to call into question the conclusion of the President that it has not been established that the suspension of operation of the contested decision would remedy the appellant's health problems. It must therefore be rejected for the same reasons as those set out in paragraph 21 of this order.

55 By his final plea, the appellant criticises the President of the Court of First Instance for not adequately assessing the condition concerning the existence of a *prima facie* case and repeats in detail the factual and legal arguments set out in his application on the merits before the Court of First Instance.

56 In that regard, it should be noted that, according to settled case-law, the conditions for granting suspension are cumulative, so that an application for suspension must be dismissed if one of them is not satisfied (orders in *SCK and FNK* v *Commission*, cited above, paragraph 30, *DSR-Senator Lines* v *Commission*, cited above, paragraph 62, and Case C-7/01 P(R) *FEG* v *Commission* [2001] ECR I-2559, paragraph 50).

57 In the present case, the application for interim relief was rejected on account of the fact that the condition concerning the urgency of the measures sought was not satisfied and the President of the Court of First Instance did not examine whether the condition for granting suspension of operation linked to a *prima facie* case was satisfied.

58 It is clear that, in the context of this appeal and in accordance with settled case-law, pleas which relate to the existence of a *prima facie* case, but do not call into question the lack of urgency of the measures sought, cannot form grounds for setting aside, even partially, the order under appeal (orders in *SCK and FNK* v *Commission*, cited above, paragraph 31, and Case C-43/98 P(R) *Camar* v *Commission and Council* [1998] ECR I-1815, paragraph 40). The eighth plea must therefore be rejected.

59 It is apparent from all the foregoing considerations that the appeal must be dismissed.

Costs

60 Under the first subparagraph of Article 69(2) of the Rules of Procedure, applicable to the appeal procedure 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. Under Article 70 of those Rules, in proceedings between the Communities and their servants the institutions are to bear their own costs. However, it is apparent from the second paragraph of Article 122 of those Rules that Article 70 is not applicable to appeals brought by officials or other servants of an institution against that institution. Since the Commission has applied for costs and since the appellant has been unsuccessful, he must be ordered to pay the costs.

On those grounds,

THE PRESIDENT OF THE COURT

hereby orders:

1. **The appeal is dismissed.**

2. **Mr Marcuccio shall pay the costs of these proceedings.**

Luxembourg, 12 February 2003.

R. Grass
Registrar

G.C.Rodríguez Iglesias
President