OPINION OF MR ADVOCATE-GENERAL CAPOTORTI DELIVERED ON 1 DECEMBER 1976 [1]

Mr President,
Members of the Court,

1. The facts in this case may be summarized as follows:

The applicant, Miss Maria Mascetti, an Italian citizen, who was employed from 1 March 1961 as a principal secretary at the Joint Nuclear Research Centre at Ispra did not report for work as from 18 November 1974. By a letter of 9 January 1975 the Personnel and Administration Service of the Centre notified Miss Mascetti that the Administration had received her request (the date of the request is not stated nor does a copy appear on the file) to have her absence set off against her annual leave until it was used up, that is until the morning of 10 December 1974.

Nevertheless, she had not resumed work on the said morning nor did she provide a medical certificate to justify her prolonged absence. Therefore, in the said letter, the Administration stated that such absence was unauthorized as from 10 December and ordered the applicant immediately to resume work, unless she had valid reasons for not doing so, notifying her that it had suspended payment of her remuneration as is prescribed in cases of unauthorized absence in Article 60 of the Staff Regulations, which is stated to apply by analogy in Article 60 of the 'Conditions of Employment of Other Servants of the Communities', which apply to the applicant.

On 30 January 1975 Miss Mascetti's lawyer forwarded to the Administration of the Centre at Ispra a request, dated 22 December 1974, in which his client asked for unpaid leave for one year on personal grounds under Article 40 of the Staff Regulations of Officials, which applies by analogy pursuant to Article 91 of the Conditions of Employment of Other Servants of the Communities, with special reference to the staff of the Joint Nuclear Research Centre. In her request Miss Mascetti stated that for reasons of *force majeure,* namely legal proceedings instituted against her on a charge of a political nature, she could not report for work. In his covering letter Miss Mascetti's lawyer stated that a warrant for her arrest was in force, issued on 14 December 1974 in criminal proceedings pending before the Ufficio d'Istruzione (examining judge) of the Tribunale di Roma.

On 20 February 1975 the Administration of the Centre at Ispra replied to Miss Mascetti that it was unable to grant her request 'because the reasons advanced provide no justification whatever for granting leave on personal grounds'. Furthermore, in that reply Miss Mascetti was reminded that her continued absence after 10 December 1974, which displayed all the characteristics of an unauthorized absence, sanctioned neither by the Staff Regulations nor by her superiors, constituted a serious failure to comply with the obligations deriving from her contract of employment as a member of the establishment staff. Then, with a view to disciplinary proceedings, Miss Mascetti was formally requested 'to appear in person in the office of the Director of the Centre before 7 March 1975 to be heard in accordance with Article 87 of the Staff Regulations which applies by analogy to members of the establishment staff'. The letter ended as follows: 'If you do not appear in person before that date I shall be obliged to conclude from your absence that you have relinquished your

1 — Translated from the Italian.

post and I shall be obliged to take the appropriate action.'

At this point Miss Mascetti, by a letter of 6 March 1975, submitted to the Commission a complaint under Article 90 of the Staff Regulations against the decision of refusal adopted in her case. However, the complaint was rejected by a decision of 11 August 1975 which was notified to her on 1 October 1975: the Commission stated that decisions concerning leave of absence are entirely discretionary and further observed: 'The fact that your request was submitted when you were already guilty of relinquishing your post was in itself unlikely to have a favourable effect on the decision you have requested. Furthermore, in view of the nature of the grounds upon which you base your request, the decision to remain outside Italy is your sole responsibility and you take that decision entirely at your own risk. The Commission does not consider that it is obliged to abet you by means of a decision which, by absolving you from the contractual requirement of residence in Italy, would in effect amount to furthering your attempts to evade the investigations of the judicial authorities of your country.'

Miss Mascetti has submitted an application against this decision to the Court of Justice wherein she primarily criticizes the reasons stated for the original decision of refusal of 20 February 1975, which were repeated in the decision now contested. According to the applicant, the reason on which she relies to justify her request for leave of absence fulfils completely the conditions laid down in Article 40 since the grounds are undoubtedly of a personal nature and the applicant's circumstances are clearly exceptional, since it is necessary for her to go into hiding, pending judgment, in order to evade a measure depriving her of her liberty. Consequently, the inadequacy of the statement of reasons for the contested decision is such as to affect the validity of that decision and to require its annulment.

2. First, we must briefly consider one of the arguments advanced by the Commission, namely that relating to the applicant's unauthorized absence at the time when she requested leave. I consider that this argument is irrelevant for the simple reason that the decision refusing leave is not based on the circumstance that Miss Mascetti was guilty of an unauthorized absence. As has been stated, the decision of refusal was based on the inadequacy of the reasons upon which Miss Mascetti relied in requesting leave on personal grounds. This, then, is the decisive aspect of the case. In order to appraise it we must first consider whether Article 40 of the Staff Regulations confers upon officials an absolute right to obtain leave of absence, the sole conditions being that it is requested and that personal reasons of any nature whatever exist.

In this connexion it should be observed that in the legal systems of the Member States civil servants do not enjoy a *right* to leave of absence, only an *interest* therein, which the administration must appraise at its discretion in order to establish that it is compatible with the requirements of the service (cf. to this effect the ruling of the Consiglio di Stato, Vth Section, of 26 May 1951, No 488, Rassegna del Consiglio di Stato, 1951, I, p. 587; similarly, the ruling of the Conseil d'État Belge of 14 January 1966, Recueil de jurisprudence du droit administratif et du Conseil d'État, 1966, p. 90; the judgment of the Conseil d'État Français of 11 March 1949, *Dame Vimont,* Recueil, p. 122; see also Paragraph 13 of the Federal German 'Verordnung über Sonderurlaub für Bundesbeamte und Richter im Bundesdienst' (Rules governing special leave for civil servants and judges in Federal service) The position must be the same in the case of Community law. It is sufficient to consider the wording of the said Article 40 of the Staff Regulations, in accordance with which an official 'may' be granted leave on personal grounds, and leave 'may' be extended for

two further periods of one year each: clearly, such measures are always based on a decision of the appointing authority. Furthermore, leave is granted 'in exceptional circumstances'; this implies that the Administration must assess whether it is possible to derogate from the normal principle of continuity of service of officials.

In this assessment the Administration must weigh the interest of the official in obtaining leave with the interest of the institution in the continuity of service. In order to justify the grant of leave the personal grounds advanced must thus be socially relevant in that they correspond to an interest which is generally held to be worthy of protection. This cannot be so when an official requests leave in order to avoid being remanded in custody, even if being a fugitive from justice does not in itself constitute a breach of duty on the part of the accused. The defendant was thus justified in refusing the applicant leave which was requested, as has been said, with a view to enabling Miss Mascetti to evade a warrant for arrest, that is, a socially reprehensible purpose.

3. Nevertheless, I do not think that in the present case we can merely dismiss the application out of hand after finding that the Commission correctly exercised the discretionary power conferred upon it by Article 40 of the Staff Regulations.

We should indeed bear in mind that, in the Commission's view, not only does the ground relied upon by the applicant not justify granting her leave, but her situation cannot even justify another type of measure which would preserve intact the contract of employment of the official (that is, the retention of her post) even in her absence and pending the outcome of the criminal proceedings instituted against her. This may be clearly inferred from the numerous statements regarding the institution of disciplinary proceedings against her on the ground of a serious failure to comply with her obligations consisting in her prolonged and unjustified absence (the letter of 20 February refers to her having 'relinquished [her] post'); disciplinary proceedings on such grounds could well lead to the dismissal of the person concerned.

Since in applications by officials the Court exercises the very widest power of appraisal regarding contested decisions and thus, in addition, regarding the facts to which they relate, I think it appropriate to consider this aspect of the case as well. The interest which Miss Mascetti wished to protect in asking to be placed on leave is clearly that of retaining her right to reinstatement in the service if the outcome of criminal proceedings pending should be favourable to her; on the other hand, if the applicant were found guilty, I do not think that, bearing in mind the gravity of the offence with which she is charged, even she would imagine that she could retain her employment with the Centre at Ispra.

It therefore appears that there is reason to consider how the Commission might take account of this interest. However, before we proceed to this it will be helpful to consider the national legal systems in order to ascertain the respective rights of administrations and of civil servants when criminal proceedings are instituted against the latter.

4. Since criminal proceedings pending in Italy against an Italian citizen are concerned in this case I shall begin with Italian law. According to Article 91 of the consolidated text of the provisions relating to the rules governing civil servants (DPR of 10 January 1957, No 3), a civil servant in respect of whom a warrant for arrest has been issued 'must immediately be suspended from his duties by his superior'. This suspension, which is merely a precautionary measure and not a disciplinary penalty, lasts until the conclusion of the criminal

proceedings, even if in the meantime the servant has been released after being held in custody (cf. the judgment of the Consiglio di Stato, IVth Section, of 23 June 1967, No 429, Rassegna 1967, I, 1376). Until the judgment in the criminal proceedings is known the administration cannot take other steps with regard to the official. The Consiglio di Stato has ruled that the administration acted unlawfully when, instead of suspending from his duties a servant in respect of whom a warrant for arrest had been issued, it instituted disciplinary proceedings against him and dismissed him (Consiglio di Stato, plenary session, ruling of 16 May 1968, No 154, Rassegna 1970, I, 1492). In accordance with the combined provisions of Articles 82 and 92 of the said consolidated text the suspension of an employee from his duties also entails the suspension of payment of his salary and related allowances other than a subsistence allowance and, where appropriate, allowances for the support of his family. It must be emphasized that a clear distinction is maintained between suspension and leave on personal grounds: in this connexion Article 66 of the said consolidated text provides that 'a servant may be granted leave of absence for military service, illness or family reasons'. Accordingly, if the applicant had been employed in the Italian public service her position today would be clear: irrespective of whether she was in custody or a fugitive from justice she would automatically have been suspended from her duties pending her trial whilst the administration would have been unable to deal further with her case, in particular in disciplinary matters.

It seems probable that the same would have been the case in the other Member States, although there is no definite duty to suspend a servant such as that incumbent on the administration in accordance with Italian law.

Under Belgian law a public servant may be suspended from his duties when the interests of the service so require (Article 103 of the Arrêté Royal of 2 October 1937, as amended by the Arrêté Royal of 13 November 1967; Article 1 of the Arrêté Royal of 1 June 1964). And there are good grounds for the view that the interests of the service require the suspension of an official in respect of whom a warrant for arrest has been issued, if it is true that it would be difficult to reconcile the dignity of the administration with the retention at his post of a person who is strongly suspected of an offence of considerable gravity.

With regard to French law it is clear from Article 32 of Ordonnance No 59.244 of 4 February 1959, which lays down the general rules in relation to public servants, that an official against whom criminal proceedings are instituted may be suspended forthwith from his duties by the disciplinary authority. Nevertheless, the case-law indicates that this suspension is only precautionary and does not constitute a disciplinary measure. The administrative status of the official is decided finally only after the conclusion of the criminal proceedings. If the official is reinstated the sums withheld from his salary during his suspension are reimbursed.

In Netherlands law, Article 91 of the Algemeen Rijksambtenarenreglement (general rules relating to public servants) provides that an official may be suspended when criminal proceedings are instituted against him and more generally if the competent authority considers that such suspension is required in the interest of the service.

5. If we now turn to Community law, the only provision to which reference may be made is Article 88 of the Staff Regulations of Officials (which Article 97 of the Conditions of Employment of Other Servants of the Communities renders applicable to the latter by analogy). In my view the provisions of that article, which corresponds almost to

the letter with the provision contained in Article 32 of the abovementioned Ordonnance No 59.244, fit the applicant's situation better than any other provision in the Staff Regulations. The first paragraph of Article 88 provides that: 'Where an allegation of serious misconduct is made against an official by the appointing authority, whether this amounts to failure to carry out his official duties *or to a breach of law,* the authority may order that he be suspended forthwith.'

Despite the impression conveyed by the wording employed in the ' said first paragraph, which in the Italian version at least refers to the 'colpevole', it is clear from Article 88 that it is not in fact necessary to establish that an official is guilty in order to suspend him; it is sufficient that such guilt should be 'alleged'. Indeed, the last paragraph provides that where the official is prosecuted for the same acts 'a final decision shall be taken only after a final verdict has been reached by the court hearing the case'.

I consider that these provisions may be applied to the present case in spite of the absence of the connexion presupposed by Article 88 between the serious misconduct of the official and the criminal charge. In other words, I am thinking of a wide application or an application by analogy of the suspension in question and it does not seem to me that this is ruled out by the fact that Article 88 appears under the Title of the Staff Regulations concerning disciplinary measures or that the suspension presupposes that an allegation of serious misconduct has been made by the appointing authority. In this matter too recourse may be had to an analogical approach, at least where, as is precisely the case in the present proceedings, the application of the rule is substantially in favour of the official.

Certainly, the Commission cannot consider as a matter of no importance the fact that criminal proceedings have been instituted against an official and in particular that a warrant for his arrest has been issued. If the Commission harbours anxieties regarding the unfavourable effect on public opinion created by the granting of leave to an official who intends to evade a warrant for his arrest, it must *a fortiori* be concerned about the impression which would be created if the same person accused of a serious crime were seen to resume his duties, as the applicant was indeed ordered to do by the Commission.

On the other hand, the Commission cannot overlook the fact that during the criminal proceedings the applicant cannot perform her duties at Ispra, even if she wished to do so, since her reappearance at work would mean that she would immediately be arrested. Therefore I do not understand the logic of the statement, contained in the decision of refusal of 20 February 1975, that if the applicant did not return to work before the expiry of a short period (which the decision fixed at 7 March 1975) her absence was to be taken to mean that she had 'relinquished her post'.

6. It seems to me that there are contradictions, of substance if not of form, in the stance adopted by the Commission. One such contradiction can be shown by reference to a hypothetical case: that in which the applicant is actually detained in custody in execution of a warrant issued for her arrest. In this case it is inconceivable that the defendant would continue to order the applicant, on pain of serious penalties, to resume her duties immediately, or that it would consider her absence to be 'unjustified'.

It seems that Article 88 of the Staff Regulations provides a solution of a precautionary nature which, reconciling as it does the interest of the institution with that of the official, is reasonable and fair. It allows the Community Administration to protect its reputation

and at the same time guards the official against the risk of losing his post by the mere fact that criminal proceedings are instituted against him.

Although, as we have seen, Article 40 of the Staff Regulations cannot be applied to the situation in question, and in this respect the Commission is therefore justified in refusing to grant the application for leave, on the other hand it must be recognized that it is contrary to the canons of fairness and of good administration to threaten to apply the penalties provided in Article 87 of the Staff Regulations to an official on the ground that she has been absent from work for some time when it is clear that her position, which she has notified to her administration, actually prevents her from carrying out her duties; and when, moreover, the gravity of the offence with which the official is charged would render her continuation in active service (even if for the sake of argument this were possible) incompatible with the dignity of the institution until the courts have delivered a judgment ruling that the charge was unfounded.

Referring to previous cases concerning officials involved in criminal proceedings, the representative of the Commission stated at the hearing that 'if the criminal trial proceeds quickly it is not worth suspending an official; it is sufficient to await the final judgment and then decide'. However, criminal proceedings may take time, in which case it seems preferable to employ the suspension provided for in Article 88 until the conclusion of the proceedings and only then to decide the fate of the official.

7. In conclusion, the application against the refusal to grant the leave provided for in Article 40 of the Staff Regulations should be dismissed as unfounded, for the reason already indicated. Nevertheless, I suggest that in the judgment of dismissal it should be stated that the threat to apply disciplinary measures to the applicant because of her absence fails to take cognizance of her actual situation and is liable to bring about an unfair result. In short, the dismissal of the application should not be understood as an implied endorsement of the Commission's behaviour as a whole towards the applicant; the interest of the applicant in not being dismissed until the outcome of her trial is known seems worthy of protection. The Commission should thus be induced to seek a solution other than the rigid choice between resumption of work and disciplinary measures; the application by analogy of Article 88 of the Staff Regulations may provide that solution.

Finally, having regard to the circumstances which gave rise to the application and the general behaviour of the Administration it seems fair that at least a part of the applicant's costs should be borne by the defendant (pursuant to the second subparagraph of Article 69 (3) of the Rules of Procedure).