# OPINION OF ADVOCATE GENERAL LÉGER
delivered on 4 July 1996 *

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1. Mr Ojha asks the Court to annul the judgment of the Court of First Instance of 6 July 1995 in Case T-36/93 *Ojha* v *Commission* [1995] ECR-SC II-497.

2. His pleas essentially concern the content of an official's personal file, transfers or reassignments [1] in the interests of the service, and the exercise of defence rights in the context of that kind of measure.

3. Having summarized the facts and procedure (I), I shall examine the applicant's

* Original language: French.

1 — A transfer implies appointment to a vacant post, whereas reassignment implies a movement of the official with his post.

various pleas and branches thereof (II). I shall then recommend that the Court partially annul the contested judgment and give a definitive ruling on the dispute pursuant to Article 54 of the EC Statute of the Court of Justice (III and IV). Finally, I shall examine the question of costs (V).

## I — Facts and procedure

*The contested administrative decision*

4. Mr Ojha, who is a Grade A 5 official in the Directorate-General for Employment, Industrial Relations and Social Affairs at the Commission in Brussels (DG V), was assigned on 15 August 1991 to the Commission's delegation in Dacca (Bangladesh) under the Directorate-General for External Relations (DG I).

5. On 9 October 1992, the Director General of Personnel and Administration and the Director General of DG I decided, pursuant to the opinion issued by the Rotation Committee [2] on 22 September 1992, that the applicant should take the steps necessary to return to Brussels. They stated that his return should take place on 1 November 1992.

2 — Provided for by the Commission notice of 26 July 1988 entitled 'Guidelines on the new system for rotating personnel outside the Community'.

6. On 19 October 1992, Mr Ojha lodged an appeal before the Rotation Committee.

7. By note of 20 October 1992 from the Director General of Personnel and Administration, he was informed that the Rotation Committee had rejected his appeal. By a decision of the same day, and in the interests of the service, he was reassigned with his post to the Directorate-General for Employment, Industrial Relations and Social Affairs in Brussels, with effect from 1 November 1992.

8. On 30 October 1992, he lodged a complaint under Article 90(2) of the Staff Regulations of Officials of the European Communities ('the Staff Regulations').

9. On 1 June 1993, he brought an action before the Court of First Instance challenging the implied rejection of his complaint, which came into being on 1 March 1993.

*The judgment of the Court of First Instance*

10. Mr Ojha claimed that the Court of First Instance should:

— annul the Commission's decision of 20 October 1992 and, so far as necessary, that of 9 October 1992;

— order the Commission to pay him BFR 500 000 in compensation for non-material damage suffered;

— take formal note of his decision to bring a separate action in damages for his material loss;

— order the Commission to pay the costs.

11. In support of his claims, he pleaded infringement of (i) the rotation procedure and the duty to state reasons, (ii) the duty to have regard to the welfare of officials, (iii) the principle of the protection of legitimate expectations and the rights of the defence, (iv) Articles 24 and 26 of the Staff Regulations, and, finally, (v) Article 86 et seq. of the Staff Regulations.

12. The Court of First Instance dismissed the action.

*The appeal*

13. Mr Ojha claims that the Court of Justice should:

— set aside the judgment of the Court of First Instance;

— annul the Commission's decision of 20 October 1992;

— refer the matter back to the Court of First Instance for a fresh ruling on his claims for compensation for the non-material damage which that decision caused him;

— order the Commission to pay the costs of the appeal proceedings and of the proceedings before the Court of First Instance.

## II — Examination of the pleas on appeal

14. For the purposes of analysis, I propose to examine in turn the first plea, the third plea, the second part of the second plea, the first part of the second plea and the fourth and sixth pleas taken together, and, finally, the fifth plea.

*The first plea*

15. The applicant maintains that, in holding that sufficient reasons were given for the contested decision, the Court of First Instance erred in law and in its reasoning on the extent of the Commission's obligation to give reasons. He pleads in substance that the second paragraph of Article 25 of the Staff Regulations was infringed.

16. Under that provision, reasons must be stated for any decision which adversely affects an official. At issue at this stage is not an obligation to demonstrate that the measure was well founded, but merely an obligation to explain the reasons for it.

17. A decision requiring an official to move against his will is an act adversely affecting him within the meaning of that article. [3]

18. As the Court has consistently held, [4] the reasons given for a decision are sufficient where the measure which is being challenged arose in a context which was known to the official concerned and enables him to understand the scope of the measure taken concerning him. The Court has held several times that it is enough for the person concerned to have been able to know, particularly by means of memoranda and other communications, '[...] the essential factors which guided the administration in its decision [...]'. [5] The Court has referred to 'discussions' [6] and 'meetings' [7] preceding the decision and enabling the official to understand the reasons for the measure concerning him.

19. In this case, the Commission's decision refers only to the 'interests of the service'.

20. Nevertheless, the statements made in the contested judgment show that:

— by note of 8 May 1992, the applicant was informed of the existence of four complaints concerning allegedly inappropriate conduct by him in the performance of his duties in the Dacca delegation;

3 — Joined Cases C-116/88 and C-149/88 *Hecq* v *Commission* [1990] ECR I-599, paragraph 26.

4 — Ibid. See also Case 125/80 *Arning* v *Commission* [1981] ECR 2539, paragraph 13.

5 — Case 61/76 *Geist* v *Commission* [1977] ECR 1419, paragraph 26; Case 791/79 *Demont* v *Commission* [1981] ECR 3105, paragraph 12; Case C-169/88 *Prelle* v *Commission* [1989] ECR 4335, paragraph 10.

6 — Case 69/83 *Lux* v *Court of Auditors* [1984] ECR 2447, paragraph 37.

7 — *Hecq* v *Commission*, cited above, paragraph 27.

— by a series of faxes and memoranda, sent between 15 and 28 June and between 11 and 18 July 1992, he responded to the criticisms which had thus been brought to his notice;

— on 13 July 1992, the Director General responsible for North-South relations in DG I informed the applicant of his intention to request his reassignment to Brussels, stressing that it was neither a disciplinary measure nor the result of a negative assessment of his professional capacities for thought and analysis, but the result of the finding that those capacities might be better used in work within the Commission, rather than in a delegation where his capacity for adapting himself to a diplomatic milieu was not as had been hoped;

— Mr Ojha explained himself to his Director General's assistant on 7 August 1992, to his Director on 7 September 1992 and to his Director General in Brussels on 9 September 1992;

— in his appeal to the Rotation Committee, Mr Ojha set out his arguments against the reassignment decision.

21. In those circumstances, the Court of First Instance correctly applied Article 25 of the Staff Regulations and did not commit any error in reasoning in holding that the applicant had been placed in a position to assess the legality and justification of the contested measure and to decide whether it was appropriate to subject it to the judicial review provided for by Article 91 of the Staff Regulations.

22. The plea alleging infringement of the second paragraph of Article 25 of the Staff Regulations must therefore be dismissed.

*The third plea*

23. In his third plea, Mr Ojha claims that the Court erred in law and reasoning by allowing the Commission to rely, in justification of its decision to reassign Mr Ojha in the interests of the service, on the mere existence of complaints against him, irrespective of whether they were well founded. He argues that no rule of law can justify that argument, nor does the Commission adduce any. In his submission, the argument accepted by the Court of First Instance is incompatible with the principles of legal certainty and sound administration.

24. It should be recalled at the outset that the Staff Regulations do not contain any *specific* rules on transfer or reassignment, entitled, for example, 'transfer or reassignment in the interests of the service'.

25. Article 7(1) of the Staff Regulations provides:

'The appointing authority shall, *acting solely in the interest of the service* and without regard to nationality, assign each official by appointment or transfer to a *post in his category or service which corresponds to his grade*.

An official may apply for a transfer within his institution.' [8]

26. The concept of the interest of the service thus underlies *any* assignment of an official to a post, whether it be a first assignment, a reassignment or a transfer, and, in the latter two cases, whether the new assignment is requested by the official or determined by the institution on its own initiative.

27. The pursuance of the interests of the service must be reconciled with the obligation to ensure that the grade and the post correspond, which is also a requirement of Article 7.

28. Subject to that reservation, it is settled case-law that the appointing authority has a wide discretion in organizing its services, [9] or, in other words, seeking solutions which the interest of the service dictates.

29. Therefore, the Community judicature, once it has ensured that the correlation between the grade and the post has been complied with, performs a restricted review of the appointing authority's exercise of its power, limited to determining whether a manifest error of assessment may have taken place, or whether there has been a misuse of powers.

30. Can the mere existence of complaints from third parties external to the institution be enough, irrespective of whether they are well founded, to justify reassignment or transfer of an official?

31. As far as internal relations in a service are concerned, the Court has held that where interpersonal difficulties are the source of tensions which impair the proper functioning of the service, they justify the transfer of an official in the interests of the service. [10]

8 — Emphasis added.

9 — See in particular, as regards reassignment decisions, *Lux* v *Court of Auditors*, cited above, paragraph 17, and Case 19/87 *Hecq* v *Commission* [1988] ECR 1681, paragraph 6.

10 — Case 35/72 *Kley* v *Commission* [1973] ECR 679, paragraphs 37 and 38; Joined Cases 4/74 and 30/74 *Scuppa* v *Commission* [1975] ECR 919, paragraphs 25 and 28; Case 124/78 *List* v *Commission* [1979] ECR 2499, paragraph 13; and *Hecq* v *Commission*, cited above, paragraph 22.

32. The Court held that the existence of tension was enough, even independently of the question of responsibility for the incidents in question. [11]

33. The same reasoning must be applied, *mutatis mutandis*, as regards the external relations of a service, especially in the area of diplomatic relations where, more than in any other area, damaging external tensions cannot be accommodated.

34. In the absence of a manifest error of assessment or a misuse of powers, the mere taking into account of external complaints, irrespective of their foundation, when they compromise the proper functioning of the service, does not constitute an infringement of the principles of legal certainty and sound administration, but is a proper application of Article 7 of the Staff Regulations.

35. In those circumstances, since the Court of First Instance has not erred either in law or in its reasoning, the third appeal plea must be dismissed.

*The second part of the second plea*

36. In the second part of his second plea, the applicant maintains that the Court of First Instance has erred in law and in its reasoning by absolving the Commission of any infringement of defence rights without examining, in the light of the relevant facts, whether the contested decision was, or might reasonably have been, justified in the interests of the service.

37. Since in my examination of the third plea I have found with reference to Article 7 of the Staff Regulations that the mere existence of complaints may in certain circumstances, irrespective of whether or not they are well founded, reveal the existence of tensions in the service's external relations which compromise its proper functioning and justify a transfer or a reassignment, the Court of First Instance, in having regard to the existence of complaints without prejudice to the question whether it might do so even as regards complaints not communicated to the official, [12] did not misapply the principle of observance of the rights of the defence or commit an error of reasoning.

38. The second part of the second plea must therefore be dismissed.

11 — *List* v *Commission*, cited above, paragraph 13.

12 — A question examined below in connection with the first part of the second plea and the fourth and sixth pleas.

*The first part of the second plea and the fourth and sixth pleas*

42. The first part of the second plea and the two other pleas, which I propose to examine together, in reality concern the scope of Article 26 of the Staff Regulations.

39. In the first part of his second plea, the applicant maintains that the Court of First Instance erred in law and in its reasoning by holding that the Commission had not infringed his defence rights by failing to communicate to him the documents on which the contested decision was based. He submits that the Court was wrong to hold such communication unnecessary in a case where a decision taken in the interests of the service does not affect an official's position under the Staff Regulations, since a premature reassignment motivated by considerations concerning the official's personality has effects which are broadly equivalent to a disciplinary measure and thus requires the rights of the defence to be observed.

43. That provision establishes a link between the content of the official's personal file and the duty of the institution to communicate documents affecting his administrative status and concerning his ability, efficiency and conduct, when the appointing authority intends to use such documents against the official; and, as the Court held in Case 88/71 *Brasseur* v *Parliament* [1972] ECR 499, [13] and repeated in Case 233/85 *Bonino* v *Commission* [1987] ECR 739 [14] and Case 140/86 *Strack* v *Commission* [1987] ECR 3939, [15] the purpose of that article is 'to guarantee an official's right of defence'.

40. In his fourth plea, Mr Ojha maintains that the Court of First Instance committed an error of law and reasoning by accepting, on the basis of a report of 21 May 1992, which was not communicated to the applicant, that the contested decision could be justified by the interests of the service, having regard to a tense situation within the Commission delegation in Dacca.

44. I should add that that provision, in the specific area of the Community civil service, is an expression of the principle of observance of the rights of the defence, which the Court has held to be a fundamental principle of Community law. [16]

41. By his sixth plea, the applicant claims that the Court of First Instance infringed Article 26 of the Staff Regulations by allowing documents not contained in an official's personal file to be used against him.

13 — Paragraph 11.

14 — Paragraph 11.

15 — Paragraph 7.

16 — See paragraph 28 of the judgment in Case 40/85 *Belgium* v *Commission* [1986] ECR 2321, which states: '[...] observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure in question'. See also, in particular, Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 29, and Case C-135/92 *Fiskano* v *Commission* [1994] ECR I-2885, paragraph 39.

45. Article 26 of the Staff Regulations provides:

'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.*

Documents shall be registered, numbered and filed in serial order; *the documents referred to in sub-paragraph (a) may not be used or cited by the institution against an official unless they were communicated to him before they were filed.*

The communication of any document to an official shall be evidenced by his signing it or, failing that, shall be effected by registered letter.

An official's personal file shall contain no reference to his political, philosophical or religious views.

*There shall be only one personal file for each official.*

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

The personal file shall be confidential and may be consulted only in the offices of the administration. *It shall, however, be forwarded to the Court of Justice of the European Communities if an action concerning an official is brought before the Court'.* [17]

46. The documents of which an official is entitled to require communication are determined by reference to the mandatory contents of the personal file, as laid down in point (a) of the first paragraph of Article 26.

47. *Ex hypothesi*, the prohibition in the second paragraph, which is at issue in this case, concerns those documents which are rather unfavourable to an official.

17 — Emphasis added.

48. What is meant by 'all documents concerning his administrative status' and 'all reports relating to his ability, efficiency and conduct'?

49. In my view, the words 'documents concerning his administrative status' should be widely interpreted.

50. The term 'documents' is a broad one. [18] Firstly, it covers formal administrative measures successively recording changes in an official's legal position. It must also include any document likely to bring about one of those changes, whenever that document concerns the person and the abilities of the official, and not merely objective considerations of service organization.

51. The verb 'concerning' is inherently broader in meaning than a verb such as 'affecting'. The former may apply to a document *capable* of affecting an official's administrative status, in which case the document must in principle be placed on file immediately and communicated pursuant to Article 26. Any subsequent measure by the appointing authority may, if it *affects* the status of the official, be struck down under the second paragraph of Article 26 if it was taken on the basis of that document without the document having been placed on file and communicated to the official before the decision was taken. [19]

52. Finally, the expression 'administrative status' covers the principal events of an official's career, namely recruitment, active employment, secondment, leave on personal grounds, non-active status and leave for military service, reports, advances in step and promotions, and final termination of service, [20] but it also covers other events concerning certain rights recognized by the Staff Regulations.

53. As for 'reports' concerning the ability, efficiency and conduct of an official, they are undoubtedly the documents containing information, analysis or assessments concerning an official's work and performance. The prime example of that type of document is the periodic staff report provided for by Article 43 of the Staff Regulations and which, under Article 45 of the Regulations, plays an important part in the awarding of

18 — That same word is, moreover, used in point (b) and in the second paragraph of Article 26 to denote both the 'documents' and the 'reports' referred to in point (a).

19 — In paragraph 11 of its judgment in Case 74/72 *Di Blasi* v *Commission* [1973] ECR 847 the Court stated that it does not follow from the prohibition in the second paragraph of Article 26 that the personal file of an official may contain only documents which were previously communicated to him; other documents may also be placed in the personal file, provided they are not used or cited against the official and have not been shown to be incorrect.

20 — See Title III of the Staff Regulations, headed 'Career of Officials'.

promotion. It may also be an *ad hoc* report, drawn up when particular circumstances warrant it.

54. In the light of those considerations, derived from the wording and the spirit of Article 26 of the Staff Regulations, I take the view that the appointing authority must communicate to the official and place on his personal file not only formal measures recording a change in his status but also any document relating to his conduct, ability and efficiency, wherever the relevant information is used in support of a decision taken against the official. The latter may thus take cognizance of the information and allegations concerning him and prepare any observations for his defence, whether to dispute the truth of the facts or to mitigate them, unless he simply accepts them.

55. The Court thus held, in the context of procedures for making appointments to vacant posts, that the following had to be included in an official's personal file and communicated to him when they were taken into account:

— a telex containing unfavourable assessments of an official's ability which differed strikingly from the opinion appearing in the staff report; [21]

— a report made on an official's probationary period. [22]

56. Moreover, concerning documents containing factual findings or the results of inquiries, the Court held that, even if such documents are also of a medical nature, they must be placed on the official's personal file and brought to his attention when they are used to draw up 'reports concerning the ability, efficiency or conduct of the official' or 'for the appraisal or alteration of the official's administrative status'. [23]

57. In this case, two fundamental questions arise.

58. Do complaints against an official and/or internal reports referring to those complaints have to be placed on an official's personal file and communicated to him where the appointing authority intends to cite them against him? Do those documents concern the official's 'administrative status' within the meaning of Article 26 of the Staff Regulations, even when they are taken into account for the purposes of transfer or reassignment without changing the classification of the official's post and thus without altering his material position?

21 — Case 21/70 *Rittweger* v *Commission* [1971] ECR 7, paragraphs 39 and 40.

22 — *Bonino* v *Commission*, cited above, paragraph 10.

23 — See *Strack* v *Commission*, cited above, paragraph 13, and Case C-283/90 P *Vidrányi* v *Commission* [1991] ECR I-4339, paragraph 25.

59. In its judgment in *Brasseur* v *Parliament*, cited above, the Court has already had to consider the question of complaints made against an official and the use of those complaints as factors in forming an assessment. [24]

60. In his Opinion in that case, [25] Advocate General Roemer referred to Euler's commentary on the Staff Regulations of European Officials: [26]

'Euler insists on the fact that secondary files containing opinions on officials are illegal. He also emphasizes that *complaints against officials which refer in a general way to conduct in or outside the service must appear in the personal files because they are important factors in forming an assessment.*' The Advocate General agreed with that interpretation. He considered that the appointing authority had, to the applicant's detriment in an internal competition, taken account of an opinion of the Director General for Administration referring to a critical note from a head of division concerning an incident which occurred during the applicant's service, and an oral complaint from a member of the European Parliament which had been reported to the Director General. Mr Roemer pointed out that those criticisms had not been placed on the applicant's personal file and concluded that the measure appointing another participant in the competition to the vacant post should be annulled.

61. Whilst the Court did not grant the annulment requested by the applicant, it nevertheless implicitly but necessarily adopted the opinion of the Advocate General that the facts referred to in the critical note and the oral complaint should have been placed on the file together with the opinion of the Director General for Administration. The Court dismissed the action not because there was no duty to communicate and to place the relevant documents on the file, but solely because it did not appear that the Director General's opinion had had a *decisive influence* on the appointing authority's decision, [27] which is another condition to which the Court's case-law makes annulment of a measure taken in disregard of Article 26 subject. [28]

62. The Court's decision does not state in so many words that not only the opinion of the Director General but also the complaints should have been placed on the personal file.

63. Nevertheless, it does not seem justified to me that, where written complaints are made, the obligation to communicate them and place them on the file should be limited to an account by the administration. Whenever it is possible, the official must be able to check for himself the existence and tenor of

24 — Unlike the situation here, that question arose in connection with an internal competition procedure and not in connection with an authority's decision to transfer an official of its own motion.

25 — Especially at the foot of page 509.

26 — Volume I, p. 238.

27 — It was held that, whilst the applicant had in total two more marks than the second candidate, the appointing authority could legitimately appoint the latter, who had scored the maximum possible marks for 'suitability for the performance of the duties' and obtained six marks more than the applicant.

28 — *Rittweger* v *Commission*, cited above, paragraph 35. See also the subsequent judgment in *Bonino* v *Commission*, cited above, paragraph 13.

the complaint, and does not have to be content with a summary, which may or may not be complete or objective. Of course, if a complaint is made orally, the official will be able to gain knowledge of its tenor only indirectly, and at that stage he could not, of course, demand a hearing in the form of enquiries, or a confrontation. Nevertheless, the fact that there may be an oral complaint, and the factual situation arising therefrom, should not be sufficient to justify non-communication of a written complaint when it exists.

64. Indeed, even an oral complaint will normally be the subject of a written note by the administration, either when a request for explanations is made or when an internal report, intended to form the basis of a decision by the appointing authority, is drawn up. For this purpose, it will be communicated to the official and placed on his file.

65. Is there reason to fear that the placing on an official's personal file of complaints made against him will too easily, and unnecessarily, tarnish his image? I think not, because only documents on which the appointing authority actually intends to rely have to be filed.

66. In my opinion, therefore, an affirmative answer should be given to the first question posed in paragraph 58 above, by holding that complaints made against an official and/or internal reports referring to such complaints must be placed on his personal file and communicated to him whenever the appointing authority intends to rely on such matters against him.

67. I would add that that answer applies even when the documents are taken into account for the purposes of transfer or reassignment without altering the classification of the official's post.

68. The status of active employment referred to in Article 35(a) and Article 36 of the Staff Regulations constitutes an official's principal 'administrative status' during his career. It implies assignment to a post and the performance of the corresponding duties.

69. A transfer or reassignment which changes that assignment thus has an effect on an official's administrative status, even if it does not result in a change in the classification of the post held. It may to some extent influence the development of an official's career, or, in other words, his future professional prospects, since some posts may, whilst being classified equally with others, carry better promotion prospects because of the nature of the responsibilities exercised. In any case, the place where an official's duties are performed and the nature of those duties undeniably form an integral part of his career, which represents one of the legitimate interests of an official which the Court has always held it important to protect.

70. It should not be forgotten that, when considering what constitutes a measure 'adversely affecting an official' for the purposes of Articles 25 and 91 of the Staff Regulations, concerning respectively the duty to state reasons for a measure and the conditions under which an action against such a measure will be admissible, the Court has held that 'even though a transfer decision may not affect the material interests or the rank of an official, it may, having regard to the nature of the duty in question, and to the circumstances, adversely affect the *morale* and the *future prospects* of the employee concerned'. [29]

71. As regards Article 26 of the Staff Regulations, the Court has held in the above-cited cases of *Brasseur* v *Parliament*, [30] *Bonino* v *Commission* [31] and *Strack* v *Commission* [32] that the purpose of that article is to prevent 'decisions taken by the appointing authority and affecting [an official's] administrative status and *career* from being based on facts concerning his conduct which are not contained in his personal file', [33] and which, I would add, are not communicated to him.

72. If the Court had taken the view that the expression 'concerning his administrative status' used in Article 26 related only to documents taken into consideration in order to alter rights under the Staff Regulations in the strict sense, it would doubtless not have added the words 'and career'.

73. If one were, nevertheless, to take the view that the words of Article 26 should be interpreted restrictively, it would be necessary first to conclude that the term *'career'* used in the Court's interpretation of that article is totally distinct from the term *'future prospects'* used in the Court's analysis of what constitutes a measure adversely affecting an official. It would be difficult to imagine a decision affecting an official's future prospects but not his career.

74. And if, in spite of everything, one wished to uphold a restrictive interpretation of Article 26, accepting that the terms *'future prospects'* and *'career'* overlap, it would be difficult to explain why an official, in the same set of circumstances, would be able to rely on Articles 25 and 91 of the Staff Regulations but not on Article 26, when the three articles are supposed to help to protect identical interests.

75. I believe that the considerations set out above are in themselves sufficient to justify the solution I propose.

29 — *Kley* v *Commission*, cited above (paragraph 4, emphasis added). In his Opinion in that case, Advocate General Trabucchi stated (p. 698): 'There is no doubt that a decision transferring an official falls within the area of his legal rights [...]'. See also: *Geist* v *Commission*, cited above (implicit solution, since the Court immediately went on to check whether the reasons given for the transfer were sufficient); Joined Cases 33/79 and 75/79 *Kuhner* v *Commission* [1980] ECR 1677, paras 12 and 13 (measure assigning an official to new duties, with effects similar to a transfer); *Demont* v *Commission*, cited above, paras 12 to 14 (reassignment within the context of a rotation — implicit solution); *Arning* v *Commission*, cited above, para. 12 et seq. (reassignment measure — implicit solution); Joined Cases 36/81, 37/81 and 218/81 *Seton* v *Commission* [1983] ECR 1789, paras 46 to 49 (reassignment — implicit solution); *Lux* v *Court of Auditors*, cited above, paras 34 and 36 to 38 (reassignment from one sector to another — implicit solution); and *Hecq* v *Commission*, cited above, paras 26 and 27 (decision entailing a move — implicit solution).

30 — Paragraph 11.

31 — Paragraph 11.

32 — Paragraph 7.

33 — Emphasis added.

76. However, I see in the Court's case-law one last strand which may be decisive.

77. In the *Rittweger* and *Bonino* judgments, cited above, the Court annulled decisions taken by the appointing authority in breach of the second paragraph of Article 26 of the Staff Regulations.

78. In each of those two cases, the applicant was a candidate for a post [34] which did not represent, for her, a promotion within the meaning of Article 45 of the Staff Regulations. Since the posting sought did not entail appointment to a higher grade, it could only constitute a transfer.

79. By holding that the documents at issue should have been placed on the personal files of the officials concerned and communicated to them, *the Court held by necessary implication that Article 26 of the Staff Regulations must be complied with even where the documents are to be used for the purposes of a decision not entailing any alteration of rights under the Staff Regulations or the material position of the persons concerned.*

80. Can it therefore seriously be maintained that Article 26 must be applied when the official is a candidate for a transfer, and that it does not have to be applied when a transfer decision is taken against the wishes of the person concerned?

81. I am convinced that, in the latter case, compliance with Article 26 is all the more imperative.

82. It may be objected that to adopt such a solution, even where the administration intends to rely solely on the interests of the service in order to take a decision which has no disciplinary connotations or any effect on the official's status under the Staff Regulations, risks having unfavourable consequences on that official's future career, since the personal file will then be 'tarnished' with unfavourable information, whereas that would not have been the case if such information had not been filed and communicated.

83. Under that view, the end result would be to harm the very person it was intended to protect.

34 — To which another candidate was finally appointed.

84. I do not believe that that concern, which is, on the face of it, highly legitimate, justifies the *de facto* sacrifice of an official's defence rights.

85. It should not be forgotten that we are dealing here with documents that call into question the very person of the individual concerned. In a case such as the applicant's, one is not dealing solely with a finding, in a given working environment, of relational problems whose origin cannot be imputed to one person rather than another and which might be resolved merely by moving one or more officials, irrespective of any assessment of individual responsibility: what is really being put forward in this case, on the basis of several incidents, is a number of character traits which, it is suggested, demonstrate the applicant's unfitness to carry out, first, diplomatic functions, but also certain responsibilities.

86. There can clearly be no question here of assessing the truth of those claims. But such a situation demonstrates *par excellence* the need to put the official in a position to know exactly the complaints levelled against him, so that he can make such observations as may be appropriate.

87. In a situation where the appointing authority and the official are in conflict, the file will thus contain not only the complaints of the administration but also the observations of the official, accompanied where appropriate with all relevant justifications. Far from being only 'tarnished', the file will show a high degree of transparency and will reflect the principle that both sides are to be heard.

88. Is that solution not preferable to pretending that, by not placing documents which are unfavourable for him on an official's file and by not communicating them to him, the administration is thereby sparing him from consequences which are themselves unfavourable for his future career?

89. Let us not deceive ourselves.

90. Can it be imagined for one moment that documents concerning, for example, traits of character, which, if substantiated, have damaging consequences for the way in which an official performs certain duties, and which have already served once as justification for a transfer or reassignment decision, can disappear from the 'administrative memory' of the appointing authority? Is it to be believed that those documents will never be used again, secretly, in a decision on promotion or in response to a request from the person concerned that he be transferred to a post identical to that which gave rise to the first transfer or reassignment decision?

91. There is, in my view, a risk that information excluded from a personal file might end up in some parallel file, contrary to the express prohibition of any hidden personal file laid down in the fifth paragraph of Article 26 of the Staff Regulations.

92. In a case such as that, as in the case where the information remains only in persons' memories and not also on file, it is very probable that it will be used each time it is relevant to the question being examined by the appointing authority.

93. Let me be quite clear.

94. Information and assessments concerning an official's ability, efficiency and conduct which have been determinative in one decision affecting his administrative status and career may, if relevant, perfectly well be taken into account again in a subsequent decision.

95. What must be prohibited, in the case of a first or a second decision, is the use of unfavourable information concerning the official's person without his having been put in a position to familiarize himself with the documents containing that information and to make his observations.

96. It is obvious that if, having satisfied the requirements of Article 26, the appointing authority considers that the information is accurate, it is its responsibility, exercising the wide discretion it has in the organization of its services, to take the decision appropriate to the situation. It is equally obvious that the same information may be used as a factor of assessment, amongst others, if and when the appointing authority subsequently has to take a new decision.

97. The end is not to be confused with the means.

98. The administration's discretion must be clearly recognized and preserved in the light of the existing rules and case-law. That is the price to be paid if its action is to be coherent and effective. But where its action leads to the drawing from considerations unfavourable to an official's person of consequences that are themselves unfavourable to him, the administration is morally obliged to use the means placed at its disposal by Article 26.

99. To say that this means is binding upon the administration does not imply that it will subsequently prevent it from using the power which is its own.

100. That does not mean that the end will be sacrificed to the means, but that the latter are to form part of the way leading to the former.

101. Allow me to make some further observations.

102. Let us imagine for a moment that the administration considers that an official's conduct has consequences for the functioning of the internal and/or external relations of the service.

103. If the appointing authority considers that the problems raised are not sufficiently serious to justify a transfer measure, it should normally, at the next staff report procedure, put in the report and thus in the personal file, with communication to the person concerned, assessments calling his conduct into question which allow him to take cognizance of the deficiency and subsequently remedy it. The purpose of the staff reporting procedure is to highlight both the qualities and any deficiencies of officials. As regards the latter, the reporting procedure must be capable of contributing, through an exchange with the official being assessed, to the better adaptation of the person concerned to the needs of the service.

104. In those circumstances, there are only two possibilities.

105. Either the unfavourable assessments are justified, in which case, without prejudice to the official's observations, they will form part of his professional profile in the normal way, in accordance with one of the aims of the personal file in which they are contained.

106. Or they are not justified, in which case the official will have no other remedy than to try, by means of his observations, to demonstrate that they are inaccurate. If he does not then bring a legal action, [35] unjustified negative assessments will, unfortunately, be left on his file.

107. What will be particularly damaging is not that the personal file should contain unfavourable elements, but that it should contain such elements which are not justified.

108. That risk is always present. It attaches to the taking of a transfer decision as well as to the preparation of a staff report.

35 — See Case 122/75 *Küster* v *Parliament* [1976] ECR 1685, paragraph 9.

109. Thus, with regard to the same official, according to whether the administration does or does not decide upon a transfer, a possible error of assessment will be committed either on the occasion of the transfer decision or at the next staff report procedure.

110. Would it be logical for him to be able to exercise his defence rights under Article 26 of the Staff Regulations in the second case but not in the first, when in the latter case the consequences of the error would be more serious and immediate for him?

111. A final, more general, consideration to end with: communication of information concerning the person of the official will be likely, ahead of any complaint or legal action, to defuse in particular certain ambiguities in procedure, by preventing any suspicion that might arise in the mind of an official confronted with persistent retention of information.

112. If, nevertheless, litigation cannot be avoided, the administration will transfer to the Community judicature, in accordance with the seventh paragraph of Article 26 of the Staff Regulations, a file which includes all the relevant information.

113. The official will not be obliged to bring a legal action in order finally to obtain, before the Community judicature, the notification of information that was sought at the outset.

114. Admittedly, where the reasons for a transfer or reassignment decision relate to the organization of services, quite independently of the official's person, the official cannot invoke any provision of the Staff Regulations entitling him to require communication of the documents relating to the organizational problem posed. That difference in treatment is, however, justified. Just as it is understandable, when his personal qualities are called into question, that his rights should be reinforced for that very reason, so, conversely, it is not necessary to allow the official, once the decision is taken, a sort of right of overview and control of the exercise by the administration of its broad power to organize its services.

115. As the result of my reasoning, I propose that the Court should hold that Article 26 of the Staff Regulations was applicable in this case, contrary to what the Court of First Instance held at paragraph 102 of its judgment.

116. The question then arises as to the consequences of that provision being applicable.

117. I have already pointed out [36] that the Court's case-law makes the annulment of a measure taken in breach of Article 26 subject to the condition that the documents in question must have had a 'decisive influence' on the decision.

118. Annulment is not, therefore, the automatic consequence of an infringement of Article 26.

119. I would stress at the outset that annulment should penalize only the non-communication of documents covered by that article. The mere fact that documents actually communicated were not placed on the personal file should not, in principle, justify annulment. In circumstances such as those now at issue, it is not in itself decisive of the decision which was taken.

120. What is meant by a 'decisive influence'?

121. An uncommunicated document has exerted a decisive influence when it has been the necessary support for the decision taken. That is not the case if the decision may be justified by other documents which were brought to the attention of the person concerned in the proper way.

122. For the purposes of such analysis, it is therefore necessary to look separately at the documents which were not communicated and ask whether the contested decision is finally justified independently of those documents, in consideration of other documents which were validly communicated. [37]

123. That solution appears to be in conformity with both a legal and pragmatic view of the problem.

124. Within the particular area of the Staff Regulations, it accords with the solution already adopted by the Court [38] and the Court of First Instance [39] in competition matters.

36 — Paragraph 61 above.

37 — It seems to me that a procedure must be avoided which, in order to avoid annulment, consisted in not putting the uncommunicated documents aside and in *checking in fact* whether the official had the opportunity to exercise his defence rights notwithstanding the lack of communication, given that he was informed *in substance* of the content of the documents in question. Such an approach would render nugatory the duty of actual communication laid down in Article 26 of the Staff Regulations. In domestic law, can one imagine such a solution being adopted in an area such as criminal procedure?

38 — Case 107/82 *AEG* v *Commission* [1983] ECR 3151, para. 30.

39 — Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775, para. 58.

125. A final important question remains: can an infringement of defence rights linked to failure to communicate an unfavourable matter be covered in the course of the court proceedings? In other words, can the documents in question still be validly communicated in the course of the litigation proceedings?

126. As a matter of law, I do not believe that is legally possible.

127. When seised of an action for annulment the Community judicature exercises its judicial review of a contested measure as at the date of the measure. The subject-matter of the dispute cannot be 'adjusted' thereafter. The Community courtroom cannot be used for further investigations concerning the prior administrative procedure. At the most, as noted at paragraph 122 above, the Court may to some extent reconstitute the past having removed certain irregularities.

128. That is the solution already expressly adopted by the Court of First Instance in the area of competition, concerning infringements of the rights of the defence. [40] It is also the solution adopted by the Court of Justice as regards the duty to state reasons laid down by Article 25 of the Staff Regulations. The Court has held that 'a failure to state ... reasons cannot be remedied by the fact that the person concerned learns the reasons for the decision during the proceedings before the Court'. [41] In a number of cases, the Court has held that the duty to state reasons could be satisfied, at the latest, at the stage of the rejection of the complaint lodged under Article 90 of the Staff Regulations. [42]

129. It is in the light of the considerations set forth above that the judgment given in response to Mr Ojha's application must be examined.

130. Specifically at issue in this case are six external complaints made against Mr Ojha:

— four are summarized in the note of 8 May 1992 sent to him for his observations by the Director of the 'Asia' Directorate of the Commission's Directorate-General for External Relations;

40 — Ibid., paras 98 and 103.

41 — Case 195/80 *Michel* v *Parliament* [1981] ECR 2861, para. 22.

42 — Case C-115/92 P *Parliament* v *Volger* [1993] ECR I-6549, paras 22 to 24.

— one complaint dated 22 April 1992, sent by a representative of the association Médecins sans Frontières, refers to a meeting held on 2 April 1992;

— a complaint dated 18 June 1992 was sent by the Ministry for Jute of the Bangladesh Government to the head of the Commission delegation in Dacca.

131. Also at issue is a very detailed report drawn up on 21 May 1992 by the head of the Commission delegation in Dacca for the Director General in charge of North-South relations in DG I, which describes a situation of tension within the delegation, imputed to Mr Ojha's personality.

132. Reading the note of 8 May 1992, it does not appear that the four complaints referred to were in writing. Reference is made to visits and conversations. Their content was brought to Mr Ojha's knowledge by the note itself.

133. Mr Ojha acknowledges that the complaint of 18 June 1992 was communicated to him on 30 June 1992 by the head of the Dacca delegation. [43]

43 — Reply before the Court of First Instance, p. 12.

134. He was perfectly able to exercise his defence rights in relation to those five complaints, on the occasion of the various discussions he had with his superiors.

135. The documents before the Court show, however, that:

— the written complaint of 22 April 1992 was brought to his knowledge during the procedure before the Court of First Instance, in Annex No 2 to the Commission's defence of 6 January 1994; [44]

— the report of 21 May 1992 was also brought to his knowledge during the court procedure, annexed to a Commission answer to a question from the Court of First Instance, dated 19 December 1994, after the closure of the written procedure.

136. By virtue of the principles set out above, those two documents of 22 April and 21 May 1992 should not have been taken

44 — That affirmation by Mr Ojha is implicitly confirmed by the Commission in its rejoinder before the Court of First Instance (para. 11). Moreover, in its reply to a question from the Court of First Instance, the Commission admitted that it had not been able to discover from the persons concerned whether the existence of that complaint had been mentioned at the various meetings with Mr Ojha.

into account by the Commission when it took its decision or by the Court of First Instance when it analysed the reason for the reassignment.

137. The Commission maintains that it did not take them into account.

138. However, as regards the complaint of 22 April 1992, the Commission stated in its statement in reply, [45] by way of justification for its decision:

'To that list of complaints [referred to in the note of 8 May 1992], there should be added that [of 22 April 1992 concerning the meeting] of 2 April 1992 by Médecins sans Frontières, France, which is sadly most illuminating as to the applicant's social behaviour [...]'

139. And, as regards the report of 21 May 1992, the Commission stated that:

'*At the end of June 1992*, it had become imperative to take the necessary measures to put an end to that particularly damaging situation for the proper functioning of the service' [46]

and that

'[...] the reassignment decision at issue was justified, in the interests of the service, by the two following circumstances:

— the existence of complaints calling the applicant's conduct into question; and

— *the very tense situation within the Dacca delegation*'. [47]

140. No document and no piece of information prior to the end of June 1992, referring to a tense situation within the delegation, was invoked by the Commission or, above all, communicated to Mr Ojha before the decision. [48] It is thus hard to accept that the report in question was not taken into

45 — Para. 4, p. 4.

46 — Ibid., para. 7, emphasis added.

47 — Ibid., para. 46, emphasis added.

48 — The other documents referred to by the Commission at paragraph 51 of its memorandum in reply by way of proof of the tense internal situation were themselves not communicated to Mr Ojha. Moreover, the second is much less detailed than the report of 21 May 1992.

account, especially since the reasoning in the Commission's defence picks up a number of analyses in the report.

141. As regards the Court of First Instance, it did not expressly exclude as evidence the complaint and the report referred to above.

142. As Mr Ojha points out in his fourth plea, the Court of First Instance itself took the report of 21 May 1992 into account at paragraph 85 of its judgment, where it stated:

'The Commission's statements in that respect are corroborated by the various documents placed on the Court's file, which show that the situation within the delegation was very tense [...]'

143. No other document, properly communicated to Mr Ojha before the decision, refers to a very tense internal situation.

144. I therefore conclude that the Court of First Instance erred in law:

— by holding that Article 26 of the Staff Regulations was not applicable and that no infringement of defence rights could be found;

— by not setting aside the complaint of 22 April 1992 and the report of 21 May 1992 on the ground that those documents had been taken into account in breach of Article 26 of the Staff Regulations and thus in breach of the rights of the defence;

— by not subsequently checking whether the four complaints referred to by the note of 8 May 1992 and the complaint of 18 June 1992 were sufficient to justify the decision taken.

*The fifth plea*

145. By his fifth plea Mr Ojha maintains that the Court of First Instance committed an error of law and reasoning by failing to take his personal interests into account. The obligation to take those interests into account arises, he submits, from the Court's judgment in *Hecq* v *Commission*, cited above. [49]

49 — Paragraph 23.

146. I see that plea as having two parts.

First part

147. Mr Ojha considers that the alleged breach arises from the fact that, for the purposes of reassigning him in the interests of the service, the mere existence of complaints was considered to be sufficient, irrespective of whether they were well founded.

148. I recall that in its judgment in *Hecq* v *Commission*, the Court reasoned in two stages.

149. First, it took the view [50] that 'the transfer of an official in order to put an end to an administrative situation which has become intolerable must be regarded as having been taken in the interest of the service'. The Court stated: [51] 'In the circumstances of the present case it was possible for the administration to take the view that *it was in the interest of the service to remove the applicant* from the division to which he belonged.' The Court thus made the interest of the service the criterion for the 'removal' aspect of a measure for moving an official.

150. It went on to state: [52] 'However, a decision to reassign an official which involves his moving from Brussels to Luxembourg, against his will, must be taken with the necessary diligence and with particular care, in particular having regard to the personal interests of the official concerned. However, the Commission offered the applicant a choice between a post in Zaventem and the one in Luxembourg, but the applicant never made his views known [...] in this regard. In those circumstances, the administration cannot be accused of not having acted with the necessary diligence.' By that reasoning, the Court attached consideration of the official's personal interests to the choosing of a new posting, which came into effect after it had already been decided in principle to remove the official concerned in the interests of the service.

151. Mr Ojha is in fact raising the issue of failure to take his personal interests into account more in order to discuss the principle of his removal from Dacca than to discuss the choice of his new assignment. By so doing, he is seeking to make a link with the question of his removal. In any event, consideration of his personal interests, which cannot take precedence over the interests of the service, allowed very few alternatives: if the problem was the official's failure to adapt

50 — Paragraph 22.

51 — Ibid., emphasis added.

52 — Paragraph 23.

himself to a diplomatic environment, a posting outside the Community was hard to envisage, so that his reassignment to Brussels, the place of his earlier posting, seems to me beyond question.

152. The first part of the fifth plea is therefore unfounded.

Second part

153. Mr Ojha claims that the Court of First Instance disregarded the first paragraph of Article 24 of the Staff Regulations, which provides:

'The Communities shall assist any official, in particular in proceedings against any person perpetrating threats, insulting or defamatory acts or utterances, or any attack to person or property to which he or a member of his family is subjected by reason of his position or duties.'

154. The Court of First Instance drew attention to the case-law of the Court, according to which Article 24 requires that, where there are serious accusations as to the integrity of an official in carrying out his duties, the administration is to take all necessary steps to establish whether the accusations are justified, and, where they are not, should refute them and do everything possible to restore the good name of the official concerned. [53]

155. It then stated: [54] 'Where the Commission decides that there is no cause to pursue the accusations against the official and no adverse consequences for his professional integrity can follow, such a decision amounts, according to the Court's case-law, to a refutation of those accusations and the re-establishment of his reputation (*N* v *Commission*, cited above, paragraphs 13, 14 and 15). In this case, it is undisputed that, as the applicant's personal file shows, the Commission did not draw from the complaints against the applicant any consequences capable of justifying the bringing of disciplinary proceedings against him or of having any effect on his administrative status, with the result that it was not obliged to take steps to open an enquiry and examine whether the complaints were justified.'

156. Mr Ojha argues that the Court of First Instance first erred in law by holding that the administration is under that duty of assistance only where it decides to open disciplinary proceedings against the official concerned and to take all necessary steps in that respect. He submits that the only relevant

53 — Case 53/72 *Guillot* v *Commission* [1974] ECR 791, paras 3 and 4; Case 128/75 *N* v *Commission* [1976] ECR 1567, para. 10.

54 — Paragraph 89.

criterion is in fact whether the official's professional integrity has been affected.

157. Secondly, the Court of First Instance erred in law and in reasoning by finding Article 24 inapplicable, whereas the Commission, contrary to the hypothesis in the *N* v *Commission* judgment cited above, did pursue the accusations against him and the complaints have had, and will have, damaging consequences for his professional integrity and career within the Commission.

158. Mr Ojha's two criticisms do not appear to me to be devoid of foundation.

159. In its judgment in *Guillot* v *Commission*, cited above, the Court pointed out, [55] as an undisputed fact, that the Commission had decided not to bring disciplinary proceedings against the applicant. Nevertheless, the Court went on to hold [56] that, in neglecting to take all steps necessary to investigate the truth of the accusations made by the applicant's superior and, more specifically, to conduct a conclusive investigation, the Commission failed in its duty to the applicant. It thus follows clearly from that decision that the institution cannot absolve itself from taking steps to check whether the accusations falling within Article 24 of the Staff Regulations are justified merely on the ground that it does not intend to bring disciplinary proceedings.

160. Moreover, the judgment in *N* v *Commission*, referred to by the Court of First Instance, has no relevant analogy with the present case. In the former case, [57] the Commission *had proceeded to institute an enquiry*, at the conclusion of which it had taken the decision, communicated to the applicant, not to pursue the accusations, thereby not involving *any adverse consequences* for him. It was in that particular context that the Court held: [58] 'Such a decision clearly means refuting the accusations made against the applicant and re-establishing his reputation [...]'. In this case, no enquiry was instituted and, above all, consequences were drawn from the accusations against the official, in that it was decided, against his will, to reassign him prematurely to Brussels.

161. At this stage of the reasoning, as between the applicant and the Court of First Instance, it might therefore be considered that the Court of First Instance misinterpreted Article 24 of the Staff Regulations, which would justify setting aside its decision to dismiss the action for annulment.

55 — Paragraph 7.
56 — Paragraph 12.
57 — See paragraph 13 of the judgment.
58 — Paragraph 14.

162. However, such a solution does not appear to me to be called for.

163. It should be remembered that a judgment can be set aside on account of an error of law only if the operative part cannot properly be based on another legal reason. [59]

164. Before embarking on the reasoning to be followed for the purposes of applying Article 24 of the Staff Regulations, the question needs to be answered whether the complaints in question actually constitute one of the attacks envisaged by that provision.

165. On that point, I take the view that the scope of Article 24 may not be extended beyond its wording and its spirit.

166. What do we read? An institution's duty to provide assistance arises where there are 'threats, insulting or defamatory acts or utterances, or any attack to [the] person or property' of the official.

167. The terms used correspond to descriptions of criminal acts in the domestic legal systems of the Member States. The threshold for applying Article 24 of the Staff Regulations must not therefore be placed at the level of any attack on, or calling into question of, an official. The interpretation of the concepts constituting that threshold must not be too broad. It may take into account only facts of a certain degree of seriousness.

168. In this case, the question is whether the substance of the complaints properly communicated were defamatory utterances within the meaning of Article 24.

169. I do not think so.

170. Defamation covers allegations or imputations of facts affecting the *honour or reputation* of the person concerned. For example, the imputation of facts which constitute offences or, more generally, illegal, immoral or dishonourable conduct, will be regarded as defamatory.

171. By contrast, mere criticism of the personality or the professional conduct of an official, with no allegations or imputations of

59 — See, in particular, Case C-30/91 P *Lestelle* v *Commission* [1992] ECR I-3755, para. 28.

precise facts affecting his honour or reputation, would not constitute defamation.

172. To my knowledge, the national legal systems of the Member States have not elevated mere criticism to the level of delictual conduct.

173. The four oral complaints referred to in the note of 8 May 1992 essentially contain criticisms concerning Mr Ojha's personality and tactless and ambiguous remarks and conduct on his part, underlying the growing tensions.

174. As for the letter from the Ministry of Jute of 18 June 1992, it attaches a copy of a letter from Mr Ojha of which it criticizes the content and tone, emphasizing that the official went over the bounds of courtesy. The complaint contains a critical assessment of a position taken by Mr Ojha concerning the accuracy of minutes of meetings held in his presence, and does not contain any allegation or imputation of facts affecting his honour or reputation.

175. I deduce from this that Article 24 could not apply to the legal situation at issue, since the official was not the victim of an attack of the kind actually envisaged by that provision.

176. For that legal reason, in substitution for the legal reasons adopted by the Court of First Instance, the second part of the fifth plea must be rejected.

177. In any event, I doubt whether an institution's disregard of Article 24 of the Staff Regulations, where it is applicable, may in itself constitute a ground for the annulment of a transfer or reassignment decision. Review of any manifestly erroneous assessment of the interests of the service is carried out by reference to Article 7 of the Staff Regulations only. In that context, as has been pointed out, a transfer or reassignment may be decided upon in consideration of the very existence of complaints, irrespective of whether they are well founded, because in certain circumstances the interests of the service clearly take precedence over those of an individual official. The obligation to provide assistance under Article 24 of the Staff Regulations is a separate matter. Non-compliance may result in the annulment of a decision refusing the assistance requested. [60] It may constitute maladministration for which the Community may be held liable. But compliance with an obligation to provide assistance is not a condition for the validity of a transfer or reassignment decision.

60 — *Guillot* v *Commission*, cited above, paragraph 14.

## III — Consequences of the error of law found to exist

178. Having analysed all the pleas put forward in the appeal, I find that the Court of First Instance erred in law by holding that Article 26 of the Staff Regulations did not apply and that no infringement of the rights of the defence could be found.

179. A substitution of legal reasoning does not seem feasible on this point. At the third stage of the reasoning summarized above at paragraph 144, it needs to be determined, as the Court of First Instance failed to do, whether the four complaints referred to in the note of 8 May 1992 and the complaint of 18 June 1992 were sufficient to justify the decision taken by the Commission. That determination must be made in the context of a limited review as to the existence of a manifest error of assessment or a misuse of powers. But, even in that context, it implies an assessment of facts which is incompatible with the substitution of legal reasons. [61]

180. Therefore, the only possible solution is annulment.

181. Must the annulment be total or partial?

182. Where an application to the Court of First Instance comprised several heads of claim, partial annulment of one of the provisions of the operative part, with dismissal of the pleas on appeal against its other heads, does not raise any particular difficulty. [62]

183. But can the Court partially annul the operative part or one of the provisions of the operative part of a judgment of the Court of First Instance by limiting annulment to one or more of the pleas directed against the provision in question, that is to say, in actual fact, to one or more of the legal grounds supporting the operative part? Or does annulment always entail the need to re-examine all the pleas relating to the provision in question, including those which, having been submitted to the Court of First Instance and rejected by it, have not been taken up again in the appeal?

184. The Court has, it appears, already held that annulment of a judgment, whether total or partial, does not require re-examination of the pleas rejected by the Court of First Instance which the applicant did not put forward again on appeal. [63]

61 — It appears that, in Case C-107/90 P *Hochbaum* v *Commission* [1992] ECR I-157, at the end of paragraph 16 of the judgment, the Court held that determination of the existence of a misuse of powers is a question of fact which falls entirely within the jurisdiction of the Court of First Instance and cannot therefore be reviewed by the Court of Justice.

62 — See, for example, Case C-18/91 P *V* v *Parliament* [1992] ECR I-3997.

63 — Case C-298/93 P *Klinke* v *Court of Justice* [1994] ECR I-3009. In that case, four pleas were submitted to the Court of First Instance, which rejected all of them. Three were repeated in the appeal, and the Court of Justice upheld all three. After annulment, and pursuant to Article 54 of the EC Statute of the Court of Justice, the Court re-examined only those three pleas on the merits, to the exclusion of the fourth. See also Case C-360/92 P *Publishers Association* v *Commission* [1995] ECR I-23, paragraph 34.

185. That case-law may be applied in this case to several pleas which the applicant raised before the Court of First Instance but not before the Court of Justice.

186. As regards the pleas actually included in the appeal, there may be some doubt as to whether annulment of the judgment's operative part or the provision of the operative part relating thereto entails in any event re-examination of all those pleas or only the one held by the Court to be well founded when dismissing the others.

187. The first solution renders it appropriate only to examine the plea allowing annulment of the operative part or the contesting ruling thereof; in the event of referral back to the Court of First Instance, an appeal may again be lodged in respect of one of the other pleas re-examined by that court. The second solution has the advantage of limiting the points remaining to be ruled upon by the Court of First Instance in the event of referral back, or by the Court of Justice itself if it should decide to apply Article 54 of the Statute of the Court of Justice (EC).

188. The second solution therefore seems to me to be preferable in terms of economy of procedure, especially where the judgment being challenged is one of dismissal.

189. I believe that that solution would certainly have been adopted in the judgment in *Klinke* v *Court of Justice*, cited above, if the Court, instead of upholding the three pleas on appeal and then ruling on the merits [64] of the three corresponding pleas before the Court of First Instance, had upheld only one or two of the pleas on appeal. At paragraph 26 of the Court's judgment, it stated: '[...] the contested judgment must be *partially* set aside, *inasmuch as it rejected the* applicant's *three pleas* in law set out above'. [65]

190. I therefore propose that the judgment of 6 July 1995 should be partially annulled, in so far as it held that Article 26 of the Staff Regulations was not applicable and that no infringement of the rights of the defence could be found, and in so far as it deduced therefrom that the claim for compensation for non-material damage was unfounded.

191. As to the remainder, the appeal should be dismissed.

192. Since the state of the proceedings appears to me so to permit, I suggest that the Court should dispose of the case on the points annulled, pursuant to Article 54 of the Statute of the Court of Justice (EC). Should the Court find total annulment necessary in the context of the first solution set out in paragraph 186 above, it would be necessary either to rule also on the merits of the other pleas raised before the Court after having been raised before the Court of First

64 — Pursuant to Article 54 of the Statute of the Court of Justice (EC).

65 — Emphasis added.

Instance, or to refer the case back to the Court of First Instance in respect of all the pleas in the appeal.

## IV — Disposal of the case after partial annulment

193. I will be fairly brief on this point, taking account of my arguments set out above.

194. The pleas raised before the Court of First Instance on which a ruling needs to be made, grouping them together, are the second plea, claiming infringement of the rights of the defence, and the third plea, claiming infringement of Article 26 of the Staff Regulations.

195. In disposing of the case itself, the Court should first rule that:

— Article 26 of the Staff Regulations was applicable to this case;

— subject to being placed on the individual file, that article was complied with as regards four oral complaints the content of which was communicated to the official by the note of 8 May 1992;

— likewise subject to being placed on the individual file, that article was complied with as regards the complaint by the Ministry for Jute of the Bangladesh Government of 18 June 1992, which was communicated to the applicant on 30 June 1992;

— Article 26 was not complied with as regards the complaint by Médecins sans Frontières of 22 April 1992, or as regards the internal report of the head of the Commission delegation in Dacca of 21 May 1992, which were communicated to the applicant after the bringing of the legal action;

— non-communication of those two latter documents, constituting as it does an infringement of Article 26 of the Staff Regulations and thus of the rights of the defence, is a ground for annulment of the decision of 20 October 1992;

— nevertheless, annulment may only be granted if those two documents had a

decisive influence on the contested decision;

— in other words, annulment cannot be granted if the five other complaints against the official are sufficient to show that the appointing authority did not commit a manifest error of assessment or a misuse of powers.

196. Secondly, the Court needs to consider the factual evidence arising from the note of 8 May 1992 and the complaint of 18 June 1992.

197. Examination of those documents reveals a number of facts all consistent, indicating the existence of serious communication difficulties which Mr Ojha had in the context of the delegation's external relations. It is quite obvious from reading the documents in question that there was a genuinely tense situation in those relations. The purpose of diplomatic functions is first to prevent tension and, secondly, to abate any that might nevertheless arise. It is certainly not to crystallize into generalized tension any difficulties which might have been resolved separately by a diplomatic approach.

198. The level of tension reached is illustrated by the letter of 18 June 1992, in which the minister concerned concludes by announcing to the head of the Commission delegation that Mr Ojha would not be invited to any further meetings and suggests that another person be appointed in his place.

199. Irrespective of whether each of the complaints considered in isolation was well founded, the situation created at the date of the contested decision was the very antithesis of the diplomatic function.

200. It threatened the imminent breakdown of certain external relations of the service if a solution were not found.

201. It thus seriously compromised the proper functioning of the service.

202. In those circumstances, it appears that, even based exclusively on the note of 8 May 1992 and the complaint of 18 June 1992, the Commission's decision was not vitiated by any manifest error of assessment or misuse of powers.

203. The two documents excluded from the proceedings were not therefore the necessary foundation for the reassignment decision.

204. Therefore, the infringement of defence rights found to exist in relation to those documents cannot entail annulment of the Commission's decision.

205. Consequently, the claims for annulment, in so far as they are based on an infringement of the rights of the defence and Article 26 of the Staff Regulations, must be rejected. The same applies to the compensation claim based on the same pleas.

## V — Costs

206. The first paragraph of Article 122 of the Rules of Procedure provides that, where the appeal is well founded and the Court itself gives final judgment in the case, it shall make a decision as to costs.

207. Article 70 of the Rules of Procedure provides that, in proceedings between the Communities and their servants, the institutions shall bear their own costs.

208. Nevertheless, the second paragraph of Article 122 provides that that rule does not apply in the case of an appeal by an official or other servant of an institution. The same provision provides that, in derogation from Article 69(2) of the Rules of Procedure, the Court may, in that case, order the parties to share the costs where equity so requires.

209. In this case, in its statement of defence the Commission has formally claimed that Mr Ojha should be ordered to pay the costs.

210. In the particular circumstances of this case, the retention by the Commission of certain documents falling within the ambit of Article 26 of the Staff Regulations may have fuelled suspicion in the mind of the official. The institution may have thus contributed to some extent to the bringing of the legal action, and the pursuit of that action to appeal.

211. I therefore propose that, pursuant to the second paragraph of Article 122 of the Rules of Procedure, two-thirds of the costs should be borne by Mr Ojha, and one-third by the Commission.

## Conclusion

212. In the light of the above observations, I propose that the Court should rule as follows:

(1) The judgment given by the Court of First Instance in Case T-36/93 *Ojha* v *Commission* is set aside in so far as it holds that Article 26 of the Staff Regulations of Officials of the European Communities was not applicable and that no infringement of defence rights could be found, and in so far as it deduces therefrom that the claim for compensation for non-material loss was unfounded.

(2) For the rest, the appeal is dismissed.

(3) The Court, ruling on the merits, dismisses the action in so far as it is based on infringement of Article 26 of the Staff Regulations and the principle of observance of the rights of the defence.

(4) The costs are to be borne as to two-thirds by Mr Ojha and as to one-third by the Commission.