OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 23 January 1986 *

Mr President,
Members of the Court,

1. The applicant, Giorgio Bernardi, who was born in 1937, worked from 10 October 1966 as a translator in the Italian Translation Division of the European Parliament, where he was promoted to Grade LA 5 on 1 April 1975.

By decision of the President of Parliament of 5 March 1982, Mr Bernardi was retired as from 1 March 1982 on an invalidity pension equal to 70% of his salary, since the Invalidity Committee provided for in the fourth subparagraph of Article 59 (1) of the Staff Regulations of officials of the European Communities considered that his case fell within Article 78 of the Staff Regulations.

The second and third paragraphs of Article 78 read as follows:

'Where the invalidity arises from an accident in the course of or in connection with the performance of his duties, from an occupational disease . . . , the invalidity pension shall be 70% of the basic salary of the official.

Where the invalidity is due to some other cause, the invalidity pension shall be equal to the retirement pension to which the official would have been entitled at the age of 65 years if he had remained in the service until that age.'

According to Parliament, Mr Bernardi was granted his pension under the third paragraph of Article 78.

2. However, before the matter was referred to the Invalidity Committee, Mr Bernardi, by letter of 27 March 1979, accompanied by two medical certificates issued by Dr Castrica (Rome) and Dr Conraux (Strasbourg), had requested that the Rules on the insurance of officials of the European Communities against the risk of accident and of occupational disease ('the Rules'), issued under Article 73 (1) of the Staff Regulations, be applied in his case. He claimed to have been suffering for some time from 'chronic laryngopharyngitis associated with clear atrophy of the rhinopharynx, which is incurable, and frequent bouts of dysphonia'. According to the medical certificate issued by Dr Castrica, the illness was due to environmental factors and to the conditions under which Mr Bernardi carried out his work.

If that request had resulted in the finding that Mr Bernardi had suffered total or partial permanent invalidity as a result of an occupational disease he would have been entitled (under Article 73 (2) (b) and (c) of the Staff Regulations) to a lump sum in addition to the pension already granted to him.

* Translated from the French.

The procedure laid down in the Rules was initiated as a result of Mr Bernardi's request. It consists of two stages:

(a) a *medical inquiry* held by the Administration and culminating in a *draft decision* of the appointing authority on whether or not the disease is of an occupational nature, which is notified to the official concerned together with the findings of the doctor or doctors appointed by the institution (Article 17 (2), Article 19 and Article 21 of the Rules);

(b) the second stage is opened only if, within a period of 60 days from the notification of the draft decision, the official concerned disagrees with the draft decision and requests that the matter be referred to the *Medical Committee*, which consists of three doctors: one appointed by the appointing authority, one by the official concerned and the third by agreement between the other two doctors; if such a request is not made in time, the appointing authority is to 'take a decision in accordance with the draft previously supplied' (first and third paragraphs of Article 21 and Article 23 (1) of the Rules).

The following emerges from the annexes to the application and from the defence and the rejoinder.

On 10 June 1980 J. M. Mutter, the Head of the Social Affairs Division within Parliament, sent Mr Bernardi a letter informing him that, after examining him on 22 February 1980, Dr De Meersman, who had been appointed by the institution, considered that the applicant's disorders were not caused by his working conditions. 'Consequently', the letter states, 'your illness cannot be recognized as an occupational disease.' Mr Mutter asked Mr Bernardi to let him know whether he accepted that decision and informed him that if he disagreed with it he was entitled to refer the matter to the Medical Committee provided for in Article 23 of the Rules. The letter also pointed out that if the Medical Committee's opinion was in accordance with that of the institution's medical officer, Mr Bernardi would be required to bear part of the expenses.

In his reply, dated 19 June 1980, Mr Bernardi challenged Dr De Meersman's findings and 'formally' requested that the matter be referred to the Medical Committee. He also gave the name of his medical adviser, Dr Fidotti, of Rome.

Mr Mutter acknowledged receipt of that letter on 28 July 1980, pointing out that the Medical Committee could not meet until it had received Dr De Meersman's *final* report, which was dependent upon the results of the examination to be carried out by Dr Stumper, a specialist, with whom Mr Bernardi was asked to make an appointment 'as quickly as possible'. Mr Mutter's letter went on to say, 'Naturally if the Medical Committee were to meet we should contact Dr Fidotti.'

On 22 May 1981 the Head of the Social Affairs Division wrote once again to Mr Bernardi as follows:

'Dear Mr Bernardi,

I have to inform you that, in the light of Dr Stumper's report, Dr De Meersman confirms his initial findings and considers

that your illness cannot be considered an occupational disease. We can therefore initiate the procedure of the Medical Committee, as requested in your letter of 19 June 1980.

In addition, today I have sent Dr Fidotti a copy of the two reports drawn up by Dr De Meersman, as you requested.

. . .'

The Medical Committee, composed of Dr Fidotti, Dr De Meersman, appointed by Parliament, and Professor Van Den Eeckhaut, appointed by agreement between the other two doctors, examined Mr Bernardi on 15 December 1981 in Brussels. Professor Van Den Eeckhaut, who was asked by his two colleagues to draw up the report, notified the Medical Committee's findings to Parliament's medical department on 3 June 1982. The report was signed by Professor Van Den Eeckhaut himself and Dr De Meersman, but not by Dr Fidotti. On 13 October 1982 Dr Fidotti had sent Professor Van Den Eeckhaut an alternative draft report. He followed this on 21 April 1983 with a telegram in which he asked that no document be submitted for the time being. In the telegram he stated that he intended to send a letter of explanation. That letter, albeit dated 23 May 1983, was not received by Professor Van Den Eeckhaut until after 3 June. Professor Van Den Eeckhaut and Dr De Meersman still maintained the findings set out in the Medical Committee's report.

That report stated, *inter alia*, that the 'the disphonia and other disorders complained of by Mr Bernardi are not attributable to an illness and . . . are likely to disappear even if he continues to work as a translator . . .'.

Dr Fidotti's letter was notified forthwith to Parliament's medical department and Dr Fidotti was informed that his colleagues stood by the terms of the report of 3 June 1983.

By letter of 4 October 1983, the Head of Parliament's Social Affairs Division:

(a) forwarded to Mr Bernardi of the Medical Committee's report confirming Dr De Meersman's findings; and

(b) informed Mr Bernardi that, since the Medical Committee's opinion was in accordance with the draft decision of the appointing authority notified to him under Article 21, under the third subparagraph of Article 23 (2) of the Rules he was obliged to pay the fee and incidental expenses of the doctor whom he had appointed to represent him on the Committee and half of the fee and incidental expenses of the third doctor, and asked him therefore to pay Parliament BFR 43 050 towards the fee and incidental expenses of Professor Van Den Eeckhaut.

By letter of 19 October 1983 Mr Bernardi challenged the Medical Committee's findings. He cast doubt on the proper conduct of the procedure followed by the Committee and refused to pay the fee and incidental expenses demanded. In addition he asked for the repayment of travel expenses incurred in consulting Dr Cis, Dr

Vigan and Dr Lieschke. Those doctors had issued certificates in connection with the procedure before the Invalidity Committee, which had been translated and submitted by Mr Bernardi to the Medical Committee. He also claimed reimbursement of the cost of translating those certificates.

By letter of 10 November 1983 the Head of the Social Affairs Division rejected that application and repeated his request for payment of BFR 43 050 within one month.

On 19 November 1983 Mr Bernardi submitted a complaint pursuant to Article 90 (2) of the Staff Regulations. By 19 March 1984 that complaint had been rejected by implication.

Subsequently the amount in question was withheld from Mr Bernardi's pension at the rate of BFR 4 305 per month.

3. Mr Bernardi therefore brought this action contesting the decision of 10 November 1983 and 'any other implied, related and/or consequential measure', in particular the above-mentioned decision of 10 November 1983 confirming the decision of 4 October 1983.

I shall not set forth the application in detail; it is set out in the Report for the Hearing.

The Court is asked to call upon Parliament to comply with certain provisions of the Staff Regulations, order it to do certain things and 'in the further alternative ... declare that the findings of the Medical Committee are improper'.

Essentially Mr Bernardi is seeking three things:

(a) The procedure prior to the referral of the matter to the Medical Committee, the procedure before the Medical Committee itself and the decisions taken by Parliament in the light of the Medical Committee's opinion should be declared void and consequently the procedure in question should be recommenced on the basis of a new 'draft decision duly drawn up and notified by the competent authority;

(b) Parliament should be ordered to pay him provisional compensation and, at the end of the new procedure, the capital sum referred to in Article 73 (2) (b) or, in the alternative, Article 73 (2) (c) of the Staff Regulations which is payable in the event of total permanent invalidity or, in the alternative, partial permanent invalidity resulting from an occupational illness; if appropriate the Court should determine 'the amount of the compensation in accordance with equitable principles';

(c) The Court should order Parliament to repay him the expenses incurred by him in undergoing the medical consultations ordered by Parliament and for the translation of the medical reports issued after those consultations.

Mr Bernardi's claims are based on the following arguments:

(a) The appointment of the Medical Committee was invalid both because the Head of the Social Affairs Division was not entitled to act as the appointing authority at the material time, since he had not been delegated so to act, and because in its letter of 10 June 1980 notifying Dr De Meersman's provisional findings of 14 March 1980 in the inquiry phase Parliament did not take into account the medical certificates issued by Dr Cis (dated 5 December 1979) and by Dr Lieschke (dated 23 April 1981). Furthermore it was clear from the findings of Dr De Meersman and Dr Stumper themselves that Mr Bernardi's

occupation was 'a concomitant cause' of his chronic illness. Consequently the applicant had been 'in error' in calling prematurely for the Medical Committee to be convened, especially since the certificates issued by Dr Cis and Dr Lieschke had not been notified to him together with the draft decision. That draft could not deviate, at the discretion of the appointing authority, from the medical findings or be based on provisional findings, in so far as Dr De Meersman's first report had been followed by Dr Stumper's examination and by a final report on 24 February 1981.

Furthermore, by granting him 70% of his basic salary, the appointing authority had necessarily accepted, albeit by implication, that his illness and invalidity were occupational in origin in accordance with the second paragraph of Article 78 of the Staff Regulations.

However, although the procedure for retirement under Article 78 of the Staff Regulations and the procedure for determining the cover for the risks of occupational illness under Article 73 of the Staff Regulations are distinct, it appears from the previous decisions of the Court (judgment of 15 January 1981 in Case 731/79 *B.* v *European Parliament* [1981] ECR 107; judgment of 12 January 1983 in Case 257/81 *K.* v *Council* [1983] ECR 1) that the procedures follow a 'parallel course' and that the decisions in which they culminate may not be in flagrant contradiction with each other.

(b) The procedure followed by the Medical Committee was also vitiated in so far as Professor Van Den Eeckhaut and Dr De Meersman did not take into account their own earlier findings in favour of the applicant's contentions. Above all, the Committee's report did not mention Dr Fidotti's observations, which is tantamount to a failure to state reasons. The signature of Dr Fidotti, as the representative of the applicant's interests, had not been deemed necessary and he had not been sent a copy of the 'alleged final report'.

4. Parliament claims that the application should be dismissed on the grounds that it is partially inadmissible and, what is more, unfounded.

As far as admissibility is concerned, Parliament contends that the Court has no jurisdiction to give purely declaratory judgments or to issue injunctions to an administration. It also claims that the Court has no jurisdiction directly to order the payment of a lump sum or of provisional compensation or to determine the amount of that compensation itself on the basis of equitable principles, contrary to the findings of the Medical Committee.

Parliament further considers that the primary claim is devoid of purpose. The procedure laid down in Articles 19 to 21 of the Rules was complied with in full and powers had been delegated to the Head of the Social Affairs Division on 1 March 1982 'for the purposes of the application to officials of all grades of the provisions of . . . Article 72 and Article 73 of the Staff Regulations', which therefore covers the appointing authority's final decision. Similarly the claims for a decision on the applicant's complaint are inadmissible, since the complaint had already been rejected by implication by 19 March 1984.

The requests for the repayment of travel expenses in connection with the examinations carried out by Dr Cis, Dr Vigan and Dr Lieschke and of the costs of translating the certificates issued by those doctors have

no connection with the procedure for determining whether or not the illness was occupational in nature. Since, moreover, they were submitted for the first time in the applicant's letter of 19 October 1983 and his complaint of 19 November 1983, which did not receive a favourable outcome within the period prescribed in Article 90 of the Staff Regulations, an appeal does not lie to the Court of Justice given the absence of a prior complaint (Article 90 (2) of the Staff Regulations).

Finally, again as regards admissibility, Parliament maintains that the Medical Committee's findings constituted a preparatory measure, which may not be challenged separately. However, the applicant does not seek the annulment of the decision notified by the appointing authority on 4 October 1983. As a result the claims in the alternative and in the further alternative are inadmissible.

As regards the substance, Parliament argues that the names of the doctors appointed under Article 17 of the Rules, that is to say Dr De Meersman and Dr Stumper, were notified to the applicant by letter of 14 November 1980. By asking, following the first examination carried out by Dr De Meersman, for the matter to be referred to the Medical Committee and by allowing himself to be examined by the latter, the applicant acknowledged that the contested procedure was properly conducted.

There is no contradiction between the findings reached by the Invalidity Committee and those reached by the Medical Committee, since the document calculating Mr Bernardi's rights to an invalidity pension establishes, in Parliament's contention, that the provision applied in that instance was the third paragraph of Article 78 of the Staff Regulations.

As regards the alleged lack of authority of the Head of the Social Affairs Division, Parliament points out that by decision of 1 March 1982 powers were delegated to him by the Secretary General 'for the purposes of the application to officials of all grades of the provisions of that last subparagraph of Article 59 (4), Article 72 and Article 73 of the Staff Regulations'.

As for the complaint to the effect that the 'draft decision' had to be consistent with the findings of the doctors appointed by the administration to conduct the inquiry, Parliament refers to the judgment of 29 November 1984 in Case 265/83 (*Suss* v *Commission* [1984] ECR 4029) in which the Court held that 'the administration is not bound by an opinion issued by a doctor appointed by it' and that it 'adopts the decision which it considers objectively justified' (paragraph 18 of the decision).

As for the complaints concerning the procedure before the Medical Committee, the applicant cannot argue that sufficient account was not taken of the observations of the doctors representing him, especially since, apart from Dr Fidotti, Dr Castrica was also permitted by the Committee to take part in the examination of Mr Bernardi conducted on 15 December 1981. The observations submitted by Dr Fidotti and Dr Castrica were scrupulously examined, although they failed to persuade the two other members of the Committee.

That Dr Fidotti did not sign the Medical Committee's report showed the disagreement between himself and the majority of the Committee, and the report reflecting the majority opinion should, in

accordance with previous cases of the Court (*inter alia*, the judgment of 21 May 1981 in Case 156/80 *Morbelli* v *Commission* [1981] ECR 1357), be regarded as valid within the meaning of the Staff Regulations with all the legal consequences.

It appears from the judgment in *Suss* (Case 265/83, cited above) that the Medical Committee, being completely independent, is in no way bound by previous medical findings. According to the judgment in *Morbelli* (Case 156/80, cited above), the Court's review may not extend to medical appraisals properly so called which are definitive. Judicial review is confined to questions 'concerning the constitution and proper functioning of the committees provided for by Articles 19 and 23 of the Rules' [1981] ECR 1357, paragraph 20 of the decision, at p. 1374).

5. I shall not detain you long on the question of inadmissibility. Parliament correctly points out that the Court's jurisdiction in disputes between a Community institution and one of its servants extends to 'the legality of an act adversely affecting such a person', in the words of Article 91 (1) of the Staff Regulations, which states that in 'disputes of a financial character the Court of Justice shall have unlimited jurisdiction'. The Court may therefore, if it sees fit, order compensation to be paid for damage sustained by a Community servant as a result of an act or an omission detrimental to his rights, which is unlawful and imputable to the institution which he serves.

That is the extent of the Court's jurisdiction; it does not extend to any power to issue injunctions.

To return to the example of the obligation imposed upon the administration by Article 21 of the Rules, the Court may penalize the institution for any failure to act in that connection but it may not enjoin it to carry out the notification which it is required to effect under that article. Consequently, the objection of inadmissibility raised by Parliament should be accepted as far as this point is concerned.

The objection of inadmissibility relating to the request for repayment of travel and translation expenses incurred in connection with the consultations of Dr Vigan, Dr Cis and Dr Lieschke should also be accepted for the reasons given by Parliament.

The Court will be aware of the classic distinction between declaratory judgments which merely describe a pre-existing legal situation and judgments which create a new legal situation (*arrêts constitutifs*).

There is doubt whether that distinction, whose scope is uncertain and the principle of which is contested by legal writers, does in fact cast much light on the present dispute.

In fact the Court does not need to remind Parliament that it must strictly observe the applicable rules of the Staff Regulations — which it has never denied — and the only problem is to ascertain whether those rules were complied with in this instance.

There remains two objections of inadmissibility, which I would ask you to dismiss: the

first on the ground that, contrary to what Parliament contends, Mr Bernardi is expressly seeking the annulment of the decision of 4 October 1983; the second — that the action is inadmissible because it is 'devoid of purpose' since the procedure in the present case was in no way defective — on the ground that it is really a substantive defence.

6. Let us turn to the substance of the case.

I would observe at the outset that there is no contradiction between the decision taken by the Medical Committee and the award of an invalidity pension at the rate of 70%. There are no serious grounds for contesting the statement made by Parliament, backed by calculations, that the said rate was granted under the third paragraph of Article 78 on the basis of Mr Bernardi's seniority and not because the invalidity was attributed to an alleged occupational cause.

Having said that, it must, in the first place, be examined whether or not the procedure followed in the medical inquiry was unlawful. I shall therefore consider the following questions:

(a) Was the medical inquiry referred to in Article 17 (2) of the Rules properly carried out?

(b) Was the draft decision, referred to in the first paragraph of Article 21 of the Rules, properly taken and notified?

The medical inquiry was entrusted to Dr De Meersman, who carried it out, with the assistance of Dr Stumper, in a manner which does not seem to warrant the Court's criticism.

As far as the draft decision is concerned, matter are less clear-cut. Curiously, the draft decision is made up of three stages.

First there is the letter of 10 June 1980 in which, as I have observed already, the applicant was asked to signify whether he accepted Dr De Meersman's finding that he was not suffering from an occupational disease and the draft decision to that effect which the appointing authority proposed to adopt, and was reminded that if he disagreed therewith he was entitled to have the matter referred to the Medical Committee. With that the substantive conditions laid down in the first paragraph of Article 21 might appear to have been fulfilled had it not transpired *subsequently* that the medical findings were merely *provisional.*

That the findings were merely provisional did not become apparent until the second stage, namely the letter of 28 July 1980. In any event, however, before he received that letter Mr Bernardi asked, by letter dated 19 June 1980, for the matter to be referred to the Medical Committee.

Thirdly there is the letter of 22 May 1981, of which I shall give the gist. The definitive findings, confirming the provisional findings, were notified to Mr Bernardi, who was informed that, in accordance with his request of 19 June, the matter would be referred to the Medical Committee for its opinion.

Let me make it quite clear that I do not consider that manner of proceeding to be a model of administrative management. A draft decision ought not to be based on provisional findings. Admittedly the provisional findings did become definitive

and the letter of 22 May 1981 did confirm that of 10 June 1980. But it would have been preferable had the draft decision not been taken until that date. It was then that Mr Bernardi should have been faced with the option provided for in the Staff Regulations between accepting the findings of the inquiry and challenging them by asking for the matter to be referred to the Medical Committee.

Those three parts, although somewhat lacking in cohesion are, in my view, capable of being regarded as a whole which *substantively* satisfies the requirements laid down in Article 17 (2) and the first paragraph of Article 21 of the Rules.

A further requirement is that the draft decision should have been taken and notified by the proper authority, namely, under Article 21 of the Rules, the appointing authority.

Who is the appointing authority in this instance? The first paragraph of Article 2 of the Staff Regulations provides that:

'Each institution shall determine who within it shall exercise the powers conferred . . . on the appointing authority.'

That article, which is substantially the same as Article 2 in the former Staff Regulations of Officials of the EEC and the EAEC (Regulations No 31 (EEC), 11 (EAEC), of the Councils of 18 December 1961, Official Journal, English Special Edition 1959-1962, p. 135), authorizes the institutions to organize a system for the distribution and delegation of powers in this sphere.

It appears from Decision No 175/62 of Parliament of 12 December 1962, which has been produced by Parliament, that in the case of officials in Mr Bernardi's category the powers conferred on the appointing authority by Article 73 of the Staff Regulations and by the relevant implementing rules are to be exercised 'by the Secretary General, who is authorized to delegate his powers of administrative implementation to the Director General for Administration' (point (i) (d) of the decision). That delegation of powers was made more flexible by the decision of 16 February 1982 of the Bureau of Parliament which authorized the Secretary General 'to delegate his powers', without specifying to whom.

However, the delegation of powers by the Secretary General to the Head of the Social Affairs Division did not take place until 1 March 1982, that is to say after the three letters mentioned, the last of which is dated 22 May 1981. That delegation of powers was not — and, moreover, was not capable of being — in any way retroactive.

What are the consequences as regards the legality of the draft itself and its notification?

Two decisions of the Court are relevant to this point.

In the more recent of the two (judgment of 30 May 1973 in Case 46/72 *De Greef* v *Commission* [1973] ECR 543), the Court held that a decision taken pursuant to Article 2 of the Staff Regulations (concerning the designation of the authority responsible for carrying out a hearing in a disciplinary procedure) had to be construed as 'a distribution of business within the Commission's services' rather than as the 'conferment of rigid powers, the non-observance of which could entail the nullity of acts done outside the limits laid down' (paragraph 18 at p. 553).

But the Court also laid down the limits of that flexibility by holding that 'sub-dele-

gation or deviation' from the criteria for such distribution determined by the Commission could 'only result in the nullity of an act done by the Administration if it is capable of affecting one of the guarantees given to officials by the Regulations or of affecting the principles of good administration in matters of staff administration' (paragraph 21 at p. 553).

The Court doubtless had in mind an earlier judgment to which Mr Advocate General Trabucchi had referred in his Opinion on the *De Greef* case. This is the other decision to which I referred and it was handed down in a case between the parties to the present proceedings (judgment of 16 March 1971 in Case 48/70 *Bernardi* v *European Parliament* [1971] ECR 175). In that case the Secretary General of Parliament had called upon an assistant translator to occupy on a temporary basis a post as translator. Mr Bernardi sought and obtained the annulment of that appointment on the ground that the aforementioned decision of the Bureau of Parliament of 12 December 1962 conferred the relevant powers not on the Secretary General but on the President, acting on a proposal of the Secretary General.

A criterion emerges from those two judgments which is based on the distinction put forward by Mr Advocate General Trabucchi between purely ancillary activities (preparatory and implementing measures) and decisions involving the 'discretion' of the institution which are 'binding' on it (Opinion of Mr Advocate General Trabucchi in Case 46/72, [1973] ECR 557 at p. 561).

7. How is the 'draft decision' referred to in Article 21 of the Rules to be classified? One possibility would be to regard it as a discretionary measure binding on the institution, especially since the third paragraph of Article 21 provides that if the official does not contest the draft decision within the prescribed period 'the appointing authority shall take a decision in accordance with the draft previously supplied'. So, at that stage, the appointing authority has the power to act but only in a particular way.

Consequently it would be possible to contemplate the annulment of a measure which was taken and notified by an authority lacking the power to do so at the time, with the result that all measures taken subsequently thereto would be null and void, that is to say, in this case, essentially the reference of the matter to the Medical Committee and the decision of 4 October 1983.

But would this not be over-formalistic. Two observations are called for.

(a) If the draft is not contested, the appointing authority has no option but to comply with it, provided, however, that it was drawn up by the competent authority. If that was not the case the appointing authority is not bound thereby.

If the official asks for the matter to be referred to the Medical Committee, the draft decision has no effect on whether or not the disease is attributed to an occupational risk, since the decision thereon is taken by the appointing authority on the basis of the Medical Committee's Opinion.

In both cases it is therefore the decision closing the procedure which decides the official's fate and not the draft. As a result,

the draft must be regarded as a preparatory measure, despite its effects as regards responsibility for the travel expenses of the Medical Committee pursuant to the third subparagraph of Article 23 (2) of the Rules. I should observe, moreover, that the fourth subparagraph of Article 23 (2) authorizes the appointing authority in exceptional cases to have all the expenditure borne by the institution.

(b) Nullity as a sanction for an irregularity is designed to protect the rights of persons affected by an unlawful measure. Consequently the question is whether the draft decision notified to Mr Bernardi infringed his rights as guaranteed by the Staff Regulations.

Had the draft not been contested and had the appointing authority, wrongly considering itself to be bound by a measure taken by an authority lacking the power to do so, considered that it was bound to apply the provisions of the third paragraph of Article 21 of the Rules, the question might conceivably have been answered in the affirmative. Again it is the decision taken by the appointing authority in conformity with the draft rather than the draft itself which would have had to have been considered as infringing the official's rights.

In any event, that is not the case here. Mr Bernardi asked for the matter to be referred to the Medical Committee and his request was granted. The decision of 4 October 1983 was taken in the light of the report of the Medical Committee, not in the light of the draft decision.

I therefore consider that the argument based on the contention that the authority which took and notified the draft decision lacked the power to do so must be dismissed.

8. As to the subsequent procedure, it appears to me to have been beyond reproach. The Medical Committee was properly constituted and functioned properly. Dr Fidotti, and even Dr Castrica, who was not a member of the Committee, had every opportunity to make their views known to it. Nearly 18 months elapsed between the first provisional report (29 December 1981) and the final report (3 June 1983) of the Committee. That was mainly due to Dr Fidotti, who used the time in order to try to persuade his colleagues. He did not succeed. His refusal to sign the final document does not affect its validity. Lastly, no objection can be raised against the decision of 4 October 1983, which was taken by an authority to which power had been duly delegated for that purpose.

9. I therefore propose that the Court should dismiss Mr Bernardi's application. As regards the costs, I propose that the Court should apply the first subparagraph of Article 69 (2) and Article 70 of the Rules of Procedure.