OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 8 December 1987

My Lords,

Following Competition Notice No CC/D/2/81 of 1 September 1981 relating to a post as chauffeur assigned to ('affecté à') a Member of the Court of Auditors, Mr Rousseau was, by a decision of 28 October 1981, appointed in a probationary capacity as a chauffeur in Grade D 3, Step 1, with assignment to ('affectation auprès') a Member of that Court. With effect from 1 May 1982 he became an established official as a chauffeur with ('auprès') a Member of that Court. He worked as a driver of a Member of the Court and in that capacity received a fixed overtime allowance in addition to his salary, pursuant to arrangements made under Article 3 of Annex VI to the Staff Regulations.

By Decision 85-12 of 16 September 1985 the Court of Auditors decided that all chauffeur posts would be attributed to the President's department ('secteur présidence') with effect from that date. On the same day the President of the Court adopted a decision changing Mr Rousseau's assignment ('affectation') with the Member of the Court to the President's department with effect from 16 September 1985. On 18 September 1985 the President decided that Mr Rousseau was 'mis à disposition ... auprès du cabinet de [the same Member] ... pour une période indéterminée ne pouvant en aucun cas excéder le mandat du Membre', with effect from 16 September 1985. Mr Rousseau continued without interruption to draw the fixed overtime allowance under Article 3 of Annex VI to the Staff Regulations.

On 25 November 1985 eight of the Members' drivers, including Mr Rousseau, protested that the decision taken was contrary to the job description in the competition notices under which they had been appointed and would deprive them of the fixed overtime allowance unless they were actually working as part of the office of a Member of the Court. Having been told in reply to that letter that the drivers could only submit individual communications, Mr Rousseau on 13 December 1985 submitted to the President a document which is described as 'a request' and which refers to Article 90 (1) of the Staff Regulations. Although there were subsequent oral discussions, there was no written reply and the request (or complaint if, as is alleged, such it was) was deemed to have been rejected by 13 April 1986.

Mr Rousseau then brought these proceedings against the Court of Auditors for the annulment of

(i) Decision 85-12 adopted on 16 September 1985 by the Court of Auditors assigning chauffeurs to the President's department;

(ii) The decision of the President of the Court of Auditors of 16 September 1985 deciding, pursuant to Decision 85-12, to assign Marc Rousseau to the President's department;

(iii) As far as necessary, the implied decision of the appointing authority rejecting the complaint lodged by the applicant on 13 December 1985 under Article 90 (2) of the Staff Regulations.

His claims are put first on the basis that there was a breach of the Staff Regulations. He was not moved to fill a vacant post, contrary to Article 4. He was not assigned within the meaning of Article 7 (1) because there was no appointment or transfer to a post. Therefore he cannot be deprived of the fixed allowance to which, as a Member's driver, he was entitled under the arrangements made pursuant to Annex VI. The change in his entitlement to that allowance and the risk that it would be removed if he ceased to work for a Member is in violation of his acquired rights.

The Court of Auditors replies first that the proceedings are inadmissible. He has no interest to protest since (a) he could always be moved within the institution at its discretion, (b) his functions have in fact remained the same and (c) he still receives the fixed allowance and will go on doing so as long as he drives a Member. Moreover, it is said that there never was a complaint under Article 90 (2) of the Staff Regulations, merely a request under Article 90 (1), so that by virtue of Article 91 (2) he cannot apply to this Court.

The first of these objections at times confounds admissibility and substance — he does not have to show that he is right as to the substance before his action can be taken as admissible.

He contends that he cannot in law be moved from the post with a Member to a post in the President's department (apparently the department of the Court of Auditors responsible for general administrative services) merely being allocated to work for a Member for an indeterminate period which cannot be longer than the mandate of the particular Member. Instead of his appointment being as an established Member's driver with a right to fixed overtime (at any rate as long as that arrangement remains in being) he is now at risk that the period during which he drives a Member may be terminated and that he will lose the fixed overtime allowance.

These seem to me to be arguable matters which he is entitled to raise. It is not necessary for this purpose that he should show that he has lost money to date (Cases 17/78 *Deshormes* v *Commission* [1979] ECR 189, at p. 197 and 7/77 *Von Wüllerstorff und Urbair* v *Commission* [1978] ECR 769, at p. 779). If his legal arguments are right

he has lost the certainty of the allowance (and the advantage, as he may consider it, of driving one person rather than acting as part of a pool). This case is quite different from Case 204/85 *Stroghili* v *Court of Auditors* [1987] ECR 389, where the alleged loss or interest was far more remote.

I would reject the argument that he has not sufficient interest to bring these proceedings.

As to the form of his communication of 13 December 1985, the Court of Auditors is right in saying that it does not refer to Article 90 (2) of the Staff Regulations, nor does it use the word 'complaint'.

The document was, however, it seems, drafted by Mr Rousseau himself following the (as I see it) incorrect statement that collective petitions or interventions could not be made. If joint applications can be made to this Court (as they frequently are) I do not see why joint requests or complaints should not be made so long as individual interests are shown in the respective documents.

In the circumstances, since the relevant decisions had been taken and there seems little chance that a request to revoke them would have achieved anything, I do not think that it would be right to take too formalistic a view about this particular document. The complaint he makes is set out in sufficient detail and (in the light of decisions such as e. g. Case 30/68 *Lacroix* v *Commission* [1970] ECR 301, at p. 309, paragraph 4; Case 79/70 *Müllers* v *Economic and Social Committee* [1971] ECR 689, at p. 697, paragraph 15; judgment of 7 May 1986 in Case 191/84 *Barcella* v *Commission*, ECR 1541, at p. 1552, paragraph 12; judgment of 27 October 1987 in Joined Cases 146 and 431/85 *Diezler* v *Economic and Social Committee*, ECR 4283, at p. 4314, paragraph 8; and in particular Case 54/77 *Herpels* v *Commission* [1978] ECR 585, at p. 600, paragraph 47: 'No form is prescribed for complaints which must, as the Court has often stated, be interpreted and understood by the administration with all the care that a large and well-equipped organization owes to those having dealings with it, including members of its staff') I would treat the note of 13 December 1985 as being a complaint, whether or not the collective drivers' note can be treated as severally a request by Mr Rousseau which was rejected by the Court of Auditors.

I would accordingly reject the preliminary objections that these proceedings are inadmissible.

In Case 69/83 (*Lux* v *Court of Auditors* [1984] ECR 2447, at p. 2463), the Court, following earlier cases, stressed that Community institutions 'have a broad discretion to organize their departments to suit the tasks entrusted to them and to assign the staff available to them in the light of such tasks, on condition however that the staff are assigned in the interests of the service and in conformity with the principle of assignment to an equivalent post'.

Despite this discretion the Court has recognized that a balance has to be struck between the interests of the service and the rights and interests of the official. Thus in Joined Cases 161 and 162/80 *(Carbognani* v *Commission* [1981] ECR 543, at p. 562), the Court said, 'As recognized by the Commission's own consistent practice, which is reflected in the disputed acts, decisions re-assigning officials are subject in the same way as transfers, as regards safeguarding the rights and legitimate interests of the officials concerned, to the provisions of Article 7 (1) of the Staff Regulations, inasmuch as officials may be re-assigned only in the interests of the service and in compliance with the requirement that posts must correspond to the officials' grades'.

In Joined Cases 33 and 75/79 *(Kuhner* v *Commission* [1980] ECR 1677, at p. 1697) the Court referred again to the balance between the rights of the official and the interests and rights of the institution. Thus: 'A particular consequence of this balance is that when the official authority takes a decision concerning the situation of an official, in this case his assignment to a specific post, it should take into consideration all the factors which may affect its decision and that when doing so it should take into account not only the interests of the service but also those of the individual concerned'.

The applicant here is right when he says that there was not an appointment or promotion or transfer to a vacant post within the meaning of Article 4, nor an 'assignment' to a post within the meaning of Article 7, of the Staff Regulations. What happened was that the post itself, as a matter of reorganization, was transferred to the President's department. There was no longer a post attached to the office of a particular Member. It must also be said that the Staff Regulations do not expressly mention the term 'mis à disposition' save in Article 37 in connection with the secondment of an official to another Community institution or organization, which is not the present case. It is thus not a formal step provided for in the regulations in the present context like 'transfer' or 'assignment'.

So long as Mr Rousseau's legitimate interests and rights were not thereby adversely affected, I do not see that this reorganization of itself gives him any ground for complaint. The question is whether such interests and rights were adversely affected.

If he had simply been appointed in the first place as a driver, but in fact allocated to drive a Member, I would not consider that he could legitimately complain, other things being equal, if he were then told that he must undertake other driving duties, even if doing so involved his losing certain rights or privileges which he had enjoyed as a Member's driver.

The notice of vacancy and the notice of competition described the 'post' simply as 'Driver D 3/2' and specified driving a Member of the Court of Auditors under the rubric 'nature of duties'.

The appointment, both as a probationer and on establishment, seems to me, however, to run the two together. The decisions make it clear that he was appointed in fact and in law as a Member's driver and established in such a post. There may be, I do not know, an advantage and a satisfaction to be gained from driving one person rather than being

available for any driving which is needed. That is one factor which distinguishes the specific from the general job, though I do not attach overmuch weight to it. What does, however, matter is that at the time of appointment the Court of Auditors had already set up a system of fixed overtime allowances under Article 3 of Annex VI. Mr Rousseau knew when he was appointed that that allowance was a part of his remuneration. His appointment was thus from the beginning to be a Member's driver and to be paid, in addition to his salary, the fixed overtime allowance.

Transferring his post to the President's department on the basis, stated in Decision 85-12, that it was convenient to provide for the possibility of putting drivers 'temporarily' and according to what was needed at the disposal of Members, for a period not longer than their mandate, and that the fixed allowance would only be paid whilst the driver was actually available to a Member ('mis à disposition auprès d'un membre') seems to me to take away his entitlement to be a Member's driver and to continue to receive the fixed overtime allowance. That in my view the Court of Auditors was not entitled to do in this case. They did not have sufficient regard to his rights and legitimate interests.

This conclusion is not inconsistent with the view that persons can be assigned to other posts or given other tasks than the ones which they have been doing, so long as they are not downgraded. The exceptional feature of this case is that there was in being at all material times a fixed overtime allowance which was equal to one-third of the basic salary and which as a result of the decisions taken has now become precarious in that it may or may not be paid according to what job he is doing at the time.

Nor does this conclusion mean that Mr Rousseau is necessarily entitled to the fixed overtime allowance for ever. The matter has not been argued, so that only a provisional view should be stated, but it seems to me prima facie that if a fixed allowance is given pursuant to Article 3 of Annex VI it may (pursuant to that provision) be given only for a period and then stopped. My conclusion in this case is no wider than that whilst the arrangements providing for the fixed allowance are in operation for Members' drivers, Mr Rousseau is entitled to the benefit of that allowance.

For my own part I do not think that the transfer for administrative reasons of the post from the Member's cabinet to the administration is necessarily bad so long as the driver appointed as a Member's driver carries out those functions on the terms applicable, though it may possibly be easier to leave the post with the Member's office. Converting a Member's driver, however, into a driver who may from time to time

and for a time be a Member's driver, but who may well equally be told to do something quite different as a driver without the fixed overtime allowance, in my view is a change of post and function outwith the Court of Auditors' powers.

It is suggested that this decision was taken in the interests not only of the service but of the drivers themselves and examples have been given which it is said support the latter justification (*sed quaere*). This may all be relevant to the consideration as to whether the interests of the service justified the changes made; it does not seem to me to cancel out any rights or legitimate interests which Mr Rousseau was entitled to have respected.

This case may at first sight seem a storm in a teacup since Mr Rousseau has been paid and will go on being paid as long as he drives a Member. In my view, however, he is entitled to a declaration that the decisions taken in respect of him should be annulled. Because of the interaction of the various clauses in Decision No 85-12 with each other, it seems to me more satisfactory to annul the whole of that decision together with the decision of 16 September 1985 assigning Mr Rousseau to the President's department. It will then be a matter for the Court of Auditors to consider what, if any, steps they should take. In the circumstances it seems to me unnecessary to annul the implied decision rejecting his complaint, but that Mr Rousseau should have his costs of these proceedings.