had to the exigencies of the public service rather than to the personal convenience of officials. Consequently when the competent authority, in pursuance of Article 40 (4) (d) of the Staff Regulations, offers a post to an official, allowing him a reasonable time within which to take up duty, his refusal or failure to take the post up on the date which has been fixed may be treated as a refusal, which is not inconsistent with a purely formal acceptance of the post which is not subsequently put into effect.

In Case 108/79

SALVATORE BELFIORE, of 41 Cirrincione, Palermo, represented by G. Vandersanden, of the Brussels Bar, 341 Avenue Louise, Brussels, with an address for service in Luxembourg at the Chambers of E. Arendt, Advocate, 34 Rue Philippe II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Denise Sorasio, a member of its Legal Department, acting as Agent, assisted by Robert Andersen, of the Brussels Bar, 214 Avenue Montjoie, Brussels, with an address for service in Luxembourg at the office of its Legal Adviser, M. Cervino, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision of 12 June 1978 requiring the applicant to resign,

THE COURT (Third Chamber)

composed of: H. Kutscher, President, J. Mertens de Wilmars and Lord Mackenzie Stuart, Judges,

Advocate General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case and the arguments put forward by the parties in the course of the written procedure may be summarized as follows:

I — Facts and written procedure

The applicant, Salvatore Rosario Belfiore, an Italian national, was employed on 10 January 1972 as an Administrator in Grade A 7 Step 2 of the Directorate-General for Personnel and Administration, Personnel Directorate, in the Individual Rights and Privileges Division at Brussels and was established on 10 July 1972 at the end of his probationary period.

On 8 December 1972 he applied for six months' leave on personal grounds under Article 40 of the Staff Regulations because of his father's state of health; this was granted with effect from 1 January 1973 and was subsequently, on his application, extended to 31 December 1973. The applicant had applied on 1 October 1973 to be reinstated but the Commission left his application unanswered; he therefore made a fresh application on 2 December 1974. Ten months later, on 1 October 1975, the Director-General of Personnel and Administration offered him a post in his grade with that Directorate-General. On 31 October 1975 the applicant accepted that offer but pointed out that for various reasons, in particular his father's death and his marriage plans, he could not resume work until the beginning of June 1976.

On 17 November 1975 the Director-General of Personnel and Administration informed the applicant that he could not hold the post vacant for so long and suggested that the applicant should take up his duties again on 1 February 1976. He added that, if the applicant did not reply before 30 November 1975, the Commission would regard its offer as having been refused and that that was "declining the first post offered" within the meaning of Article 40 (4) (d) of the Staff Regulations.

In a letter of 24 November 1975 the applicant refused to accept the suggested date and denied that his conduct could be compared to "declining the first post offered". The Commission adhered to its point of view.

On 16 September 1976 the Director-General of Personnel and Administration offered the applicant a fresh post in his grade in the same Directorate-General as from 3 November 1976: if the applicant did not reply by 6 October 1976 at the latest he would consider his failure to do so as declining the post offered to him for the second and last time.

After an exchange of letters and some interviews it was agreed that the applicant should resume his duties on 1 December 1976, but on 30 November 1976 he sent a telegram to the Commission to the effect that unforeseen circumstances were now preventing him from coming to Brussels, as agreed, on 1 December 1976.

On 9 December 1976, as the applicant had still not appeared, the Director-General of Personnel and Administration gave him notice in writing that consideration was being given to initiating in his case the procedure for compulsory resignation as provided for in Article 40 *in fine* of the Staff Regulations.

On 20 October 1977 Mr Tugendhat, a Member of the Commission, informed the applicant that the Joint Committee had concurred in the proposal that he should be required to resign; he fixed 3 November as the date when the applicant was to be heard by the Director-General of Personnel and Administration. After several sudden changes the applicant was finally heard on 22 March 1978 by the Director of Personnel and, on 12 June 1978, the appointing authority decided to require the applicant to resign and notified him of that decision by a letter dated 15 June 1978.

On 11 September 1968 the applicant submitted a complaint within the meaning of Article 90 (2) of the Staff Regulations against the decision requiring him to resign. The complaint was rejected by a letter from Mr Tugendhat dated 12 February 1979. On 31 May 1979 the applicant reported to the Commission that he had received that letter only on 5 April 1979 and he put forward further arguments against the decision which had been taken and asked that his case be reconsidered. By an application lodged at the Court Registry on 4 July 1979 the applicant brought this action for the annulment of the decision requiring him to resign.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court (Third Chamber) decided to open the oral procedure without holding a preparatory inquiry. It nevertheless requested the Commission to produce the originals of certain letters exchanged between the parties. Both parties were also invited to give an explanation of any delay in bringing the action.

II — Conclusions of the parties

The *applicant* claims that the Court should

(a) Annul the Commission's decision of 12 June 1978 requiring him to resign,

(b) Order the Commission to pay the costs.

The *defendant* contends that the Court should

(a) Dismiss the application as inadmissible and in any event as unfounded;

(c) Order the applicant to pay the costs.

III — Submissions and arguments of the parties

A — Admissibility

The *applicant* submits in his application that the application is admissible because it was lodged within three months after receipt by him of the letter of 12 February 1979 notifying him of the Commission's decision rejecting his complaint.

The *defendant* contends in its defence that the application is inadmissible. It submits that the applicant has not submitted a complaint under Article 90 (2) of the Staff Regulations, or *a fortiori* lodged an application at the Court of Justice against the decisions notified by the letters of 29 December 1975 and 9 December 1976 in which the

Commission informed him that in its view he had refused the first and then the second post offered to him in the context of the reinstatement procedure within the meaning of Article 40 of the Staff Regulations.

Since these decisions have become final their legality can no longer be called in question either within the framework of a complaint through official channels against the decision requiring him to resign of 12 June 1978 or of an application for the annulment of that decision. The application is based solely on the illegality allegedly committed by the Commission in the belief that it had to find that there had been two refusals within the meaning of Article 40 *in fine* of the Staff Regulations.

The *applicant* in his reply states that the letters of 29 December 1975 and of 7 December 1976 are, in the context of the procedure prescribed by Article 40 (4) (d) of the Staff Regulations, only the necessary acts preparatory to the initiation of the procedure for compulsory resignation as laid down by Article 49 of the Staff Regulations. Such acts do not in themselves constitute the damage which the applicant has suffered and they are not definitive because the initiation of the procedure for compulsory resignation is a matter for the discretion of the appointing authority. As long as such a procedure has not been set in motion the appointing authority is free to make the person concerned fresh offers of employment. It is only to the extent to which it decides to have recourse to the procedure for compulsory resignation that it takes a decision adversely affecting an official which might be challenged.

Furthermore the fact that Article 49 of the Staff Regulations, which governs the procedure for compulsory resignation, expressly refers to Article 40 shows that the Court may review the legality of the application of the said Article 40 during an action relating to compulsory resignation.

The *defendant* in its rejoinder submits that, although compulsory resignation is conditional on a preliminary finding by the competent authority that the official has refused to accept two offers of employment, it does not follow that the decisions recording these refusals cannot be the subject of a complaint and thus of an application for annulment independently of the decision for compulsory resignation. In this connexion it is sufficient that they are acts capable of adversely affecting an official. That is in fact the position since, following the finding that the first offer has been refused, the appointing authority may, if a second offer is refused, initiate the procedure for compulsory resignation at any time. Consequently the official has an existing and immediate interest in preventing these conditions from arising.

The fact that Article 49 of the Staff Regulations refers to Article 40 thereof is moreover irrelevant since its only purpose is to state the circumstances in which the decision for compulsory resignation may be taken.

The defendant maintains that the delayed receipt by the applicant of the letter of 12 February 1979 requiring him to resign is due to his negligence, for he notified his change of address only by a letter which the defendant received on 13 February 1979 without apparently making any arrangements to have his mail redirected to his new address.

B — The substance

1. The application

According to the *applicant*, although the appointing authority has a discretion when applying Article 40 (4) (d) it is advisable to consider whether the decision has not been vitiated by a wrong interpretation (mistake of law) or by a misapplication (mistake of fact) of this legal provision and whether it has not been vitiated by misuse of powers.

In this case the Commission's decision is vitiated at one and the same time by mistake of law, mistake of fact and by misuse of powers.

(a) Mistake of law

The applicant stresses that he has at no time refused to resume work in the service; on the contrary he specifically and repeatedly expressed his firm and definite intention to rejoin the Commission whereas the Commission on its part for nearly two years (1 January 1974 to 1 October 1975) failed to carry out its obligation to afford him the opportunity to be reinstated in a post in his category and grade. His attitude to the two offers of employment ultimately made to him on 1 October 1975 and 16 September 1976 can in no way be compared to a refusal within the meaning of Article 40, because each time he expressly accepted the post offered and was merely prevented from resuming his duties within the periods which the defendant's administration purported to impose on him.

Thus the Commission has infringed Article 40 (4) (d) of the Staff Regulations twice, on the one hand, by failing for two years to inform him of the first vacant post which might have suited him and, on the other hand, by initiating the procedure for compulsory resignation without the applicant's refusing to accept the posts offered him.

(b) Mistake of fact

According to the applicant the well established case-law on the civil service law of such Member States as are acquainted with compulsory resignation lays down that the administrative authority cannot merely in these cases give a general statement of the grounds upon which its decisions are founded but must base its decisions on legally admissible grounds arising out of the decision itself or of the administration's file (Belgian Conseil d'État, 10 October 1978, No 19.177, *Wastiels*, R.A.C.E., 1978, p. 1011). Having regard to the expressly stated willingness of the applicant to accept the posts offered, the defendant, before considering whether there had been any refusal, ought to have examined the genuineness of the explanations put forward by the applicant and it could not then have decided without further ado that the explanations relied on were inaccurate or unjustified. The applicant quotes, in this connexion, the judgment of the Belgian Conseil d'État of 20 October 1966, No 12.035, *Bracke*, R.A.C.E., 1966, p. 838.

However, the contested decision does not even refer to the existence of any explanation put forward by the applicant and *a fortiori* does not proceed to examine its validity.

The applicant also relies on a number of Belgian and Italian judgments which lay down that the administration is under a

duty before taking a decision as serious as that of requiring compulsory resignation to ascertain whether the delay (or the relinquishing of a post) is justified or not (Belgian Conseil d'État of 26 May 1976, No 17.674, *d'Otreppe de Bouvette*, R.A.C.E., 1976, p. 531; Italian Consiglio di Stato, IV Sezione of 20 May 1960, No 503; of 5 May 1965, No 404; of 28 September 1967, No 427; of 23 November 1973, No 493; VI Sezione of 18 May 1955, No 363; of 26 October 1971, No 795; of 23 November 1973, No 493).

The applicant considers that he had good reasons for not complying with the requirements of the Commission concerning the date when he was to resume his duties so that the defendant has wrongly described his attitude as a refusal.

(c) Misuse of powers

By requiring him to resign without producing evidence that he had refused the posts which he had been offered the defendant used its powers for purposes other than those for which they were intended. It has in fact removed the applicant from the service without having complied with the procedures and legal rules to which such a penalty must by its very nature conform.

2. The defence

According to the *defendant* there has been no mistake of law, mistake of fact or misuse of powers.

(a) Mistake of law

Although it is true that the Commission as from 1 January 1974, the date when the applicant's leave on personal grounds expired, was under a duty to reinstate him in the first post corresponding to his grade which fell vacant in his category, provided that he satisfied the requirements for that post, account must, according to the defendant, be taken of the fact that between 1 January 1974 and 1 October 1975 there was no vacant post in the Individual Rights and Privileges Division of the Personnel Directorate, the institution being at that time anxious to reinstate officials on leave on personal grounds for preference in their original department. For its part it draws attention to the lack of eagerness shown by the applicant himself in this connexion. In any case the action is not concerned with the Commission's attitude at that time but solely with the question whether it was in law able to decide to require the applicant to resign by reason of his attitude when the posts were offered to him.

According to the defendant, although the applicant did not formally refuse the two posts offered to him, the conditions accompanying his acceptance as regards the date at which he was to resume his duties were such that his reinstatement in the post offered became impossible taking account of the objective requirements of the service, whereas, on the other hand, the periods originally provided for, which were to begin with in themselves reasonable, had been extended having regard to the personal circumstances which the applicant mentioned.

(b) Mistake of fact

Under this head the defendant points out first that there are good reasons for not placing a decision requiring an official to resign provided for by Article 40 (4) (d) and a disciplinary measure on the same

footing. Compulsory resignation is only the exercise of the right which the appointing authority is acknowledged to have to break the legal link created by the appointment of the official when, on the expiry of leave on personal grounds, he twice declines a post permitting him to be reinstated.

A finding that the official has twice declined a post is sufficient to justify the decision and the exercise of this right is mitigated by procedural guarantees for the benefit of the official. Consequently the applicant's references to national laws and cases must be ignored because, although the laws relating to the civil service of most of the Member States provide for compulsory resignation, in the context of European civil service it is regulated by the Staff Regulations so as to preclude any references to a general legal principle of the Member States. Moreover it is not denied that the applicant has had the benefit of the procedural guarantees laid down by the Staff Regulations.

As far as concerns the applicant's criticism of the fact that the defendant regarded his conduct as a refusal the latter replies that its action in doing so was in no way wrongful but entirely justified. The reinstatement of officials at the end of leave on personal grounds has not been provided for solely in the interest of the official himself but also, and even primarily, in the interests of the service. The granting of leave on personal grounds is an exceptional measure limited in time and an official is normally in active employment. Consequently it is for the administrative authority to fix the reinstatement period in accordance with the exigencies of the service and not for the official to do so having regard to his personal convenience, which must only be taken into account to the extent to which it tallies with the exigencies of the service.

With regard to the first post offered to the applicant the defendant considers that in any case it gave him a reasonable period which was extended several times.

With regard to the second offer the defendant's main submission is that the applicant failed to explain the unforeseen circumstances which prevented him from resuming his duties on the agreed date. It was only in the application for annulment that the applicant referred for the first time to a sudden deterioration in his mother's health without however annexing a medical certificate.

(c) Misuse of powers

The defendant firmly rejects the accusation that it has misused its powers and maintains that it is clear from the foregoing that it has correctly applied Article 40 (4) (d) of the Staff Regulations.

3. Reply

The *applicant* in his reply answers the Commission's arguments in the following way:

(a) Mistake of law

He first points out that where, because of the Commission's concern to reinstate officials in the department where they originally worked, the reinstatement period is extended, as in this case, by nearly two years there is nothing to stop the Commission from informing the official concerned of the position. Furthermore this attitude is incompatible

with Article 40 (4) (d) of the Staff Regulations which requires reinstatement in the first post falling vacant so that the Commission is not entitled to base its decision requiring him to resign on this irregular procedure for reinstatement.

On the other hand it is not true that the period allowed him for the resumption of his duties was reasonable in the case of the two posts which he was offered and that he was granted substantial extensions of time in each case. Particularly in the second case it is absurd to speak of a reasonable time-limit and a substantial extension when the period which the applicant was allowed by the Commission was only one week, namely the time which elapsed between his interview with the head of the Individual Rights and Privileges Division on 22 November 1976 and 1 December 1976.

According to the applicant the Commission's reasoning is particularly illogical as far as concerns the alleged refusal to accept the second post offered. After the applicant had sent a telegram to the effect that he was unable to be present in Brussels on 1 December 1976, the Director-General took him to task in his letter of 9 December 1976 for not having put forward any valid reason to explain his absence and informed him that the reinstatement procedure must be deemed to be terminated in consequence of his refusal for the second time of a post which he had been offered. That might force the applicant to justify his absence but did not permit the inference that he had refused to accept the post which he had been offered when he had expressly accepted it. The reason why he did not subsequently give an explanation was that he was convinced that the Commission, as the letter of 9 December 1976 indicates, had, on this point, finally made its mind up by treating his alleged unauthorized absence as a second refusal.

He preferred at that time to wait for the Commission to take a decision requiring his compulsory resignation in order to challenge it on its merits.

(b) Mistake of fact

The applicant is of the opinion that it is not unprofitable, having regard to the exiguous nature of the provisions of the Staff Regulations on compulsory resignation, to refer to the legal systems of the Member States. The administrative authority, before taking a decision as serious as requiring an official to resign, is under a duty to look into the absence of any possible explanation on the part of the official concerned. According to the applicant, after the Commission had received his telegram of 30 November 1976, it ought to have inquired into the precise reasons which he might put forward in order to justify his absence and prescribed a period within which he was to reply. The Commission in matters of administrative non-contentious procedure must abide by certain principles which, without being contrary to the interests of the service, do not disregard the rights of the officials concerned.

(c) Misuse of powers

According to the applicant it is apparent from his observations that the defendant has not applied the provisions of Article 40 (4) (d) of the Staff Regulations correctly and that in consequence it had no right to extend the procedure by a

decision requiring him to resign. It follows that it used the power conferred upon it by Article 40 (4) (d) of the Staff Regulations with a view to bringing to an end the performace of his duties by a decision to remove him from the service.

4. Rejoinder

(a) Mistake of law

The defendant, after stressing its previous explanations of the period which elapsed between the expiry of the applicant's leave on personal grounds and the first offer of a post, points out that on the expiry of leave on personal grounds an official must expect to receive at any time an offer of a post enabling him to be reinstated. The defendant admits that it could have offered the applicant any post in his grade rather than choose to reinstate him in his original department, but this attitude, which has been adopted essentially in the actual interests of the official, contrary to the view of the applicant, has no effect on the legality of the subsequent conduct of the reinstatement procedure.

With regard to the long period which the applicant allowed to elapse between his two applications for reinstatement the defendant maintains that, although Article 40 (4) (d) of the Staff Regulations does not impose on the official in question the obligation to co-operate, it is no less true that the applicant's failure to react between 1 October 1973, the date when he applied for reinstatement, and 1 December 1974, the date when he reapplied, and also between that date and 1 October 1975, when he received the first offer of a post, is evidence of "lack of ordinary vigilance" on his part (judgment of 1 July 1976 in Case 58/75, *Jacques Henri Sergy* v *Commission of the European Communities* [1976] ECR 1139). The applicant's lack of interest in some 30 vacancy notices in his career bracket which he received between 21 July 1976 and 6 September 1976 is also evidence that he was in no hurry to be reinstated, as moreover are his successive applications for an extension of the time-limits as well as the general and changing nature of the personal and family reasons he put forward for these purposes.

As far as concerns the period the applicant was allowed when he received the second offer of a post the Commission points out that this offer was dated 16 September 1976 so that he had all the time which he required to make arrangements for his reinstatement.

Furthermore, it is evident that the letter to him of 24 November 1976 confirming what was said during his interview with the head of the Individual Rights and Privileges Division about his reinstatement as from 1 December 1976, without any possibility of the period's being extended, clearly did not exclude unforeseeable circumstances or *force majeure* which might have prevented him from resuming duty. The only thing which was ruled out was the possibility of extending the period in the absence of some new factor, whilst the applicant had indicated that he agreed with this date. According to the defendant the letter of 9 December 1976 does not therefore contradict that of 24 November 1976. Furthermore the letter of 9 December referred to the absence of good reasons which should logically have caused the applicant to offer an explanation and produce all the requisite

evidence in support of his attitude. But as it happened he preferred to keep silent.

(b) Mistake of fact

Because of the particularism of the law of the Member States in this field which the defendant illustrates by comparing the French and Italian civil service law, it denies that there is a general legal principle, common to the Member States, that it should itself have taken the initiative in making certain that the applicant did not have a good excuse for his absence.

The defendant is, on the contrary, of the opinion that it has shown the greatest consideration for the applicant and his personal situation, especially as regards the second offer of a post. After the defendant had agreed to bring forward the original date when the applicant was to take up his duties again from 3 November to 1 December 1976 and after the applicant had signified that he accepted that date and had been warned that he would not be allowed a further extension except in the event of unforeseeable circumstances or of *force majeure* duly established, he merely sent, on the day before the date fixed for his reinstatement, a telegram in which he simply referred, without giving any further particulars, to unforeseen circumstances preventing his departure and did not even give an explanation later.

It is impossible to maintain seriously in such circumstances that it was for the defendant to take the initiative in asking the applicant why he did not present himself for work on 1 December 1976 or on the following days and in checking the veracity as well as the relevance of his reasons.

(c) Misuse of powers

The defendant stresses again that the applicant merely states that there has been misuse of powers without producing a scintilla of evidence.

IV — Oral procedure

The applicant, represented by A. Vandencasteele of the Brussels Bar, and the Commission of the European Communities, represented by Denise Sorasio, a member of its Legal Department, assisted by R. Andersen of the Brussels Bar, presented oral argument at the sitting on 6 March 1980. Following the request of the Court the parties produced the originals and the envelopes of certain letters which had passed between them.

The Advocate General delivered his opinion at the sitting on 24 April 1980.

Decision

I The application which the applicant, a former official of the Commission of the European Communities in Grade A 7, lodged on 4 July 1979 is for the annulment of the Commission's decision of 12 June 1978 requiring him to resign.

2 The contested decision is based on Article 40 (4) (d) of the Staff Regulations of Officials under which an official who, on the expiry of leave on personal grounds, has twice declined the post which he has been offered with a view to his reinstatement, may be required to resign after the Joint Committee has been consulted.

Admissibility

3 Before a decision is given on the substance of the case it is necessary to consider whether the action must not be held to be inadmissible because it has been brought outside the period laid down by Article 91 (3) of the Staff Regulations. Since observance of the periods prescribed for bringing actions is a mandatory requirement it is for the Court to ascertain, even of its own motion, whether it has been complied with.

4 The decision of 12 June 1978 by which the applicant was required to resign was notified to him in a letter sent by post on 15 June 1978 to his address: 14 Via O. Sozzi, Palermo. Against that decision he lodged a complaint dated 11 September 1978 which was registered at the Secretariat of the Commission on 9 October 1978. The complaint was rejected — after the expiry of the period of four months imposed on the competent authority by Article 90 (2) of the Staff Regulations — by a letter dated 12 February 1979 and sent by post to the applicant at the above-mentioned address.

The action for annulment was brought on 4 July 1979, that is to say nearly five months after the date when the complaint was rejected, although under Article 91 of the Staff Regulations it must be commenced within the period of three months beginning on the date of notification of the decision taken in response to the complaint.

5 On this point the applicant points out that he did not receive the letter in question until 5 April 1979 and he attributes this delay to the negligence of the Commission which sent this letter to an address at which he was no longer living when it could and should have known his new address, 41 Via Cirrincione, Palermo. He states that he was not therefore notified until 5 April 1979 with the result that the action has been brought within the prescribed period and is admissible.

The applicant, in support of this reasoning, points out that his complaint of 11 September 1978 was sent by registered letter with a form for acknowledgement of receipt which mentioned his new address and that that address was also endorsed on the back of the envelope of the letter.

6 The facts relied on by the applicant do not establish the existence of the negligence alleged. Acknowledgements of receipt of a registered letter are not in fact left by the postal authorities in the hands of the addressee and an administration which receives each day a large number of postal communications is not under a duty to examine each time the backs of the envelopes with a view to checking whether the sender has not changed the address previously notified. It was only by a letter of 5 February 1979 which reached the Commission on 13 February 1979, that is to say the day after the despatch of the letter rejecting the complaint, that the applicant gave one of the Commission's departments his new address and asked that any future correspondence should be sent to him there.

7 However it is necessary to point out that the Commission despatched the letter of 12 February 1979 without taking the precaution of having it registered or arranging to have it accompanied by a form for acknowledgement of receipt, even though it had taken both those steps when it sent previous messages to the applicant. In these circumstances and taking into account the fact that the onus of proving notification and the date thereof lies on the Commission, it must be declared that the latter has placed itself in a position in which it cannot adduce conclusive evidence on this point and that, in the case of notification of such an important decision as compulsory resignation, the applicant is entitled to the benefit of the slight doubt as to the date when the period prescribed for bringing the action began to run.

8 The Commission relies on a further ground in support of the inadmissibility of the claim, namely that the contested decision is only the consequence of the two preceding decisions by which the competent authority recorded its finding under Article 40 (4) (d) of the Staff Regulations, that the applicant had declined to accept the first and second post offered to him with a view to his reinstatement at the end of his leave on personal grounds. Since the applicant did not lodge a complaint or bring an action against those decisions, the defendant claims that they should be regarded as definitive and the possibility that they might be illegal may no longer be relied on to support an application for the annulment of his compulsory resignation.

9 This claim must be rejected. Under Article 40 (4) (d) of the Staff Regulations an official who, on the expiry of leave on personal grounds, twice declines posts offered to him may be required to resign. Consequently, the documents

recording these refusals — in so far as their scope is other than purely declaratory — are only decisions preparatory to the decision requiring the applicant to resign, so that the possibility that they may be illegal may be relied on in an action brought against such resignation.

10 It follows from the foregoing considerations that the application must be held to be admissible.

The substance

11 According to Article 40 (4) (d) of the Staff Regulations of Officials:

"On the expiry of his leave an official must be reinstated in the first post corresponding to his grade which falls vacant in his category or service, provided that he satisfies the requirements for that post. If he declines the post offered to him, he shall retain his right to reinstatement when the next vacancy corresponding to his grade occurs in his category or service, subject to the same proviso; if he declines a second time, he may be required to resign after the Joint Committee has been consulted. Until effectively reinstated he shall remain on unpaid leave on personal grounds."

12 The contested decision, after drawing attention to the letters exchanged and the interviews between the applicant and the administration with a view to his reinstatement after the expiry of his leave on personal grounds, recites that with regard to the first offer of a post the applicant "without declining the post offered to him, made his acceptance subject to unacceptable conditions of such a nature that the said acceptance was valueless and must be regarded as a refusal" and that with regard to the second offer of a post "he did not appear on the date appointed for the resumption of his duties, which had been fixed following an extension of the time-limit granted at his request" and "that this fact has been treated as a refusal of the second post offered him with a view to his reinstatement".

13 According to the applicant that decision is vitiated by a mistake of law and infringes Article 40 (4) (b) in as much as the Commission wrongly took the view that he had declined the posts offered to him, when in fact, after he had accepted them, he merely applied in each case for the date when he was to take up his duties again to be adjourned, and the fact that he found it impossible to resume work on the date fixed by the Commission cannot be assimilated to a refusal of the post.

14 This submission must be rejected. The Court file shows that the Commission first offered the applicant a post by a letter dated 1 October 1975 and asked him to fix a date "as soon as possible" for taking up his duties again. The applicant suggested the month of June 1976, that is, a period of eight months, and the Commission was fully justified, having regard to the exigencies of the service, in refusing to agree to a period which could under no circumstances be regarded as reasonable and *bona fide*. The Commission fixed the date of resumption of duty as 1 February 1976 (four months) but he refused to resume work on that date. On 16 September 1976 the Commission offered him a second post and fixed the date for starting work at 3 November 1976. The applicant accepted the post but asked to be allowed to negotiate with regard to the date of his return. The Commission, showing great consideration, acceded to this request and after the applicant had arranged for postponement of a first interview he agreed to take up his duties again on 1 December 1976. On 30 November 1976 he sent a telegram stating that "unforeseen circumstances" prevented him from leaving.

15 When a vacant post in an administration is filled regard must be had to the exigencies of the public service rather than to the personal convenience of officials. Consequently if the time-limits which the official concerned is allowed are reasonable, which they clearly were in this case, his refusal or failure to take up a post on the date which has been fixed may rightly be treated by the competent authority as a refusal, which is not inconsistent with a purely formal acceptance of the post which is not subsequently put into effect.

16 That applies all the more in the applicant's case, because the family reasons relied on *a posteriori* to justify his attitude, even if they were shown to be genuine, as in fact they have not been, were not of such a kind as to prevent his taking up the post within the prescribed period.

17 The Commission has therefore properly applied Article 40 (4) (d) of the Staff Regulations of Officials in forming the opinion that the applicant's conduct was tantamount to declining a post twice which, according to the said provision, justifies his compulsory resignation.

18 It follows from these considerations that the application is unfounded and must be dismissed.

Costs

19 Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

However, under Article 70 of the Rules of Procedure, in proceedings by servants of the Communities institutions are to bear their own costs, without prejudice to the second paragraph of Article 69 (3) of the rules.

Having regard to the circumstances of this case the Court is of the opinion that the action in respect of which the Commission has had to incur costs is vexatious and that they must be borne by the applicant. The applicant must therefore be ordered to pay the whole of the costs.

On those grounds,

THE COURT (Third Chamber)

hereby:

1. **Dismisses the application;**

2. Orders the applicant to pay the whole of the costs.

Kutscher Mertens de Wilmars Mackenzie Stuart

Delivered in open court in Luxembourg on 5 June 1980.

J. A. Pompe
Deputy Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 24 APRIL 1980 [1]

Mr President,
Members of the Court,

The opinion which I deliver in this case will be extremely short, because Mr Belfiore's application appears to me to be manifestly inadmissible since it was lodged out of time.

Whereas the express decision of the Commission rejecting the applicant's complaint is dated 12 February 1979 the application now before the Court was not lodged until 4 July 1979. It is therefore well outside the time-limit of three months prescribed by Article 91 of the Staff Regulations.

It is true that Mr Belfiore maintains that he did not receive the decision of 12 February until 5 April and that he attributes that delay solely to the negligence of the defendant institution. The latter sent it to him at his former address even though, according to Mr Belfiore, it was or ought to have been aware that he had changed his residence.

Having regard to the facts of this case this assertion appears to be very much open to question. Mr Belfiore only informed the Commission officially of his change of address by a letter of 5 February 1979 registered by the administration on 13 February 1979, that is to say the day after that on which the decision rejecting his complaint was sent to him. Consequently that letter cannot be taken into consideration.

Before that the applicant, according to his own statements, merely wrote his new address on the back of the envelopes containing his letters of 11 September 1978 and 23 October 1978.

1 — Translated from the French.