JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

14 April 1994 *

In Case T-10/93,

A, residing at Xalapa (Mexico), represented by Nathalie Leclerc-Petit, of the Montpellier Bar, with an address for service in Luxembourg at the Chambers of François Prum, 13b Avenue Guillaume,

applicant,

supported by

Union Syndicale (Brussels), represented by Jean-Noël Louis, of the Brussels Bar, and by **Union Syndicale (Luxembourg)**, represented by Gérard Collin and Thierry Demaseure, of the Brussels Bar, with an address for service in Luxembourg at the offices of Fiduciaire Myson SARL, 1 Rue Glesener,

interveners,

* Language of the case: French.

Commission of the European Communities, represented by Sean van Raepenbusch, a member of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, also a member of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision of 16 March 1992 confirming the negative medical opinion given by its medical service and refusing to recruit the applicant to a post as an administrator and for compensation for the non-material damage which the applicant claims to have suffered,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of: R. García-Valdecasas, President, B. Vesterdorf and J. Biancarelli, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 26 January 1994,

gives the following

Judgment

Facts

1 The applicant passed Open Competition COM/A/696 for the establishment of a reserve list for administrators specializing in development cooperation, particularly in the field of agriculture in tropical and sub-tropical regions. By letter of 5 July 1991, the Commission informed the applicant that his name had been placed on the reserve list.

2 On 24 October 1991 the applicant underwent, in the Commission's medical service, the medical examination required under the first paragraph of Article 33 of the Staff Regulations of Officials of the European Communities ('the Staff Regulations').

3 It is common ground that the applicant voluntarily told the medical officer in the course of that examination that he was seropositive and voluntarily underwent screening tests for the human immunodeficiency virus (HIV). It was agreed during the examination that a medical report updated by the applicant's own doctor, Dr F., would be sent to supplement the tests carried out or prescribed by the Commission's medical officer.

4 By letter of 28 November 1991, the Commission's medical officer expressed the opinion that the applicant was physically unfit. That letter is worded as follows:

'On 24 October 1991 you underwent, in accordance with the Staff Regulations of Officials of the European Communities, a pre-recruitment medical examination in the medical service of the Commission of the European Communities, in your capacity as a candidate for the post of administrator in African-Caribbean-Pacific (ACP) delegations.

In the course of that examination, you revealed the nature of the condition from which you are suffering. We agreed that a medical report updated by your own doctor, Dr F., would be sent to me as additional information to supplement the tests carried out during your pre-recruitment examination.

The report of Dr F., dated 14 November 1991, reached me on 25 November 1991.

I regret to inform you that on the basis of the examination carried out in this service and on the basis of Dr F.'s report the medical service cannot state as its opinion that you are physically fit to perform the duties corresponding to the post for which you are a candidate.

It will be obvious that this unfitness is connected with the nature of the post for which you have applied.'

5 The applicant thereupon brought the matter before the medical committee referred to in the second paragraph of Article 33 of the Staff Regulations.

6 In a note sent on 5 March 1992 to the relevant administrative departments of the Commission, the medical committee confirmed the opinion of the medical officer in the following terms:

'After examining the pre-recruitment medical file of the candidate and the related reports of the medical specialist consulted, as well as the medical reports submitted by the candidate to the medical committee, and after hearing the doctor who delivered the opinion that A was not fit the medical committee takes the view that A is not physically fit to perform his duties.'

7 The defendant subsequently notified the applicant of its decision by letter of 16 March 1992. That letter is worded as follows:

'Following your letter of 17 December 1991, I would inform you that the medical committee met on 5 March 1992 in order to examine the opinion declaring you medically unfit delivered after your medical examination on 24 October 1991.

I regret to inform you that the committee could only confirm that negative opinion. As a result, it would appear that you are not physically fit to perform the duties of administrator within the Commission within the meaning of Article 28(e) of the Staff Regulations.

For that reason your application unfortunately can no longer be taken into consideration.'

8 By letter of 12 June 1992 the applicant submitted a complaint within the meaning of Article 90(2) of the Staff Regulations against the decision of 16 March 1992, in

support of which he relied on, *inter alia*, the Conclusions of the Council and the Ministers for Health of the Member States, meeting within the Council, on 15 December 1988 concerning AIDS and the place of work (89/C 28/02, Official Journal 1989 C 28, p. 2) ('the Conclusions of the Council and the Ministers for Health'), according to which 'employees who are HIV positive but who do not show any symptoms of the disease should be looked on and treated as normal employees, fit for work.'

9 In its decision of 9 October 1992, notified to the applicant by letter of 16 October 1992, the Commission replied in substance that its decision not to recruit the applicant was consistent with the documents emanating from the Community institutions and in particular with the Conclusions of the Council and the Ministers for Health in view of the fact that the applicant had contracted the disease and had gone beyond the stage of seropositivity alone. The Commission added that since the applicant had formally undertaken to perform a substantial part of his duties in delegations in developing countries, the requirements and environmental conditions of the probable posting, coupled with deficient local medical infrastructures, were additional factors to be taken into consideration.

Procedure

10 In those circumstances the applicant brought the present action by application lodged at the Registry of the Court of First Instance on 21 January 1993.

11 By documents lodged at the Registry of the Court of First Instance on 5 May 1993, the Union Syndicale (Brussels) and the Union Syndicale (Luxembourg) applied to intervene in support of the forms of order sought by the applicant. By order of 22 June 1993 the President of the Third Chamber granted leave to intervene. The interveners submitted a joint statement in intervention on 1 September 1993. The applicant did not submit any observations on the statement in intervention.

12 At the applicant's request, the Court of First Instance (Third Chamber) decided that the oral procedure should be held *in camera* and that the applicant's name be replaced by the letter A in all documents for publication.

13 Upon hearing the report of the Judge-Rapporteur, the Court (Third Chamber) decided to request the applicant to lodge the medical file relating to the examination carried out by Dr P., of the Paris-based medical centre for companies working abroad, and to confirm his agreement to the production of his medical file by the Commission. The applicant acceded to that request by lodging the medical file drawn up by Dr F. and confirmed his agreement to the production of the Commission's medical file. Upon production by the Commission of that file, the Court decided to open the oral procedure without any preparatory inquiry. The Court requested the two main parties to be accompanied at the hearing by doctors of their choice who would be able to answer general medical questions. The applicant and the interveners were accompanied at the hearing by Dr W., deputy head of the clinic for infectious diseases at the Saint-Pierre Hospital in Brussels, while the Commission's Agent was accompanied by that institution's medical officer, Dr S.

14 The parties presented oral argument and replied to the Court's questions at the hearing on 26 January 1994.

Forms of order sought by the parties

15 The applicant claims that the Court of First Instance should:

— annul the Commission decision of 16 March 1992 refusing to consider his application;

— annul the Commission's decision of 9 October 1992 rejecting the applicant's complaint;

— order the Commission to pay him the sum of FF 50 000 by way of compensation for non-material damage;

— order the Commission to bear the costs.

16 The Commission contends that the Court of First Instance should:

— dismiss the application as unfounded;

— make the appropriate order as to costs.

17 The interveners claim that the Court of First Instance should:

— make the form of order sought by the applicant in the application initiating the proceedings;

— order the Commission to bear the costs, including those of the interveners.

Application for annulment

18 In support of the application for annulment, the applicant has relied on five pleas in law based on infringement of the rights of the defence, defects in the statement of grounds of the contested decision, breach of the principle of equality, infringement of the right to respect for private life and, finally, a manifest error of assessment and breach of the Conclusions of the Council and the Ministers for Health.

19 In addition to the pleas in law submitted by the applicant, the interveners have relied on a plea in law based on the illegality of the second paragraph of Article 33 of the Staff Regulations. The Court considers it appropriate to examine this plea first.

The plea in law based on the illegality of the second paragraph of Article 33 of the Staff Regulations

20 The interveners argue that the contested decision must be annulled inasmuch as it is based on a medical opinion which was unlawful since it was given on the basis of the second paragraph of Article 33 of the Staff Regulations concerning the composition and operation of the medical committee, a provision which is itself unlawful. The interveners submit in the first place that, in so far as it provides that the medical committee is to be composed of three doctors chosen by the appointing authority from among the institutions' medical officers, the second paragraph of Article 33 infringes candidates' rights to a fair hearing. In this case, they contend, the infringement is all the more serious since it was the medical officer who originally declared the applicant unfit who indicated to the Directorate-General for Personnel and Administration the three doctors whom he wished to see sitting on the medical committee. A committee constituted under such circumstances will scarcely be impartial and independent of the Community institutions, contrary to the principle of respect for the applicant's right to a fair hearing. Secondly, the interveners argue that the medical committee procedure, as provided for under the second paragraph of Article 33 of the Staff Regulations, also results in an infringement of a candidate's right to a fair hearing inasmuch as a candidate rejected by reason of a negative medical opinion must himself take the initiative to request the

medical committee that he and his own doctor be heard, while knowing nothing of the content of that negative medical opinion. It follows that, in most cases, the medical committee meets and takes decisions on the basis of documents without hearing either the candidate or his own doctor. Thirdly, the interveners submit that they were, and continue to be, unaware of the factors on which the medical committee bases its assessment. According to them, it would appear that the medical committee merely serves to confirm what has been decided by the institution's medical officer.

21 The Commission submits that this plea in law is inadmissible since it was not raised by the applicant in his complaint or in his application and also that it is unfounded since there is nothing in the documents in the case to suggest that the medical committee failed to examine the file established after the applicant's pre-recruitment medical examination with due objectivity and impartiality.

22 As a preliminary point, the Court notes that the first paragraph of Article 33 of the Staff Regulations provides that 'before appointment, a successful candidate shall be medically examined by one of the institution's medical officers in order that the institution may be satisfied that he fulfils the requirements of Article 28(e)' and that, according to the second paragraph of Article 33, 'where a negative medical opinion is given as a result of the medical examination provided for in the first paragraph, the candidate may, within 20 days of being notified of this opinion by the institution, request that his case be submitted for the opinion of a medical committee composed of three doctors chosen by the appointing authority from among the institutions' medical officers. The medical officer responsible for the initial negative opinion shall be heard by the medical committee. The candidate may refer the opinion of a doctor of his choice to the medical committee ...'.

23 In the first place, the Court observes that when the Community legislature included in the Staff Regulations a provision requiring a medical examination prior to recruitment, it was not obliged by any higher-ranking rule of Community law or by any other mandatory rule to establish any mechanism whatever for internal appeals against the opinion given by the medical officer after that medical examination. By none the less establishing an appellate medical committee under the

second paragraph of Article 33 of the Staff Regulations the legislature intended to provide an additional guarantee for candidates and thereby improve the protection of their rights.

24 Secondly, the Court takes the view in those circumstances that a medical committee composed of three doctors, excluding the medical officer responsible for the initial opinion of unfitness, which is chosen from among the medical officers of the institutions and not exclusively from the medical officers of the institution in question represents a real additional guarantee for candidates. The Court also finds that the interveners' argument that those three doctors are neither sufficiently competent nor sufficiently impartial is not supported by anything to make it possible to determine whether it is well founded. It follows that the Court cannot accept the argument of the interveners that in laying down rules on the composition of the medical committee the second paragraph of Article 33 infringes the principle of respect for the applicant's right to a fair hearing.

25 In the third place, the Court holds that it is clear from the second paragraph of Article 33 that the candidate may refer the opinion of a doctor of his choice to the medical committee. It is also clear from the documents in the case that the Commission's medical service did not simply request the applicant to submit to the medical committee all the documents which he considered relevant but also invited him to attend in person or to be represented by a doctor of his choice. Furthermore, according to well-established case-law, a candidate may always request and ensure that the reasons for an opinion declaring him unfit are notified to a doctor of his choice (judgment of the Court of Justice in Case 75/77 *Mollet* v *Commission* [1978] ECR 897 and judgment of the Court of First Instance in Joined Cases T-121/89 and T-13/90 *X* v *Commission* [1992] ECR II-2195). Such notification may be made before the medical committee is convened.

26 It is common ground in this case that the applicant was informed by telephone of the grounds on which the opinion that he was unfit was based even before he received written notification of that opinion. There is, in those circumstances, no factual basis for the interveners' argument that rejected candidates have to take the

initiative in requesting a hearing before the medical committee while being unaware of the medical content of the opinion declaring them unfit.

27 With regard to the factors taken into account by the medical committee, it is clear from the second paragraph of Article 33 that the committee must base itself on the medical file established within the institution, on the comments to the committee of the medical officer who gave the negative opinion and, where appropriate, on the opinion of a doctor of the candidate's own choice. As the file in this case shows, the medical committee may also base its decision on a discussion with the candidate and/or his own doctor and on all the documents which the candidate sees fit to submit to the committee. Moreover, the medical committee may, if it considers it to be desirable, have the candidate undergo a fresh examination, if appropriate, calling for additional tests or requesting the opinion of other specialist doctors. It follows that the medical committee may carry a full and impartial re-examination of the candidate's situation (see the judgment in *X* v *Commission*, cited above).

28 It follows from all the foregoing that the plea in law based on the illegality of the second paragraph of Article 33 must in any event be rejected without it being necessary to examine whether that plea is admissible.

The plea in law based on infringement of the rights of the defence

29 At the hearing the applicant adopted the heads of complaint based on infringement of the rights of the defence which had been submitted by the interveners in their statement in intervention. The applicant and the interveners submit in that regard that the applicant was not properly informed of the procedure laid down by the second paragraph of Article 33, particularly in respect of the definitive nature of the medical committee's decision with regard to assessments of a medical nature. They thus argue that it was contrary to the rights of the defence for the Commission to refuse to take account of a medical report drawn up on 28 September 1992 by Dr F. which makes it clear that the contested decision is based on a medical

opinion which is vitiated by a manifest error of assessment. The interveners add that the failure of the medical officer to inform the applicant's own doctor of the findings made at the pre-recruitment examination or of the result of that examination also amounts to an infringement of the rights of the defence. For those reasons, it is argued, the applicant was unable to prepare his defence.

30 The Court takes the view, as the Commission has submitted, that there is no factual basis for this plea in law. It is clear from the documents in the case that the Commission's medical service informed the applicant by letter of 20 February 1992 that he was 'free to submit to the medical committee all documents (reports, X-rays, analyses, practical tests etc.) which you may consider to be useful' and that 'according to Article 33 of the Staff Regulations the medical officer responsible for the initial negative opinion is required to be heard by the medical committee', while the candidate may 'refer the opinion of a doctor of his choice to the medical committee'. It is also clear from the documents in the case that prior to the written notification to the applicant of the first negative opinion, the medical officer had informed the applicant by telephone of the result of the pre-recruitment medical examination and of the reasons for the negative opinion he had given. It follows that the applicant was adequately informed of the procedure laid down by the second paragraph of Article 33. The Court also notes that the said letter of 20 February 1992 expressly drew the applicant's attention to the possibility of referring the opinion of a doctor of his choice to the medical committee. The head of complaint under which the applicant accuses the Commission of failing to take account of the medical report drawn up by his own doctor on 28 September 1992, that is to say, six months after the medical opinion adopted by the medical committee, is therefore unfounded. Finally, there is no rule under the Staff Regulations that a medical officer must inform a candidate's own doctor, rather than the candidate himself, of the results of the pre-recruitment medical examination. Although the Court indicated in its judgment in *X* v *Commission*, cited above, that the obligation to give reasons for an adverse decision has to be reconciled with the requirements of medical confidentiality, which is done by enabling the person concerned to request and ensure that the reasons for his being declared unfit are notified to a doctor of his own choice, that option does not in any way preclude the possibility that the medical officer may, if he considers it to be appropriate and compatible with medical ethics, inform the person concerned directly of the reasons for his unfitness. In the present case, in any event, that choice by the medical officer did not constitute an infringement of the principle of respect for the rights of the defence in view of the applicant's knowledge of his state of health, as is clear from all the documents in the case.

31 It follows that this plea in law must be rejected.

The plea in law that the statement of grounds for the contested decision is defective

32 The applicant and the interveners submitted during the oral procedure that, contrary to Article 25 of the Staff Regulations, neither the negative medical opinion issued on 28 November 1991 by the Commission's medical officer, nor the opinion of the medical committee of 5 March 1992 confirming that negative opinion, nor the contested decision, nor the Commission's reply of 16 October 1992 to the complaint made by the applicant contains a statement of grounds enabling the applicant to identify the medical basis underlying the contested decision.

33 Against this, the Commission argues that the applicant was perfectly aware of his medical condition since he had voluntarily revealed his seropositivity to the Commission's medical officer in the course of the pre-recruitment medical examination. Moreover, the medical officer had, prior to sending written notification of his negative medical opinion, personally informed the applicant by telephone of the opinion which he had given and the grounds on which it was based, as expressly acknowledged by the applicant in his letter to the Commission of 17 December 1991.

34 The Court would first point out that it has been consistently held that the obligation to give reasons, laid down by the second paragraph of Article 25 of the Staff Regulations, is intended on the one hand to provide the person concerned with sufficient information to determine whether the decision adversely affecting him was well founded and whether it is appropriate to bring proceedings before the Court, and on the other to enable the Court to review that decision (judgment of the Court of Justice in Case 195/80 *Michel* v *Parliament* [1981] ECR 2861; judgment of the Court of First Instance in Case T-52/90 *Volger* v *Parliament* [1992] ECR II-121).

35 According to the consistent case-law, however, that obligation to give reasons must 'be reconciled with the requirements of professional secrecy which, save in exceptional circumstances, leave the individual doctor to decide whether to communicate to those whom he is treating or examining the nature of the condition from which they may be suffering. This reconciliation is effected through the ability of the person concerned to request and ensure the communication to a doctor of his choice of the grounds on which he has been declared unfit' (judgment of the Court of Justice in Case 121/76 *Moli* v *Commission* [1977] ECR 1971; judgment in *X* v *Commission*, cited above). Furthermore, with regard to the extent of the obligation to give reasons, it is necessary to take account of the circumstances in which a decision was taken and to consider whether the person concerned was aware of those circumstances (judgments of the Court of Justice in Joined Cases 161/80 and 162/80 *Carbognani and Coda Zabetta* v *Commission* [1981] ECR 543 and in Case 19/87 *Hecq* v *Commission* [1988] ECR 1681).

36 In the light of those principles, the Court finds, in the first place, that both the negative medical opinion given by the Commission's medical officer and the opinion given by the medical committee confine themselves to referring to the results of the medical examinations carried out and to the fact that those results were based on the examination carried out in the Commission's medical service and the report of 14 November 1991 drawn up by Dr F. Thus, at first sight neither of those opinions in themselves enables the applicant to know the specific findings on which they are based.

37 In the second place, however, the Court finds on the basis of all the documents put before it that the applicant was fully aware, before the pre-recruitment medical examination, of his physical condition and of the condition from which he was suffering, as is clear from, *inter alia*, the fact that he himself voluntarily informed the Commission's medical officer of his seropositivity in the course of that medical examination.

38 Thirdly, as already stated above (paragraph 30), it is clear from the documents in the case, and has not been contested by the applicant, that the Commission's medical officer, prior to sending the applicant written notification on 28 November 1991 of his negative medical opinion, informed the applicant by telephone of the result of the medical examination and the reasons for it. At the hearing, the

Commission's medical officer stated in that regard, without being gainsaid by the applicant, that he had on that occasion informed the applicant of the medical findings and of the grounds on which his negative opinion was based. That statement is moreover confirmed by the letter of 12 December 1991 sent by the applicant himself to the Commission, in which he writes: 'I have received your letter of 28 November 1991 setting out the decision you have taken on the basis of the results of my medical examination. I am grateful to you for having given me prior notification by telephone ... Frankly, I think that the (medical committee) will confirm your opinion ...'.

39 Lastly, the Court finds that the Commission's reply to the applicant's complaint contains additional information to that given in the opinions of the medical officer and the medical committee. As grounds for the contested decision, that reply states, *inter alia*, that the Conclusions of the Council and the Ministers for Health cited by the applicant in his complaint 'refer to persons "who do not show any symptoms of [AIDS]", which, according to the information supplied by the medical service, is not the case with regard to A', that 'according to the medical service (while respecting medical confidentiality and without divulging information on the state of health of the person concerned), the applicant has contracted the disease', that he had 'gone beyond the stage of seropositivity alone' and that 'it has been noted that A is receiving specific treatment for this symptomatology and that it is not possible to regard him as an asymptomatic carrier'.

40 On the basis of those findings, the Court takes the view that in the present circumstances the Commission has complied with its obligation to give reasons, which, as stated above (paragraph 35), had to be reconciled with the requirements of medical confidentiality. It follows that the applicant's right to a fair hearing has not been infringed by inadequacies in the statements of reasons and also that the Court has not been unable to review the legality of the decision. The second plea in law must in any event therefore be rejected without it being necessary to rule on its admissibility.

The plea in law based on breach of the principle of equality

41 The applicant and the interveners submit that the applicant's voluntary declaration that he was seropositive has led, in the circumstances of this case, to inequality of treatment, to his detriment, *vis-à-vis* candidates who do not reveal their seropositivity. According to the applicant, such inequality of treatment and discrimination exist because it is impossible for the medical officer to require candidates to undergo an HIV screening test, as a result of which discovery that such persons are seropositive is exclusively dependent on their good faith and is thus arbitrary in nature and wholly discriminatory.

42 According to a consistent line of case-law, the principle of equal treatment is breached when two categories of persons whose factual and legal circumstances disclose no essential difference are treated differently or where situations which are different are treated in an identical manner (see the judgment of the Court in Joined Cases T-18/89 and T-24/89 *Tagaras* v *Court of Justice* [1991] ECR II-53).

43 The Court finds that in this case the position of the applicant, as described in paragraph 3 above, is in no way comparable to that of another candidate who did not make such a voluntary declaration during the pre-recruitment medical examination. In those circumstances, and even if the applicant did declare himself to be seropositive, it was the duty of the medical officer and subsequently that of the medical committee to consider, in accordance with the combined provisions of Article 28(e) and the first paragraph of Article 33 of the Staff Regulations, whether the applicant satisfied the requisite conditions of physical fitness. A further consideration is that a voluntary declaration by a candidate during a pre-recruitment medical examination that he suffers from a particular illness cannot have the effect of precluding the medical officer from giving further consideration to that circumstance. If that were the case, the medical examination, which must necessarily to some extent be based on what is said by a candidate, would serve no purpose.

44 It follows that this plea in law must be rejected without it being necessary to rule on its admissibility.

The plea in law based on infringement of the right to respect for private life and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

45 The applicant submits that the decision not to appoint him to a post corresponding to the duties for which he had passed tests in a competition because of information which he volunteered to the medical service on his state of health and which he was in no way obliged to give constitutes a manifest breach of the right of every individual to look after his health and his life as he sees fit and to take such risks as may be necessary in order to realize his fundamental professional and personal aspirations.

46 The interveners point out that it follows from the judgment of the Court of Justice in Case C-185/90 P *Commission* v *Gill* [1991] ECR I-4779 that the pre-recruitment medical examination is solely in the interest of the institution. It was thus really introduced, according to the interveners, to safeguard the budgetary equilibrium of the institution concerned by preventing it from having to bear major expenses in the long or short term. Such an objective is not compatible with the right to respect for private life, as laid down in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention'). The interveners add that in this case the mere fact of an HIV screening test having been carried out in itself constitutes an infringement of the right to respect for private life, since such a test was totally pointless and superfluous as the applicant had already stated that he was seropositive.

47 The Court points out, to begin with, that Article 8(1) of the Convention provides that 'everyone has the right to respect for his private and family life, his home and his correspondence.'

48 As the Court of Justice held in its judgment in Case C-260/89 *ERT* [1991] ECR I-2925, 'fundamental rights form an integral part of the general principles of law, the observance of which it ensures. For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories (see, in particular, the judgment in Case 4/73 *Nold* v *Commission* [1974] ECR 491, paragraph 13). The European Convention on Human Rights has special significance in that respect (see in particular Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 18). It follows that, as the Court held in its judgment in Case 5/88 *Wachauf* v *Germany* [1989] ECR 2609, paragraph 19, the Community cannot accept measures which are incompatible with observance of the human rights thus recognized and guaranteed.'

49 Moreover, Article F(2) of the Treaty on European Union, which came into force on 1 November 1993, provides that 'the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.'

50 The Court considers first that the requirement under Article 33 of the Staff Regulations that every person should undergo a medical examination prior to being recruited as a Community official is in no way contrary to the fundamental principle of respect for private life set out in Article 8 of the Convention. That examination is designed to enable the institution not to appoint a candidate unsuitable for the duties envisaged or to recruit him and assign him to duties compatible with his state of health. That objective is perfectly lawful within any system of public administration and meets the interests of both the institutions and Community officials. In addition, the Court notes that the requirement of a medical examination prior to recruitment of officials is a requirement which is common to most legal systems in the Member States. In those circumstances, the very principle of a pre-recruitment medical examination cannot be regarded as being contrary to the principle of respect for a person's private life. That conclusion is not rendered invalid by the fact that the negative opinion made at the time of the examination is partially attributable to voluntary declarations made by a candidate for a post in the Community public service.

51 In the second place, the Court takes the view that such a medical examination prior to recruitment must, if it is not to be completely pointless, necessarily include a clinical examination and any supplementary biological tests considered necessary by the medical officer. In this case, the Court notes that the applicant voluntarily stated that he was seropositive and that it is common ground that he agreed to undergo an HIV screening test. The interveners' argument that this screening test was pointless and unnecessary has for that reason no basis whatsoever, and as it can do no more than note that the medical officer considered such a test to be necessary or, at least, useful, the Court cannot, in the context of its review of legality, criticize such an assessment of an exclusively medical nature.

The plea in law based on a manifest error of assessment and a breach of the Conclusions of the Council and the Ministers for Health of the Member States, meeting within the Council, on 15 December 1988 concerning AIDS

Arguments of the parties

52 The applicant and the interveners argue first of all that the contested decision is vitiated by a manifest error of assessment in so far as it is based on mistaken assessments by the medical service that the applicant had contracted the disease and had gone beyond the stage of seropositivity alone. Those findings are contradicted by the medical findings of the Commission's medical officer during the pre-recruitment medical examination, in which the latter had not diagnosed any particular ailment, and also by the statement in the medical report drawn up on 14 November 1991 by the applicant's own doctor, Dr F., a specialist in the field, to the effect that the applicant's clinical and immunological conditions were satisfactory. It is significant, according to the applicant, that at no time did his 'T4 count' fall below the threshold regarded as being that at which the disease manifests itself. The applicant stresses that at each of the periodical check-ups carried

out by Dr F. that doctor concluded that the results of the clinical examination remained within the limits of what was normal.

53 The applicant goes on to submit that the views expressed by the Commission as to the inappropriate nature of environmental conditions and the inadequacy of medical infrastructures in developing countries in the context of his seropositivity are contradicted not only by the medical opinions put before the Court but also by the work in which he is at present engaged. Since March 1991 he has been working as a researcher for the Centre for International Cooperation in Agronomic Development Research and has, in that capacity, been in charge since January 1992 of an agricultural development project in Xalapa, Mexico. He claims that the work he is doing is very similar to that which would have been assigned to him as a specialist administrator for the Commission. Prior to leaving for Mexico he underwent an examination at the French medical centre for companies which operate abroad, following which Dr P. issued an opinion approving his leaving for Mexico since he could return periodically to Montpellier. The applicant considers that such a decision is tantamount to an opinion that he is physically fit. He also argues that his own experience confirms that the opinion that he is fit is correct, inasmuch as he has already been working for some time in a developing country. On the basis of that experience, the applicant concludes that his seropositivity is perfectly compatible with his research duties in developing countries with only limited medical infrastructures.

54 The applicant and the interveners submit further that since it has been established that the applicant has not gone beyond the stage of seropositivity alone and it is accepted that he does not show any symptoms of AIDS, the Commission failed to comply with the Conclusions of the Council and the Ministers for Health in view

of the fact that the applicant ought to have been treated as a 'normal [employee], fit for work' and not rejected on the ground that he was physically unfit.

55 The interveners also submit that neither the Commission's medical officer nor the doctors making up the medical committee provided any evidence, so far as the interveners are aware, of qualifications or specific experience establishing their competence in the area of infectious diseases and, more particularly, of the problems associated with the immunodeficiencies resulting from HIV infection.

56 Against this, the Commission argues that in effect the plea in law raised by the applicant casts doubt on the strictly medical assessment made by the institution's medical officer and by the appellate medical committee. The Commission refers in that connection to the case-law of the Community judicature on the scope of the judicial review of the legality of a refusal to recruit on grounds of physical unfitness. The medical opinion, which was delivered on the basis of the results of the clinical examination and medical report of Dr F., evinces, in the view of the Commission, a comprehensible link between the medical findings which it contains and the conclusion it reaches that the applicant was not fit; it cannot therefore be regarded as being vitiated by a manifest error of assessment. According to the Commission, the report of 14 November 1991 drawn up by the applicant's own doctor, Dr F., actually refers to the immune system being affected, to a fall in the 'T4 count' linked to a symptomatology deriving from the normal clinical indicia of HIV infection, that is to say, hairy leucoplakia of the tongue and oral candidiasis. The very existence of these infections, in the Commission's opinion, makes it possible to say that the applicant had, at the time of the pre-recruitment medical examination, gone beyond the stage of asymptomatic seropositivity and had entered an advanced evolutionary stage of the disease. The medical report subsequently drawn up by the same Dr F. on 28 September 1992 referring to the applicant's satisfactory clinical state and to an improvement in the condition of his

immune system is not, the Commission contends, of such a kind as to establish the existence of a manifest error of assessment by the institution's medical officer in view of the medical information in his possession when he carried out the examination.

57 The Commission adds in that connection that the duties for which the applicant was a candidate in the field of agriculture in tropical and sub-tropical regions are to be performed in 'high-risk countries', given the dangers of infections and the lack of appropriate health-care infrastructures. That is an important factor which the medical officer was right to take into consideration, as is clear from the opinion declaring the applicant unfit.

58 In conclusion, the Commission states that the practice which it normally follows and which it followed in this case corresponds exactly to the position set out in the Conclusions of the Council and the Ministers for Health. The medical service had found symptoms of AIDS in the applicant and the applicant was therefore not covered by those Conclusions.

Assessment of the Court

59 It follows from the Conclusions of the Council and the Ministers for Health that 'employees who are HIV positive but who do not show any symptoms of the disease should be looked on and treated as normal employees, fit for work'.

60 It is clear from both the Commission's written submissions and from its arguments at the hearing that it regards itself as bound by those Conclusions. In those circumstances, the Court takes the view that, while they cannot be treated as provisions of the Staff Regulations or of Community legislation, those Conclusions

must none the less be treated as rules of practice which the administration imposes on itself and from which it may not depart without specifying the reasons which have led it to do so, since otherwise the principle of equal treatment would be infringed (judgment of the Court of First Instance in Case T-2/90 *Ferreira de Freitas* v *Commission* [1991] ECR II-103).

61 With regard to the scope of the judicial review of the legality of a refusal to recruit on grounds of physical unfitness, the Community judicature has consistently held that it cannot substitute its own assessment for an opinion which is specifically medical in nature. However, it is the task of the Court, in the context of its judicial review, to ascertain whether the recruitment procedure was conducted in a lawful manner and, in particular, to examine whether the decision of the appointing authority refusing to appoint a candidate on grounds of physical unfitness is based on a reasoned medical opinion establishing a comprehensible link between the medical findings which it contains and the conclusion which it draws (see the judgment of the Court of Justice in Case 189/82 *Seiler* v *Council* [1984] ECR 229; judgment in *X* v *Commission*, cited above).

62 Finally, it is possible, according to the case-law of the Community judicature, for the medical officer of an institution to base a finding that a candidate is unfit not only on the existence of actual disorders but also on a medically justified prognosis of future disorders capable of jeopardizing in the foreseeable future the normal performance of the duties in question (see the judgment of the Court of Justice in Case 155/78 *Miss M.* v *Commission* [1980] ECR 1797; judgment in *X* v *Commission*, cited above).

63 It is thus for the Court to decide whether there is a comprehensible link between the medical findings of the institution's medical service and the conclusion drawn from that by the appointing authority in the contested decision and also to examine whether the Conclusions of the Council and the Ministers for Health have been complied with in this case.

64 With regard to the existence of a comprehensible link between the medical findings in the pre-recruitment medical examination and the conclusion regarding the applicant's physical unfitness, the Court finds that it is clear from the medical file produced by the Commission, including the clinical and biological test carried out by the medical officer and the medical report drawn up on 14 November 1991 by the applicant's own doctor, Dr F., that the medical examination had revealed, in the case of the applicant, the existence of persistent hairy leucoplakia, probable oral candidiasis, a low T4 count of 293/mm³ (normal value 675-1575) and a T4/T8 ratio of 0.6 (normal value 1-3). In addition, it is clear from the replies given by the two doctors present at the hearing that a person who is HIV positive and shows such symptoms is classified in Group IV (symptomatic), Subgroup C2 (associated infections), according to the classification of the different evolutionary stages of AIDS used at the date of the medical examinations in question by the whole scientific community, as accepted by the two doctors present at the hearing.

65 In those circumstances, the Court finds that it has not been established that the medical opinion given by the medical officer and confirmed by the medical committee is vitiated by a manifest error of assessment. On the contrary, the Court takes the view that there is indeed in this case, as argued by the Commission, a comprehensible link between the medical findings contained in the opinion and the conclusion which it draws regarding the applicant's physical unfitness to perform the duties for which he had applied, particularly as those duties were to be performed in developing countries where, as the applicant and the interveners admitted at the hearing, the risks of infection are greater than in Europe.

66 So far as concerns the applicant's argument that the opinion declaring him unfit reveals a manifest error of assessment inasmuch as it is contrary to the conclusion arrived at by Dr F. in his report of 14 November 1991 stating that the applicant's clinical state and the condition of his immune system were satisfactory, the Court finds, on reading that report, that it can reasonably be interpreted only as meaning

that it was in view of the specific characteristics of the applicant's case that his condition could be regarded as satisfactory. This conclusion thus in no way contradicts the conclusion reached by the Commission's medical officer and confirmed by the appellate medical committee. The applicant's argument cannot therefore be accepted.

67 With regard to the applicant's argument that he worked for a period in Mexico without any physical problem whatsoever, it suffices to point out that Mexico does not belong to the group known as the 'ACP' (African-Caribbean-Pacific) countries in which the tasks for which the applicant was a candidate were to be carried out, and also that, as was accepted by the two doctors present at the hearing, the medical infrastructure in Mexico is not generally comparable with the more rudimentary infrastructure in the ACP countries.

68 So far as concerns the interveners' argument regarding the competence of the Commission's medical officer and of the doctors sitting on the medical committee, it is sufficient to note that, in the context of its powers of judicial review regarding opinions declaring persons physically unfit, it is not for the Community judicature to assess the scientific competence of the doctors who issued such an opinion. Moreover, and in any event, the Commission explained, in the first place, that the medical officer has attended several training courses and medical symposia on AIDS, that he has a qualification from the Institute of Tropical Medicine in Antwerp and that he worked for six years as a doctor in a country in central Africa and, secondly, that it is evident from the opinions of the medical officer and the medical committee that they based themselves primarily on the medical report drawn up on 14 November 1991 by Dr F., a recognized specialist in the field.

69 Finally, with regard to the alleged breach of the Conclusions of the Council and the Ministers for Health, the Court takes the view that as the applicant came at the material time within Group IV (symptomatic), Subgroup C2 (associated infections), according to the classification of the different evolutionary stages of AIDS applicable at that time, he was not covered by those Conclusions, which, as stated

above, apply only to persons who do not show any symptoms of the disease, a category into which the applicant does not come. It follows that the Commission did not act contrary to those Conclusions.

70 Accordingly this plea in law cannot be accepted and the application for annulment must consequently be rejected.

The application for compensation

71 The applicant submits that the Commission must compensate him for the non-material damage he has suffered by reason of its service-related fault in making an incorrect assessment of his physical fitness and its flagrant breach of certain general principles of Community law and fundamental rights.

72 The Court points out that examination of the pleas in support of the application for annulment did not reveal any breach by the Commission of the applicant's rights or any manifest error of assessment and that it was therefore not established that the Commission had committed any fault of such a kind as to render it liable. Accordingly, the application for compensation must also be rejected.

73 It follows from all the foregoing that the application must be dismissed in its entirety.

Costs

74 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, Article 88 of those Rules provides that in proceedings brought by servants of the Communities the institutions are to bear their own costs. Each party, including the interveners, should therefore be ordered to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Dismisses the application;

2. Orders the parties to bear their own costs.

García-Valdecasas Vesterdorf Biancarelli

Delivered in open court in Luxembourg on 14 April 1994.

H. Jung
Registrar

R. García-Valdecasas
President