# OPINION OF MR ADVOCATE GENERAL CRUZ VILAÇA
delivered on 9 February 1988 *

*Mr President,*
*Members of the Court,*

1. Having found that an official in its employment, Lise Clasen, had been absent from work on grounds of ill health for 542 days between 13 January 1982 and 1 August 1985, the European Parliament, in a letter from the Director of Personnel and Social Affairs dated 4 October 1985, notified to her its decision to initiate the procedure provided for in Article 78 of the Staff Regulations of Officials of the European Communities and asked her to appoint a doctor to represent her on the Invalidity Committee in accordance with Article 7 of Annex II to the Staff Regulations.

2. The applicant designated Dr J. Christophersen, a doctor in Denmark, to represent her on that committee; the Parliament had appointed Dr L. Fettmann as its representative, and by letter of 28 November 1985 it asked him to contact Dr Christophersen regarding the choice of the third doctor and to make arrangements for the functioning of the committee.

3. Pursuant to Article 78 of the Staff Regulations, the task of the committee was — as is apparent from the letters to which I have just referred — to determine whether the applicant was suffering from total permanent invalidity preventing her from performing the duties corresponding to a post in her career bracket.

4. By letter of 6 December 1985, Dr Fettmann informed Dr Christophersen that Dr Palgen was to be the third doctor on the committee and invited her to a meeting on 12 December 1985. However, on 9 December, Dr Christophersen told Dr Fettmann that she did not have sufficient up-to-date information regarding the applicant's health and would be examining her on 19 December; thereafter, on 6 January, she sent a medical report to the Parliament concluding that an invalidity pension should be granted to the applicant. A further meeting was then convened by Dr Fettmann for 17 February 1986. The meeting in fact took place in the absence of Dr Christophersen, who wrote to say that she would be unable to travel to Luxembourg on the proposed date. The two doctors present then prepared a report, signed by both of them, concluding that the applicant was not suffering from either permanent or temporary invalidity.

5. Having regard to the committee's conclusions, the Parliament's administration, by letter of 3 March 1986, called upon the applicant immediately to resume work.

6. It was against that decision, which gave rise to the consequences provided for in Article 60 of the Staff Regulations, that the applicant submitted a complaint, which was rejected by the administration and followed by the bringing of the present action. The applicant seeks the annulment of the order to resume work, since in her view it was

* Translated from the Portuguese.

based on the report of an Invalidity Committee whose composition and proceedings were vitiated by serious irregularities; she also asks that, in consequence, her case should be referred to a new Invalidity Committee and that she should be paid the salary which she considers to be due to her, together with default interest, and that she should be awarded costs.

7. In response to the application, the Parliament raised an objection of inadmissibility on the ground that the applicant had no interest in bringing an action.

8. Let us consider that aspect immediately.

**A — The admissibility of the action**

9. According to the European Parliament, the underlying cause of the present action is not an application for the grant of an invalidity pension which was rejected by the appointing authority but simply a procedure initiated by that authority to establish whether or not the applicant's absences were justified on medical grounds, with a view to the possible application of the measures provided for in Article 60 of the Staff Regulations.

10. Although a medical report would have been sufficient for that purpose, the appointing authority resorted to the procedure under Article 59 of the Staff Regulations because it also wished to check, as a matter of proper administrative practice, whether or not it was appropriate to grant an invalidity allowance. In those circumstances, even if the procedure were subject to any irregularity under Article 7 *et seq.* of Annex II to the Staff Regulations, that could only affect the validity of a decision as to the invalidity or otherwise of the applicant for the purposes of Article 78 of the Staff Regulations but not the validity of the only decision which was in fact taken, namely to instruct the applicant to resume work on the ground that her state of health was not considered such as to justify her prolonged absence.

11. In those circumstances, the applicant, in the Parliament's view, has no interest in bringing proceedings since a declaration that the procedure followed was void could not have any effect on the decision adopted.

12. It does not seem to me that the Parliament is correct to approach the problem from the point of view of admissibility of the application.

13. The decision attacked by the applicant is the instruction to resume work contained in the administrative measure adopted by the European Parliament on 3 March 1986. Since that measure is capable of adversely affecting the applicant, she has an interest in contesting its legality (Article 91 (1) of the Staff Regulations) if the intervention of the Court might result in the decision's being changed. Whether or not the submissions relied upon by the applicant are well founded is another question.

14. It seems to me to be beyond dispute that the decision contained in the letter of 3 March displays the features of a measure likely to have an adverse effect and, as such, one against which an action may be brought. In fact, the letter in question (notwithstanding the courteous terms in which it is couched) contains a clear and precise instruction to the applicant requiring her *immediately* to resume her duties. The Parliament's order immediately affected the applicant's legal situation since failure to

comply with it would involve the transition from justified absence on grounds of ill health to unjustified absence, and the ensuing consequences (essentially, financial and disciplinary measures). It does not seem that the applicant should be obliged to wait for those consequences (some of which are automatic, under Article 60) in order to bring her action.

15. As is apparent from the actual letter sent to the applicant, the administration's decision was based on the conclusions of the 'Invalidity Committee'. By alleging that the constitution and functioning of that committee was irregular, the applicant sought to challenge the legality of the measure to which its proceedings gave rise.

16. If the Court were to consider that her arguments were well founded, the applicant would be in a legal situation different from that which would have existed if she had not brought an action.

17. In other words, the applicant has an interest in bringing an action by virtue of the effects which the judgment to be delivered by the Court might have on her legal situation, if that judgment were to uphold her application. [1]

18. I therefore propose that the Court should dismiss the objection of inadmissibility.

## B — The merits of the application

19. The test of admissibility having been passed, the submissions and arguments relied upon remain to be examined; let us therefore consider the merits of the case.

20. However, in that regard it does not seem to me that the applicant's position is tenable. The submissions and arguments relied upon by her do not relate to the contested decision in such a manner as to enable them to produce the desired result.

21. Those submissions and arguments could only have repercussions upon a decision which was not in fact taken: the grant or refusal of an invalidity pension under Article 78 of the Staff Regulations. As regards the decision which was actually taken and is now challenged (which is capable only of giving rise to the consequences envisaged in Article 60 of the Staff Regulations), although it was adopted by the appointing authority pursuant to the procedure laid down in Article 78, it would have been sufficient to follow a procedure which offered considerably fewer safeguards. Accordingly, only if it should prove to be the case that irregularities in the procedure followed resulted in less adequate safeguards being available to the applicant than those inherent in the procedure normally used for the adoption of the contested decision could those irregularities have any effect on the validity of that decision; take, for example, the hypothetical case of an objection regarding the standing as doctors of the persons who considered whether the applicant's absence was justified.

22. However, that is not the case here.

23. The propriety of the decision would have been sufficiently guaranteed by any medical examination arranged for by the institution (Article 59 (1) of the Staff Regu-

1 — See judgment of 2 July 1969 in Case 20/68 *Pasetti* v *Commission* [1969] ECR 235, at p. 243.

lations), for example an examination carried out by a single doctor appointed by the defendant. In the present case, in addition to the doctor appointed by the defendant, the examination involved another doctor and took account of the report sent by the doctor attending the applicant.

24. Thus, the contested decision was based on a procedure designed to establish whether the applicant's absence was justified on health grounds, which provided much greater safeguards than those required by the rules.

25. Thus, in my opinion, the alleged irregularities concerning the composition and functioning of the Invalidity Committee are unfounded, being incapable of affecting the validity of the contested decision. As the Court has held in the past 'in principle a procedural irregularity will entail the annulment of a decision in whole or in part only if it is shown that in the absence of such irregularity the contested decision might have been substantively different'.[2]

26. If, however, it were to be considered, contrary to the approach just described, that, even though it was not obliged to have recourse to the procedure under Article 78, the appointing authority, by virtue of having initiated it, was bound to comply with the rules governing it, it would be necessary to express a view on the merits of the various submissions relied upon by the applicant.

27. That is what I shall do, merely by way of alternative.

2 — See judgment of 23 April 1986 in Case 150/84 *Bernardi* v *Parliament* [1986] ECR 1375, paragraph 28; see also judgment of 29 October 1980 in Joined Cases 209 to 215 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 47.

(1) *Infringement of the third indent of the first paragraph of Article 7 of Annex II to the Staff Regulations*

28. According to the applicant, the third doctor on the Invalidity Committee was not appointed by agreement with the doctor appointed by her, contrary to the requirements of Article 7.

29. On this point, the parties give contradictory accounts. The Parliament states (Annex C to the defence) that the secretary in its medical department contacted the applicant's doctor, giving her details of the procedure for the appointment of the third doctor, for which her agreement was required. By contrast, the applicant denies that her doctor was ever given any information about the procedure for the appointment of the third doctor, and therefore never gave her agreement to the choice of Dr Palgen (Annex 17 to the reply). According to the applicant, the content of the letter of 6 December 1985 led Dr Christophersen to think that the appointment of the third doctor was a *fait accompli* which she could not influence in any way.

30. The applicant's argument does not seem to me to be well founded.

31. On the one hand, the applicant's doctor herself (Annex 17) acknowledges that she was informed by the applicant of the procedure for the constitution of the Invalidity Committee, in particular the requirement of an agreement between the doctors for the two parties as to the appointment of the third doctor. None the less, the applicant's doctor did not raise any objections in the correspondence following the letter of 6 December 1985 between her and the doctor appointed by the defendant.

32. The applicant herself was well acquainted with the procedure to be followed, not only because she had the opportunity thoroughly to familiarize herself with the Staff Regulations but also because the requisite clarification had been given to her in the letter of 4 October 1985 from the European Parliament. After Dr Christophersen received the letter of 6 December, she had personal contact with the applicant when the latter attended for an examination during the Christmas holidays; she thus had an opportunity to clarify the situation on that occasion regarding the procedure to be followed in the event of her not agreeing with the appointment of the third doctor.

33. In those circumstances, regardless of the credibility to be attributed to the Parliament's statements concerning the information communicated to the applicant's doctor, no other conclusion can be reached than that the applicant's doctor, not having objected to the appointment of the doctor proposed by Dr Fettmann, accepted that appointment.

34. The applicant has thus not provided the least proof required to support her allegations, and therefore this submission must be rejected.

(2) *Infringement of the third paragraph of Article 7 of Annex II to the Staff Regulations*

35. According to the applicant, the conduct of Dr Fettmann, in depriving her and her doctor of the opportunity to challenge the appointment of the third doctor, made it impossible for her to apply to the President of the Court of Justice to appoint the third doctor, in accordance with the third paragraph of Article 7 of Annex II to the Staff Regulations.

36. This submission is closely linked to the previous one and the same considerations which prompted me to regard the latter as unfounded are also conducive, in my opinion, to rejection of this submission.

37. It should be added that the applicant's statement that she only became aware of Dr Palgen's appointment at the time of the meeting of the Invalidity Committee on 17 February 1986 is unacceptable, particularly if it is borne in mind that the applicant was examined in December 1985 by Dr Christophersen who at that time already knew perfectly well who the third doctor appointed by Dr Fettmann was.

(3) *Dr Christophersen's absence from the meeting of the Invalidity Committee*

38. According to the applicant, Dr Christophersen thought that her presence at the meeting of 17 February was unnecessary, since no decision would be taken at that time.

39. However, the letter of 30 January 1986 from Dr Fettmann to Dr Christophersen (Annex 9 to the application) shows conclusively that at the meeting set for 17 February it was envisaged that a medical report would be prepared, and the addressee was even told that in the event of her not agreeing with the conclusions of the other doctors she should decline to sign the report. It is therefore at least surprising that the applicant should state that her doctor was unaware of the fact that any decision would be taken at that meeting.

40. It is true that, in the same letter, it was stated that the applicant's doctor did not need to be personally present at the meeting.

41. That statement raises the rather more delicate question whether the Invalidity Committee can adopt valid decisions without holding a meeting attended by all its members and therefore whether its proceedings can be conducted in writing.

42. I do not see any reason why the Invalidity Committee should not discharge the duties entrusted to it merely because one of its members, who was given the opportunity of attending, did not wish to do so. The very principle of continuity in the public service militates against such a solution, otherwise it would be easy indefinitely to protract the proceedings of the committee, preventing it from fulfilling the tasks entrusted to it under the Staff Regulations. It should be added that if, as this Court has held, a member of an Invalidity Committee may not, by his failure or refusal to sign the report, render impossible the application of the provisions of the Staff Regulations, the committee being obliged in the event of disagreement to decide by a majority,[3] for the same reason that member cannot prevent the application of those provisions by refusing to attend the meeting at which that report is drawn up.

43. That implies, however, that the applicant's doctor should have been given a genuine opportunity to attend. Since she resided abroad, the natural course of action would have been to suggest alternative dates, so that she could choose the one most convenient to her.

44. It is doubtful whether that happened in this case. Dr Christophersen was offered a first date — 12 December 1985 — which was, quite reasonably, refused by her because she needed to examine the applicant.

45. Thereafter, and without any alternative being offered, Dr Christophersen was convened to a meeting on 17 February 1986. In other words, not only was she not given an opportunity, as would have been normal in view of the fact that she resided abroad, of suggesting a date convenient to her for the meeting but in addition she was, ultimately, encouraged not to attend by being told that she would not need to be personally present at the meeting.

46. The information thus given to her was, in my opinion, incorrect and misleading, since the proceedings of a collegiate body, such as an Invalidity Committee, in principle require all the members to be present. In fact, although medical data are objective data, the fact remains that a diagnosis and, furthermore, the conclusions drawn therefrom may differ if put to discussion amongst the members of the committee. In the present case, the diagnosis of the three doctors was the same, the only difference being in the conclusions drawn by them. However, there is no guarantee that that would have been the case if the conclusions had been arrived at by joint consideration of the opinions of the three doctors.

47. Since not everything was done which would normally be required to enable a

3 — See judgment of 12 March 1975 in Case 31/71 *Gigante* v *Commission* [1975] ECR 337; judgment of 9 July 1975 in Joined Cases 42 and 62/74 *Vellozzi* v *Commission* [1975] ECR 871; judgment of 16 December 1976 in Case 124/75 *Perinciolo* v *Council* [1976] ECR 1953; judgment of 21 May 1981 in Case 156/80 *Morbelli* v *Commission* [1981] ECR 1357; and judgment of 23 April 1986, *Bernardi* v *Parliament*, *supra*.

meeting of the committee to take place, and since the conduct of the defendant and its representatives was such that the applicant's doctor was liable to be misled as to the need for her to be present, it does not seem to me that the conclusions of a medical report adopted in those circumstances can be considered valid.

48. That view is not, as far as I am concerned, undermined by the defendant's argument that Article 8 of Annex II to the Staff Regulations requires the applicant to bear the extra charges resulting from the choice of a doctor not residing at his place of employment, with the exception of travel expenses. Indeed, if it has a dissuasive purpose, that provision does not relate to the presence of the doctor at the committee meeting but rather to the choice of a doctor residing elsewhere than at the place of employment of the official, who would necessarily have to travel some distance to meetings, with the concomitant extra costs. It does not seem to me that any particular significance should be attached to the textual arguments which the Parliament draws from the wording of the various articles of Annex II to the Staff Regulations.

(4) *Irregularity of the proceedings through lack of a quorum*

49. The applicant argues that, according to the principles of Danish administrative law, for a three-member committee to be quorate all the members must be present.

50. The problem ultimately comes down to the same issue as that raised in the previous submission, and the answer must be the same.

51. Since in principle meetings of the committee must include all its members, the absence of one of them, if at least in part attributable to the conduct of the administration, prevents its proceedings from being valid.

(5) *Infringement of the second paragraph of Article 7 of Annex II to the Staff Regulations*

52. According to the applicant, she was given, by the letter from the Director of Personnel of 4 October 1985, a period of one month in which to appoint a doctor; that period is not laid down in Article 7 of Annex II to the Staff Regulations and therefore the constitution of the Invalidity Committee was in her view defective *ab initio*.

53. However, there is no foundation for that view. The period allowed was a reasonable period in which the applicant was able, without difficulty, to appoint her doctor. Moreover, the applicant did not complain about the setting of that time-limit, in particular in her letter of 21 April 1986 (Annex 13 to the application), and she must therefore be regarded as having tacitly agreed to it. Thus, if there was a formal defect, it was subsequently rectified.

54. Moreover, the time-limit was merely laid down for guidance by the Parliament in the interests of sound administration and to prevent the proceedings of the committee from being protracted, in the absence of provisions in that regard in the Staff Regulations.

55. In my opinion, therefore, there was no irregularity as a result, and therefore this submission must be dismissed.

(6) *Infringement of Article 78 of the Staff Regulations*

56. In the applicant's view, Article 78 requires the Invalidity Committee to determine whether the official is suffering from total permanent invalidity preventing him from performing the duties corresponding to a post in his career bracket. However, the conclusion reached by the two doctors on the committee (Dr Fettmann and Dr Palgen) that the applicant was not suffering from any invalidity, either temporary or permanent, was not arrived at, in the applicant's view, by reference to the duties performed by her.

57. However, it is clear that the assessment of invalidity in the light of the duties performed by the official is only necessary where there is partial invalidity. Only in such a case is it necessary to consider whether or not the official is thereby prevented from performing certain specific duties.

58. In the present case the conclusion reached was that the applicant was not suffering from any invalidity, total or partial. It would therefore be otiose to require a precise statement, in those circumstances, that the applicant was able to perform the duties corresponding to a post in her career bracket, namely career bracket C3/C2.

59. Therefore, this submission must also be rejected.

## C — Conclusion

60. From the foregoing analysis of the various submissions relied upon by the applicant, only the one concerning the absence of the applicant's doctor from the meeting of the Invalidity Committee could, in my opinion, lead to the annulment of the contested decision, if, in fact, it were found to be necessary in this case to observe the rules applicable to that committee for the contested decision to be adopted validly.

61. However, I am of the opinion that there were no defects relating to the constitution and functioning of the committee of such a kind as to affect the decision that was actually adopted and is challenged in these proceedings.

62. In view of all the foregoing considerations, I propose that the Court should dismiss the application and order the parties to bear their own costs in accordance with the combined provisions of Articles 69 and 70 of the Rules of Procedure.