OPINION OF ADVOCATE GENERAL ALBER

delivered on 3 December 1998 *

A — Introduction

1. In the present case the Court is called upon to determine an appeal brought by a (former) official of the European Parliament (hereinafter 'the appellant') [1] against a judgment of 5 November 1997 [2] in which the Court of First Instance dismissed his application for revision of the proceedings concluded by a judgment of the Court of First Instance in 1991, [3] on the ground that no new facts had come to light. In the latter judgment his appeal against the decision downgrading him from grade A 3 to grade A 7 on disciplinary grounds was dismissed.

B — Facts of the main proceedings

2. The proceedings have their origin in disciplinary proceedings brought against Mr de Compte, a former official of the European Parliament, now retired. The most recent disciplinary proceedings were initiated in 1987 and related to his duties as an accounting officer at the European Parliament. He was accused of various irregularities in connection with those duties. [4] In 1988 Mr de Compte brought an action against the disciplinary decision of the European Parliament downgrading him; his action was dismissed by judgment of the Court of First Instance in October 1991. [5]

3. Mr de Compte's appeal against that judgment was dismissed by the Court of Justice in a judgment of 2 June 1994. The Parliament's complaints against Mr de Compte were described by the Court of Justice as follows: [6]

'It is apparent from the contested judgment that the following complaints made by the appointing authority against the applicant ... were upheld:

(a) responsibility for the opening ... of an interest-bearing account with the

* Original language: German.

1 — The appellant is also referred to by name, or as 'the applicant' where the context so requires.

2 — Case T-26/89 (125) *De Compte* v *Parliament* [1997] ECR-SC IA-305 and II-847.

3 — Case T-26/89 *De Compte* v *Parliament* [1991] ECR II-781

4 — Case T-26/89 (cited in note 3), paragraph 11.

5 — Case T-26/89 (cited in note 3).

6 — Case C-326/91 P *De Compte* v *Parliament* [1994] ECR I-2091, paragraph 2.

Midland Bank, London, on 21 July 1981 with the amount of UK £400 000 bearing 16 % annual interest without prior authorisation, accounting entries relating to those operations or entries regarding interest in the Parliament's accounts for 1980 and 1981;

(b) encashment on 4 September 1981 and 11 November 1981, without specific and valid justification, of two cheques drawn on the Midland Bank in the amounts of UK £17 189.15 and UK £35 176.98, which were paid in cash by the Sogenal Bank in Luxembourg in BEF, DM and FF; failure to record those operations in the Parliament's accounts during the 1981 financial year; registration after a six-month delay (28 February 1982) in the overall amount of BEF 4 136 125 although the withdrawal had been made in a number of currencies;

(c) failure to comply with the obligation imposed on the accounting officer to effect expenditure only on production of proper supporting documentation and to ensure the safeguarding of the Parliament's assets (absence of supporting documentation relating to the sum of BEF 4 100 000 missing from the Parliament's funds).'

As the Court of First Instance again pointed out in its judgment of 1997, the complaint against Mr de Compte therefore concerned not the loss of cash but solely the absence of supporting documents. [7]

4. The Court of Justice referred to the findings of the Court of First Instance as follows: [8]

'195 The Court finds that the parties' arguments regarding this complaint relate essentially to two questions: in the first place, whether it has been sufficiently established for legal purposes that the deficit of approximately BEF 4 100 000 recorded in the members' cash office and which lacks supporting documentation is due to the entry noting the encashment, for an overall amount expressed in Belgian francs, of two cheques drawn on the Midland Bank; ...

196 So far as the first question is concerned, it must be pointed out that the appointing authority gave reasons for the conclusion reached in its disciplinary decision by relying on the following findings. The balance of the "Belgian franc cash fund" account at the end of the 1981 financial year corresponded to the amount of the balance indicated on the "Belgian franc cash fund" accounting form at the time of the examination carried out by the Court of Auditors on 18 March 1982. The Parliament's accounting books

7 — Case T-26/89 (125) (cited in note 2), paragraph 49.

8 — The Court sets out in full paragraphs 195, 196 and 200 to 206 of the judgment of the Court of First Instance of 17 October 1991 (cited in note 3).

show that an entry for BEF 4 136 125, representing the total amount in Belgian francs of the two cheques drawn on the Midland Bank, was made on 28 February 1982. The Court of Auditors does not believe that that entry could have been made on 28 February 1982 in view of the fact that it was not found during the examination of the members' cash office carried out in March 1982. That entry revealed a discrepancy between, on the one hand, the "accounting forms — Midland Bank" and "Belgian franc cash fund" accounts and, on the other, the cash book which accompanies liquid assets in the safe. This discrepancy amounts to a cash office deficit of the same extent, that is to say, BEF 4 136 125, the existence of which was confirmed by the Court of Auditors, internal investigations by the Parliament and by the Parliament's decision of 11 July 1986 granting a discharge for the 1982 financial year. In the letter which he sent to the President of the Parliament on 30 March 1982, the applicant admitted failing to record in the accounts expenditure of BEF 4 121 573. In his capacity as accounting officer required to justify every transaction in the cash office, the applicant failed to produce any supporting document for the payment of an amount equivalent to that of the deficit in the cash office and also failed to explain the origin of that deficit.

...

200 ... the Court concludes that the appointing authority, in the contested decision, accepted that there was a link between the appearance of a deficit of BEF 4 100 000 in the members' cash office and the encashment of the two disputed cheques drawn on the Midland Bank, on the ground that the entry confirming that transaction had not been made on Sunday 28 February 1982 but at some time after 18 March 1982, the date on which the Court of Auditors carried out its examination. The appointing authority considered as established that the late registration of the entry relating to the encashment of the two cheques revealed a deficit of BEF 4 136 215 corresponding to the total amount of those cheques. The Court takes the view that this interpretation by the appointing authority of the facts presented to it is supported by the successive opinions of the Court of Auditors and the Disciplinary Board, which carried out meticulous examinations and investigations with the object of casting light on the background to the deficit.

201 In those circumstances ... it must be held that the contested decision was quite properly entitled to consider as established that the absence of supporting documents was connected in this case with the encashment of the two cheques drawn on the Midland Bank. From this it follows that the applicant has failed to prove that the contested measure is inadequately reasoned or is vitiated by a manifest error, in fact or in law, or by an abuse of power, concepts which represent the limits of the examination of the legality of an administrative measure by a court which has jurisdiction to annul that measure.' [9]

9 — Case C-326/91 P (cited in footnote 6), paragraph 76.

C — Factual context of the application for revision

5. On 28 June 1995 — that is to say, after the Court of Justice delivered its judgment of 2 June 1994 upholding the judgment of the Court of First Instance of October 1991 — Jean-Claude Pasty, a Member of the Parliament and Rapporteur for the Parliament's Budgetary Control Committee, drew up a draft report providing for discharge in regard to the implementation of the Parliament's budget for the 1993 financial year. In his report Mr Pasty referred to the case of the members' cash office. When the Budgetary Control Committee met in September 1995, it adopted the draft report, but without the section relating to the case of the members' cash office, which Mr Pasty had withdrawn.

6. In a comprehensive letter to the Director-General for Personnel, the Budget and Finance of the Parliament, dated February 1996 and consisting of more than 30 pages (with 283 paragraphs), Mr Pasty set out a detailed commentary on the complaints against Mr de Compte. He concluded that they were unfounded, in particular because the checks carried out by the Court of Auditors had not been thorough, because no document attesting to a deficit of the amount indicated existed and because there could have been other reasons for such a deficit.

7. Relying on that letter, Mr de Compte brought an action in June 1996 for revision of the proceedings. It was dismissed as inadmissible by the Court of First Instance. [10] The Court took the view that the conditions for revision — the existence of decisive facts which at the time when the judgment was delivered were unknown to the Court and to the party seeking revision — were not met. The facts on which Mr de Compte relied were mere claims, assumptions and personal assessments on the part of Mr Pasty. The Court also dismissed the application for revision on the ground that the evidence relied on could not ultimately lead the Court to a different determination of the proceedings. The facts relied on were in part facts which were already known to Mr de Compte at the time of the earlier proceedings and for which he failed to produce supporting evidence, as required under the Rules of Procedure, or they were not expressed in a sufficiently clear and precise manner to enable the defendant to prepare its defence and the Court to determine the application for review. [11]

8. Mr de Compte appealed against that judgment on 7 January 1998. He claims that the Court should:

— declare the appeal admissible and well founded;

10 — Case T-26/89 (125) (cited in note 2).

11 — Paragraphs 18 to 50 of the judgment (cited in note 2).

— set aside the judgment of the Court of First Instance of 5 November 1997;

— refer the case back to the Court of First Instance for a decision on the application for revision of the proceedings;

— order the Parliament to pay the costs of these proceedings and the proceedings before the Court of First Instance.

9. The Parliament contends that the Court should:

— declare the appeal manifestly inadmissible;

— in the alternative, declare it unfounded;

— make an order as to costs in accordance with the second subparagraph of Article 69(3) of the Rules of Procedure of the Court of Justice.

D — Relevant provisions of Community law

10. Article 168a(1) of the EC Treaty provides that judgments of the Court of First Instance are subject to a right of appeal to the Court of Justice on points of law only. The relevant requirements are described in more detail in Article 51 of the EC Statute of the Court of Justice (hereinafter 'EC Statute'), which is worded as follows:

'An appeal to the Court of Justice shall be limited to points of law. It shall lie on the grounds of lack of competence of the Court of First Instance, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Community law by the Court of First Instance.

...'

11. Revision is governed by Article 41 of the EC Statute, which comes under Title III 'Procedure', which, pursuant to the first paragraph of Article 46 of the EC Statute, also governs the procedure before the Court

of First Instance. Article 41 provides as follows:

'An application for revision of a judgment may be made to the Court only on discovery of a fact which is of such a nature as to be a decisive factor, and which, when the judgment was given, was unknown to the Court and to the party claiming the revision.

The revision shall be opened by a judgment of the Court expressly, recording the existence of a new fact, recognising that it is of such a character as to lay the case open to revision and declaring the application admissible on this ground.

...'

12. According to Article 126(1) of the Rules of Procedure of the Court of First Instance, an application for revision must, *inter alia*,

'...

(c) set out the facts on which the application is based;

(d) indicate the nature of the evidence to show that there are facts justifying revision of the judgment, and that the time-limits laid down in Article 125 have been observed.'

E — Parties' arguments

13. The appellant first makes a number of general observations concerning the judgment of the Court of First Instance, and then proceeds to analyse the judgment under appeal on what he maintains is a paragraph-by-paragraph basis.

14. He examines, in particular, the letter from Mr Pasty, on which the application for revision of the proceedings primarily relied. He stresses Mr Pasty's level of authority and his role, above all, as Rapporteur for the Parliament's Budgetary Control Committee, which meant that, when he wrote the letter in question, he had unrestricted access to all the accounting documents of the administration. On the basis of a detailed examination, Mr Pasty had concluded in his letter that the complaints against the appellant were unfounded. The letter therefore constitutes a new fact which is of such a nature as to be a decisive factor.

15. According to the appellant, the Court of First Instance should have regarded this document, which was never challenged in any way, as having the same probative value in the revision proceedings as had been accorded in the earlier proceedings to statements made

by officials of the Parliament and the Court of Auditors, on which the Court of First Instance had based its decision and which it regarded as irrefutable evidence. The Court of First Instance failed to meet its obligation to give Mr de Compte the same opportunity as the opposite party to adduce his evidence.

16. The appellant maintains that the Court of First Instance committed an error (of law) in so far as it did not regard the issues addressed by Mr Pasty as a new fact, notwithstanding that the points which he raised to cast doubt on the Parliament's arguments were new. Mr Pasty's assertions were set out in writing and had the same value as the assertions made by officials which formed the basis of the complaints on which the Court relied when it delivered its judgment in October 1991.

17. Mr Pasty's letter must be examined as a whole. The Court of First Instance erred, therefore, in failing to examine its fundamental conclusion which, according to the appellant, constitutes in itself a new fact, namely, that there are no grounds for the complaints against him.

18. Denying that these considerations have any relevance before examining them is equivalent to refusing to hear a witness who is prepared to attest to the innocence of a person convicted of a criminal offence such as murder.

19. Lastly, the appellant refers to a number of judgments and orders of the Court of Justice and the Court of First Instance [12] and points out that according to the case-law of the Court of Justice the expression 'facts' is to be given a broad interpretation. Furthermore, the Court of Justice apparently understands this expression to refer not only to facts as such but also to evidence capable of proving or disproving those facts.

20. The Parliament first examines the question of the admissibility of an appeal against a judgment of the Court of First Instance declaring an application for revision inadmissible. It takes the view that such an appeal must be dismissed as clearly inadmissible. In that regard, it relies on two grounds.

21. First, the Parliament refers to Article 168a of the EC Treaty and Article 51 of the EC Statute, which provide that an appeal is to be limited to points of law. Article 41 of the EC Statute provides that revision, however, is possible only on discovery of a (new) fact, and Article 127(2) of the Rules of Procedure of the Court of First Instance provides that a ruling must first be given on the admissibility of an application for revision, without prejudice to the decision on the substance. Accordingly, the Parliament maintains that the Court of First Instance only examines the facts without addressing points of law.

12 — Case 1/60 *Acciaieria Ferriera di Roma* v *High Authority* [1960] ECR 165, Case 28/64 Rev. *Müller* v *Council* [1967] ECR 141, order in Case T-4/89 Rev. *BASF* v *Commission* [1992] ECR II-1591, order in Case T-8/89 Rev. *DSM* v *Commission* [1992] ECR II-2399, and Case C-403/85 Rev. *Ferrandi* v *Commission* [1991] ECR I-1215.

22. The Parliament also points out that the Court of Justice has consistently held that the Court of First Instance alone has jurisdiction to establish and evaluate the facts. Accordingly, an appeal which seeks only a re-examination of facts which have already been raised before the Court of First Instance must be declared inadmissible. It follows that an appeal against a judgment declaring an application for revision inadmissible which challenges the assessment of the allegedly new facts by the Court of First Instance and merely seeks a reappraisal of the application for revision must be declared inadmissible.

23. In the present case the Court of First Instance decided in its judgment of 5 November 1997 that the true purpose of the application for revision was to obtain from that Court a fresh assessment of facts which were already known, and therefore of the merits of the judgment, which had meanwhile acquired the force of *res judicata*. The Parliament maintains that, by this appeal, the appellant hopes to obtain from the Court of Justice a reappraisal of the facts adduced before the Court of First Instance. Since, accordingly, the appeal relates to facts, not points of law, it must be declared inadmissible.

24. Next, the Parliament points out that the limits to the admissibility of an appeal are defined in Article 51 of the EC Statute. Furthermore, Article 112(1)(c) of the Rules of Procedure of the Court of Justice provides that an appeal is to contain the pleas in law and legal arguments relied on. In the present case, however, no breach of a legal rule is alleged. The appeal contains no legal argument but merely challenges the assessment by the Court of First Instance of the facts of the application for revision. The appellant analyses the judgment but fails to put forward any specific legal argument in support of his appeal. In particular, he makes no reference to any of the grounds of appeal set out in Article 51 of the EC Statute, and fails to specify in what way the Court of First Instance infringed rules of law. He does no more than list a series of errors allegedly committed by that court, by virtue of its refusal to classify Mr Pasty's assertions as new facts. Thus the appeal is aimed solely at requiring the Court of Justice to re-examine the letter submitted to the Court of First Instance. The Parliament concludes that the appeal should be dismissed as clearly inadmissible.

25. As regards the significance of Mr Pasty's letter, the Parliament refers to the implications of *res judicata*. No opinions, assertions, evaluations, interpretations or similar views concerning a case which has been closed and which has acquired the force of *res judicata* can be taken into consideration. Mere assertions, unsubstantiated by evidence, do not constitute new facts capable of justifying the special procedure of revision. If it were possible, on the basis of personal opinions, to reopen every case which has been closed, the principle of legal certainty would cease to have any meaning. In that regard, the Parliament refers to Article 126(d) of the Rules of Procedure of the Court of First Instance, which provides that an application for revision must indicate the nature of the evidence to show that there are facts justifying revision of the judgment.

26. As regards the appellant's assertion that he was not given an opportunity to produce his evidence, the Parliament points out

that he, too, had access to all the documents and that all means of presenting a defence were available to him.

27. Lastly, the Parliament points out that the paragraph in Mr Pasty's report on the Members' cash office is not an official document — since it was withdrawn by the Rapporteur and was therefore not put to the vote — and, accordingly, there is no need to comment on it. As the Court of First Instance also observed, the letter which Mr Pasty subsequently sent to the Director-General merely reflects Mr Pasty's personal opinion. The Parliament therefore sees no reason to comment on that opinion.

F — Findings

Admissibility of the appeal

28. As regards the question of admissibility, it is not a foregone conclusion that, when called upon to determine an appeal against a judgment dismissing an application for revision on the ground that no new facts exist, the Court will not have to determine points of law. What is at issue here is not the way in which the Court of First Instance assessed a fact as such, since that falls within its exclusive jurisdiction, [13] but the way in which it interpreted and applied Article 41 of the EC Statute. The questions to be determined, therefore, are whether the assessment made by the Court of First Instance was consistent with Article 41 of the EC Statute; whether the facts submitted by the applicant were new; and whether they were previously unknown and of such a nature as to be decisive factors.

29. While the appellant states that the Court of First Instance erred in its interpretation of certain expressions which it was required to examine, a number of questions of law must also be reviewed. Accordingly, the question is not only whether the Court of First Instance was correct in refusing to class certain facts as new facts, but also whether its interpretation of the expression 'new facts' within the meaning of Article 41 of the EC Statute was too narrow. That is a question of law. Review by the Court of Justice may also prove necessary in relation to the interpretation of the expression 'decisive', for example where it is alleged that a provision has been incorrectly applied. For those reasons, it cannot be assumed that an appeal is by definition inadmissible if brought against a judgment of the Court of First Instance declaring an application for revision inadmissible on the ground that no new facts exist.

30. In the present case the appellant does not dispute the finding of fact made by the Court of First Instance that the facts relied upon

13 — Case C-209/94 P *Buralux and Others* v *Commission* [1996] ECR I-615, paragraph 21; Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 47 *et seq.*

do not in themselves constitute *new* facts. He takes the view, however, that Mr Pasty's letter — taken as a whole, including the conclusion reached therein, which contradicts the Parliament's conclusion — must be regarded as a new fact within the meaning of Article 41. In support of his submission he refers to the case-law of the Court of Justice, from which he infers that not only the new fact in itself, but also the substantiating evidence, is to be regarded as a new fact within the meaning of Article 41 of the EC Statute. Similarly, his argument that case-law requires that the expression 'fact' be given a broad interpretation must be taken to mean that he is challenging the Court of First Instance's interpretation of Article 41 of the EC Statute, not just its assessment of the facts. Whether the same applies to all the arguments which he raises in his detailed analysis of the judgment under appeal will be examined below, point by point. It must be stated, however, that the appeal cannot be dismissed at the outset as clearly inadmissible; rather, it must be declared admissible.

The substance of the appeal

31. According to the case-law of the Court of Justice, revision is not a form of appeal, but a special form of action 'that allows an applicant to call in question the authority of *res judicata* attaching to a final judgment on the basis of the findings of fact relied upon by the court; [r]evision presupposes the discovery of elements of a factual nature which existed prior to the judgment and which were unknown at that time to the court which delivered it as well as to the party applying for revision and which, had the court been able to take them into consideration, could have led it to a different determination of the proceedings.' [14]

32. Although the appellant emphasises the special nature of the document, namely the special position and role of its author, and also the detailed analysis and the conclusion drawn therein, that does not justify rescinding the authority of *res judicata* acquired by the judgment. Nor does the fact that the content of the letter has not so far been challenged.

33. The appellant himself states that the matters dealt with in the letter are not in themselves new. In invoking the points raised in order to invalidate the Parliament's findings and to prove that the accusations are unfounded, the appellant is relying, as he himself concedes, on assertions. That is not in itself sufficient, however, to rescind the authority of *res judicata* acquired by an existing judgment. On the contrary, those assertion must be substantiated.

34. For that reason it is not sufficient for the appellant merely to claim that the other parties, the Parliament and the Court of Auditors, put forward mere assertions and that

14 — Case C-185/90 P Rev. *Gill* v *Commission* [1992] ECR I-993, paragraph 12.

the Court of First Instance reached its decision on that basis. Furthermore, the judgment is not based solely on the statements made by the Parliament and the Court of Auditors. During the proceedings, the appellant was also given the opportunity to comment on the accusations against him. The Court of First Instance found that the contested measure was not inadequately reasoned and that it was not vitiated by a manifest error, in fact or in law, or by an abuse of power, concepts which represent the limits of the examination of the legality of an administrative measure by a court which has jurisdiction to annul the measure. [15]

35. The nature of an action for revision is such that a mere assertion cannot in principle constitute a new fact for the purposes of Article 41 of the EC Statute. That also follows from Article 126(1)(d) of the Rules of Procedure of the Court of First Instance, which provides that the application for revision is to indicate the nature of the evidence to show that there are facts justifying revision of the judgment.

36. Nor does examination of the case-law cited by the appellant lead to a different conclusion. It is not entirely clear whether the evidence itself must also be regarded as a new fact, but that too is not of decisive importance in the present case. The fact is, however, that in the cases cited the alleged new facts were also supported by documents or were actually in the form of documents. [16] Furthermore, in one case the classification of a post was attested by a notice of vacancy which contained a decision to that effect adopted by the Secretary-General. [17] In another case a certain practice of the Commission was attested by statements made by Commission officials at a hearing; and evidence of that statement was in turn adduced in the form of the tape-recording made of the hearing. [18] As evidence of amendments which had apparently been made to a written document, the document itself was produced. [19] It can therefore be stated that, irrespective of whether they are regarded as new facts or as evidence of those facts, official documents or statements were produced or attested to in substantiation of the alleged new facts.

37. In that regard, the Court of Justice has held that where a judgment contains a legal assessment of facts which were not known when an earlier judgment was delivered in different proceedings, the later judgment 'itself is not capable of constituting a new fact'. [20] For the purpose of calculating the time-limit for lodging an action for revision of the earlier judgment the Court of Justice held that time begins to run when the facts (in that case, a medical expert's opinion) actually become known, not when the later judgment is delivered. The Court has likewise refused to classify the legal assessment of statements in a judgment as a new fact. [21]

15 — Case T-26/89 (cited in note 3), paragraph 201.

16 — Case 1/60 (cited in note 12).
17 — Case 28/64 (cited in note 12).
18 — Order in Case T-4/89 Rev. (cited in note 12).
19 — Order in Case T-4/89 Rev. (cited in note 12).
20 — Case C-403/85 (cited in note 12), paragraph 13.
21 — Order in Case T-4/89 Rev. (cited in note 12), paragraph 12.

38. In the present case, the document put forward is not an official document, but a private letter reflecting Mr Pasty's personal opinion. Moreover, his assessment of the facts is not comparable with an expert opinion. Since, as we have seen, the legal assessment of facts by the Court of Justice cannot be regarded as a new fact, *a fortiori* Mr Pasty's personal evaluation, which he did not provide in his capacity as Rapporteur but as a private individual, cannot be regarded as a new fact.

39. What is more, production of that letter is not to be compared with the calling of a witness in criminal proceedings. The witness himself provides actual evidence of new facts, such as an alibi for the convicted person. In the present case, however, no new facts were alleged to have emerged: rather, a different assessment had been made of facts already known. That in itself, without further evidence, does not serve to found an action for revision.

40. Thus the letter expressing Mr Pasty's personal evaluation of the facts cannot in itself be regarded in itself as a new fact serving to justify revision. The position might be different if the assertions contained in the letter were also supported in some way. Whether that is so will be considered below when I examine the appellant's analysis of the judgment of the Court of First Instance of 5 November 1997.

G — Appellant's analysis of the judgment of the Court of First Instance

Point 1

Facts and submissions

41. The appellant claims that as regards certain passages of the judgment of November 1997 the Court of First Instance incorrectly failed to regard his evidence as new. He refers, first, to the statement that he was not given an opportunity to put the accounts in order. It was essential that as an interested party he be allowed to carry out controls and checks. The new fact is that evidence that he was not given such an opportunity is now adduced for the first time in Mr Pasty's letter. Furthermore, the Court of First Instance incorrectly regarded Mr Pasty's complaints against the Parliament in his letter as mere assumptions. According to those complaints, the Parliament gave the appellant access to the accounts only after some time, during which it was able to draw up new documents or registers to conceal the way in which the appellant had managed the account before he was removed from his post. That, submits the appellant, is a decisive factor.

Observations

The appellant's submission that Mr Pasty's letter contains the first indication in writing that he was unable to put the accounts in order does not disclose a new fact. The circumstance in itself is not new: not only the appellant but the Court of First Instance, too, was aware of when he was transferred and knew he was subsequently unable to carry out any controls or checks. Nor is that circumstance a decisive factor. The fact that it has now been set out in writing by Mr Pasty in his personal letter does not make it a new fact which would justify revision of the judgment.

42. As regards the complaints that the administration had drawn up new documents, these are allegations which are not supported and therefore do not constitute sufficient grounds for revision.

Point 2

Facts and submissions

43. The second point of the analysis refers to the judgment in so far as it rejects the appellant's argument that the competent authorities were aware of the account at the Midland Bank. This assertion is based on Mr Pasty's letter, in which it is stated that a receipt (ordonnance de recette) relating to UKL 19 000 regarding the account in issue had been signed by the European Parliament's Director of Finance in February 1982.

44. The Court of First Instance found, however, that it was apparent from the receipt in question only that it was dated May 1982 by the person who drew it up and that it was also signed by the Director of Finance in May, that is to say, after the Midland Bank had informed the Parliament of the existence of the account. The Court of First Instance concluded that the alleged new fact was not in any event susceptible of inducing it to reach a different conclusion from the one reached in the judgment of October 1991.

45. The appellant now claims that the Court of First Instance erred in failing to take cognisance of the fact that the receipt refers to interest from the Midland Bank from 24 February 1982, that is to say, before April 1982 and therefore before the Midland Bank informed the Parliament of the account's existence. Mr Pasty also states in paragraph 34 of his letter that the documents relating to the opening of the account are held in the archives, and it is therefore impossible to claim that the account was secret or illicit.

Findings

46. The finding by the Court of First Instance in its judgment of 1997 [22] that the receipt was signed in May 1982 is a finding of fact which is not amenable to review. It does not follow from the appellant's present argument (that the receipt refers to interest from February 1982) that the Director of Finance, who signed that receipt in May 1982, was aware of the account before then. That, as the Parliament also argues, does not prove that the account must have been known to exist.

Point 3

Facts and submissions

47. The appellant further criticises the Court of First Instance for failing to take into consideration Mr Pasty's statement that he had not found a single accounting document attesting to a cash surplus of BEF 14 552, as claimed by the Court of Auditors, but only a document indicating a surplus of BEF 11 772. The Court of First Instance held that the applicant (that is, the appellant in these proceedings) had failed to submit that document in support of his application as required under Article 126(1)(d) of the Rules of Procedure. The appellant considers that the error on the part of the Court of First Instance lies in the fact that it did not also apply the same requirements to the production of documents by the Court of Auditors, which maintained that there was a surplus of BEF 14 552, a sum which Mr Pasty claims is not confirmed by any document. This also constitutes a new fact which is of great significance to the proceedings.

48. The Parliament points out that the Court of First Instance denied the existence of a new fact not solely for lack of evidence but also because the question regarding an alleged cash surplus of BEF 11 772 had already been raised by the applicant during the procedure leading to the adoption of the disciplinary decision. The Court of First Instance also pointed out that the applicant had had the opportunity at that time to challenge the figures relied upon by the Court of Auditors.

Findings

49. I must agree with the Parliament. The application for revision was rejected not only for lack of evidence but also because of

22 — Case T-26/89 (125) (cited in note 2), paragraph 21.

the lack of a new fact. [23] As far as the question of the amount of the actual cash surplus is concerned, it is by no means certain that this is a decisive factor.

Findings

Point 4

Facts and submissions

50. The appellant argues that the Court of First Instance should have taken into consideration not only the encashment of the two cheques but also the fact that Mr Pasty considered the encashment of the cheques lawful, which should have been regarded as a new fact. By way of illustration, the appellant again gives the example of a witness in criminal proceedings.

51. In the Parliament's view, the appellant ignores the fact that the Court of First Instance was unable to examine the substance of Mr Pasty's view, since it was a mere assertion, unsupported by any evidence. Moreover, the Court explained in detail why those assertions did not constitute new facts.

52. The appellant's submission that the encashment of the cheques was lawful cannot, in the absence of evidence, justify revision. According to the information in Mr Pasty's letter, on which the appellant relies, there is evidence that the appellant deposited the value of the cheques in the Parliament's safe. [24] The appellant refers to Mr Pasty's statements but does not produce the evidence referred to in the letter. The same applies to the question of when the appellant entered the encashment of the cheques in the accounts. Mr Pasty states in his letter that the entry was actually made in February and concludes that the examination carried out by the Court of Auditors, which failed to find an entry in the accounts, was not thorough or careful. He refers in that regard to an audit carried out by a private firm, which established that the value of the two cheques was entered in the books. [25] However, he is very vague as to when the corresponding audit report was submitted and does not state precisely when the audit was carried out. Thus the letter contains mere assertions. Since the appellant refers solely to that letter, and produces no other documents, there are no grounds for revision of the proceedings. As the Court of First Instance observes, the entry in the accounts does not in itself — that is to say, without an exact date — constitute a new fact, since it was already referred to in the procedure. [26]

23 — Case T-26/89 (125) (cited in note 2), paragraph 23.

24 — Paragraph 41 of the letter.

25 — Paragraph 71 of the letter.

26 — Case T-26/89 (125) (cited in note 2), paragraph 35 et seq..

Thus, the judgment of the Court of First Instance is not open to criticism in this respect.

Point 5

Facts and submissions

53. On this point the appellant maintains that when the Court of First Instance found that the allegedly new facts were not indicated clearly and precisely it did not give the same consideration to his submissions concerning the conclusions of the 1991 judgment [27] as it did to statements made previously by officials of the Parliament and the Court of Auditors. The assertions based on Mr Pasty's letter are clear and precise and, moreover, have so far gone unchallenged, unlike the mere assertions made by the Parliament and the Court of Auditors. Yet the Court of First Instance based its judgment on those assertions and rejected the applicant's submissions as insufficiently clear and precise.

Findings

54. The grounds stated by the Court of First Instance in the 1997 judgment [28] cannot be called in question as wrong in law. The Court held that the applicant had not met the obligation laid down in Article 162(1)(c) of the Rules of Procedure in that he failed to specify the facts on which his application for revision was based. The Court referred to the case-law and held that the particulars of the new facts alleged must be sufficiently clear and precise, in order (*inter alia*) to enable the opposite party to prepare its defence and the Court to give judgment on the application. [29]

55. As I have already said, the fact that Mr Pasty drew different conclusions from the facts provided does not suffice to constitute a new fact. It is up to the appellant, therefore, to provide further details of what the new facts are based on and of how they are to be proved. He has failed to do so.

56. The Court of First Instance pointed this out. In so doing it did not merely reject the appellant's submissions as inadequate. It also held that the paragraphs in Mr Pasty's letter to which he referred reflected only a personal opinion of the facts. On this point, too, the Court cannot be criticised.

27 — Case T-26/89 (cited in note 3), paragraphs 200 and 201.

28 — Case T-26/89 (125) (cited in note 2), paragraph 38 et seq..

29 — Cf. paragraph 39 of the judgment (cited in note 28) and the case-law cited therein.

57. The appellant refers to paragraphs 170 to 180 of the letter, in which Mr Pasty states that the Court of Auditors relied on incorrect information. Since the appellant's observations are not supported by other documents, however, they also constitute mere assertions.

58. Mr Pasty also claims in his letter that, speaking as an accountant, there is no indication that the two cheques had caused the discrepancy in the accounts, since other circumstances were equally capable of doing so.

59. Were it a question of alternatives which had not previously been taken into consideration, that circumstance might constitute a new fact. That is not the position, however. The judgment of 17 October 1991 already refers to the fact that the Disciplinary Board pointed out that during its deliberations it had been presented with two conflicting theories, one of which precluded a connection between the accounting discrepancy and the drawing of the cheques. [30] The Court further pointed out that '[i]n those circumstances, and taking into consideration the declaration made by the Court of Auditors' representative before the Disciplinary Board to the effect that even a strict identity between the recorded accounting discrepancy and the amount of the two cheques would not make it possible to conclude with absolute certainty that the deficit in question resulted from the encashment of the two cheques, it must be held that the contested decision was quite properly entitled to consider as established that the absence of supporting documents was connected in this case to the encashment of the two cheques drawn on the Midland Bank.' [31] This shows that other theories to explain the accounting discrepancy were also put forward and examined in the earlier judgment. In this regard, too, the existence of new facts has not been shown.

Point 6

Facts and submissions

60. The appellant also criticises the fact that no record was made of the accounting situation when authority passed to the new accounting officer. He does not deny that the Court of First Instance was quite correct to point out that he had raised that question on a number of occasions and that he had approached the Parliament in order to obtain that record, and to that extent this point does not constitute a new fact.

61. The new fact consists in the statement which the Parliament first made in its pleadings of 25 July 1996 to the effect that the loss was not established in the form of a record. That is an essential element of such a kind as to have a decisive influence on the disciplinary proceedings as a whole. In the absence of a record the accusations are based on mere

30 — Case T-26/89 (cited in note 3), paragraph 197.

31 — Case T-26/89 (cited in note 3), paragraph 201.

suppositions or assertions, which do not have the weight of facts for which there is genuine legal certification but are challenged, as Mr Pasty's letter shows.

62. To deny that the Parliament's admission that it did not draw up a record has the value of a new fact would be equivalent to refusing an application for revision in criminal proceedings even though the prosecution itself may in the meantime have established the accused's innocence.

63. Lastly, as regards the probative value of the statements made by officials of the Parliament, the appellant observes that the Court of First Instance refers to written and oral statements made by two Parliament officials. In the proceedings which the Parliament brought against the Royal Belgian insurance company before the Luxembourg Commercial Court, however, these officials made written statements which completely contradicted their previous statements. The appellant therefore lodged a complaint against them for giving false evidence. [32]

64. In response the Parliament points out that before the Luxembourg court the two officials described the same situation that had been established by the Court of Auditors, the Parliament and the Court of First Instance and from which the conclusion had been drawn that the Parliament had suffered economic loss. The appellant's accusations against those officials are therefore manifestly unfounded.

65. As regards the absence of a record, the Parliament maintains that the appellant himself acknowledges that this does not constitute a new fact. Furthermore, the Court of First Instance took the view that the submissions regarding the absence of a record were time-barred.

66. The Parliament further states that even on the assumption that an observation in its pleadings did constitute a new fact, the appellant has confused the roles in the revision procedure. It is not the European Parliament that submits (and is required to submit) new facts. The Parliament merely reiterated the facts which formed the grounds of the 1991 judgment. The Parliament also refers to the Disciplinary Board's reasoned opinion of November 1987, from which it is apparent that this question had already been raised in the disciplinary proceedings and that a representative of the Court of Auditors had stated that because audits were carried out on such a frequent basis and in strict accordance with the applicable rules, such a procedure for handing over the accounts was not normal practice in the Community institutions.

32 — By these allegations the appellant is probably seeking to cast doubt on the credibility of the witnesses.

Findings

67. As regards the question of the absence of a record, it is not very clear what is supposed to constitute the new decisive fact. The absence of a record has indisputably already been invoked. The fact that this absence is now referred to by the Parliament itself can at the most constitute a new fact if that point had been strongly disputed and of great importance to the decision. That does not appear to be the case, however.

68. As regards the accusation against the two officials, the very most that can be said is that a conviction for giving false evidence might constitute a new fact, but only if the Court of First Instance relied mainly on the evidence of those two officials in its 1991 judgment. That is not the position. The judgment also relies, for example, on the investigations and opinions of the Court of Auditors and the Disciplinary Board. [33]

Point 7

Facts and submissions

69. Lastly, the appellant refers to the observations of the Court of First Instance to the effect that he had merely reproduced certain paragraphs of Mr Pasty's letter and therefore did not present in a sufficiently clear and precise manner the facts on which he based the application for revision, and that it is not for the Court to search the submissions for the alleged new facts.

70. The appellant again refers to the corresponding paragraph numbers and concludes by saying that his statements are so clear that further research unnecessary.

Findings

71. It should be pointed out at the outset that the Court of First Instance observed in its judgment that under Article 126(1)(c) of the Rules of Procedure the new facts must be presented in a sufficiently clear and precise manner. The Court had previously examined in detail the paragraphs of Mr Pasty's letter to which the appellant refers. The appellant has already criticised the Court's statements, to no avail, in the previous points of his analysis. Accordingly, there is no need

33 — Case T-26/89 (cited in note 3), paragraph 200.

to (re)examine further the appellant's arguments, since in that regard they are merely a repetition of what he has already said.

H — Summary

72. Accordingly, it does not appear from the appellant's arguments taken as a whole that in examining his submissions the Court of First Instance erred in its assessment of a fact which might have been new and decisive. He has therefore failed to establish that the assessment made was wrong in law.

I — Costs

Costs at first instance

73. The appellant also appeals against the order for costs made by the Court of First Instance.

74. Since in these proceedings all the other grounds of appeal must be rejected, all that remains is to determine the action challenging the costs. In such a case the second paragraph of Article 51 of the EC Statute provides that an appeal regarding only the amount of the costs or the party ordered to pay them must be rejected as inadmissible. [34]

Costs of the appeal

75. Under Article 122 of the Rules of Procedure of the Court of Justice the Court is to make a decision as to costs where the appeal is unfounded. The second paragraph provides that in proceedings between the Communities and their servants Article 70 is to apply only to appeals brought by institutions. That is not the case here and, accordingly, Article 70, which provides that in proceedings between the Communities and their servants the institutions are to bear their own costs, does not apply.

76. In proceedings between the Communities and their servants Article 122 also provides, however, that by way of derogation from Article 69(2) of the Rules of Procedure the Court of Justice may, in appeals brought by officials or other servants of an institution, order the parties to share the costs where equity so requires.

34 — Case C-396/93 P *Heinrichs* v *Commission* [1995] ECR I-2611, paragraphs 65 and 66, and order in Case C-140/96 P *Dimitriadis* v *Court of Auditors* [1997] ECR I-5635, paragraph 56.

77. In its pleadings the Parliament requested that an order for costs be made in accordance with the second subparagraph of Article 69(3), which provides that the Court may order a party, even if successful, to pay costs which the Court considers that party to have unreasonably or vexatiously caused the opposite party to incur. Since the Parliament stated in the body of its submissions that the appellant should be ordered to pay the costs, however, it may be concluded that the Parliament requested that the appellant be ordered to pay the costs in any event, therefore no doubt even if he were successful. As the appellant has been unsuccessful, however, he should be ordered to pay the costs in accordance with the first paragraph of Article 69(2).

J — Conclusion

78. I therefore propose that the Court should:

(1) dismiss the appeal;

(2) order the appellant to pay the costs of the proceedings.