OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 15 OCTOBER 1981

My Lords,

This action concerns two claims made by Mr Bernard Fournier, an official of the Commission. The first is for damages based on the way he had been treated during his career. The second is for a declaration that his contracts of employment with the Commission from 1 September 1964, in the alternative 1 September 1965, were in substance contracts appointing him a temporary agent and so should be taken into account for the purpose of calculating his pension and years of service under Article 77 (1) of the Staff Regulations.

The facts of the case are long and complicated but, for present purposes, they may be summarized as follows. Mr Fournier was first employed by the EEC Commission, as it then was, in DG I (External Relations) as an auxiliary agent for a period of six months with effect from 1 September 1964. His contract of employment was extended another six months to 31 August 1965. At the time, it seems that the Commission recognized that his appointment as an auxiliary agent could not be extended beyond that date because, under Article 52 of the Conditions of Employment of Other Servants of the European Communities ("the Conditions of Employment") his employment could not exceed one year unless he had been engaged to replace an official or a temporary agent who was unable for the time being to perform his duties. That does not seem to have been the case. Nevertheless, DG I requested his contract to be extended a third time to 28 February 1966. The reason seems to be that the work for which Mr Fournier was originally appointed had not yet come to an end. After some internal discussion his contract was extended to 30 September 1965 while the negotiations for his reappointment were taking their course. Eventually the Commission decided to extend his contract to 31 December 1965 and, later, to 28 February 1966. On 11 January 1966, the Director-General for Personnel and Administration wrote to Mr Fournier to say that his contract would not be extended beyond 28 February and to thank him for his services.

It seems that Mr Fournier actually finished his work in DG I at the end of December 1965 and an agreement was reached between DG I and DG III (Internal Market) that he should be transferred to the latter with effect from 1 January 1966 in order to do some preparatory work for a conference which the Commission was to hold in June. As a result of a request from DG III, Mr Fournier's contract as an auxiliary agent was extended to 31 March 1966 and then, by six more extensions, to 31 December 1968. By that time it seems

that the Commission had decided to end the employment of all auxiliary agents and re-employ them as temporary agents so as to give them the opportunity to be recruited as officials (cf. Case 18/69 *Fournier* v *Commission* [1970] ECR 249 at p. 253). In consequence, Mr Fournier was offered a contract as a temporary agent assigned to DG II (Economic and Financial Affairs) for a period of three months starting on 1 January 1969 "pending a decision concerning (his) appointment as an official". This contract was progressively extended at six-monthly intervals to 31 December 1971. He was then offered a contract as an auxiliary agent attached to DG VIII (Development). The contract was initially for three months but it was extended a number of times until the end of 1972. On 21 February 1973 the Commission decided to re-appoint him a temporary agent with effect from 1 January 1973 for a period of four months. Mr Fournier seems to have been informed of this on 9 March. He was then made a probationary official with effect from 1 May and finally established with effect from 1 April 1974.

On 30 March 1979, Mr Fournier submitted a formal request under Article 90 (1) of the Staff Regulations that he be paid compensation for the harm done him by the Commission's wrongful acts, being in essence the steps which the Commission had taken or failed to take in connection with his appointment over the period 1 September 1965 to 31 March 1974. The damage suffered and the amounts claimed are the same as those set out in the application in the present action. Apart from the money claims, there was also a claim for the recalculation of his pension rights. This arises because, while Article 40 of the Conditions of Employment provides that any period of service as a temporary agent is to be taken into account when calculating an official's years of pensionable service, no similar provision seems to exist in respect of periods of service spent as an auxiliary agent. Mr Fournier says he has wrongly been treated as an auxiliary agent during the period in issue. The request was rejected on 1 August. On 25 October, Mr Fournier lodged his complaint against the rejection of the request, within the period of three months fixed for doing so in the Staff Regulations. The Commission failed to reply within four months and, on 28 March 1980, Mr Fournier commenced proceedings before the Court. The Commission expressly rejected the complaint in a letter dated 22 May 1980 but, although it dismissed his claim for damages, it conceded that Mr Fournier's contracts as an auxiliary agent from 31 December 1965 should be regarded as contracts as a temporary agent because he had performed permanent duties, not those transitory ones performed by auxiliary agents *stricto sensu.* In consequence the whole of Mr Fournier's career after that date was to be taken into account when calculating his pensionable service.

The Commission whilst resisting his claims as to the merits contends that the claim for damages is in any event inadmissible. It was agreed between the parties that the Court should decide at this stage (i) the merits of the pension claim and (ii) the admissibility of the damages claim. If the latter is held to be

admissible it is agreed that the written and oral procedures should be reopened.

Mr Fournier's claim that the period before 31 December 1965 should be regarded as having been completed, in substance, as a temporary agent is based on Case 17/78 *Deshormes* v *Commission* [1979] ECR 189, where it was held that the designation of a period of employment depends on the duties performed and the conditions under which they were performed, rather than the formal nature of the contract of employment. In the judgment it is said that "the characteristic of this contract (as an auxiliary agent) is its precariousness in time, since it can be used only to effect a temporary replacement or to allow the performance of administrative duties which are of a transitory nature which fill an urgent need or which are not clearly defined ... The difference between auxiliary staff and temporary staff lies in the fact that a member of the temporary staff fills a permanent post included in the list of posts, whereas, except in the case of temporary replacement of an official, a member of the auxiliary staff performs administrative work without being assigned to a post included in the list of posts." (pp. 201 and 202). In that case, the person concerned had performed the same duties for 18 years and those duties corresponded to the definition of a post in the list of posts appended to the section of the budget relating to the Commission. The Court therefore held that she must be regarded as having been employed *de facto* as a temporary agent.

Counsel for Mr Fournier has concluded from this case that, if the duties performed are permanent, well defined, Community public service duties, the period of employment is that of a temporary agent not an auxiliary agent. This, however, leaves out of account (or fails to give sufficient weight to) what seems to me to be a factor stressed by the Court in the *Deshormes* case, namely that there should be "a post". It is not sufficient that duties of the same general kind are frequently, or even always, done by others as auxiliary agents. Otherwise all auxiliary agents could claim to be temporary agents. The true test seems to lie in the existence of a post with the same duties as those performed by the auxiliary agent. This furnishes the proof that the auxiliary agent's duties are in fact permanent, well defined, Community public service duties.

There is little information concerning the duties which Mr Fournier was called on to perform after 1 September 1964 and, due to the lapse of time, the Commission has been unable to clarify matters. For his part, Mr Fournier places considerable reliance on a note written in 1972 by another official of the Commission to the Director-General for Personnel and Administration in order to support Mr Fournier's attempts to be made an official. From contemporary documents it appears that Mr Fournier was one of six persons who were appointed auxiliary agents in Category A and assigned to the Directorate in DG I concerned with general commercial policy. The reason

for their appointment was that this Directorate was short of staff and unable to cope with the tasks given it to perform in 1964. In his contract of employment, Mr Fournier's responsibilities were described as "la fonction de collaborateur scientifique". A letter written by the Director-General of DG I on 22 July 1965 states that he was first appointed "pour une étude importante" and it seems that his work was connected with research into the Community's external trade.

A note written by Mr Fournier himself and dated 9 July 1965 states that, in the autumn of 1964, he had worked on a report covering the Community's external trade between 1958 and 1963 and a further report on trade in the third quarter of 1964. The following year he worked on the entry in the Eighth General Report on the Community's activities relating to external trade in 1964 and on a report covering trade in the fourth quarter of 1964. This is to some extent borne out by the note upon which he now relies, dated 30 May 1972 and apparently written by a head of division in what was then DG XI (External Trade), which says that he drafted the first report on the Community's external trade (together with a revised version for the year following), quarterly reports on Community trade and a research programme into the Community's external trade. Mr Fournier had also, it seems, represented DG I in a group of experts concerned with medium-term forecasting. It should be observed that the contents of this note appear to have been derived from enquiries made by the writer and information given to him by others; it does not seem that he had any personal or direct knowledge of the facts which, he suggests, took place before his arrival on the scene.

Counsel for Mr Fournier drew attention to the fact that the reports which Mr Fournier drafted or helped to draft are produced at regular intervals. But it must be shown that Mr Fournier was to all intents and purposes doing what a temporary agent would be doing. For this it is essential that his duties can be attributed to a particular post. It would, no doubt, be sufficient if it could be shown that, after Mr Fournier had left DG I, an existing or new post was entrusted with the duties he had performed. However, it has not been suggested that his duties, so far as they can be determined, fell at any time under the rubric of a particular post in the Commission. They seem instead to have been part of the overall responsibilities of the Directorate to which he was attached. Furthermore, the fact that he was employed in DG I in order to help with its increased workload in 1964, and was transferred as soon as that work had finished, suggests that the duties he performed filled an urgent but transitory need and cannot therefore be regarded as permanent. The fact that on 22 July 1965 he was told that his appointment could not be extended beyond 28 February 1966 and that he must finish the work on which he was engaged emphasizes the *ad hoc* nature of his task.

It was suggested that the Commission's decision to recognize the period after 31 December 1965 as having been completed in substance as a temporary agent necessarily meant that the period beforehand should be treated in like manner. The origin of the Commission's concession appears to lie in a rule of thumb it adopted in the light of the *Deshormes* case to the effect that, in the absence of any clear evidence relating to the duties actually performed, it is presumed that the person in question was truly an auxiliary agent at least during the first year of his employment but that, thereafter, he was such only formally. In this case, the Commission took the view that the evidence indicated that, throughout his time in DG I, Mr Fournier had in substance performed the duties of an auxiliary agent. On the other hand, the information concerning his duties after his transfer to DG III on 1 January 1966 was so exiguous that it was presumed in his favour that he had been *de facto* a temporary agent. Whatever the rights and wrongs of this concession, it does not seem right, in view of the evidence, to extend it to the period before 31 December 1965. Counsel for Mr Fournier suggested that Mr Fournier was performing the same duties before and after that date but this does not seem to be so. For one thing, he was not in the same Directorate-General and, for another, he was initially employed in DG III to help in the preparation of a forthcoming conference.

The reason for not according pension rights to an auxiliary agent is well understood. The result of excluding years spent as an auxiliary agent is less attractive when an auxiliary agent is taken on as an employee with pension rights and spends his whole career with an employer. Here it seems to me that the Commission behaved fairly, perhaps generously, in treating the period after 31 December 1965 as counting for a pension. It was entitled on the basis of the *Deshormes* judgment to exclude the period to that date.

As a result, this claim must, in my view be rejected.

In his application, Mr Fournier alleges six respects in which the Commission has acted wrongfully: (i) his career in the Commission has been precarious and uncertain, (ii) his grading as an auxiliary and temporary agent, (iii) his grading as an official, (iv) his employment as an auxiliary agent was illegally and abusively prolonged, (v) harassment, intimidation and the fact that, since his establishment, he has been entrusted with trivial duties and (vi) the Commission has ignored warnings concerning his medical wellbeing. The heads of damage also number six: (i) ill health, (ii) mental suffering resulting from the ill health of his family, (iii) mental suffering resulting from the absence of a normal professional career, (iv) loss of earnings, reduction of pension rights and absence of promotion (v), establishment in Grade A 6 rather than A 4 and (vi) mental suffering arising from the triviality of the duties assigned to him.

The Commission objects that the whole claim for damages is inadmissible because Mr Fournier is trying to recover by way of damages the same relief which either has been refused to him in a claim for annulment in 1969, or which he

could have sought in due time by other claims to set aside acts of the Commission. The Commission refers to Case 18/69 *Fournier* v *Commission* [1970] ECR 249. In that case he sought to annul an implied decision refusing his request to establish him as an official in Grade A 4 in place of his existing post as a temporary agent in Grade B 1. He asked for a declaration that he should be established in Grade A 4. His claim was dismissed since he was asking the Commission to depart from the requirements and procedures of the Staff Regulations. On 4 December 1972 he lodged a request under Article 90 (1) of the Staff Regulations asking to be appointed to a post corresponding to his qualifications. The Commission does not seem to have replied to his request. He made no complaint against any rejection of it. Moreover the Commission relies on the Court's decision in Cases 114 to 117/79 *Fournier* v *Commission* [1980] ECR 1529 in which Mr Fournier's wife and children claimed that they had suffered personal injuries as a result of the Commission's negligent behaviour towards him. The Court rejected these actions as inadmissible. It was said that the actions were "for compensation for damage alleged to have been caused by the conduct of an institution affecting the progress of the career of one of its officials or servants, even though the latter has been in a position to avail himself of the opportunities afforded by the Treaty to challenge any decision of the institution concerned which was intended to, or in fact did, place or keep him in unlawful conditions of employment and, if need be, for this purpose to bring an action before the Court." (p. 1531).

Article 179 of the EEC Treaty gives the Court jurisdiction in any dispute between the Community and its servants within the limits and under the conditions laid down in the Staff Regulations or in the Conditions of Employment. In Case 9/75 *Meyer-Burckhardt* v *Commission* [1975] ECR 1171, at p. 1181, the Court said that this kind of dispute "where it originates in the relationship of employment between the person concerned and the institution" is to be pursued "under Article 179 of the Treaty and Articles 90 and 91 of the Staff Regulations and, as regards in particular the question of its admissibility, lies outside the sphere of application of Articles 178 and 215 of the Treaty and of Article 43 of the Protocol on the Statute of the Court of Justice of the EEC" (cf. Case 11/72 *Giordano* v *Commission* [1973] ECR 417).

As the *Meyer-Burckhardt* decision itself explains, even if the procedures to be followed are both contained in Articles 90 and 91 of the Staff Regulations, two distinct types of action are available — a claim for annulment of an act said to be unlawful and a claim for damages. It is for the applicant to decide whether he claims one or the other or both, so long as he observes the prescribed time-limits following the rejection of his complaint.

An "application for damages is an independent legal remedy . . . It does not seek to have a specific decision set aside but to make good the damage caused by

an institution in the exercise of its functions ... For the application to be well-founded it must be established that the defendant is liable for a wrongful act or omission which caused the applicant a still-subsisting injury." Damages can be awarded even if they represent a financial consequence no different from that which would have resulted from the annulment of the act — (Case 79/71 *Heinemann* v *Commission* [1972] ECR 579, pp. 588-9).

Although the two forms of claim are different, there can be circumstances in which a failure to claim, or, after application, to obtain an order for the annulment of an illegal act may affect the right to claim damages. So for example in Case 4/67 *Muller* v *Commission* [1967] ECR 365, an applicant sought, out of time, to claim the annulment of another person's appointment and in addition she claimed as damages the income she lost through not being appointed to the post in question. The Court held that the inadmissibility of the first claim brought in its train the inadmissibility of the second. The basis of the decision seems to be that the loss alleged really flowed from the failure to seek annulment in due time. "The applicant could have avoided this damage by contesting the measure in question in good time ... she has failed to do so. In these circumstances she cannot repair this omission and, so to speak, acquire the opportunity of bringing a new appeal by means of a claim for damages." (pp. 373 to 374).

In Case 59/65 *Schreckenberg* v *Commission* [1966] ECR 543, p. 550, the Court said "Although a party may take action by means of a claim for compensation without being obliged by any provision of law to seek the annulment of the illegal measure which causes him damage, he may not by this means circumvent the inadmissibility of an application which concerns the same illegality and has the same financial end in view". The approach has been similar in other cases such as Joined Cases 15/73 etc. *Schots-Kortner and Others* v *Council, Commission and Parliament* [1974] ECR 177 and Case 33/80 *Albini* v *Council and Commission* [1981] ECR 2141.

In Joined Cases 4 and 30/74 *Scuppa* v *Commission* [1975] ECR 919, 940, Mr Advocate General Trabucchi said that "the fact that the action for annulment of the act which is alleged to have been the cause of the loss is inadmissible does not in my view of itself affect the admissibility of the claim for damages." He suggested that where the claim for damages was not merely a means of avoiding a time bar which precluded the claim for annulment, or where it could not be said that no loss flowed from the act, or where the claim for damages could really be said to stand on its own, a claim for damages could proceed even if a claim for annulment was inadmissible. Mr Advocate General Capotorti in Case 153/79 et al *Bowden* v *Commission* et al, 14 May 1981, not yet reported, at p. 39, expressed the view that where the two claims are closely linked an applicant should not be allowed to escape the rules barring a claim for annulment by claiming damages.

These and other cases such as Case 53/70 *Vinck* v *Commission* [1971] ECR

601, Cases 126/75 et al *Giry* v *Commission* [1977] ECR 1937, Case 23/69 *Fiehn* v *Commission* [1970] ECR 547 (where even though the financial results might be the same, the damages claim was said not to be based on the illegality of the decision challenged in the claim for annulment) seem to lead to the propositions (a) that a claim for damages cannot be used as a substitute for an inadmissible claim for annulment; (b) that the failure of the claim for annulment may show that no damage flows from the acts complained of but only from the failure to take annulment proceedings in proper time; (c) that a damages claim may stand on its own and involve other considerations than those at stake in a claim for annulment even if the same facts are relied on; (d) that a damages claim may be put in a way which is quite independent of the claim for annulment.

Applying these principles to the present case, it seems to me at the present stage of the procedure that, in so far as they are simply claiming damages for acts of the Commission which could have been in due time the subject of a claim for annulment (or which in 1969 were rejected), the second, third and fourth claims are inadmissible. The other claims (and possibly matters which may be included in the second, third and fourth claims) are on a different basis. They raise an independent question as to whether the Commission has been in breach of duty to Mr Fournier, in respect of the way he has been treated throughout his career, which has led to damage. These do not hinge solely on whether certain appointments or failures to appoint were illegal and the damage claimed is different from that which would flow from an independent illegal act.

Accordingly in my opinion:

1. Whilst not expressing any view as to whether Mr Fournier's claims are well-founded in the end, or as to whether he could have minimized his damage, I consider that the claims ought not to be rejected as inadmissible to the extent which I have indicated. In my opinion the written procedure should now be reopened so that further observations on the claims for damages so far as they are admissible may be made if the parties so wish. Mr Fournier should in particular give further details of the damage alleged and of the manner in which he has arrived at the sums which he claims;

2. The claim that the period from 1 September 1964 to 31 December 1965 is to be treated as a period of employment other than as an auxiliary agent should be dismissed.