

JUDGMENT OF THE COURT (First Chamber)  
12 November 1996<sup>\*</sup>

In Case C-294/95 P,

**Girish Ojha**, an official of the European Communities, represented by E. H. Pijnacker Hordijk, of the Amsterdam Bar, with an address for service in Luxembourg at the Chambers of L. Frieden, 62 Avenue Guillaume,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (First Chamber) of 6 July 1995 in Case T-36/93 *Ojha v Commission* [1995] ECR-SC II-497, seeking to have that judgment set aside,

the other party to the proceedings being:

**Commission of the European Communities**, represented by A. M. Alves Vieira, of its Legal Service, acting as Agent, assisted by D. Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

THE COURT (First Chamber),

composed of: D. A. O. Edward, acting as President of the Chamber, P. Jann and M. Wathelet (Rapporteur), Judges,

<sup>\*</sup> Language of the case: French.

Advocate General: P. Léger,  
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from Mr Ojha, represented by E. H. Pijnacker Hordijk and by K. Coppenholle, of the Brussels Bar, and from the Commission, represented by A. M. Alves Vieira, assisted by D. Waelbroeck, at the hearing on 13 June 1996,

after hearing the Opinion of the Advocate General at the sitting on 4 July 1996,

gives the following

### Judgment

1 By application lodged at the Court Registry on 12 September 1995, Girish Ojha appealed under Article 49 of the EC Statute and the corresponding provisions of the ECSC and EAEC Statutes of the Court of Justice against the judgment delivered by the Court of First Instance on 6 July 1995 in Case T-36/93 *Ojha v Commission* [1995] ECR-SC II-497 ('the contested judgment'), dismissing his action for the annulment of the Commission's decision of 20 October 1992 to recall him to Brussels in the interests of the service ('the contested decision').

2 The findings of the Court of First Instance show that on 15 August 1991 Mr Ojha, a Grade A 5 official in the Commission's Directorate-General for Employment,

Industrial Relations and Social Affairs (DG V) in Brussels, was assigned to the Commission's delegation in Dacca (Bangladesh) as an adviser and a supervisor of aid and development projects.

3 By a memorandum of 8 May 1992, the Director of the 'Asia' Directorate of the Commission's Directorate-General for External Relations (DG I), Mr Fossati, informed Mr Ojha of four complaints, from the Bangladesh Government, the World Bank and two European firms, accusing him of inappropriate conduct in the performance of his duties.

4 Mr Ojha replied by a series of fax messages and memoranda, sent on 15 and 28 June and between 11 and 18 July 1992 to Mr Fossati or to the head of the Dacca delegation, Mr Bailly.

5 On 13 July 1992, Mr Prat, the Director General responsible for North-South relations in DG I, informed Mr Ojha of his intention to request his recall to Brussels, stressing that this was neither a disciplinary measure nor the result of a negative assessment of his professional abilities. He simply took the view that Mr Ojha's abilities could be better used inside the Commission than in a delegation where he had not shown the adaptability to a diplomatic environment that might have been expected of him.

6 Despite the explanations which Mr Ojha gave to the assistant to his Director General, Mr Lipman, on 7 August, to his Director on 7 September, and to his Director General in Brussels on 9 September, the latter maintained the decision to recall him. On 9 October 1992, the Director General of Personnel and Administration and the Director General of DG I decided, in accordance with an opinion issued on 22 September 1992 by the Rotation Committee — provided for by the

Commission's Communication of 26 July 1988, entitled 'Orientations about the new rotation system for staff serving outside the Community' —, that the applicant should take the measures necessary for his return to Brussels as from 1 November 1992.

7 On 19 October 1992, Mr Ojha appealed against that decision before the Rotation Committee. By memorandum of 20 October 1992, the Director General of Personnel and Administration informed Mr Ojha that the committee had dismissed his appeal and that, consequently, he had adopted the decision, in his capacity as the appointing authority and in the interests of the service, to recall Mr Ojha to Brussels as from 1 November 1992.

8 After bringing a complaint under Article 90(2) of the Staff Regulations of Officials of the European Communities ('the Staff Regulations'), Mr Ojha brought an action before the Court of First Instance on 1 June 1993 against the implied decision to reject his complaint, which took effect on 1 March 1993.

9 Mr Ojha applied to the Court of First Instance for annulment of the contested decision and, so far as necessary, of the decision of 9 October 1992. He also applied for an award of BFR 500 000 damages against the Commission for the non-material damage allegedly suffered, and costs.

10 In support of his claims, he advances four pleas alleging infringement of (i) the rotation procedure and the duty to state reasons; (ii) the duty to have due regard to the welfare of officials, the principle of the protection of legitimate expectations and the rights of the defence; (iii) Articles 24 and 26 of the Staff Regulations and, finally, (iv) Article 86 et seq. of the Staff Regulations. Those pleas will be summarized only in so far as they concern the present appeal.

- 11 First, Mr Ojha claims that insufficient reasons were stated for the contested decision. It merely stated that he had shown himself to be unsuitable for exercising a diplomatic function, whereas the recall required the most precise reasons, since it did not constitute a normal rotation movement.
- 12 Secondly, he claims that the Commission infringed his defence rights by failing, despite his repeated requests, to communicate to him the documents on the basis of which it had adopted the decision to recall him. Thus, it had not sent him the four complaints referred to by the Director of DG I, Mr Fossati, in his memorandum of 8 May 1992, but had merely provided him with a summary. Similarly, a series of documents, annexed to the Commission's defence, had never previously been communicated to him.
- 13 Thirdly, by adopting the contested decision on the strength of accusations made against him without opening any kind of enquiry, Mr Ojha claims that the Commission infringed the first paragraph of Article 24 of the Staff Regulations, which provides that:
- ‘The Communities shall assist any official, in particular in proceedings against any person perpetrating threats, insulting or defamatory acts or utterances, or any attack to person or property to which he or a member of his family is subjected by reason of his position or duties.’
- 14 In Mr Ojha's submission, Article 24 of the Staff Regulations required an enquiry to be opened in order to re-establish his reputation, which had been called into question by unfounded accusations (see Case 53/72 *Guillot v Commission* [1974] ECR 791, paragraph 3 and Case 128/75 *N v Commission* [1976] ECR 1567, paragraphs 10 and 15).

15 Fourthly, he maintains that the Commission infringed Article 26 of the Staff Regulations, the first two paragraphs of which provide that:

'The personal file of an official shall contain:

- (a) all documents concerning his administrative status and all reports relating to his ability, efficiency and conduct;
- (b) any comments by the official on such documents.

Documents shall be registered, numbered and filed in serial order; the documents referred to in sub-paragraph (a) may not be used or cited by the institution against an official unless they were communicated to him before they were filed.'

16 Following the accusations made against Mr Ojha by the Bangladesh authorities, the Head of Delegation, Mr Bailly, sent the Commission in Brussels a report of 21 March 1992 concerning Mr Ojha's conduct without first communicating it to him and without a copy being placed on his personal file.

### The contested judgment

17 As regards the first plea, the Court of First Instance begins by pointing out, at paragraph 59, that the purpose of the duty to state reasons for a decision adversely affecting an official is to enable the person concerned to assess whether or not the decision is tainted with illegality and to enable the Community judicature to exercise its power of reviewing the legality of the contested decision.

- 18 It then emphasizes, at paragraph 60, that the extent of the duty to state reasons must be determined on the basis of the particular facts of each case (see Case 69/83 *Lux v Court of Auditors* [1984] ECR 2447, paragraph 36 and Case C-169/88 *Prelle v Commission* [1989] ECR 4335, paragraph 9). In particular, the reasons given for a decision are sufficient if the measure against which the action is brought was adopted in circumstances known to the official concerned and enables him to understand its scope (see Case 125/80 *Arning v Commission* [1981] ECR 2539).
- 19 In this case, the Court of First Instance found, at paragraph 61, that, before the contested decision was adopted, Mr Ojha was informed of the likelihood of his redeployment, first by Mr Lipman, the assistant to the Director General, and then by a letter of 13 July 1992 from Mr Prat. In addition, he had had a series of discussions on that subject with Mr Lipman, Mr Fossati and Mr Prat between 7 August and 9 September 1992. Finally, Mr Ojha had been able to put forward his arguments against the redeployment decision of 9 October 1992 in his appeal of 19 October.
- 20 Considering that Mr Ojha had been put in a position to assess whether the contested decision was well founded and whether it was appropriate to refer it for judicial review, the Court held, at paragraph 62, that the reasons stated for the decision were sufficient.
- 21 As regards the alleged infringement of the rights of the defence and of Article 24 of the Staff Regulations, the Court of First Instance began by pointing out, at paragraph 81, that the Community institutions have a wide discretion in organizing departments and assigning staff, provided that staff are assigned in the interests of the service and in conformity with the principle of assignment to an equivalent post. It also emphasized that, if such a measure does not affect an official's position under the Staff Regulations or infringe the principle that the post to which he is assigned should correspond to his grade, the administration is not obliged to give him a hearing beforehand (Joined Cases C-116/88 and C-149/88 *Hecq v Commission* [1990] ECR I-599, paragraph 14).

- 22 It then noted, at paragraph 83, that the transfer of an official in order to put an end to an administrative situation which has become intolerable constitutes a measure taken in the interests of the service, and that a decision to reassign an official which involves his moving to another posting against his wishes must be taken with the necessary diligence and with special care, in particular having regard to the personal interests of the official concerned (see Joined Cases C-116/88 and C-149/88 *Hecq v Commission*, cited above, paragraphs 22 and 23, and Case T-50/92 *Fiorani v Parliament* [1993] ECR II-555, paragraph 35).
- 23 The Court took the view, at paragraph 85, that the contested reassignment decision had to be regarded as having been adopted solely in the interests of the proper functioning of the Commission's delegation to Dacca and, more generally, in the interests of its external relations with the non-member country concerned.
- 24 Indeed, it appeared from the various documents on file that the situation within the delegation was very tense, and that several complaints had called Mr Ojha's conduct into question. In that respect, the Court found that the mere existence of the complaints, whether or not they were well founded, justified Mr Ojha's reassignment to the institution's headquarters in the interests of the service alone.
- 25 The Court further pointed out, at paragraph 85, that the contested decision did not involve a change in grade or affect Mr Ojha's position under the Staff Regulations, but was motivated by the fact that, without his professional capacities being called into question in any way, Mr Ojha had not shown the aptitudes essential for carrying out duties of a diplomatic nature. No disciplinary proceedings were brought against him on account of those facts.
- 26 Since the measure in question was taken in the interests of the service, and was neither a disciplinary measure nor a decision affecting Mr Ojha's position under the Staff Regulations, the Court held, at paragraph 86, that Mr Ojha could not argue that his defence rights had been infringed (see *Fiorani v Parliament*, cited above, paragraph 36; *Arning v Commission*, cited above, paragraph 17, and Joined Cases C-116/88 and C-149/88 *Hecq v Commission*, cited above, paragraph 14).



27 In rejecting Mr Ojha's allegation of infringement of Article 24 of the Staff Regulations, the Court also based its reasoning on the fact that the contested decision was in the nature of a measure taken in the interests of the service.

28 It held, at paragraph 89, that the obligation imposed on the Commission by Article 24 of the Staff Regulations, where serious accusations are made against an official's professional integrity, to take all necessary steps to establish whether the accusations are justified applied only where it decides to bring disciplinary proceedings against the official. Where, on the other hand, the Commission decides, as in this case, that there is no need to take the accusations made against the official any further, and that no consequence damaging to his professional integrity could result, such a decision amounted, according to the case-law of the Court, to a dismissal of the accusations against the official and the re-establishment of his professional reputation (see *N v Commission*, cited above, paragraphs 13 to 15).

29 As regards the alleged infringement of Article 26 of the Staff Regulations, the Court of First Instance pointed out, at paragraph 102, that the purpose of that provision is to guarantee compliance with an official's defence rights by ensuring that decisions taken by the appointing authority affecting his administrative status are not based on matters concerning his conduct which are not included in his personal file (see Case T-82/89 *Marcato v Commission* [1990] ECR II-735, paragraph 78; Case T-76/92 *Tsirimokos v Parliament* [1993] ECR II-1281, paragraphs 33 to 35; Case T-109/92 *Lacruz Bassols v Court of Justice* [1994] ECR-SC II-105, paragraph 68). The contested decision, being a measure taken in the interests of the service, and not a disciplinary measure or one affecting Mr Ojha's administrative status or career, the latter could not claim any infringement of Article 26 of the Staff Regulations.

30 At paragraph 108, therefore, the Court of First Instance rejected the application for annulment in its entirety. At paragraph 131, it also dismissed the claim for compensation, given that the alleged unlawfulness of the Commission's conduct was based on the same complaints as those raised in support of the action for annulment. Finally, at paragraph 137, the Court ordered the Commission to bear

one-half of Mr Ojha's costs as well as its own, since the Commission's conduct after the adoption of the contested decision had contributed to the action being brought.

### The appeal

31 Mr Ojha has lodged an appeal against the contested judgment, in which he requests the Court of Justice:

- to set aside the judgment of the Court of First Instance;
- to annul the contested decision;
- to refer the matter back to the Court of First Instance for a fresh ruling on his compensation claim in respect of the non-material damage which that decision caused him;
- to order the Commission to pay the costs of both sets of proceedings.

32 The Commission requests the Court to dismiss the appeal as unfounded and order Mr Ojha to pay the costs.

33 Mr Ojha's appeal against the contested judgment is based on a number of grounds which may be grouped together in six pleas:

- error of law and reasoning as regards the extent of the Commission's obligation to state reasons;

- error of law in that the Court of First Instance held that the mere existence of complaints against him was sufficient to justify his reassignment solely in the interests of the service, irrespective of whether those complaints were well founded;
- error of law in that the Court of First Instance did not take his personal interests into account and infringed Article 24 of the Staff Regulations;
- infringement of Article 26 of the Staff Regulations, in that the Court of First Instance allowed documents not included in an official's personal file to be used against him;
- undue restriction of the scope of defence rights;
- undue consideration of documents by the Court of First Instance.

### The first plea

34 Mr Ojha maintains that the Court of First Instance was wrong to hold that sufficient reasons were stated for the contested decision. Throughout the procedure the Commission had withheld relevant information which led to the decision to recall him. Thus, despite his repeated requests, the Commission had always refused to communicate to him the complaints on which it relied, and given him only an oral summary.

35 It is settled case-law that the reasons given for a decision are sufficient if it was adopted in circumstances known to the official concerned which enable him to understand the scope of the measure concerning him (see *Arning v Commission*, cited above, paragraph 13, and Joined Cases C-116/88 and C-149/88 *Hecq v Commission*, cited above, paragraph 26).

36 In this case, the contested judgment shows that:

- by memorandum of 8 May 1992, Mr Ojha was informed of the existence of four complaints referring to inappropriate conduct on his part in the performance of his duties at the Dacca delegation;
- by a series of fax messages and memoranda, dated 15 and 28 June and between 11 and 18 July 1992, he replied to the criticisms thus brought to his attention;
- on 13 July 1992, the Director General responsible for North-South relations in DG I informed Mr Ojha of his intention to request his recall to Brussels, stressing that this was neither a disciplinary measure nor the result of a negative assessment of his professional abilities of thought and analysis, but resulted from a finding that Mr Ojha's abilities could be better used working inside the Commission than in a delegation where his adaptability to a diplomatic environment had not been as hoped;
- Mr Ojha explained himself to the assistant to his Director General on 7 August 1992, to his Director on 7 September 1992 and to his Director General in Brussels on 9 September 1992;
- in his appeal against the decision before the Rotation Committee, he set out his arguments against the decision to recall him.

37 In those circumstances, the Court of First Instance was right to hold that Mr Ojha had been put in a position to assess the legality of the contested decision and determine whether it was appropriate to refer it for judicial review.

38 The first plea must therefore be dismissed.

## The second plea

39 Mr Ojha maintains that the Court of First Instance erred in law and reasoning by allowing the Commission to rely, as justification for the decision to recall him in the interests of the service, on the mere existence of the complaints against him, irrespective of their foundation. No rule of law could justify such a solution, which, moreover, infringed the principles of legal certainty and the proper administration of justice.

40 It should be recalled that the Court has held that the Community institutions have a broad discretion to organize their departments to suit the tasks entrusted to them and to assign the staff available to them in the light of such tasks, provided such assignment conforms with the principle of assignment to an equivalent post (see *Lux v Court of Auditors*, cited above, paragraph 17, and Case 19/87 *Hecq v Commission* [1988] ECR 1681, paragraph 6).

41 The Court has repeatedly held that, where they cause tensions prejudicial to the proper functioning of the service, internal relationship difficulties may justify the transfer of an official in the interests of the service. Such a measure may even be taken irrespective of the question of responsibility for the incidents in question (see Case 124/78 *List v Commission* [1979] ECR 2499, paragraph 13).

42 That case-law applies *a fortiori* in relation to the external relations of a department, especially where it is entrusted with diplomatic tasks. The essential element of diplomatic functions is, indeed, to prevent tensions from arising and to smooth out any which do. Such functions absolutely require the confidence of those involved. Once that is shaken, for whatever reason, the official in question is no longer able

to carry out the functions. So that the criticisms made against him do not extend to the whole of the department concerned, sound administration requires that the institution should distance him from the situation as soon as possible.

43 The Court of First Instance was therefore right, taking account of the circumstances it ascertained, to find that the Commission was justified in relying on the mere existence of a number of complaints about Mr Ojha's conduct, irrespective of their foundation, in order to recall him prematurely to the Brussels headquarters in the interests of the service.

44 The second plea must therefore be dismissed.

### The third plea

45 In the first part of the plea, Mr Ojha maintains that, by holding that the reassignment measure was adopted solely in the interests of the proper functioning of the service, the Court of First Instance infringed the principle that a reassignment decision involving an official moving against his wishes must be taken having regard to his personal interests.

46 In the second part of the plea, he argues that the Court of First Instance infringed Article 24 of the Staff Regulations, by holding that the administration's duty to assist officials contained in that provision existed only when the administration decided to bring disciplinary proceedings against the official concerned.

*The first part of the plea*

47 In the first place, the Court of First Instance duly recalled, at paragraph 83 of the contested judgment, that a decision to reassign an official which involves his moving to another place of employment against his wishes must be taken with the necessary diligence and with special care, in particular having regard to the personal interests of the official concerned.

48 Secondly, the Court's statement, at paragraph 85 of the contested judgment, that the disputed reassignment measure had been adopted solely in the interests of the proper functioning of the Commission delegation in Dacca, must be understood in the light of its context. Paragraphs 85 and 86 show that, with those words, the Court of First Instance merely found that the reassignment decision was genuinely adopted in the interests of the service and did not constitute a disguised disciplinary measure. Nor did it hold that the Commission had ignored Mr Ojha's interests.

49 Resting as it does on an erroneous interpretation of the contested judgment, the first part of the third plea must therefore be dismissed.

*The second part of the plea*

50 Mr Ojha claims that the Court of First Instance infringed Article 24 of the Staff Regulations by holding, at paragraph 89 of its judgment, that the administration's duty to assist officials contained in that provision exists only when the administration decides to bring disciplinary proceedings against the official concerned.

- 51 It should be pointed out in that respect that the institution's duty to provide assistance under Article 24 of the Staff Regulations is in no way dependent upon the bringing of disciplinary proceedings against the official concerned. Thus, in *Guillot v Commission*, cited above, the Commission's decision not to bring disciplinary proceedings against the official concerned did not prevent the Court from holding that it had infringed Article 24 of the Staff Regulations by not taking all the measures necessary to examine whether the accusations by the official's superior were well founded.
- 52 The interpretation of Article 24 of the Staff Regulations adopted by the Court of First Instance must therefore be regarded as erroneous. Nevertheless, it is not capable of resulting in the contested judgment being set aside, since the operative part of the judgment appears to be well founded on other legal grounds (see Case C-30/91 P *Lestelle v Commission* [1992] ECR I-3755, paragraph 28).
- 53 Suffice it to say in that respect that the plea of infringement of Article 24 of the Staff Regulations was, in the circumstances, misplaced. Since a decision to transfer or reassign an official may be taken on the basis of the mere existence of complaints, where the interests of the service so require, the institution cannot be impugned for adopting such a measure without first opening an enquiry in order to determine whether those complaints are well founded. In such a context, any non-performance of the duty to provide assistance can only lead to the annulment of the decision refusing the assistance requested (see *Guillot v Commission*, cited above, paragraph 14) and, in some cases, may constitute maladministration for which the Community may be liable.
- 54 The second part of the third plea must therefore be dismissed.



### The fourth, fifth and sixth pleas

- 55 By his fourth and fifth pleas, Mr Ojha claims essentially that the Court of First Instance infringed Article 26 of the Staff Regulations by holding that it was not improper for the decision to recall him to be based on documents which did not appear in his file and which had not been communicated to him, on the ground that the decision did not affect either his administrative status or his career.
- 56 By his sixth plea, Mr Ojha claims more specifically that the Court of First Instance committed an error of law and reasoning by holding, on the basis of a report of 21 May 1992 from the Head of Delegation, which was not disclosed to him and produced only in the proceedings before the Court of First Instance, that the contested decision was justifiable in the interests of the service, having regard to a tense situation in the Commission's Dacca delegation.
- 57 The purpose of Article 26 of the Staff Regulations is to ensure that decisions taken by the appointing authority concerning the administrative status and career of the official concerned are not based on matters concerning his conduct which are not included in his personal file and have not been communicated to him (see Case 88/71 *Brasseur v Parliament* [1972] ECR 499, paragraph 11; Case 233/85 *Bonino v Commission* [1987] ECR 739, paragraph 11; and Case 140/86 *Strack v Commission* [1987] ECR 3939, paragraph 7).
- 58 A decision to redeploy an official necessarily affects his administrative status, since it alters the place and the conditions for the performance of his duties and also their nature. It may also affect his career by influencing his future prospects, since some functions, whilst being equally classified with others, lead more readily to promotion by reason of the nature of the responsibilities exercised.

- 59 By holding, on the one hand, that the purpose of Article 26 of the Staff Regulations is to ensure compliance with the official's rights of defence by preventing decisions by the appointing authority which affect his administrative status and career from being based on facts concerning his conduct which are not mentioned in his personal file, and at the same time holding that the contested reassignment decision did not affect either Mr Ojha's administrative status or his career, the Court of First Instance therefore failed to uphold Article 26 of the Staff Regulations.
- 60 By consequently allowing documents not communicated to Mr Ojha and relating to his conduct in the service to be used against him, the Court of First Instance more particularly failed to uphold the second paragraph of Article 26 of the Staff Regulations.
- 61 Paragraphs 73, 79 and 85 of the contested judgment show that several documents annexed to the Commission's defence had not previously been communicated to Mr Ojha, and that the Court of First Instance nevertheless held that the Commission could take them into account in adopting the decision to redeploy him (see paragraphs 12 and 24 above).
- 62 The fourth, fifth and sixth pleas are therefore well founded. The contested judgment must be quashed in so far as the Court of First Instance held that Article 26 of the Staff Regulations did not apply and that no infringement of the second paragraph of Article 26 could be found.
- 63 Under the first paragraph of Article 54 of the Statute of the Court of Justice (EC), the Court of Justice is to quash the decision of the Court of First Instance if the appeal is well founded. It may then either give final judgment in the matter itself, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment. Since the state of the proceedings does so permit, final judgment must be given on the fourth, fifth and sixth pleas wrongly rejected by the Court of First Instance.

## The action for annulment

64 Mr Ojha contends that the Commission took the contested decision on the basis of four complaints mentioned in the letter sent to him by the Director of DG I, Mr Fossati, on 8 May 1992, although those complaints, which contained assessments of his conduct in the service, were neither brought to his knowledge nor placed on his file.

65 He also argues that a series of documents, annexed by the Commission to its defence, were never previously communicated to him, namely:

- (i) a complaint from the humanitarian organization Médecins sans Frontières of 22 April 1992, concerning an incident alleged to have taken place at a meeting held on 2 April 1992 with certain members of the Dacca delegation, including Mr Ojha;
- (ii) a highly detailed report, drawn up on 21 May 1992 by the head of the Commission's Dacca delegation for the Director General responsible for North-South relations in DG I, describing a tense situation within the delegation, for which Mr Ojha was held responsible;
- (iii) a complaint from the Ministry for Jute in the Bangladesh Government to the head of the Commission's delegation to Dacca, of 18 June 1992;
- (iv) a memorandum of 13 July 1992 from Mr Prat to Mr de Koster, Director of Personnel and Administration, requesting the opening of the proceedings for recalling Mr Ojha to Brussels;

- (v) a confidential memorandum of 16 July 1992 from Mr Bailly to Mr Prat on the need to recall Mr Ojha to Brussels on account of his conduct both inside and outside the delegation;
  
- (vi) a record dated 14 September 1992 of the meeting on 9 September 1992 between Mr Prat and Mr Ojha, concerning his reassignment to Brussels;
  
- (vii) various memoranda of 14, 15, 18, 19 and 28 October 1992 concerning the aggression allegedly shown by Mr Ojha on 14 October 1992 towards a member of the delegation, Mr Hossain;
  
- (viii) a memorandum of 22 October 1992 from Mr Bailly to Mr Prat and Mr de Koster concerning the measures to be envisaged in the event of Mr Ojha's stay being extended after 31 October 1992;
  
- (ix) a memorandum of 8 November 1992 from the head of the Dacca delegation to Mr de Koster and Mr Prat concerning an incident on 8 October 1992, in which Mr Ojha allegedly showed aggression towards the head of the delegation.

66 It should be pointed out first that, as held in paragraphs 57 to 59 of this judgment, Article 26 of the Staff Regulations was applicable in this case, since the contested decision affected Mr Ojha's administrative status and career.

67 Infringement of that provision entails the annulment of a measure only if it is established that the documents in question could have had a decisive influence on

the contested decision (see Case 21/70 *Rittweger v Commission* [1971] ECR 7, paragraph 35; Case 263/81 *List v Commission* [1983] ECR 103, paragraph 27, and *Bonino v Commission*, cited above, paragraph 13).

68 The mere fact that documents were not placed on an official's personal file is not enough to justify annulment of a measure adversely affecting him if they were in fact brought to his knowledge. It is apparent from the second paragraph of Article 26 of the Staff Regulations that the prohibition on using against an official documents concerning his ability, efficiency and conduct applies only to documents which were not previously communicated to him. It does not cover documents which, although brought to his knowledge, have not yet been placed on his personal file. In the event of the institution not placing such documents on the official's personal file, it would always be open to the official to make a request to that effect under Article 90(1) of the Staff Regulations, and, in the event of rejection, to lodge an administrative complaint. But, in any case, the institution cannot be prevented from taking a decision in the interests of the service on the basis of documents that were previously communicated to the person concerned, simply on the ground that they were not put on his personal file.

69 In view of the foregoing, the question to be examined is, first, which documents were communicated to the applicant and may therefore be used against him, and, secondly, whether they are sufficient to justify the contested decision.

70 As regards the four complaints referred to by Mr Ojha, the Court finds that they were oral, and were summarized in the memorandum of 8 May 1992, which was sent to him. Mr Ojha has also acknowledged that the complaint from the Bangladesh Ministry for Jute of 18 June 1992 was also communicated to him on 30 June

1992 by the head of the Dacca delegation. As for the memoranda listed in (vii) to (ix) above, suffice it to say that they were subsequent to the Commission's decision of 9 October 1992 and do not therefore have to be taken into consideration.

71 By contrast, the internal report of 21 May 1992 by the head of the Commission's Dacca delegation, the written complaint of 22 April 1992 from Médecins sans Frontières, the memorandum of 13 July 1992 in which Mr Prat requested that Mr Ojha be reassigned, and the memorandum of 14 September 1992 reporting on the meeting of 9 September 1992 were not sent to Mr Ojha until after the bringing of the legal action.

72 The Court finds, however, that the matters contained in the memorandum of 8 May 1992 and the complaint of 18 June 1992 are enough to justify the reassignment in the interests of the service. Those documents show that Mr Ojha had serious communication difficulties in the context of the external relations of the delegation. The tension was such that, concluding its letter of 18 June 1992, the Ministry for Jute announced to the head of the Commission delegation that Mr Ojha would not be invited to any further meetings and suggested that another person should be appointed in his place.

73 In those circumstances, it has not been shown that the documents which were not communicated could have had a decisive influence on the adoption of the contested decision.

74 In the light of the above considerations, Mr Ojha's action for annulment must be dismissed.

## Costs

- 75 The first paragraph of Article 122 of the Rules of Procedure of the Court of Justice provides that where the appeal is well founded and the Court itself gives final judgment in the case, the Court shall make a decision as to costs. Article 69(2) of those Rules provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Nevertheless, under the second paragraph of Article 122 of the Rules of Procedure, the Court may, in appeals brought by officials or other servants of an institution, order the parties to share the costs where equity so requires.
- 76 In this case, the Commission claims that Mr Ojha should be ordered to pay the costs.
- 77 Whilst Mr Ojha has not actually won his case, he has nevertheless rightly maintained that Article 26 of the Staff Regulations applied to the procedure concerning him.
- 78 Pursuant to the second paragraph of Article 122 of the Rules of Procedure of the Court of Justice, Mr Ojha should be ordered to pay two-thirds of the costs and the Commission one-third.

On those grounds,

THE COURT (First Chamber)

hereby rules:

1. The judgment of the Court of First Instance of 6 July 1995 in Case T-36/93 *Ojha v Commission* is set aside in so far as it holds that Article 26 of the Staff Regulations of Officials of the European Communities was not applicable and that no infringement of the second paragraph of Article 26 of the Staff Regulations could be found.
2. For the rest, the appeal is dismissed.
3. The action, in so far as it is based on an infringement of Article 26 of the Staff Regulations, is dismissed.
4. The costs are to be borne as to two-thirds by Mr Ojha and as to one-third by the Commission.

Edward

Jann

Wathelet

Delivered in open court in Luxembourg on 12 November 1996.

R. Grass

L. Sevón

Registrar

President of the First Chamber