

Case 206/89 R

S.

v

Commission of the European Communities

(Application for suspension of operation of a decision)

Order of the President of the Second Chamber of the Court, 31 July 1989 2841

Summary of the Order

Application for interim measures — Suspension of operation of a decision — Conditions for granting — Prima-facie case — Serious and irreparable damage — Applicant's interest in obtaining the suspension order applied for
(EEC Treaty, Art. 185; Rules of Procedure, Art. 83(2))

In order for an order suspending the operation of an act as provided for in Article 185 of the Treaty to be granted, Article 83(2) of the Rules of Procedure requires that the application for such a measure must state both the factual and legal grounds establishing a prima-facie case for the interim measure applied for and the

circumstances giving rise to urgency, which is to be assessed in the light of the risk of serious and irreparable damage. The applicant must also prove that he has an interest making his application, which is an essential and fundamental prerequisite for any legal proceedings.

ORDER OF THE PRESIDENT OF THE SECOND CHAMBER
OF THE COURT
31 July 1989*

In Case 206/89 R

* Language of the case: French.

S., represented by Thierry Demaseure, Michel Deruyver and Gérard Collin, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Yvette Hamilius, 11, boulevard Royal,

applicant,

supported by

Union syndicale Bruxelles, represented by Jean-Noël Louis, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Yvette Hamilius, 11 boulevard Royal,

intervener,

v

Commission of the European Communities, represented by Henri Étienne, Principal Legal Adviser, and Sean Van Raepenbusch, a member of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Department, Wagner Centre,

defendant,

APPLICATION for the suspension, as an interim measure, of the operation of the Commission's decision of 6 June 1989 refusing to recruit the applicant as a member of its temporary staff on the ground that he is not physically fit,

F. A. SCHOCKWEILER, JUDGE, ACTING AS
PRESIDENT OF THE SECOND CHAMBER,

acting under Article 9(4), the second paragraph of Article 11 and Article 96(1) of the Rules of Procedure,

after hearing the views of Mr Advocate General Van Gerven,

makes the following

Order

- 1 By application lodged at the Court Registry on 4 July 1989, Mr S. brought an action under Article 91 of the Staff Regulations of Officials of the European Communities (hereinafter referred to as 'the Staff Regulations') for the annulment of the Commission's decision of 6 June 1989 refusing to recruit him as a member of its temporary staff on the grounds that he is not physically fit.
- 2 By another application lodged at the Court Registry on the same day, the applicant sought the suspension, as an interim measure, pursuant to Article 185 of the EEC Treaty and Article 83 of the Rules of Procedure, of the operation of the Commission's decision of 6 June 1989.
- 3 By order of the President of the Second Chamber of 21 July 1989, the Union syndicale Bruxelles was granted leave to intervene in support of the applicant's conclusions.
- 4 The Commission submitted its written observations on 17 July 1989. The intervener, the Union syndicale Bruxelles, submitted its written observations on 28 July 1989. The parties presented oral argument at the hearing on 31 July 1989, which the President of the Second Chamber, at the request of the applicant, decided should be held in camera pursuant to Article 56(2) of the Rules of Procedure and Article 28 of the EEC Statute of the Court of Justice.
- 5 With a view to being engaged as a member of the Commission's temporary staff, and in accordance with Articles 12(2)(d) and 13 of the Conditions of Employment of Other Servants of the European Communities, the applicant underwent a medical examination to determine whether he was physically fit to perform his future duties. During that examination, he refused to undergo the HIV-antibody

(AIDS) screening test proposed to him. After a clinical examination, supplemented by biological tests, the Medical Service concluded that the applicant's immunity system was severely impaired. On the basis of that conclusion, the Commission's Director-General for Personnel and Administration informed the applicant, by letter of 6 June 1989, that the Commission considered that he was not physically fit and that he could not, therefore, be engaged.

- 6 The applicant brought an action for the annulment of that decision, claiming that the Commission's medical service had carried out a disguised AIDS screening test.
- 7 Article 185 of the EEC Treaty provides that actions brought before the Court are not to have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested act be suspended.
- 8 In order for an interim measure such as that requested to be granted, Article 83(2) of the Rules of Procedure requires that the application for such a measure should state both the factual and legal grounds establishing a prima-facie case for the interim measure applied for and the circumstances giving rise to urgency. The applicant must also prove that he has an interest in making his application, which is an essential and fundamental prerequisite for any legal proceedings.
- 9 As regards the grounds establishing a prima-facie case for suspension, the applicant, supported by the Union syndicale Bruxelles, claims that the decision is unlawful because the Medical Service of the Commission carried out disguised screening for AIDS. In support of his application, the applicant submits that the decision should be annulled on the grounds of infringement of Article 25 of the Staff Regulations, infringement of the rights of the defence, breach of the general principles of law set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Conclusions of the Council and the Ministers for Health of the Member States of 31 May and 15 December 1988, breach of the principles of legitimate expectations and bona fides and misuse of procedure.

- 10 The Commission maintains that no AIDS screening test was carried out, even in disguised form, during the medical examination and that there is therefore no question of invoking the disease as the cause of the unfitness in question. The medical examinations carried out revealed a serious immuno-deficiency which, whatever its origins, constitutes a justification for declaring the applicant physically unfit for work.
- 11 With regard to the urgency of the interim measure applied for, the applicant, supported by the Union syndicale Bruxelles, maintains that the contested decision causes him serious and irreparable damage.
- 12 In the Commission's view, any damage suffered is not irreparable since, if the decision rejecting the applicant's candidature is annulled, the Commission will be able to offer him, at the earliest opportunity, a new post as typist on the temporary staff once a new medical examination, free from any irregularities which the Court might find, has been carried out.
- 13 Questioned by the President about his interest in making his application, the applicant stated that an order suspending the operation of the decision would place him in the position he was in before the decision was taken and would enable him to apply for another vacant post with the European Communities and undergo a new medical examination conducted in the proper form. Failure to suspend the operation of the decision finding him physically unfit would also involve a risk of indiscretion on the part of the Commission.
- 14 In that regard, it must be pointed out that the contested decision is a negative administrative decision against which an application to suspend its operation is inconceivable, since the granting thereof cannot have the effect of changing the position of the applicant, who will not be able to be engaged as long as the Commission has not taken a positive decision.
- 15 In so far as the decision consists of a refusal to recruit the applicant as a member of the temporary staff to the desired post of typist owing to his physical unfitness, suspension of the operation of that refusal would not give the applicant access to that post.

- 16 Moreover, if the contested decision were to be regarded, independently of the recruitment procedure in question, as a general statement concerning the applicant's state of health, operation of that decision could consist only in its constituting grounds for a refusal to engage him for any other post with the European Communities. Interim suspension of the operation of the decision would neither eliminate that ground for refusal to engage the applicant nor result in his being deemed to be physically fit.
- 17 With regard to the applicant's argument that a failure to order the suspension of the operation of the contested decision would involve a risk of indiscretion, it must be noted that such a risk, assuming that its existence can be established, is inherent in the existence of the medical findings on which the decision refusing to recruit the applicant is based and that it cannot be dispelled by suspending the operation of the contested decision as long as that decision is not annulled.
- 18 Moreover prima-facie it does not appear that the grounds for annulment submitted by the applicant necessarily undermine the conclusions of the medical examination concerning the applicant's physical unfitness, whatever its primary causes may be. Furthermore, the applicant has been unable to establish in what way the damage arising from the maintenance in force of the contested decision — even assuming it to be particularly serious — would be irreparable if the main action were successful. The Commission has rightly observed that if the applicant were eventually considered to fulfil the conditions regarding the required degree of physical fitness there would be nothing to prevent him from being engaged as a member of the temporary staff in another post falling vacant.
- 19 In those circumstances, the application for an order suspending the operation of the contested decision must be dismissed as inadmissible for lack of interest in making the application.

On those grounds,

F. A. SCHOCKWEILER, JUDGE, ACTING AS
PRESIDENT OF THE SECOND CHAMBER,

acting under Article 9(4), the second paragraph of Article 11 and Article 96(1) of
the Rules of Procedure,

hereby orders as follows:

- (1) The application for suspension of the operation of the contested decision is dismissed as inadmissible.**
- (2) The costs are reserved.**

Luxembourg, 31 July 1989.

J.-G. Giraud
Registrar

F. A. Schockweiler
Judge, acting as President of the Second Chamber