Reports of Cases

JUDGMENT OF THE EUROPEAN UNION CIVIL SERVICE TRIBUNAL (First Chamber)

12 May 2011 *

(Civil service — Officials — Action for damages — Rule of correspondence between request, complaint and action regarding compensation — Inter partes nature of proceedings — Use in judicial proceedings of a confidential document classified as 'EU restricted' — Non-contractual liability of the institutions — Liability for fault — Causal link — Plurality of causes of damage — Third party fault — No-fault liability — Duty to provide assistance — Obligation on an institution to ensure the protection of its staff — Murder of an official and his spouse by a third party — Loss of a chance of survival)

In Case F-50/09,

ACTION under Articles 236 EC and 152 EA,

Livio Missir Mamachi di Lusignano, residing in Kerkhove-Avelgem (Belgium), acting on his own behalf and as the legal representative of the heirs of Alessandro Missir Mamachi di Lusignano, his son, former official of the European Commission,

represented by F. Di Gianni, R. Antonini and N. Sibona, lawyers,

applicant,

v

European Commission, represented by L. Pignataro, B. Eggers and D. Martin, acting as Agents,

defendant,

THE CIVIL SERVICE TRIBUNAL (First Chamber),

composed of S. Gervasoni (Rapporteur), President, H. Kreppel and M.I. Rofes i Pujol, Judges,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearings on 15 December 2009 and 8 December 2010,

gives the following

* Language of the case: Italian.

Judgment

1 By application lodged by fax at the Registry of the Tribunal on 12 May 2009 (the original was lodged on 18 May 2009), Mr Missir Mamachi di Lusignano applied first for annulment of the decision of 3 February 2009 in which the Commission of the European Communities rejected his application for compensation for material and non-material damage resulting from the murder of his son and daughter-in-law on 18 September 2006 in Rabat (Morocco) and secondly for an order that the Commission pay to him and to his son's heirs and successors various sums by way of reparation for material and non-material damage as a result of these murders.

Legal context

2 Under Article 1e(2) of the Staff Regulations of Officials of the European Communities in the version applicable to these proceedings ('the Staff Regulations'):

'Officials in active employment shall be accorded working conditions complying with appropriate health and safety standards at least equivalent to the minimum requirements applicable under measures adopted in these areas pursuant to the Treaties.'

3 Article 24 of the Staff Regulations 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.

They shall jointly and severally compensate the official for damage suffered in such cases, in so far as the official did not either intentionally or through grave negligence cause the damage and has been unable to obtain compensation from the person who did cause it.'

4 Under the first paragraph of Article 70 of the Staff Regulations:

'In the event of an official's death, the surviving spouse or dependent children shall receive the deceased's full remuneration until the end of the third month after the month in which the death occurred.'

5 Article 73(1) and (2) of the Staff Regulations provide as follows:

'1. An official is insured, from the date of his entering the service, against the risk of occupational disease and of accident subject to rules drawn up by common agreement of the institutions of the Communities after consulting the Staff Regulations Committee. He shall contribute to the cost of insuring against non-occupational risks up to 0.1% of his basic salary.

Such rules shall specify which risks are not covered.

2. The benefits payable shall be as follows:

(a) In the event of death:

Payment to the persons listed below of a lump sum equal to five times the deceased's annual basic salary calculated by reference to the monthly amounts of salary received during the 12 months before the accident:

— to the deceased official's spouse and children in accordance with the law of succession governing the official's estate; the amount payable to the spouse shall not, however, be less than 25% of the lump sum;

— where there are no persons of the category above, to the other descendants in accordance with the law of succession governing the official's estate;

— where there are no persons of either of the two categories above, to the relatives in the ascending line in accordance with the law of succession governing the official's estate;

— where there are no persons of any of the three categories above, to the institution.

...

As provided for in these rules an annuity may be substituted for the payments provided for above.

The benefits listed above may be paid in addition to the benefits provided for in Chapter 3.'

6 The third indent of Article 7(2) of the common rules on the insurance of officials of the European Union against the risk of accident and of occupational disease (the 'Common Rules'), which were adopted for the purpose of applying Article 73 of the Staff Regulations, provides that 'the consequences of assaults on or attempts on the life of the insured party, even in the course of strikes or disturbances unless it is proved that the insured party participated of his/her own free will in the violent action in which he/she was injured, other than in self-defence', shall be regarded as accidents within the meaning of the Common Rules.

7 Under Article 76 of the Staff Regulations, gifts, loans or advances may be made to officials, former officials or where an official has died, to those entitled under him who are in a particularly difficult position as a result of serious or protracted illness or by reason of a disability or family circumstances.

8 In accordance with the first paragraph of Article 80 of the Staff Regulations:

'Where an official ... dies leaving no spouse entitled to a survivor's pension, the children dependent on the deceased within the meaning of Article 2 of Annex VII at the time of his death shall be entitled to orphans' pension in accordance with Article 21 of Annex VIII.'

9 Article 21 of Annex VIII to the Staff Regulations provides that the orphan's pension shall be equal to eight tenths of the survivor's pension to which the official's surviving spouse would have been entitled and that it shall be increased, for each dependent child after the first, by an amount equal to twice the dependent child allowance.

10 Annex X to the Staff Regulations lays down special and exceptional provisions applicable to officials serving in a third country. Article 5 of that annex provides that:

'1. If the institution provides the official with accommodation which corresponds to the level of his duties and to the composition of his dependent family, he shall reside in it.

2. Detailed rules for the application of paragraph 1 shall be laid down by the Appointing Authority, after consultation of the Staff Committee. The Appointing Authority shall also decide on the entitlement to furniture and other fittings for accommodation, in line with the conditions applying at each place of employment.'

11 Under Article 25 of Annex X to the Staff Regulations, the spouse, children and other persons dependent on the official shall be insured against accidents occurring outside the Union in the countries appearing on a list adopted for this purpose by the appointing authority. Half the premium shall be paid by the official and half by the institution.

12 On 26 April 2006 the Commission adopted a decision establishing a harmonised policy for health and safety at work for all Commission staff (the 'decision of 26 April 2006').

13 As can be seen from the statement of the objectives of that document, which was submitted to the College of Commissioners for approval at its meeting on 26 April 2006, the purpose of the decision — which was adopted to comply with Article 1e of the Staff Regulations, in particular — is to provide and maintain health and safety at work for all Commission staff in all its services, that is not only for the Commission's headquarters but throughout all its sites, both within and outside the Union.

14 Pursuant to Article 1 of the decision of 26 April 2006, the decision applies 'in all Commission workplaces', which are defined, under Article 2(a) of the decision, as the places 'intended to house workstations on the premises of the Commission and any other place within the area of these premises to which the staff has access in the course of their work'. It contains general provisions based on Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1).

15 In the course of the proceedings, after having carried out preparatory enquiries (see paragraphs 46 to 48 of this judgment), the Tribunal was able to ascertain that for 2006 the Commission had adopted security measures applicable to the accommodation provided for the staff of the Commission's delegations in third countries. These measures are set out in a document classified as 'EU restricted'. The legal scope and the conditions for the use of that document in judicial proceedings will be the subject of further examination.

Facts of the case

16 Alessandro Missir Mamachi di Lusignano, who entered the service of the Commission as an official on 1 November 1993, married Ariane Lagasse de Locht in 1995. The couple had four children, born between 1996 and 2002.

17 Promoted to grade A 7 in 1996 and to grade A 6 in 2002, Alessandro Missir Mamachi di Lusignano took part, in particular, from 2001 to 2005 in the accession negotiations between the European Union and the Republic of Turkey as a member of the 'Turkey' unit of the Directorate-General (DG) for Enlargement.

18 From 28 August 2006 onwards Alessandro Missir Mamachi di Lusignano was posted to the Commission's delegation in Rabat as political and diplomatic counsellor. Before his transfer he had indicated that his wife and children would accompany him in this posting. He was asked to attend information sessions arranged for officials posted to delegations in third countries dealing, in particular, with the problems of security in the various postings, but he did not attend. The parties did not provide the Tribunal with sufficient information for it to determine the reasons for that absence, in particular whether it was due to professional commitments.

19 The Missir Mamachi di Lusignano family stayed in a hotel from 28 to 31 August 2006 and from 1 September onwards temporarily occupied a furnished house rented by the Commission delegation at No G 2, Rue Lailak, Sector 16, in the Hay Riad quarter of Rabat. The lease between the owner of the house and the Commission had been signed on 8 August 2006 for an initial period of three months with effect from 15 August 2006, before the arrival of the Missir Mamachi di Lusignano family in Rabat.

20 During the night of 17 to 18 September 2006, towards half past midnight, a burglar entered the house by squeezing between the bars of a ground-floor window in one of the side walls. Suddenly awoken by the presence of the burglar in the parents' bedroom on the first floor, Alessandro Missir Mamachi di Lusignano surprised the intruder, who was searching the room. The criminal then stabbed the official several times and left him on the floor. The wife of Mr Missir Mamachi di Lusignano, who had also awoken, was stabbed in the back and appears to have died very quickly from her injuries. After binding and gagging Mr Missir Mamachi di Lusignano, the intruder took a shower and then forced the seriously injured official to reveal the personal identification number of his credit card. The official finally died from his wounds. The murderer spared the children. He left the premises at about four in the morning at the wheel of the family's car, taking with him various objects, including a television set.

21 On 19 September 2006 the Moroccan police arrested Karim Zimach. During his preliminary interrogation he confessed to the double murder of Mr and Mrs Missir Mamachi di Lusignano during the night of 17 to 18 September. Karim Zimach was found guilty of these crimes and was sentenced to death in a judgment of 20 February 2007 by the Criminal Chamber of First Instance of the Court of Appeal, Rabat, which was confirmed on appeal by a judgment of 18 June 2007 by the Criminal Appeal Chamber of the same court. It should be noted that the Moroccan authorities have not carried out a death sentence since 1993, the year of the last execution of a person sentenced to death in Morocco.

22 The Commission brought independent action for damages in the Moroccan courts. In its abovementioned judgment, the Criminal Chamber of First Instance of the Court of Appeal, Rabat, declared the Commission's civil action to be admissible and ordered Karim Zimach to pay a symbolic dirham to the European Union.

23 As a result of the tragic loss of their parents, the four Missir Mamachi di Lusignano children were placed in the care of their grandparents, including the applicant, by an order of 24 November 2006 of the Magistrates' Court, Kraainem (Belgium).

24 From 1 October to 31 December 2006, the Commission made the payment due under the first paragraph of Article 70 of the Staff Regulations.

25 The Commission also paid to the children and heirs of the deceased official the sum of EUR 414 308.90 by way of death grant under Article 73 of the Staff Regulations and the sum of EUR 76 628.40 on account of the death of the spouse under Article 25 of Annex X to the Staff Regulations.

26 In addition, the Commission granted to the four children, as from 1 January 2007, entitlement to the orphans' pension under Article 80 of the Staff Regulations and the education allowance referred to in Annex VII to the Staff Regulations.

27 Moreover, the Commission granted the deceased official a posthumous promotion to grade A*11, first step, with retroactive effect from 1 September 2005. This promotion was taken into account in calculating the orphans' pension and the death grant.

28 Furthermore, by decision of 14 May 2007 taken on the basis of Article 76 of the Staff Regulations, the Commission granted each of the children an extraordinary monthly benefit on social grounds equal to a dependent child allowance, payable until they reached the age of 19 years.

29 On 18 September 2007, the anniversary of the double murder of Mr and Mrs Missir Mamachi di Lusignano, the Commission held a ceremony on its premises at the initiative of the Enlargement DG to commemorate the deceased. In the course of the ceremony a meeting room was dedicated to the memory of the deceased official and a plaque bearing his name was unveiled.

30 By letter of 25 February 2008 addressed to the President of the Commission, the applicant, after thanking the Commission for the ceremony of 18 September 2007, first expressed his disagreement with the amounts paid to his four grandchildren and his dissatisfaction with the Commission's refusal to authorise the permanent engagement of a governess or family assistant, which in his opinion was essential in view of the respective ages of the children and their grandparents. The applicant then asked whether the Commission had yet begun negotiations with Morocco for the latter to pay adequate compensation beyond the single dirham granted symbolically to the European Union by the Moroccan court. Lastly, the applicant drew the attention of the President of the Commission to the answer provided on 6 August 2007 by Mrs Ferrero-Waldner, the Commissioner for External Relations, to a written question from Mr Coûteaux, Member of the European Parliament (written question of 25 June 2007, P-3367/07, OJ 2008 C 45, p. 179), on the 'murder of an official of the Directorate-General for External Relations in Morocco' (the 'written answer of 6 August 2007'). According to the applicant, the adequate security measures usually taken by the Commission and recalled in the answer from the Commissioner for External Relations had not been taken before the double murder. In his view, the Commission had thus been guilty of gross negligence, justifying the payment to the minor children of compensation equivalent to at least the total salary that the murdered official would have received up to the presumed date of his retirement in 2032, that is to say 26 years' salary.

31 Mr Kallas, Vice-President of the Commission responsible for personnel, replied to the applicant by letter of 11 June 2008. In that letter Mr Kallas stated that no negligence or fault could be attributed to the Moroccan authorities and that the conditions for opening diplomatic negotiations with Morocco with a view to obtaining compensation were not fulfilled. He indicated that the staff protection measures taken by the Commission complied with the security conditions relating to the Rabat delegation and that the request for compensation submitted in that respect in the applicant's letter of 25 February 2008 could not be granted. He stated that the payments already made by the Commission (EUR 490 937.30 in death grant and accident insurance, EUR 4 376.82 per month in orphans' pensions and education allowances, EUR 2 287.19 per month — including tax rebate — in dependent child allowances and EUR 1 332.76 per month in extraordinary assistance or additional dependent child allowance for each child) had been calculated correctly.

32 However, in that letter of 11 June 2008 the Commissioner informed the applicant that, in view of the particularly tragic circumstances of this case, the Commission had decided to take an additional measure and exceptionally to increase the amounts paid under Article 76 of the Staff Regulations. Accordingly, by decision of 4 July 2008 each of the grandchildren was granted on this basis, as from 1 August 2008 and until reaching the age of 19 years, a monthly amount equal to two dependent child allowances. In the light of that decision, the monthly payment from the Commission to the children of the deceased official amounted to more than EUR 9 800 (EUR 9 862 in February 2009).

33 By letter of 10 September 2008 the applicant submitted a complaint against the letter of 11 June 2008 on the basis of Article 90(2) of the Staff Regulations. In that complaint he maintained that the Commission bore liability for wrongful acts on account of its failure to meet its obligation to protect its staff. He also claimed that the Commission bore liability even without fault owing to the harm caused

by a lawful act. Lastly, in the alternative, he relied on Article 24 of the Staff Regulations, under which the Communities are required jointly and severally to compensate for damage caused by a third party to one of their agents.

34 By decision of 3 February 2009 the appointing authority rejected the complaint.

Forms of order sought by the parties and procedure

35 The applicant claims that the Tribunal should:

— annul the appointing authority's decision of 3 February 2009;

— order the Commission to pay to the heirs and successors of Alessandro Missir Mamachi di Lusignano:

  — the sum of EUR 2 552 837.96, corresponding to the murdered official's salary spanning a period of 26 years, to be reassessed in order to take account of that person's career prospects, by way of compensation for financial loss;

  — the sum of EUR 250 000 by way of compensation for the non-material damage suffered by the victim before his death;

  — the sum of EUR 1 276 512 by way of compensation for the non-material damage suffered by the children of the victim, who witnessed his tragic murder;

— order the Commission to pay the sum of EUR 212 752 by way of compensation for the non-material damage suffered by the applicant as the father of the victim;

— order the Commission to pay 'compensatory interest and default interest accrued';

— order the Commission to pay the costs.

36 The Commission contends that the Tribunal should:

— dismiss the action;

— order the applicant to pay the costs.

37 At the hearing on 15 December 2009 the applicant produced two tables to explain the scope of his claims for compensation. The Commission did not object to the placing of these documents in the case-file. The first table, which summarises the applicant's claims for compensation, contains a reassessment of the amount of the alleged material damage. This amount, estimated provisionally in the application at EUR 2 552 837.96, rises to a total of EUR 3 975 329 in view of figures produced by the Commission in its statement of defence and taking account of grade promotions that the applicant's son might have received up to the end of his career. By means of the second table the applicant maintains that, of the amounts paid or to be paid in future by the Commission to the heirs and successors of the deceased official, only the amount of EUR 414 308 granted under Article 73 of the Staff Regulations can be considered to have been paid to compensate for the damage suffered by the official's heirs; according to the applicant, the other sums mentioned by the Commission constitute social security benefits.

38 In the preparatory report for the hearing the Tribunal indicated to the parties that, in order to assess whether the Commission had fulfilled its obligation to ensure the safety of the applicant's son and his family, it was necessary to have regard to Article 1e(2) of the Staff Regulations, which refers, as regards 'appropriate safety standards', to the minimum requirements applicable under measures adopted in these areas pursuant to the Treaties, which include those contained in Directive 89/391. The Tribunal asked the parties to state in their pleadings the impact which, in their view, these provisions had on the assessment of the conditions for the administration to incur non-contractual liability in the present dispute.

39 In the preparatory report for the hearing the Tribunal also asked the Commission, among other questions, to specify the level of risk which its departments perceived in 2006 for officials posted to Morocco and whether the level of risk set for that country gave rise to special security measures under the internal directives of the External Relations DG or other documents. The applicant maintained in his written submissions (the letter of 25 February 2008, the complaint of 10 September 2008 and the application), with reference to the written answer of 6 August 2007 from Mrs Ferrero-Waldner to a question from a Member of the Parliament, that security and protection measures were established and applicable to the accommodation of staff of the Commission's delegations in third countries and that those measures had not been complied with in the present case. Moreover, it had been indicated in a report annexed to the application, drawn up on 4 October 2006 by two officials of the departments responsible for security in the External Relations DG and the Personnel and Administration DG who had been sent to Rabat shortly after the murder of the applicant's son and daughter-in-law, that 'the security conditions for the Rabat delegation and staff housing have been defined as category [III] for several months past. This therefore requires that the accommodation of expatriate staff be kept under surveillance'.

40 In its oral argument at the hearing on 15 December 2009 the Commission did not reply directly to the two questions put to it, mentioned in the first sentence of the preceding paragraph. It stated that the written answer of 6 August 2007 had been given almost one year after the double murder in order to clarify the type of measures in place in the delegations in 2007 and was therefore not relevant to the present case.

41 In reply to a question from the Tribunal about the existence of internal rules on the security measures applicable to delegation officials posted to third countries in 2006, the Commission replied that no binding text existed in this field and that the institution's duty to ensure the protection of its staff posted to these delegations stemmed solely from the principle of sound administration, as the institution enjoyed wide discretion in this field. The Commission considered that Directive 89/391 related only to the place of work of employees and that it could therefore not be relevant to the present case, which related to the security of the official's private accommodation. The Commission stated that the purpose of the decision of 26 April 2006 was to 'transpose' that directive in its departments. Moreover, in reply to other questions the Commission insisted that the obligation to adopt certain protective measures did not concern the private accommodation of delegation officials.

42 Subsequently, it emerged at the hearing, first, that the third countries in which delegations are established are classified by the departments of the Commission on the basis of a set of criteria according to the level of risk that the countries present (low, medium or high) and, secondly, that Morocco had been classified at the level of risk considered 'high' in 2006. The Commission also admitted that special security measures appropriate to the level of risk judged to be 'high' should have been taken and implemented in the delegations concerned.

43 Part of the hearing on 15 December 2009 was held in camera, as requested by the Commission, without the applicant expressing any objection. During that part of the hearing the Commission provided additional explanations to the Tribunal and to the applicant but without mentioning the texts or documents, of whatever legal status or form (decisions, internal directives, recommendations, and so forth) relating to the security measures referred to in the preceding paragraph. The

Commission also mentioned inspections and security checks that had allegedly been carried out in the first half of 2006 in Rabat and which had covered only the premises of the delegation, to the exclusion of the 18 'permanent' residences made available to the delegation officials.

44 The Tribunal considered that it had not been sufficiently informed by the replies provided by the Commission at the hearing and, accordingly, asked the latter, by order of 22 January 2010, to produce the texts or documents, whatever their legal status or form, setting out the security measures recommended/provided for/prescribed in 2006 for the Rabat delegation, corresponding to the level of risk then assessed for Morocco, any reports on inspections and checks carried out in Rabat during the first half of 2006 or documents reporting the content and results of those inspections and checks, the lease for the temporary accommodation between the Commission and the owner of the property and the decision of 26 April 2006.

45 By letter of 12 February 2010 the Commission produced the documents requested and stated that one of them — a note dated 6 June 2006 from the head of the delegation in Morocco to the director of the External Service Directorate responsible for questions of security within the External Relations DG appended to which was the mission report of the official for regional security — should be accessible only to the applicant's lawyers and only in the offices of the Registry of the Tribunal and without the possibility of making a copy. In the same letter the Commission mentioned the existence of two other documents which it felt unable to produce, as they were classified as 'EU restricted', and which it considered in any case to be irrelevant for the purposes of the dispute but which it was prepared to communicate only to the Tribunal on condition that security measures strictly equivalent to the security measures laid down in Commission Decision 2001/844/EC, ECSC, Euratom of 29 November 2001 amending its internal Rules of Procedure (OJ 2001 L 317, p. 1) were respected.

46 The Tribunal considered that one of these two documents classified as 'EU restricted', described by the Commission as an 'extract of the document "standards and criteria" of the [Personnel and Administration DG — Directorate "Security"] relating to the security measures for category III for permanent accommodation' was likely to be of particular importance for resolution of the case. Consequently, by an order of 17 March 2010 the Tribunal asked the Commission to produce this document. In that order the Tribunal specified the security measures to which access to this document would be subject, indicating in particular that only the Registrar and the members of the bench hearing the case would be authorised to consult the document and only in the offices of the Registry where it would be kept and that neither the applicant nor his lawyer would be authorised to consult this document.

47 In its order of 17 March 2010 the Tribunal stated that if it intended to base the resolution of the dispute on this document it would be necessary to consider the means of applying to the present case the principle of the *inter partes* nature of the proceedings and the provisions of Article 44(1) of the Rules of Procedure, as that principle and those provisions could mean that the applicant should have access to at least part of the said document. In that regard, the Tribunal noted that the fact that the document in question was classified as 'EU restricted', the lowest level of protection under Decision 2001/844, was not of itself grounds for an absolute refusal to communicate this document to the applicant. The Tribunal stated, first, that documents classified as 'EU restricted' are not among the documents deemed to be 'sensitive documents' under Article 9 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) and deduced from that fact that such a document is liable to be subject to the normal rules of law established by that regulation, providing for access to the documents of the institutions subject to the exceptions listed in Article 4 of the regulation. Secondly, the Tribunal noted that Decision 2001/844 provides that a classified document may be downgraded or declassified by the originating authority.

48 By letter dated 30 March 2010, addressed for the personal attention of the Registrar of the Tribunal in a sealed envelope with acknowledgement of receipt, the Commission released a five-page document consisting of extracts from a document entitled 'Document on Standards and Criteria', 2006 edition ('S & C, 2006 edition/DS3/A.W', hereinafter the '2006 document on security standards and criteria') on the security measures applicable in particular to accommodation provided for delegation staff ('staff houses'). In that letter the Commission emphasised that it produced this document 'solely to enable the Tribunal to verify its confidential nature under Article 44(2) of the Rules of Procedure'. It repeated that in its view the 2006 document on security standards and criteria was not relevant to resolution of the dispute, in particular as it related only to permanent accommodation provided for the staff of delegations in third countries, and not to temporary accommodation. The Commission also maintained that in any case it was out of the question that this document be declassified or communicated to the applicant, even in part, as such disclosure could jeopardise the safety of the officials of delegations in third countries. It also stated that Regulation No 1049/2001 was not applicable in the present proceedings and that, in any event, a refusal to release this document to the applicant was justified by considerations of public security, in accordance with Article 4(1) of that regulation. The Commission nevertheless indicated that if the Tribunal considered this document to be relevant to resolution of the dispute the Tribunal would have to examine together with the Commission the measures necessary to reconcile the principle that both parties must be heard with protection of the confidentiality of the information in the said document, 'for example, [by] the production of a summary of the document (see the order of the Court of 4 February 1981 in Case 155/79 R *AM & S Europe* v *Commission*) that only the applicant's lawyer would be authorised to consult in accordance with the terms laid down in Case F-2/07 [*Matos Martins* v *Commission*, which gave rise to a judgment of the Tribunal of 15 April 2010]'.

49 The Commission's letter of 30 March 2010 was received by the Registrar of the Tribunal on 31 March 2010. The members of the bench consulted the extracts from the 2006 document on security standards and criteria in the offices of the Registry.

50 The applicant's lawyer consulted the document mentioned in the first sentence of paragraph 45 above at the Registry of the Tribunal. The applicant's lawyer did not have access to the extracts from the 2006 document on security standards and criteria.

51 By letter of 12 April 2010 the applicant submitted his observations on the documents produced by the Commission in response to the order of 22 January 2010, in particular the document which his lawyer had consulted at the Registry of the Tribunal. In that letter the applicant pointed out that the documents in question showed that the Commission had a duty to ensure security, including that of the temporary accommodation of staff posted to Morocco, and that the measures which the Commission was required to take included, in particular, permanent professional protection by a specialised company. He alleged that protection of this kind had not been provided in the present case, whereas it could have been arranged in only a few days. Such a security measure would certainly have deterred the murderer from committing his crimes and would, at the very least, have made emergency assistance possible, which might have saved the life of the applicant's son.

52 By order of 20 May 2010 the Tribunal ordered the Commission to produce another extract of the 2006 document on security standards and criteria relating to the 'installation requirements for grids' applicable to the accommodation of staff at the delegations in third countries in category II or category III (corresponding respectively to medium and high levels of risk). In that order the Tribunal stated that the production of this document and access to it would be subject to the same conditions as those laid down in the order of the Tribunal of 17 March 2010.

53 The Commission submitted its observations on the applicant's letter of 12 April 2010 in a letter of 2 June 2010. In its observations (paragraphs 57 to 60 of which were divulged only to the applicant's lawyer in the offices of the Registry), the Commission emphasised that it has wide discretion with regard to the private accommodation of officials posted to the delegation and only a general duty of

care. It could incur non-contractual liability only in the event of a sufficiently serious breach of a rule of law intended to confer rights on individuals. It alleged that the decision of 26 April 2006 applied only to places of work and therefore did not require any security measures to be taken at the accommodation of staff posted to the delegations, whether such accommodation was permanent or temporary. It maintained that the only document referring to security measures for permanent accommodation was the vade mecum of the External Relations DG annexed to its letter of 12 February 2010. According to the Commission, that vade mecum contained only a general recommendation to heads of delegation to protect official residences and/or accommodation, while leaving the administration wide discretion as to the means of applying it. Hence, since the accommodation of the applicant's son was only temporary, no special security measure was prescribed under a rule of law. Moreover, according to the Commission, the applicant's son had agreed to occupy this accommodation with his family. In any event, in the view of the Commission, this temporary housing was safe and had security features that were adequate in view of the low level of common crime ascertained in Morocco, in particular a protection service comparable to that provided for permanent accommodation in the 2006 document on security standards and criteria. Even supposing that the Commission had committed an error of omission, the Commission maintained that the applicant had not shown that the damage was caused directly by the inaction of which he complains.

54 By letter of 8 June 2010 the Commission produced the extract of the 2006 document on security standards and criteria relating to the installation requirements for grids. In that letter the Commission pointed out that, contrary to what the Tribunal had stated in its order of 20 May 2010, the installation requirements for grids referred to in Section 54.3 of the 2006 document on security standards and criteria applied only to the permanent accommodation of staff of delegations in category III and not to those in category II.

55 The members of the bench consulted the extract of the 2006 document on security standards and criteria relating to the installation requirements for grids in the offices of the Registry.

56 By letter of 2 July 2010 the Tribunal informed the parties that it considered the extracts from the 2006 document on security standards and criteria to be relevant to resolution of the dispute. In accordance with the proposal made by the Commission in its letter of 30 March 2010, it notified the parties of the Tribunal's intention to produce a summary of these extracts and to place them in the case-file. It stated that the summary would contain some sections of the document in question (appearing on pages 37, 140 and 142, that is to say three of the seven pages communicated to the Tribunal by the Commission). The parties were invited to submit their comments on the letter dated 2 July 2010.

57 By letter of 9 July 2010 the Commission took note of the Tribunal's letter of 2 July 2010 and stated that, because of the imperative of protecting the security of the officials of delegations in third countries that it had already voiced in its letters of 30 March and 8 June 2010, it could accept only that the summary of the 2006 document on security standards and criteria refer to the subject-matter of the sections in question but not contain extracts from the document itself. In response to a request from the Tribunal, the Commission set out, in a letter of 22 September 2010, what should be understood by a summary of the 'subject-matter' of the relevant sections by giving an example of the summary that might be envisaged for Section 54.3, which appears on page 140 of the 2006 document on security standards and criteria.

58 By letter of 13 July 2010 the applicant informed the Tribunal that he agreed with the Tribunal's proposal to draw up a summary of the extracts from the 2006 document on security standards and criteria.

59 By letter of 6 October 2010 the Tribunal sent to the Commission a draft summary of the relevant sections of pages 37, 140 and 142 of the 2006 document on security standards and criteria, a summary which did not consist of extracts from the document but referred to the subject-matter of the sections in question, as suggested by the Commission.

60 By letter of 6 October 2010 the Tribunal asked the applicant if he wished to be granted anonymity. That request has remained unanswered.

61 By letter of 19 October 2010 the Commission submitted its comments on the draft summary, asking the Tribunal to remove from the title of the draft the reference to page 37 of the 2006 document on security standards and criteria.

62 The Tribunal acceded to that request from the Commission and drew up a final summary of the extracts from the 2006 document on security standards and criteria.

63 That summary was sent to the Commission. As regards the applicant, the summary was only brought to the knowledge of the applicant's lawyer in the offices of the Registry of the Tribunal on 30 November 2010.

64 In the light of the information produced subsequent to the hearing on 15 December 2009, the Tribunal considered a second hearing to be necessary.

65 In the preparatory report for the second hearing, the Tribunal asked the parties to focus their oral arguments on the following questions:

'1. Procedural questions:

(a) In his request for compensation submitted on the basis of Article 90(1) of the Staff Regulations the applicant did not seek compensation for non-material damage; is it admissible to submit claims for such compensation to the Tribunal?

(b) Does the 2006 document on security standards and criteria form part of the legal framework of the dispute?

(c) For legitimate security reasons, the relevant extracts from that document can be communicated to the applicant only in the form of a brief summary; can they none the less be taken into account by the Tribunal in order to assess whether the Commission acted wrongfully in the present case? Does not the search for an equitable balance between protection of the confidentiality of this document and the applicant's right to effective judicial review mean, in the circumstances of the present case, that the Tribunal must derogate from Article 44(1) of the Rules of Procedure (see, by analogy, [European] Court [of Human Rights, judgment of 19 February 2009 in *A. and Others v. the United Kingdom*, no. 3455/05], especially paragraphs 205 to 208)?

2. Substantive questions:

(a) What is the legal scope of the 2006 document on security standards and criteria?

(b) Did the Commission act wrongfully in the implementation of security measures applicable to the temporary accommodation provided for the applicant's son?

(c) Is the causal link between any error on the part of the Commission and the alleged damage direct and certain?

(d) On the supposition that the Commission acted wrongfully in such a way as to incur liability, can the Commission be held liable for the total damage suffered or only a part thereof on account of any fault on the part of the victims or an act by a third party?

(e) Has the Commission paid sufficient compensation for the part of the damage that could be directly linked to the fault of the institution?'

66 Prior to the hearing the Commission submitted, by letter of 26 November 2010, comments on the question set out in paragraph 1(c) of the preparatory report for the hearing. In particular, it stated that, in its view, the summary drawn up by the Tribunal had struck the right balance between the need to preserve the confidentiality of the 2006 document on security standards and criteria on the one hand and the applicant's right to a fair hearing on the other. Hence, in its opinion, the Tribunal could not base its examination of the case-file on extracts from the 2006 document on security standards and criteria that were not included in that summary unless it disregarded Article 44(1) of its Rules of Procedure. Nevertheless, if the Tribunal considered that the extracts from the 2006 document on security standards and criteria that the Commission had communicated to the Tribunal contained information not reflected in the summary, the Commission was willing to study the possibility of the Tribunal complementing the summary while continuing to seek the correct balance between the need to preserve the confidentiality of the document and the applicant's right to a fair hearing, and to do so before the second hearing.

67 By letter faxed to the parties on 2 December 2010 the Tribunal stated that in the present dispute it was not a question of finding the correct balance between preserving the confidentiality of the document and the applicant's right to a fair hearing but between the preservation of the confidentiality of the document and the need to ensure effective judicial protection, the applicant having to be able to enjoy effective judicial review when certain documents of use in his action are held by the administration. The Tribunal invited the parties to refer in this connection to the judgment of 13 July 2006 in Case C-438/04 *Mobistar*, paragraph 40, and to the judgment of 14 February 2008 in Case C-450/06 *Varec*, especially paragraphs 52 and 53 and the operative part. The Tribunal also asked the Commission to indicate, before the hearing, whether it was prepared to accept that the summary mention the precise security measures (characteristics of the guard service, the alarm system, the panic buttons, the window protection grids) that are laid down in the 2006 document on security standards and criteria for the accommodation of the staff of delegations in risk category III. The Tribunal stated that only the applicant's lawyer would have access to this new summary.

68 By letter received at the Registry of the Tribunal by fax on 3 December 2010 the Commission replied that it was not prepared to accept that the summary mention the precise security measures contained in the 2006 document on security standards and criteria.

69 By letter received at the Registry of the Tribunal by fax on 6 December 2010 the applicant stated that the 2006 document on security standards and criteria was relevant to resolution of the dispute. Having noted that the summary to which his lawyer had had access related only to the subject-matter of that document and not to the nature of the security measures it described, the applicant requested access to the relevant extracts from that document, at least through the intermediary of his lawyer, by virtue of his right to effective judicial protection and in accordance with the principle of equality of arms. The applicant pointed out that the classification level of the 2006 document on security standards and criteria, the lowest in the classification provided for in Decision 2001/844, did not appear to justify the Commission's refusal of access. In competition matters, documents classified as 'EU restricted' were normally accessible to the parties in an action, subject to the adoption of the necessary protection measures (prohibition on making photocopies, access granted only to the parties' lawyers). If the Tribunal considered that it could not supplement the summary that had already been drawn up or communicate the extracts from the 2006 document on security standards and criteria to the applicant, the Tribunal should, on the basis of the case-law of the Court of Justice (the *Varec* judgment) and by way of derogation from Article 44(1) of its Rules of Procedure, deliver judgment on the dispute by taking into account the relevant extracts from that document that were in its possession and not content itself with the summary.

70 The second hearing was held on 8 December 2010. At the hearing the Commission stated that, should the Tribunal consider that the 2006 document on security standards and criteria applied to temporary accommodation, it would not object to the Tribunal delivering judgment on the dispute by taking account of the relevant extracts from that document as well as the summary.

Law

I – *The subject-matter of the application*

71 Although in formal terms the applicant seeks the annulment of the decision of the appointing authority of 3 February 2009, it must be recalled that such a decision, in which the administration adopted a position on the applicant's claims for compensation, forms an integral part of the preliminary administrative procedure which precedes an action to establish liability before the Tribunal and only has the effect of allowing the applicant to apply to the Tribunal for compensation. Consequently, the applicant's claims for annulment cannot be assessed in isolation from the claims relating to compensation (see, to that effect, the judgment of 18 December 1997 in Case T-90/95 *Gill* v *Commission*, paragraph 45).

72 Hence, in examining the action it must be considered that its sole purpose is to obtain compensation for damages that the applicant, the deceased official and the latter's children allegedly suffered on account of the Commission's actions.

II – *Admissibility*

A – *Arguments of the parties*

73 The Commission raises several pleas of inadmissibility.

74 First, it points out that in his claim for compensation of 25 February 2008 brought under Article 90(1) of the Staff Regulations the applicant restricted his claims to compensation for material damage and made no application for reparation for non-material damage. In the view of the Commission, the application is therefore inadmissible as it seeks reparation for non-material damage suffered by the deceased official, his children and the applicant.

75 Secondly, with regard to the non-material damage suffered by the deceased official, Article 73 of the Staff Regulations does not mention the victim among the heirs and successors. The victim can therefore not validly rely on damage in the context of an action for non-contractual liability on the basis of Article 236 EC. Consequently, as the deceased official possessed no right under Article 73 of the Staff Regulations, no right can be transferred to the applicant, following the adage *nemo dat quod non habet*. Moreover, in the view of the Commission, an action for damages under Article 236 EC permits only a claim for compensation over and above that provided for in Article 73 of the Staff Regulations and is available only to persons falling within the scope *ratione personae* of that provision.

76 Thirdly, the non-material damage suffered by the applicant was not mentioned in the complaint of 10 September 2008 and, according to the Commission, is therefore inadmissible. Furthermore, the Commission maintains that the applicant is not one of the heirs and successors referred to in Article 73 of the Staff Regulations and therefore cannot rely on damage in the context of non-contractual liability under Article 236 EC.

77 Fourthly, according to the Commission, the claim for non-material damage suffered by the children of the deceased official is not admissible in support of an action for damages based on Article 236 EC unless the victim's children have a right under Article 73 of the Staff Regulations. Moreover, in the opinion of the Commission, the applicant has not provided a shred of evidence of the existential damage suffered.

78 Fifthly, the applicant's argument that, had the deceased official lived, he would have left his children a far larger capital sum than that paid by the Commission under Article 73 of the Staff Regulations is not, according to the Commission, backed by any proof and is entirely lacking in precision. In addition, the Commission maintains that the applicant failed to report any alternative source of income (for example, any life assurance income to which the deceased official and his wife may have been entitled) that would make it possible to determine the loss of income actually suffered by the heirs and successors of which he is the legal representative.

79 Sixthly, the Commission points out that neither the second nor the third plea raised in the application — respectively, the Commission's liability even without fault in respect of a lawful act and liability under Article 24 of the Staff Regulations — was mentioned in the claim for compensation of 25 February 2008. Moreover, according to the Commission, these two pleas are not supported by any information from which the alleged damage can be quantified and are not the subject of any claim in the application. It maintains that these pleas should therefore be declared inadmissible.

80 Lastly, according to the Commission, the applicant has produced no mandate from the other guardians of the deceased official's children proving that he is authorised to lodge the application in the name of and on behalf of the latter. In the opinion of the Commission, he therefore has no standing to bring proceedings.

B – *Findings of the Tribunal*

81 It is necessary to examine first the pleas of inadmissibility mentioned in paragraphs 74 to 77 of this judgment, all of which relate to the applicant's claims for compensation for non-material damage.

82 It must be recalled that, within the system of actions provided for in Articles 90 and 91 of the Staff Regulations, where an action does not contain any claim for the annulment of a particular measure but claims compensation for damage allegedly caused by a series of wrongful acts or omissions which, because they have no legal effect, cannot be described as acts adversely affecting an official, it is imperative that the administrative procedure commence with a request by the person concerned that the appointing authority compensate him for the damage, and be followed where appropriate by a complaint against the rejection of such request, failing which a subsequent action will be inadmissible (see, in particular, the judgment of 13 July 1995 in Case T-44/93 *Saby* v *Commission*, paragraph 31).

83 Moreover, it is settled case-law that the relief sought in the application to the Courts of the European Union must be the same as that set out in the complaint and the application may contain only heads of claim based on the same cause of action as those raised in the complaint, and that those heads of claim may be developed before the courts by means of pleas and arguments which did not necessarily appear in the administrative complaint but are closely linked to it (see, for example, the judgment of 23 April 2002 in Case C-62/01 P *Campogrande* v *Commission*, paragraph 34).

84 The Tribunal recently held that the concept of 'cause of action' must be given a broad interpretation (judgment of 1 July 2010 in Case F-45/07 *Mandt* v *Parliament*, paragraph 119). Although this guideline was established by the Tribunal with regard to an action for annulment, that does not mean that it cannot be applied by analogy to an action for damages, subject to the specific nature of the latter case being respected. However, in cases relating strictly to compensation, the concept of 'cause of action' is not defined by reference to 'heads of claim' within the meaning of the case-law cited in the preceding paragraph but to 'heads of damage' raised by the official concerned in his claim for compensation. It is these heads of damage that determine the subject-matter of the compensation sought by the official and, consequently, the relief sought by the claim on which the administration must rule.

85 It follows from the considerations set out in the three preceding paragraphs that claims for compensation based on different heads of damage are admissible before the Tribunal only if they have been preceded first by an application to the administration seeking the same relief and based on the same heads of damage and then by a complaint against the decision of the administration that ruled, expressly or impliedly, on that application.

86 That does not prevent the official concerned from altering the amount of the claims stated in his application to the administration, in particular if the loss worsens further or if the extent of the damage is not known or cannot be assessed until after the application has been lodged (see, to that effect, on the possibility of quantifying a loss at the application stage, the judgment of 23 September 2004 in Case C-150/03 P *Hectors* v *Parliament*, paragraph 62), but on condition that the heads of damage for which he seeks compensation were listed in the application.

87 In the present case, whereas the applicant seeks reparation for the damaging consequences of the same facts as those referred to in his application of 25 February 2008, his claims for damages are based on reparation for the various non-material losses allegedly caused to himself, his deceased son and his grandchildren.

88 It is common ground that in the request for compensation contained in his letter of 25 February 2008 the applicant sought only reparation for material damage and did not raise the heads of non-material damage alleged before the Tribunal.

89 It is true that subsequently, in his complaint, the applicant requested reparation not only for material damage but also for non-material damage, which enabled the administration to adopt a position on these heads of damage in the decision rejecting the complaint before the action was brought. However, this part of the decision rejecting the complaint must be regarded as the first decision taken by the administration on the said heads of damage. The applicant did not lodge a complaint against that decision, as he should have done, and therefore failed to comply with the two-stage administrative procedure which determines the admissibility of claims for compensation based on these heads of damage.

90 The line of argument based on the judgment of 26 January 1989 in Case 224/87 *Koutchoumoff* v *Commission*, which the applicant developed at the second hearing, cannot be accepted. Although the Court of Justice acknowledged in that judgment that an official was permitted to submit claims for damages for the first time before the Court, it did so on the ground that the challenge to the lawfulness of the act adversely affecting the official, which was set out in the complaint, could imply a request for damages for the loss caused by that act. However, the present dispute relates solely to damages and is not associated with a challenge to the lawfulness of a decision adversely affecting the applicant.

91 As a consequence, the claims for reparation for non-material damage must, in the present case, be dismissed as inadmissible, without there being need to examine the other pleas of inadmissibility raised against them.

92 Secondly, the Tribunal considers that the Commission's arguments set out in paragraph 78 of this judgment are linked to the question whether the applicant had lost all standing to bring proceedings on account of the sums already paid by the Commission by way of benefits under the Staff Regulations, a question which will be analysed subsequently in the context of the examination of the substance of the first plea.

93 Thirdly, with regard to the pleas of inadmissibility against the second and third pleas of the application, mentioned in paragraph 79 of this judgment, it is necessary, in view of information available to the Tribunal for ruling on the substance of the dispute and in the interest of the sound administration of justice, to examine, first, whether an institution may incur liability even without fault on account of a

lawful act, or whether liability can be based on the provisions of Article 24 of the Staff Regulations. If the Tribunal considers that the applicant's claims for damages based on these two pleas are unfounded and that the action must be dismissed, it will not be necessary to examine these pleas of inadmissibility (judgment of 26 February 2002 in Case C-23/00 P *Council* v *Boehringer*, paragraph 52; judgment of 22 May 2008 in Case T-250/06 P *Ott and Others* v *Commission*, paragraphs 75 and 76; judgment of 14 November 2006 in Case F-4/06 *Villa and Others* v *Parliament*, paragraph 21; and judgment of 20 January 2009 in Case F-32/08 *Klein* v *Commission*, paragraph 20).

94 Fourthly and lastly, with regard to the plea of inadmissibility based on the applicant's lack of standing to bring proceedings as the legal representative of the heirs and successors of the deceased official on the ground that he had failed to obtain the agreement of their other guardians, it must be noted that, when invited by the Tribunal by letter of 15 June 2010 to present a document establishing that he was acting with the agreement of these co-guardians, the applicant produced the mandate signed by the latter by letter of 17 June 2010. The Tribunal is thus able to find, under Article 36 of the Rules of Procedure, that the applicant meets the requirements of Article 35(1)(b) of those rules. This plea of inadmissibility must therefore be dismissed.

95 Even supposing that the failure to produce such a mandate when the application is lodged cannot be rectified in the course of the proceedings, the Tribunal points out, in any case, that the Court of Justice has already ruled that the fact that an entity did not have the capacity to be a party to proceedings under national law did not necessarily prevent it from bringing an action in the Courts of the European Union (see, to that effect, with regard to a company being formed which the Commission had allowed to participate in an invitation to tender and the validity of its tender, the judgment of 28 October 1982 in Case 135/81 *Groupement des Agences de voyages* v *Commission*).

96 Moreover, in the present case the Commission did not, in its reply to the applicant's complaint, point out that he could bring proceedings only with the agreement of the other co-guardians of the heirs and successors of the deceased official, even though the complaint was the last stage of the procedure before the bringing of legal proceedings.

III – *Substance*

A – *The first plea, based on the failure of the Commission to fulfil its obligation to ensure the protection of its official*

1. Arguments of the parties

97 According to the applicant, the condition for the Commission to incur non-contractual liability, based on that institution's unlawful conduct, is satisfied. He maintains that the Commission was negligent in its compliance with the general security obligation incumbent upon it as an employer, an obligation stemming directly from the duty to provide assistance under the first paragraph of Article 24 of the Staff Regulations and which, in his view, is of specific relevance in the case of officials serving in a third country and of their families.

98 He alleges that the Commission failed to fulfil its obligation to provide safe accommodation for the deceased official and his family, an obligation that is all the more binding in that the official is required, under Article 5(1) of Annex X to the Staff Regulations, to live in the accommodation that the institution provides. In his opinion, the Commission's negligence is demonstrated by the fact that a casual criminal, who moreover was under the influence of alcohol and drugs, easily entered the house occupied by the deceased official, without having to force an entry and without encountering any obstacle. The Commission had taken no steps to ensure that the bars on the dining room window were an effective obstacle. They were therefore not fit for their purpose. As to the possibility that the

window of that room was open, according to the applicant it had not been established that this was the case and in any event it could not be adduced to exonerate the Commission of its liability. Moreover, the Commission should, in the view of the applicant, be held liable for the lack of a night watchman at the time of the break-in. In addition, measures as inexpensive and effective as the inclusion of an alarm system and/or a panic button had not been taken, despite their being presented as 'standard' security measures by the author of the written answer of 6 August 2007.

99 The agreement given by the deceased official when the temporary accommodation was made available cannot, according to the applicant, in any case release the Commission from its obligations with regard to security. Moreover, the applicant's son had not chosen this accommodation, which had been rented by the Commission before his arrival in Rabat.

100 The applicant states that he does not claim that the Commission was required to ensure absolute security for the deceased official and his family but only that the minimum, effective and reasonable measures that could have provided concrete protection for the safety of his son and the latter's family were not taken.

101 The Commission relies on the case-law according to which an official — or his heirs and successors — in receipt of benefits under Article 73 of the Staff Regulations cannot bring an action for non-contractual liability against the institution concerned unless the benefits are insufficient to compensate for the damage suffered. In its view, that case-law can be applied by analogy to the other benefits paid under the Staff Regulations to the heirs and successors of the deceased official in the present case. According to the Commission, the applicant, on whom the burden of proof rests, has failed to show that the sums paid by the Commission in the present case are insufficient in this regard. The Commission therefore expresses doubt as to the applicant's interest in bringing proceedings, at least as regards the alleged non-material damage. With regard to the material damage, the Commission maintains that, in determining the compensation which he claims, the applicant took no account of the benefits awarded to the deceased official's heirs and successors under the Staff Regulations, whereas the case-law mentioned above precludes an additional action for non-contractual liability that would result in double compensation for the same damages.

102 The Commission does not dispute its general obligation to provide security as an employer but maintains that it had adopted the adequate security measures that the situation demanded, thus excluding the possibility that it had committed a fault. The Commission's arguments in defence on these questions are set out in paragraph 53 of this judgment. In addition, the Commission considers that the only person responsible for the damage alleged by the applicant is the criminal himself. The applicant's son had, in the view of the Commission, also been negligent in some respects, contributing to the occurrence of the damage, in particular by not participating, before his departure for Morocco, in the information sessions on security organised by the Commission for persons posted to a delegation in a third country and by leaving a window of his accommodation open during the night of the double murder.

103 After having consulted, in the offices of the Registry of the Tribunal, the summary of the extracts from the 2006 document on security standards and criteria, the applicant's lawyer emphasises that that document is binding on the Commission and that it sets out the conditions established by the institution itself for the exercise of its discretion. He also maintains that the Commission did not comply with any of the measures prescribed in that document, despite being aware of the risks run by its officials serving in Morocco. But for this failure on the part of the Commission, the double murder would not have been committed. Moreover, if the security measures laid down in the 2006 document on security standards and criteria had been implemented, the applicant's son would have been able to raise the alarm and may not have died of his injuries. He had thus been deprived of a chance to survive. In the opinion of the applicant's lawyer, the causal link between the fault on the part of the Commission and the damage is clearly established. The Commission's liability is not mitigated by any fault on the part of the murdered official.

104 The Commission replies that the 2006 document on security standards and criteria is not applicable to temporary accommodation such as that provided for the applicant's son and that, in any event, it contains only recommendations and not binding measures. It contends that the administration therefore has wide discretion in this regard, the limits of which it had not manifestly disregarded, as the protection measures applied in the present case were sufficient and reasonable.

2. Findings of the Tribunal

(a) The objection raised by the Commission on the ground that full reparation for the alleged damage has already been paid

105 At the outset it is necessary to examine whether the applicant fulfils the condition for damage eligible for compensation, in the absence of which his action for damages should be dismissed. The Commission maintains that full reparation for the damage alleged by the applicant has been provided by the benefits granted under the Staff Regulations to the deceased official's heirs and successors. One of the conditions for the European Union to incur liability, that is to say proof of damage for which reparation has not been made, is therefore lacking, so that in the opinion of the Commission the action should be dismissed at the outset without the need to consider whether the Commission was at fault. For his part, the applicant maintains that the lump-sum benefits payable under the Staff Regulations are completely insufficient to provide adequate compensation for the considerable material and non-material damages suffered in the present case, which is unprecedented in the history of the institutions of the Union. In his view, additional compensation is required, given the exceptional circumstances of the dispute, on the basis of the case-law (judgment of 8 October 1986 in Joined Cases 169/83 and 136/84 *Leussink* v *Commission*).

106 In this regard, it has been held that, in view of the lump-sum nature of the benefits laid down in the Staff Regulations for the heirs and successors of a deceased official, those heirs and successors are entitled to seek additional compensation from the institution where the latter can be held responsible for the death of the official and the benefits payable under the staff insurance scheme are insufficient to provide full compensation for the injury suffered (see, to that effect, *Leussink* v *Commission*, paragraph 13, and the judgment of 9 September 1999 in Case C-257/98 P *Lucaccioni* v *Commission*, paragraphs 22 and 23).

107 It is first and foremost for the party seeking to establish the Union's liability to adduce conclusive proof as to the existence or extent of the damage he alleges and to establish the causal link between that damage and the conduct complained of on the part of the institutions (see, in particular, the judgment of 21 May 1976 in Case 26/74 *Roquette frères* v *Commission*, paragraphs 22 and 23, and judgment of 7 May 1998 in Case C-401/96 P *Somaco* v *Commission*, paragraph 71).

108 The Commission's line of argument, based on the sufficiency of the compensation provided by the benefits under the Staff Regulations, appears to be a plea of inadmissibility, as the Commission seems to consider that the applicant no longer has an interest in bringing proceedings. It could therefore be held, in accordance with settled case-law, that it is for the defendant who raises the applicant's lack of interest in bringing proceedings to establish that the application encounters such an obstacle of admissibility.

109 Such an interpretation of the Commission's line of argument cannot be accepted, however. In fact, the Commission's argument is that the applicant does not fulfil one of the substantive conditions for establishing the non-contractual liability of the Union, namely proof of damage eligible for compensation. Since it is for the applicant to establish the existence and extent of the damage for which he seeks compensation, it is he who must prove that the damage he alleges has not yet been entirely made good by the benefits granted to him under the Staff Regulations (see, to that effect, *Lucaccioni* v *Commission*, paragraph 16).

110 In the present case, the Tribunal considers that the applicant has provided sufficient information in this regard.

111 First, the assumption on which the applicant based the estimate of the amount claimed for material damage, which constitutes an approximate assessment of the financial loss suffered by the deceased official's heirs and successors, namely that the latter would have been able to continue working until retirement, appears plausible and reasonable, even though it is true that the period thus taken into account is 26 years. The sum of EUR 2 552 837.96 mentioned in the application, corresponding to the remuneration that the applicant's son would have received if he had continued to work until retirement age, is therefore not excessive a priori. Moreover, the applicant has made no claim for loss of pension rights that his son would have acquired over the same period, whereas the Courts of the European Union accept that such rights may be taken into account when assessing material damage (see the judgment of 5 October 2004 in Case T-45/01 *Sanders and Others* v *Commission*, paragraph 167, and judgment of 12 July 2007 in Case T-45/01 *Sanders and Others* v *Commission*, paragraphs 87 to 90).

112 It must then be noted that the sum calculated in this way exceeds the total amount of benefits which the Commission has paid or will pay to the deceased official's heirs and successors under the Staff Regulations, even on the assumption envisaged by the Commission in paragraph 54 of its defence, under which the said benefits would be paid until the orphans reached the age of 26 years (amount estimated on that basis at EUR 2 478 375.47).

113 Lastly, the sum of EUR 2 552 837.96 proposed by the applicant was increased to approximately EUR 4 million in the table which he submitted at the first hearing to take account, inter alia, of grade promotions which, in his opinion, his son would have obtained. It is true that such promotions are, by their very nature, hypothetical, as officials do not have a right to such career development. Moreover, it must be pointed out that the Commission awarded the deceased official a posthumous grade promotion, which was taken into account in the calculation of the benefits paid to his heirs and successors under the Staff Regulations. Nevertheless, it seems reasonable to consider that the abovementioned sum of EUR 2 552 837.96 should be subject to several increases linked at least to advancements to higher steps that the deceased official might have obtained on the basis of seniority (see paragraphs 199 and 200 of this judgment for a more precise determination of the amount of material damage).

114 In the light of the information provided by the applicant, it cannot be excluded that, if the Commission were held entirely liable for all the material damage suffered, the benefits paid under the Staff Regulations to the persons concerned, all of whom are orphaned minors with neither a father nor a mother, are insufficient to ensure full reparation for the considerable material damage they have suffered. Contrary to the assertions made by the Commission at the hearing, the fact that the monthly sums paid to the deceased official's heirs and successors by way of benefits under the Staff Regulations exceed the amount of remuneration that the official would have received in June 2009 is not such as to bring this conclusion into question. Indeed, as has been stated, that remuneration could have been paid to the applicant's son until he reached retirement age, in other words over a longer period than that foreseen for the payment of benefits to his heirs and successors under the Staff Regulations.

115 The Commission is therefore not justified in maintaining that the applicant's action for damages should be dismissed at the outset owing to his failure to establish that the alleged damage had not been entirely made good by the benefits already granted to his son's heirs and successors under the Staff Regulations.

(b) The plea that the Commission failed to fulfil its obligation to ensure the safety of the deceased official and his family

The conditions for establishing the non-contractual liability of the Commission

116 According to the settled case-law of the Courts of the European Union, a dispute between an official and the institution by which he is or was employed concerning compensation for damage is pursued, where it originates in the relationship of employment between the person concerned and the institution, under Article 236 EC and Articles 90 and 91 of the Staff Regulations and lies outside the scope of Articles 235 EC and 288 EC (judgment of 22 October 1975 in Case 9/75 *Meyer-Burckhardt* v *Commission*, paragraph 7; judgment of 17 February 1977 in Case 48/76 *Reinarz* v *Commission and Council*, paragraph 10; order of 10 June 1987 in Case 317/85 *Pomar* v *Commission*, paragraph 7; judgment of 7 October 1987 in Case 401/85 *Schina* v *Commission*, paragraph 9; order of 26 June 2009 in Case T-114/08 P *Marcuccio* v *Commission*, paragraphs 12, 13 and 24; and judgment of 11 May 2010 in Case F-30/08 *Nanopoulos* v *Commission*, paragraphs 130 to 133, which is the subject of an appeal before the General Court of the European Union in Case T-308/10 P). That case-law may be applied by analogy to a dispute between the heirs and successors of a deceased official or their legal representative and the institution to which the official was answerable, as such a dispute originates in the relationship of employment between the latter and the said institution.

117 In order for an institution to incur liability under Article 236 EC, a number of conditions must be met, namely the existence of a fault or unlawful act committed by the institution, the unquestionable existence of quantifiable damage and the existence of a causal link between the fault and the alleged damage (see, to that effect, the judgment of 13 December 1990 in Case T-20/89 *Moritz* v *Commission*, paragraph 19; judgment of 9 February 1994 in Case T-82/91 *Latham* v *Commission*, paragraph 72; and judgment of 21 February 1995 in Case T-506/93 *Moat* v *Commission*, paragraph 46). As those conditions must be satisfied cumulatively, the fact that one of them has not been satisfied is a sufficient basis on which to dismiss an action for damages (*Lucaccioni* v *Commission*, paragraph 14).

118 As regards the first of these conditions, which the Tribunal will examine first, it has to be stated that, even if it is not the lawfulness of a decision-making act but, as in the present case, the culpable nature of non-decision-making conduct that is at issue, the Courts of the European Union must take into account, among the relevant factors of the case concerned, the discretion available to the administration at the time of the contested facts.

119 Where an institution has wide discretion, in particular where the applicable legal framework does not require it to act in a predetermined manner, the deciding factor for considering that the first condition is met is whether there was clear and serious disregard for the limits on its discretion. Where the administration has not committed a manifest error, it cannot be accused of unlawful conduct and it therefore does not incur liability. For example, the opening of an investigation, at the end of which the official concerned is exonerated, is not liable to establish the liability of an institution if the decision to open the investigation rests on a sufficient and relevant body of evidence and, for that reason, is not manifestly wrong (see, to that effect, the judgment of 2 May 2007 in Case F-23/05 *Giraudy* v *Commission*, paragraphs 104, 105 and 167).

120 However, where the discretion of the administration is considerably reduced or non-existent, the mere infringement of European Union law may be sufficient to establish the existence of a sufficiently serious breach for the institution to incur liability (judgment of 4 July 2000 in Case C-352/98 P *Bergaderm and Goupil* v *Commission*, paragraph 44). Hence, if the administration must adopt a particular form of conduct dictated by legislation in force, respect for general principles and fundamental rights or by the rules that it has imposed on itself, the simple failure to fulfil such an obligation is such as to give rise to liability on the part of the institution concerned.

121 The Courts of the European Union have thus held that liability was incurred by an institution that had failed to exercise the diligence required of it as employer as regards the inspection, maintenance and use of the official car in which an official was travelling at the time of an accident (*Leussink* v *Commission*, paragraphs 15 to 17), by an institution that had failed to warn an official of the existence of an illness revealed by his file, despite having a duty to alert him to behaviour posing a threat to his health (*Gill* v *Commission*, paragraph 34), by an institution whose medical service had not informed an official of risk factors which may cause an illness to appear (judgment of 25 September 1991 in Case T-36/89 *Nijman* v *Commission*, paragraph 37), or by an institution that had failed to rule within a reasonable period on a request for recognition of the occupational origin of a disease (judgment of 11 April 2006 in Case T-394/03 *Angeletti* v *Commission*, paragraphs 161 and 167).

122 Although the Commission maintains, relying on the judgment of 8 July 2008 in Case T-48/05 *Franchet and Byk* v *Commission*, paragraphs 95 to 97, and on the judgment of 10 December 2008 in Case T-57/99 *Nardone* v *Commission*, paragraph 162, that the first condition for establishing the non-contractual liability of the administration presupposes that in all cases there has been a sufficiently serious breach of a rule of law intended to confer rights on individuals, it is settled case-law that such a condition is relevant for actions for damages brought by individuals on the basis of Article 288 EC but is not applicable to actions for damages which originate in the relationship of employment between an official and his institution. In particular, in the judgments mentioned in the preceding paragraph the Courts of the European Union concluded that there was fault on the part of the administration solely on the basis that an unlawful act had been committed, without establishing that there had been a 'sufficiently serious' breach nor verifying whether the disregarded rule could be considered to be a rule intended to confer rights on individuals. The Court of First Instance, sitting as the Appeal Chamber, confirmed in the order in *Marcuccio* v *Commission* (paragraphs 11, 12 and 13), which was made after the judgments in *Franchet and Byk* v *Commission* and *Nardone* v *Commission*, that an official cannot, by reason of a relationship of employment with the European Union, be treated as an individual and that the conditions for establishing liability under Article 236 EC are different from those under Article 288 EC. If the Commission's argument were accepted, actions for liability brought by officials against the administration would as a rule be subject to a requirement that there be grave or serious fault, whereas the requirement for a finding of grave fault makes sense only in fields where the administration has a wide discretion.

123 It must be noted that, in a judgment of 16 December 2010 in Case T-143/09 P *Commission* v *Petrilli*, paragraph 46, which was delivered after the second hearing in the present case, the General Court of the European Union clearly rejected the Commission's argument and reconsidered the judgment reached in *Nardone* v *Commission*. It thus ruled that, contrary to what had been held in that judgment, disputes involving the civil service under Article 236 EC and Articles 90 and 91 of the Staff Regulations, including those in which compensation is sought for damage caused to an official or agent, are governed by particular and special rules that differ from those stemming from the general principles on the non-contractual liability of the Union under Article 235 EC and the second paragraph of Article 288 EC (see, to that effect, the judgment of 12 June 2002 in Case T-187/01 *Mellone* v *Commission*, paragraph 74, and judgment of 14 October 2004 in Case T-1/02 *Polinsky* v *Court of Justice*, paragraph 47). It is clear from the Staff Regulations, in particular, that, unlike any other individual, an official or agent of the Union is linked to the institution to which he is answerable by a legal relationship of employment entailing a balance of specific reciprocal rights and obligations, which is reflected in the institution's duty to have regard to the welfare of the person concerned (see, to that effect, the judgment of 29 June 1994 in Case C-298/93 P *Klinke* v *Court of Justice*, paragraph 38). That balance is essentially intended to preserve the relationship of trust which must exist between the institutions and their officials in order to guarantee to citizens the effective performance of tasks in the public interest entrusted to the institutions (see, to that effect and by analogy, the judgment of 6 March 2001 in Case C-274/99 P *Connolly* v *Commission*, paragraphs 44 to 47). It follows that where the Union acts as employer it is subject to increased liability, in the form of the duty to make reparation for damage caused to its staff by any unlawful act committed in its role as employer.

124 In any event, even supposing that the interpretation of the first condition for establishing liability defended by the Commission is correct, it would have to be found that the rule that may have been infringed in the present dispute, that is to say the Commission's duty to ensure the safety of its staff, is a rule intended to confer rights on individuals, in accordance with the case-law developed in application of Article 288 EC (see, by analogy, *Nardone* v *Commission*, with regard to the obligation to ensure a healthy working environment, stemming from the duty to have due regard to the welfare of officials). The question whether disregard of this rule is sufficiently serious will be examined below.

125 It follows from the foregoing that, in order to ascertain whether the Commission committed a fault and whether that fault is such that it gives rise to liability, it is necessary to consider, first, the discretion that the Commission enjoyed in the present case for ensuring the protection of the deceased official and his family.

The extent of the discretion that the Commission enjoys for ensuring the protection of its officials serving in a delegation in a third country

126 As regards safe working conditions for its staff, it cannot be disputed that the Commission, like any public or private employer, has a duty to act. The staff can rely on a right to working conditions that respect their health, safety and dignity, as recalled in Article 31(1) of the Charter of Fundamental Rights of the European Union. For that reason alone, the argument that the Commission has wide discretion in this field, a formula used in areas where the administration may freely determine its means of action without having to guarantee a right, cannot be relied on. Moreover, it is clear both from general texts on the subject and from the case-law that the Commission's duty, as employer, to ensure the safety of its staff must be discharged with particular rigour and that the administration's discretion in this area is reduced, although not eliminated.

127 Regarding first the general texts on the subject, Article 1e(2) of the Staff Regulations provides that officials in active employment are to be accorded working conditions complying with appropriate health and safety standards at least equivalent to the minimum requirements applicable under measures adopted in these areas pursuant to the Treaties (see, with regard to this article, the judgment of 30 April 2009 in Case F-65/07 *Aayhan and Others* v *Parliament*, paragraph 116). It is clear from several EU directives, and in particular from Directive 89/391, that the employer is required to ensure the safety and health of its staff in every aspect related to the work. The content of the duty to provide workers with a safe working environment is set out in Articles 6 to 12 of Directive 89/391 and in several other directives which lay down preventive measures that must be taken in certain specific areas. Moreover, in its role as custodian of the Treaties, the Commission is obliged to interpret strictly the duties thus placed on employers (see the judgment of 14 June 2007 in Case C-127/05 *Commission* v *United Kingdom*). Furthermore, the Commission's adoption of the decision of 26 April 2006 confirms that the institution drew the necessary conclusions from Article 1e(2) of the Staff Regulations, basing itself on the rules applicable in the Member States under Directive 89/391.

128 In addition, as the applicant rightly states, the duty to protect its staff is, for the Commission, a principle underlying Article 24 of the Staff Regulations and is of particular importance for officials serving in third countries, where, under Article 5(1) of Annex X to the Staff Regulations, they are required to live in accommodation provided by the institution. Article 5(2) of Annex X to the Staff Regulations provides in this regard that the appointing authority decides on the entitlement to furniture and other fittings for accommodation, in line with the conditions applying at each place of employment. The accommodation is thus the subject of specific regulations and cannot be considered to be outside the responsibility of the administration, particularly in postings where there is a particular risk to the safety of officials. The duty of protection also extends to the members of the official's family living with him in the third country in question, as shown by the fact that spouses must also attend certain information sessions on safety matters as part of 'pre-posting' programmes.

129 Furthermore, where the Court of Justice has had cause to acknowledge that an institution had incurred liability by failing to fulfil its duty to ensure the safety of its staff, it has not held that the administration had a wide discretion in the matter or that the failure had to be particularly serious. For example, an institution has been ordered to make amends for the consequences of an accident that occurred at a holiday camp for the children of its officials because it had failed to arrange adequate insurance or to inform the persons concerned of this fact (judgment of 7 October 1982 in Case 131/81 *Berti* v *Commission*, paragraphs 23 and 24), or to compensate an official injured while travelling on official business in a poorly maintained official vehicle driven by another official of the institution (*Leussink* v *Commission*, paragraphs 15 to 17). The Court has even considered that the duty to ensure safety also applied to a building contractor, who was neither an official nor an agent of the institution, but who fell from a building of the institution on which he was working (judgment of 27 March 1990 in Case C-308/87 *Grifoni* v *EAEC*, paragraphs 13 and 14).

130 Although this duty to ensure the safety of its staff is wide, it cannot go as far as to place an absolute duty on the institution to achieve the desired result. In particular, budgetary, administrative or technical constraints to which the administration is subject, and which sometimes make it difficult or impossible to implement urgent and necessary measures swiftly despite the efforts of the competent authorities, cannot be ignored. Moreover, the duty to ensure safety becomes delicate where the official concerned, unlike a worker in a fixed position in a set location, is required, as was the applicant's son, to work in a third country and to assume a function comparable to a diplomatic function, exposed to a variety of risks that are less easy to identify and manage.

131 In that regard, the Tribunal notes that although the accommodation of such an official is provided for him by reason of his duties and is subject to specific protection measures in certain delegations in third countries, it cannot be completely equated to a workstation or workplace within the meaning of Directive 89/391. Nor do staff houses of delegations in third countries match the definition of 'workplaces' or 'Commission sites' as set out restrictively in the decision of 26 April 2006. Moreover, Article 5(4) of Directive 89/391 provides that the Member States have the option to provide for the exclusion or the limitation of employers' responsibility where occurrences are due to unusual and unforeseeable circumstances, beyond the employers' control, or to exceptional events, the consequences of which could not have been avoided despite the exercise of all due care. Such a limitation of liability which Directive 89/391 allows for employers in the Member States can therefore be permitted for the institutions of the Union as employers under Article 1e(2) of the Staff Regulations.

132 In view of the foregoing considerations and taking due account of the specific living and working conditions of an official posted to a delegation in a third country, the Tribunal considers, in the light of the main rules laid down in Directive 89/391, that the Commission's duty to ensure safety in such a situation implies, first, that the institution must assess the risks to which its staff are exposed and take integrated preventive measures at all levels of the service, secondly, that it should inform the staff involved of the risks that have been identified and check that the staff have received appropriate instructions on the risks to their safety, and, finally, that it should take appropriate protection measures and establish the organisation and means it considers necessary.

133 In the present case the applicant focuses his criticism on the third aspect relating to the protection measures which the Commission allegedly failed to take. He does not claim that the Commission failed to fulfil its duties to carry out a preventive risk assessment and to inform his son.

134 The Tribunal nevertheless considers it necessary to point out, before examining the nature of the measures which the Commission had a duty to implement, that the institution in no way neglected its duty to carry out a prior assessment of the risks to which its officials posted to the Rabat delegation were exposed.

135 Indeed, the Commission carried out a preventive assessment of the risks to which its staff posted to Rabat were exposed at the time of the facts at issue. It is apparent from the safety instructions given to officials before taking up their duties in the delegation, as part of the so-called 'pre-posting' programme, that the risks which the Commission took into account for Morocco were those to which persons with a relatively high standard of living are exposed during their stay, that is to say the risks of attack in certain places or at certain times, theft or burglary. Furthermore, in January 2006, several months before the double murder, the risk level for the Rabat delegation and staff accommodation had been raised to 'category III', the highest risk level for delegations in third countries, which entailed, in particular, the permanent surveillance of the accommodation of expatriate staff by a specialised company. Although before 2006 Morocco had not been listed as a country where the risk of attacks on members of the diplomatic corps was particularly high, since no attack had previously been reported (apart from that in which diplomats were victims at the time of the attempt on the life of the king in Skhirat in 1971), the Commission then considered that a terrorist threat aimed more directly at the European Union might exist in several countries, including Morocco, justifying the transfer of the Rabat delegation from risk category II to category III. Moreover, in a note to heads of delegation dated 6 February 2006 the director of the External Service Directorate of the External Relations DG had recalled several recommendations in this context, in particular making security staff aware of the need for 'heightened vigilance and supervision of the offices, residences and accommodation' and the importance of 'ensuring scrupulous compliance with the contractual instructions and procedures'.

136 Hence the Commission in no way underestimated the risks facing its officials posted to the Rabat delegation.

Fault in the implementation of appropriate protection measures

137 With regard to the protection measures taken in the present case, the Tribunal has concluded, on the basis of information obtained as a result of preparatory enquiries, that the Commission failed to fulfil its obligations.

138 At first sight, it could be considered, in the light of the only information available to the Tribunal before the first hearing, that the measures to protect the accommodation occupied by the deceased official and his family were appropriate. The accommodation was in a quiet residential district, inhabited by senior officials of the Moroccan State, expatriates and diplomats. It was not isolated, and was situated in a complex surrounded by a 2-metre high wall. The entrance to the complex was in principle controlled by a guard in a sentry box facing the house occupied by the deceased official and his family, approximately 10 metres from the front door of the house. The house therefore enjoyed one of the protection measures described as 'additional' by the author of the written answer of 6 August 2007. Furthermore, it appeared to be equipped with devices to prevent the normally foreseeable risks of intrusion: all the access doors were fitted with Yale-type locks that had been changed by the delegation's workmen before the arrival of the official who died there, and all the exits (except the front door and the terrace door on the first floor) were protected by iron bars.

139 However, at the hearing on 15 December 2009 the Tribunal became aware for the first time of certain information on the security measures applicable to the staff of delegations in third countries, and in particular that in 2006 Morocco was considered a high-risk third country for delegation staff.

140 In order to determine the nature and scope of these measures and thus to be able to respond to the arguments of the applicant, who maintained that in the temporary accommodation in which the murders took place the Commission had failed to take the protection measures which it had itself considered necessary for the accommodation provided for its staff posted to Rabat, the Tribunal made three orders in which it instructed the Commission to produce documents relevant for the purposes of this assessment.

141 It must be noted that before ordering these preparatory enquiries the Tribunal had considered that the applicant had alleged with a sufficient degree of precision and probability that protection measures had to be observed in the accommodation provided for delegation staff, in particular by his reference to the written answer of 6 August 2007. Moreover, the documents which the Tribunal wished to obtain were likely to constitute not evidence but factors in the legal framework of the dispute. The Tribunal cannot rule on whether the Commission fulfilled its duty to ensure safety without knowing the nature and scope of that duty, which became clear from the legal framework applicable to the dispute.

142 Among the documents released by the Commission, the Tribunal considered that the extracts from the 2006 document on security standards and criteria should be given special consideration and, in order to respect the confidential nature of this document classified as 'EU restricted', it drew up a summary of those extracts.

143 However, the Commission objected to the extracts as such being placed in the file and to the applicant having access to them. The applicant, for his part, maintained that this obstructionist attitude by the Commission was unjustified and prejudiced his right to effective judicial protection. He pointed out that the summary produced by the Tribunal related only to the subject-matter of the extracts from the 2006 document on security standards and criteria, not to the content of those extracts, and that it was therefore insufficient to ensure equality of arms in the proceedings. Consequently, he asked that he be allowed access to the extracts from the 2006 document on security standards and criteria or, failing that, that the Tribunal take account of those extracts in its assessment of the case, in derogation from Article 44(1) of its Rules of Procedure.

144 It is therefore necessary to rule on the applicant's request for access to this document and, if that request is rejected, to envisage the manner in which that document could be used by the Tribunal.

– The applicant's request for access to the extracts from the 2006 document on security standards and criteria

145 It must first be noted that the 2006 document on security standards and criteria is classified as 'EU restricted' and that, as a matter of principle, a classified document is accessible only to specially authorised persons, as expressly laid down in Decision 2001/844. Hence the applicant could have access to this document only if he was authorised to do so, which cannot be easily envisaged, as the applicant has no professional relationship with the institutions. He could also have access to the document if it were formally declassified. However, when questioned on this point by the Tribunal, the Commission ruled out the possibility of adopting a decision to declassify.

146 If the Tribunal were to decide, contrary to all authorisation or declassification procedures, to communicate the extracts from the 2006 document on security standards and criteria to the applicant, it would infringe the rules laid down for handling such a document. Such a decision would also damage the trust and good faith that must exist in relations between the Courts and the administration of the European Union, since the institution released these extracts to the Tribunal solely to enable the Tribunal to verify that they were confidential. Only overriding considerations, based in particular on the protection of fundamental rights, could justify, as an exceptional measure, the Tribunal placing a classified document in the case-file and communicating it to all the parties without the agreement of the administration. There are no such circumstances in the present case.

147 Lastly, contrary to the claims of the applicant, the Commission's invoking of the confidential nature of the 2006 document on security standards and criteria is not an abuse of power or disproportionate. The protection of confidentiality is necessary to ensure the safety of delegation staff in third countries and even more so in the case of staff posted to the delegations in risk category III, where the risk of terrorism is considered to be especially high, as in Morocco since 2006.

148 While it is true that allowing only the applicant's lawyer to examine the extracts from the document in the offices of the Registry of the Tribunal might be a less restrictive measure than the denial of access, justified by the guarantees surrounding the exercise of the profession of lawyer, in particular disciplinary guarantees, such a measure would also entail a risk of disclosure of information likely to imperil the safety of delegation staff even if the integrity of the lawyer were not called into question in any way.

149 Lastly and above all, the Tribunal considers that in the present case the applicant's right to effective judicial protection and to respect for the equality of arms does not require that he or his lawyer know the content of even the extracts from the 2006 document on security standards and criteria. It is possible for the Tribunal to use the extracts from this document in ways that respect both the applicant's rights and the confidential nature of the document.

– The use by the Tribunal of the 2006 document on security standards and criteria

150 As stated in the part of this judgment dealing with procedure, the Tribunal has considered that the extracts from the 2006 document on security standards and criteria communicated to the Tribunal are relevant for resolution of the dispute. These extracts describe the security measures laid down by the Commission for the accommodation of staff of delegations in risk category III, which have included Morocco since January 2006. In order to reconcile the need to preserve the confidentiality of the document, the principle of the *inter partes* nature of the proceedings and the applicant's right to effective judicial protection, the Tribunal drew up a summary of the extracts in question, in accordance with the proposal from the Commission (see, by analogy, the order in *AM & S Europe* v *Commission*).

151 The applicant rightly maintains that this summary reflects only the subject-matter of the relevant extracts from the 2006 document on security standards and criteria and, since it gives no indication of the content of the security measures specifically mentioned in those extracts, does not enable him to exercise his right to effective judicial protection. This summary cannot, of itself, ensure balance between the conflicting interests mentioned in the preceding paragraph or the equality of arms between the parties (see, by analogy, for a case in which communication of a confidential document to the General Court of the European Union and to the applicant in the form of a summary was ruled to be insufficient to guarantee the rights of the defence, the judgment of 30 September 2010 in Case T-85/09 *Kadi* v *Commission*, paragraph 174, which is the subject of appeals before the Court of Justice in Cases C-584/10 P, C-593/10 P and C-595/10 P).

152 In such a situation, it is for the Tribunal to strike the correct balance between the interests involved, by assessing in particular whether it is possible to derogate, in the present case, from Article 44(1) of the Rules of Procedure, under which the Tribunal is to take into consideration only those documents which have been made available to the parties' representatives and on which they have been given an opportunity of expressing their views.

153 As the European Court of Human Rights has held, there may be restrictions on the right to a fully adversarial procedure where strictly necessary in the light of a strong countervailing public interest, such as national security, the need to keep secret certain police methods of investigation or the protection of the fundamental rights of another person. However, in order to ensure a fair trial, any difficulties caused to the defendant by a limitation on his rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities (see, to that effect, the judgment of the European Court of Human Rights in *A. and Others v. the United Kingdom*, especially paragraphs 205 to 208 and the case-law cited).

154 While it is true that this case-law of the European Court of Human Rights is applicable in criminal cases, as the Commission has rightly pointed out, and cannot be applied by analogy to the present case, which does not relate to such matters and, moreover, does not raise the problem of the

applicant's right to a fair hearing but that of his right to effective redress, it does provide indications on which the Courts of the European Union may draw in the conduct of the cases before them (see, to that effect, *Varec*, paragraphs 46 to 48).

155 Furthermore, the Court of Justice has held that the right to effective judicial protection requires that the court be able, in order to settle the dispute submitted to it, to have at its disposal the information required, including confidential information, in order to decide in full knowledge of the facts (see, to that effect, *Varec*, paragraphs 53 and 55).

156 It follows from the foregoing that the protection of the confidential nature of the extracts from the 2006 document on security standards and criteria means, in the present case, that the applicant does not have access to this document other than in the form of a summary and, as a consequence, that the proceedings are not fully adversarial. Nevertheless, the applicant's right to effective legal protection can be guaranteed in such a situation only if the Tribunal, in derogation from Article 44(1) of its Rules of Procedure, itself takes account of the relevant extracts from this document in order to be in a position to decide in full knowledge of the facts, even though the Commission communicated the extracts in question to the Tribunal only in order that the latter could verify the confidential nature of the document.

157 It must also be pointed out that the Commission, which in its observations of 26 November 2010 on the preparatory report for the second hearing had rejected the proposal that the Tribunal should proceed in that manner, no longer objected, at the second hearing, to the Tribunal taking into account the relevant extracts from the 2006 document on security standards and criteria if it should consider that the document regulates the situation of temporary accommodation of delegation staff.

– The applicability of the 2006 document on security standards and criteria to the temporary accommodation provided for the applicant's son and his family

158 Contrary to the Commission's assertion, the 2006 document on security standards and criteria does not relate only to accommodation that the institution classifies as 'permanent'.

159 First, none of the extracts from this document to which the Tribunal had access uses this qualification. These extracts refer only to the 'accommodation' of delegation staff ('staff houses'). Nor do the other texts or documents relevant to assessment of the case confirm a distinction between permanent and temporary accommodation as far as security is concerned. For example, Article 18 of Annex X to the Staff Regulations merely provides that, upon his arrival in the third country, an official who is obliged to stay in a hotel or in temporary accommodation is entitled to reimbursement of the actual cost of renting such accommodation, after prior approval by the competent authority. The vade mecum of the External Relations DG contains no other provisions on the security measures applicable to temporary accommodation, laying down only the conditions for meeting the cost of renting such accommodation and paying the daily allowance to the official concerned. Section 15.3.3 of that vade mecum, entitled 'Limits', simply indicates that budgetary and security aspects are taken into account in the selection of temporary accommodation and that periods of housing in temporary accommodation are to be limited as far as possible. For example, it is considered appropriate that the period of temporary accommodation at the end of a posting should not exceed one week. Since this section is within a chapter of the vade mecum dealing with budgetary and administrative aspects of the stay in temporary accommodation, no conclusion can be drawn from such an indication as to the nature of the security measures applicable to such accommodation.

160 Secondly, page 142 of the 2006 document on security standards and criteria, which was among the extracts from the document forwarded to the Tribunal, contains the following sentence, reproduced in the summary of the document which the applicant's lawyer examined: 'the recommendations mentioned in the said document are minimum security requirements which must be fulfilled in all circumstances; no exception or alternative arrangement shall be permitted without the prior

agreement of [the] Personnel and Administration [DG] — Directorate Security'. If the stipulation that these minimum security requirements must be fulfilled 'in all circumstances' related only to 'permanent' accommodation, it would lose its rationale. The authors of the 2006 document on security standards and criteria knew that temporary accommodation was occasionally used in the delegations and would probably have made reference to the special situation of such accommodation if they had intended to exclude it from the scope of the document in question.

161 Lastly, although it is true, as the Commission maintained at the second hearing, that temporary accommodation cannot, by its very nature, in every case have the same protection devices as permanent or 'definitive' accommodation, that fact does not mean that the 2006 document on security standards and criteria is not applicable to such accommodation. Indeed, by providing for possible derogations from these measures with the prior agreement of the competent department, this document allows for security measures to be adapted to the characteristics of the accommodation concerned and thus for account to be taken of their temporary nature.

162 In these conditions, it must be considered that the 2006 document on security standards and criteria is indeed relevant for assessing whether appropriate security measures were taken with regard to the temporary accommodation occupied by the applicant's son and his family, as the measures mentioned in this document for the accommodation of the staff of delegations in risk category III are applicable 'in all circumstances'.

163 In the alternative, even if it were acknowledged that this document was not applicable to the accommodation at issue, account should be taken of such instructions for permanent accommodation to assess whether the Commission took all the care necessary with regard to temporary accommodation. That alternative assessment will be made below.

– The legal scope of the 2006 document on security standards and criteria

164 As the applicant rightly maintained at the second hearing, this document is an internal directive by means of which the Commission limited its discretion for the implementation of measures to protect its staff, and which is enforceable against it until such time as it amends it.

165 First, the measures mentioned in this document appear — by reason of their purpose, wording, degree of precision, conditions of application and the inspections to which they are likely to be subject — to be binding measures and are not simply recommendations without mandatory legal effect, as the Commission's duty to ensure safety would otherwise be rendered ineffective. The Commission was therefore wrong to maintain, until the first hearing, that no text of any kind laid down security measures for the accommodation of the staff of the delegation in Morocco and that there was only a general recommendation to protect the residences and official accommodation addressed to the head of delegation in the vade mecum of the External Relations DG.

166 Secondly, it is clear from the case-file that in 2006 the services of the delegation in Morocco considered it necessary to implement these measures all the more quickly, as in January 2006 the delegation had moved from risk category II to category III, the highest level on the scale of risks. Moreover, the competent departments of the External Relations DG had carried out an inspection of the services of the delegation in Rabat in November 2005 to assess the 'Delegation's compliance with the "Standards and Criteria"', which are precisely the standards and criteria set out in the 2006 document on security standards and criteria. It is also apparent from a note of 6 June 2006 from the head of delegation and from the mission report appended to that note, drawn up by the regional security officer following his inspection of 10 to 13 May 2006 in Rabat, that it was necessary to comply fully with 'the obligation for each official and contractual agent to have ... protection 24 hours a day and 7 days a week', that work was necessary to make accommodation secure and that special

emphasis was placed on the strong recommendation to install bars on the windows of one of the accommodations and on the obligation to equip 'the accommodations' with an alarm system and a panic button.

167 Even supposing that the scope of such security measures was similar to that of internal directives, which according to the case-law are to be regarded as rules of conduct indicating the practice to be followed and which the administration imposes on itself, the Commission has not in any way pleaded that considerations of public interest or reasons based on the interest of the service had justified the failure to apply these measures in the present case. The Commission only claimed, wrongly, that the measures set out in the 2006 document on security standards and criteria were not applicable to temporary accommodation.

168 It follows from the foregoing that, in order to assess whether the Commission was at fault in fulfilling its duty to ensure safety, the Tribunal must take account of the measures that the Commission itself considered appropriate for the level of risk existing in Morocco in 2006, as demonstrated by the 2006 document on security standards and criteria.

– The existence of fault on the part of the Commission

169 It is clear from the documents in the case-file, and especially from the summary and extracts from the 2006 document on security standards and criteria, that the Commission had set minimum security requirements for the accommodation of its staff posted to the delegation in Rabat. These consisted of the installation of protection devices appropriate for the level of risk assessed for Morocco and applicable in all circumstances, in particular the installation of an intruder alarm, panic buttons, protection grids with precise characteristics and permanent surveillance by a specialised company.

170 As stated above, these measures were applicable to all accommodation provided for delegation staff, unless derogations had previously been agreed by the competent department. The aim of such measures was to avert a terrorist risk, which at that time was considered sufficiently serious to warrant classifying the delegation in risk category III. In addition, the head of delegation had asked the External Relations DG to carry out an inspection. That inspection, which was conducted from 10 to 13 May 2006, identified a number of deficiencies in the protection of the accommodation provided for delegation staff.

171 Although the Commission administration was fully aware of the especially high risks to which its staff were exposed, none of the measures laid down for the protection of the accommodation of delegations in risk category III had been implemented in the accommodation occupied by the applicant's son and his family.

172 The accommodation in question was equipped with neither an intruder alarm system nor panic buttons. The bars between which the murderer was able to squeeze did not comply with the recommendations of the 2006 document on security standards and criteria, of which the Tribunal learnt from one of the extracts from the document communicated by the Commission and which, had they been applied, would have prevented even a slightly-built attacker from passing through the bars. As the applicant has stated, these bars were therefore not fit for their purpose. Lastly, surveillance of the house was not provided by a specialised company charged with the specific protection of these premises 24 hours a day, 7 days a week. As reported by the Commission at the second hearing, the guard whose sentry box was close to the entrance of the house was responsible for guarding a number of houses in the same development and was not expected to supervise more closely the house occupied by the applicant's son. Moreover, the lease on the house made no reference to the terms for guarding the house. It can also be noted that although the guard was present on the night of the murder at the time when the murderer infiltrated the house, it appears that there was no protection later: the murderer was therefore able to load objects stolen from the house (a set of golf clubs, paintings and trinkets, a television set, and so forth) into the victims' car parked in front of the

entrance and to leave at the wheel of this vehicle without being challenged by anyone. The Tribunal notes, in addition, that some of the measures laid down for the accommodation of delegations in risk category II (intruder alarm system and panic buttons) had not been implemented either for this property.

173 Admittedly, in order to find that the Commission failed to fulfil its duty regarding security, the Tribunal cannot confine itself to noting that the protection measures listed in the 2006 document on security standards and criteria had not been implemented. It is evident that, in certain circumstances, particularly in an emergency, the occupation of temporary accommodation that does not have the same security features as permanent accommodation may be contemplated as a temporary measure.

174 However, even in such a situation the administration cannot dispense with minimum measures to counter the main risks to the safety of the occupants of temporary accommodation or to limit the probability of their occurring, in conditions that are acceptable from the budgetary and administrative points of view. This is all the more true where special circumstances have been brought to the attention of the Commission.

175 In the present case, the high level of risk ascertained for Morocco in view of terrorist threats likely to affect an official of the European Union, the inspection carried out in May 2006, which had identified inadequacies in the protection of the accommodation provided for delegation staff, and the presence of four young children in the home of the official concerned were factors that justified the taking of special precautions before the official occupied the accommodation in question, even on a temporary basis. It must also be noted that the Commission has at no time maintained that the protection measures existing in the accommodation provided for the deceased official were the subject of a derogation by the competent department, in application of the 2006 document on security standards and criteria. Nor has the Commission claimed that additional work to make the house safe, such as modification of the window bars through which the murderer entered the house or the installation of an alarm system or panic buttons, or even the temporary extension of the contract for protection provided by a specialised company, would have caused budgetary or administrative difficulties. In any case, the Commission had known since 6 April 2006, the date on which the applicant's son accepted his posting to Morocco, that it would be necessary to house him and his family in Rabat. Finally, the fact that the applicant's son and his family wanted to leave the hotel where they had been lodged temporarily, in conditions of discomfort for a family with four children, was not such that it relieved the administration of its duty to install protection devices corresponding to the risk level assessed for the delegation, by implementing, if not all the measures laid down in the 2006 document on security standards and criteria, at least one or several of them that could be taken without great difficulty to the institution, such as the fitting of new bars or the installation of panic buttons.

176 It is clear from the above considerations that the applicant is entitled to maintain that the Commission acted wrongfully in such a way as to incur liability.

177 On the assumption that it be necessary, the Tribunal considers that the Commission's failure to fulfil its duty to guarantee the protection of its official and his family posted to a third country constitutes, for the reasons set out in paragraphs 171 to 175 of this judgment, a sufficiently serious breach of a rule of law intended to confer rights on the applicant's son and his family for the Commission to incur liability.

The causal link and the existence of a cause exonerating the institution from liability (fault of the victims and act of a third person)

178 At the second hearing the applicant and the Commission submitted two views of the certain, direct causal nexus that must exist between the fault committed by the institution and the damage pleaded. According to the applicant, where the fault consists in the failure of an institution in its duty to act, that omission is a direct and certain cause of the damage claimed if it is demonstrated that, had the

institution adopted the required measures, that damage would 'probably not have occurred'. In the view of the applicant, this assessment is clear from the judgment of 13 December 2006 in Case T-304/01 *Abad Pérez and Others* v *Council and Commission*. He further maintains that the Court of First Instance ruled, to the same effect, that an unlawful act is the certain and direct cause of the damage if it is shown that, had the institution abided by the law, it seems 'eminently probable' that the applicant would have obtained satisfaction (judgment of 5 October 2004 in *Sanders and Others* v *Commission*, paragraph 150). The Commission, by contrast, argues that there must be certainty that, but for the omissions, the damage would not have occurred in order to demonstrate that the causal link between the fault and the damage is direct and certain (judgment of 13 December 2006 in Case T-138/03 *É. R. and Others* v *Council and Commission*, paragraph 127).

179 The case-law on the causal link is among the most subtle and nuanced, as the arguments of the parties confirm. It is nevertheless settled case-law, whatever the nuances in the formulae used by the Courts of the European Union, that only a fault leading to the damage by means of a direct link of cause and effect renders the institution liable. The Union can be held liable only for damage which is a sufficiently direct consequence of the wrongful conduct of the institution concerned (judgment of 24 October 2000 in Case T-178/98 *Fresh Marine* v *Commission*, paragraph 118 and the case-law cited, and judgment of 19 March 2010 in Case T-42/06 *Gollnisch* v *Parliament*, paragraph 110 and the case-law cited).

180 The applicant has to establish that, but for the fault committed, the damage would not have occurred and that the fault is the determining cause of that damage (see, to that effect, the judgment of 30 September 1998 in Case T-149/96 *Coldiretti and Others* v *Council and Commission*, paragraphs 116 and 122). Where the damage is an inevitable and immediate consequence of the fault committed, the causal link is established (judgment of 9 July 1999 in Case T-231/97 *New Europe Consulting and Brown* v *Commission*, paragraphs 57 to 60).

181 Moreover, the Courts of the European Union consider that the direct and certain origin of the damage may lie not in a single cause but in several causes that contributed decisively to its occurrence (judgment of 12 June 1986 in Case 229/84 *Sommerlatte* v *Commission*, paragraphs 24 to 27; *Grifoni* v *EAEC*, paragraphs 17 and 18; and *Fresh Marine* v *Commission*, paragraphs 135 and 136).

182 In the present case, the applicant maintains that, had the necessary security measures been implemented, first the murders would not have been committed, and secondly the alarm would have been raised, giving his son, who did not immediately succumb to the wounds he had received, a chance of surviving his injuries. It is necessary to examine on these two points whether the causal link is established between the fault and the damage pleaded.

183 First, as regards the causal link between the fault and the double murder, the Tribunal considers that the applicant has established to a sufficient legal standard that, had the Commission complied with its duty to ensure the protection of its official, the double murder would not have occurred. If a permanent surveillance service for the sole protection of the house provided for the applicant's son had been arranged and if bars with the characteristics laid down by the competent departments of the Commission had been installed, the murderer would have been dissuaded or at least physically prevented from penetrating the house. The Commission thus contributed directly to the damage by creating the conditions for it to occur. The direct and certain nature of the causal link is therefore established.

184 It is true that the risk to staff safety perceived by the Commission, which justified the classification of the Rabat delegation in risk category III, was linked to a terrorist threat and not to ordinary criminality such as that to which the applicant's son and daughter-in-law fell victim. However, that fact has no effect on the assessment of the direct and certain nature of the causal link described in the preceding paragraph. Indeed, it is reasonable to consider that measures to prevent a terrorist attack or the murder of an official for political reasons or by the act of terrorist groups should provide effective

protection, a fortiori, against the intrusion of an individual into the home of an official. The Commission cannot validly claim that it should be absolved of all liability on the ground that the criminal's motive was not the one initially feared.

185 Moreover, the Commission cannot find support for its arguments in various errors that its official allegedly committed and which, in its view, would break the causal link or mitigate the administration's liability.

186 On the one hand, the official's absence from 'pre-posting' training sessions on security undoubtedly constitutes negligence on his part. Nevertheless, the Tribunal has been unable to determine the cause of that absence, which may have been due to professional reasons. Furthermore, it is not clear from the invitations to attend these sessions, which merely '[asked the deceased official] to take part', that participation was presented as an essential official obligation before posting to a delegation. Moreover, it was possible to post the applicant's son to Morocco without his having undergone that training. In addition, the organisation of such 'pre-posting' sessions cannot, of itself, release the Commission from its duty to inform its officials of the risks to their safety to which they are exposed in the delegations, particularly those posted to delegations in risk category III. If an official posted to such a delegation does not attend these sessions before his departure, it is for the administration to satisfy itself that he has received the necessary information. The Commission has not alleged that the applicant's son was sent the documents relevant to his safety before his departure for Morocco.

187 Furthermore, it emerged in the course of the second hearing that officials posted to delegations do not normally have access to the 2006 document on security standards and criteria, as this document classified as 'EU restricted' is not sent to them. Hence, even if he had attended the 'pre-posting' sessions, the applicant's son would probably not have been placed in a position to assess the actual security measures taken for the accommodation provided for him in Morocco. The Commission's arguments that the official had accepted the living and accommodation conditions prevailing in Morocco and had agreed to move into the temporary accommodation can therefore not be accepted, as that agreement was not given in full knowledge of the facts. The Tribunal notes in this respect that on 6 April 2006 the Commission asked the applicant's son to certify that he accepted his posting to Rabat and that, in particular, he had acquainted himself fully with the accommodation provided for him, despite the fact that the lease on that accommodation was not signed between the owner and the Commission until 8 August 2006. Moreover, when the applicant's son confirmed, on 24 August 2006, that he accepted the accommodation offered, it was clearly indicated on the acceptance form that at that date no rented accommodation corresponding to the composition of his family was available.

188 On the other hand, although it is common ground that the window through which the murderer entered the house had been left open by the occupants and that the shutter on that window was partially raised, that circumstance cannot be considered to be the result of negligence or fault on the part of the victims. Indeed, the window in question was behind bars which the applicant's son, who had no knowledge of the 2006 document on security standards and criteria, could reasonably suppose to constitute a sufficient obstacle to a possible attacker. Moreover, the Commission itself alleged, in its written submissions and at the first hearing, that the bars would prevent the entry of an adult of average body size. Furthermore, it was still hot at that time of year and it cannot be considered negligent to leave a window open behind bars that were adequate a priori, in a dwelling without air conditioning in which four young children lived.

189 The Commission therefore fails to prove that the applicant's son had, by his negligence, committed an error that absolved the administration of liability or that the causal link between the fault committed and the murders had been broken.

190 Secondly, as regards the causal link between the fault and the loss of a chance of survival for the applicant's son, the Tribunal considers that the applicant has established to a sufficient legal standard that, had appropriate security measures been taken, the alarm could have been raised in one way or another after the murderer had entered the house, either owing to the alertness of a guard or as a result of the injured official himself or one of his children pressing a panic button. It is certain that the attacker would not have remained so long in the house, where he spent about four hours, if one of the measures for raising the alarm had been taken. Hence, owing to the fault of the Commission, the applicant's son lost a serious chance of receiving help and a chance of surviving his injuries.

191 The murderer's share in the liability for the occurrence of the damage remains to be determined.

192 It cannot seriously be argued that the Commission should be held primarily liable for the damage due to the double murder. Although the Commission created the conditions for this damage to occur by failing to take adequate security measures to prevent the entry of the attacker, the double murder was not the immediate and inevitable consequence of that fault. The murders were the act of an individual whose motive was theft and whose behaviour was unforeseeable. The normally predictable consequence of the Commission's fault, where such an individual is concerned, was burglary, possibly accompanied by physical threats to the occupants of the house, not acts as serious as those that were committed. This assessment does not deviate from the principles of Directive 89/391, Article 5(4) of which provides that an employer's responsibility may be limited, in particular where occurrences are due to unusual and unforeseeable circumstances beyond his control.

193 The actions of the attacker cannot, however, entirely absolve the institution of liability. If it were considered that the causal link between the Commission's fault and the double murder had been broken, the administration would bear no consequence for its wrongful omission, whereas it created the conditions in which such damage could occur. Such a solution would be inconsistent with case-law, which acknowledges that damage may have several causes and does not necessarily require that the administration bear sole responsibility for the damage for it to incur liability.

194 The Tribunal therefore considers that the Commission is liable for 30% of the damage suffered.

195 The Tribunal reaches a different conclusion with regard to the loss of a chance of survival. Here the Commission's fault is the direct and exclusive cause of the damage. The murderer's actions do not mitigate the liability of the institution.

196 Nevertheless, although the loss of a chance of survival is certain, the Tribunal considers that the applicant's son had only a very faint chance of surviving his injuries. Given the lack of precise information in the case-file and the uncertainty inherent in this type of assessment, it is very difficult to evaluate this chance of survival. The Tribunal considers that it can be estimated at 20%. It is clear from the documents in the file that the official had been stabbed in the neck and that, although he did not succumb immediately, he had been very gravely injured, which seriously jeopardised his chances of survival, even if help had arrived quickly.

197 In conclusion, taking into account the two counts of damage pleaded — that is to say the double murder and the loss of a chance of survival — and the fact that the second damage is narrower in scope than the first, the Tribunal considers that the Commission must be held liable for 40% of the damage suffered.

The damage

198 The certain damage for which, in principle, compensation can be paid in the present case is only that for which the applicant is entitled to apply to the Tribunal for reparation, that is to say the material damage suffered by the heirs and successors of the deceased official, assessed in relation to the remuneration that the applicant's son would have received up to retirement age, estimated by the applicant to total EUR 3 975 329.

199 Taking into account the uncertainty of such a calculation and the conjecture it entails about the career that the person concerned might have had, this sum constitutes prima facie a reasonable estimate of the remuneration that the deceased official would have received and provides an extremely approximate but relevant basis for evaluating the loss of income of the heirs and successors of the applicant's son.

200 The Tribunal cannot, however, take it into consideration as it stands for determining the material damage actually suffered by the heirs and successors. If the applicant's son and daughter-in-law had not been murdered, they would have spent a substantial part of that sum on their own needs. The children would therefore not have benefited from that sum in its entirety. Furthermore, it is probable that the children of the deceased couple benefit or will benefit within a few years from the inheritance that will accrue to them legally and which they would not have received had their parents remained alive. In addition, the Commission has stated, without being contradicted, that it is not precluded that the heirs and successors of the deceased parents received payments under life assurance policies as a result of the double murder. The Tribunal therefore considers that the material damage linked to the loss of revenue which must be taken into consideration in the present case amounts to the sum of EUR 3 million.

201 As stated above, the Commission is required to make good 40% of this damage, that is to say to pay the heirs and successors of the deceased couple an overall amount of EUR 1.2 million.

202 It is apparent from the defence statement, and it has not been contested, that the amounts which the Commission has already paid and which it will continue to pay to the heirs and successors — amounts which exceed the benefits normally provided under the Staff Regulations — total almost EUR 1.4 million, which could increase to around EUR 2.4 million if the benefits concerned are paid until the 26th birthday of each of the four children.

203 The Commission has therefore already made full reparation for the material damage for which it must bear liability.

204 The fact adduced by the applicant that the amounts paid by the Commission are by way of social security benefits does not affect this assessment, even if proved true. The purpose of the benefits paid is to make good the financial consequences of the death of an official, whatever the cause. While it is true that, where the administration is at fault, the administration is required to make full reparation for the damage, if necessary by supplementing the benefits paid under the Staff Regulations (see, to that effect, *Leussink* v *Commission*, paragraphs 18 to 20), it is established case-law that the Court takes benefits under the Staff Regulations into account when assessing whether or not damage suffered has been made good by the administration. The purpose of such benefits is thus to ensure that reparation for an injury is made, even where the administration has committed a fault for which it is liable. Moreover, in the present case the Commission exceeded its obligations under the Staff Regulations by granting the deceased official a posthumous promotion, by calculating the benefits payable to his heirs and successors on that basis and by increasing the amounts of those benefits in accordance with Article 76 of the Staff Regulations.

205 It follows from all the foregoing that the first plea of the action, although well founded, does not permit the Tribunal to accept the applicant's arguments for reparation of the material damage suffered.

206 The Tribunal must therefore examine the other two pleas, in which the applicant maintains that the Commission bears liability, first by reason of a lawful act, even without fault, and secondly by reason of its duty to provide assistance.

B – *The second plea, alleging that the Commission bears liability by reason of a lawful act, even without fault*

1. Arguments of the parties

207 The applicant claims that, even supposing that the Commission did not commit any negligence, the conditions for the administration to incur no-fault liability by reason of a lawful act are fulfilled. He maintains that the damage and the causal link between the damage and the lawful act are proven; the damage was unusual, serious and special. He concedes that in the judgment of 9 September 2008 in Joined Cases C-120/06 P and C-121/06 P *FIAMM and FIAMM Technologies* v *Council and Commission* the Court of Justice ruled that a regime of no-fault liability of the European Union did not exist, but maintains that this applied only to its legislative measures, which are within the discretionary powers of the legislature. According to the applicant, the Court in no way precluded the application of such a regime to the institutions, as in the present case. The applicant considers that, in its assessment of this issue, the Tribunal should take account of the exceptionally serious and tragic nature of the events suffered by the children of the deceased official, who lost their parents prematurely and were impotent witnesses of the terrifying murder of their father and mother. He asserts that the Tribunal should rule on the claim for compensation in accordance with the criteria of justice inspired by the deep sense of fairness that should distinguish the institutions of the Union.

208 As stated above, the Commission considers this plea to be inadmissible, as it was not raised in the initial request for compensation and is not supported by the least information quantifying the scale of the alleged damage. As to the substance, the Commission points out that the principle of liability for a lawful act has not to this day been recognised by the Court of Justice. It contends that the applicant has provided no proof that the Tribunal should acknowledge the existence of such a regime of liability for the conduct of the institutions. In any event, in the present case, the Commission maintains that the applicant has failed to prove that the conditions for incurring such no-fault liability are fulfilled.

2. Findings of the Tribunal

209 It is clear from *FIAMM and FIAMM Technologies* v *Council and Commission*, paragraph 175, that, while comparative examination of the Member States' legal systems enabled the Court of Justice to make at a very early stage the finding concerning convergence of those legal systems in the establishment of a principle of liability in the case of unlawful action or an unlawful omission of the authority, including of a legislative nature, that is in no way the position as regards the possible existence of a principle of liability in the case of a lawful act or omission of the public authorities, in particular where it is of a legislative nature. The Court thus concluded that, as European Union law currently stands, Article 288 EC, which refers to the 'general principles common to the laws of the Member States', cannot be interpreted as meaning that the Union can incur no-fault liability by reason of a lawful act or omission.

210 Contrary to the assertions of the applicant, it is apparent from the very terms employed by the Court in the cited paragraph in its judgment ('including of a legislative nature' and 'in particular where [that lawful act or omission] is of a legislative nature') that the conclusion which it reached in that judgment is not limited to the sphere of the legislative competence of the Union.

211 As recalled in paragraph 116 of this judgment, a dispute between an official and the institution by which he is or was employed concerning compensation for damage is pursued, where it originates in the relationship of employment between the person concerned and the institution, under Article 236 EC and Articles 90 and 91 of the Staff Regulations and lies outside the scope of Articles 235 EC and 288 EC. The case-law of the Court of Justice and the General Court of the European Union on the conditions for non-contractual liability on the basis of Article 288 EC cannot therefore be applied by analogy automatically to actions for non-contractual liability brought by officials or their heirs and successors against the institutions under Article 236 EC and Articles 90 and 91 of the Staff Regulations. In this regard, the applicant rightly notes that such actions relate to the institutions not in the exercise of their legislative or regulatory powers laid down in the Treaties but in their actions towards their staff in their capacity as employer.

212 However, in view in particular of the general terms employed by the Court of Justice and the nature of that judgment as a decision of principle, the Tribunal cannot discern reasons why, in their relations with their staff, the institutions of the Union can be held liable on the basis of conditions that are radically different from those obtaining under Article 288 EC and far removed from the general principles common to the laws of the Member States.

213 Although the circumstances of this dispute are exceptional, this argument, the only one put forward by the applicant, is not sufficient justification for recognising in principle the existence of a regime of no-fault liability in actions for non-contractual liability brought on the basis of Article 236 EC, the benefit of which is reserved to officials of the Union and their heirs and successors.

214 Moreover, the Court has held that Directive 89/391, which is a relevant frame of reference for determining, in accordance with Article 1e of the Staff Regulations, the duties incumbent on the institutions of the Union, could not be interpreted as obliging the Member States to establish a regime of employers' no-fault liability for damage to the health and safety of workers (*Commission* v *United Kingdom*, paragraphs 37 to 51). By contrast, the Commission maintained before the Court that Directive 89/391 had provided for a regime of employers' liability covering the consequences of any event detrimental to workers' health and safety, regardless of whether that event or those consequences could be attributed to any form of negligence on the part of the employer in adopting preventive measures.

215 Even supposing that no-fault liability on the part of the Commission could in principle be established, it must be noted that this form of objective employer's liability, which rests on the obligation to pay compensation for a professional risk and not on the finding of a fault on the part of the employer for which he must make reparation, already underlies the obligation for the institution to pay benefits under the Staff Regulations to the official or his heirs and successors in the event of an accident occurring in the exercise of his duties, occupational disease or death. Indeed, even without it being proven that the institution committed any fault as employer, the official or his heirs and successors receive a flat-rate benefit to compensate for the consequences of these events. The settled legal requirement that fault must be proven for the official or his heirs and successors to be granted compensation over and above the benefits awarded under the Staff Regulations, in order fully to make good the damage that they consider they have suffered, shows that non-contractual liability on the part of the administration remains firmly subject to the existence of a fault or unlawful act.

216 It follows from the foregoing that the applicant is not entitled to ask the Tribunal to find that the conditions for no-fault liability on the part of the Commission are fulfilled.

217 Consequently, the second plea must be dismissed, without it being necessary to rule on its admissibility.

C – The third plea, claiming that under Article 24 of the Staff Regulations the Commission is obliged to pay compensation jointly and severally for the damage suffered

1. Arguments of the parties

218 The applicant maintains, in the alternative, that under the second paragraph of Article 24 of the Staff Regulations the Commission must in any case make reparation for the damage suffered by its official by reason of his position or duties. In his view, the double murder was objectively linked, in causal terms, to the professional activity of his son on Moroccan territory, where he was present solely by reason of his duties. Moreover, the murder had been committed within a dwelling chosen by the Commission. He asserts that in the exceptional circumstances of the present dispute, the Commission should even have acted on its own initiative without being served with an application to that effect, and should have jointly and severally compensated for the damage suffered by the official and his spouse by the act of a third party.

219 As stated previously, the Commission claims that this plea is inadmissible, as it was not raised in the initial claim for compensation. As to the substance, it considers that the dramatic events that caused the death of the applicant's son had nothing to do with his position as an official and that the condition required by the second paragraph of Article 24 of the Staff Regulations as interpreted in the case-law, that is to say that the official must have suffered damage by reason of that position, has therefore not been satisfied.

2. Findings of the Tribunal

220 As the Court of Justice has ruled, the purpose of Article 24 of the Staff Regulations is to provide officials and other servants in active employment with protection both at the present time and in the future in order to enable them to carry out their duties better in the general interest of the service (see *Sommerlatte* v *Commission*, paragraph 19).

221 It is clear from Article 24 of the Staff Regulations and from the associated case-law that under that provision the institutions of the Union are obliged to assist their officials only in the event of actions on the part of third parties to which the officials are subjected by reason of their position or duties (see, in particular, the judgment of 5 October 1988 in Case 180/87 *Hamill* v *Commission*, paragraph 15, and judgment of 27 June 2000 in Case T-67/99 *K* v *Commission*, paragraph 32).

222 In the present case, it is common ground that the conditions for the application of Article 24 of the Staff Regulations linked to the perpetrator of the incriminated act are satisfied. The applicant's son was indeed the victim of actions on the part of a third party.

223 However, Article 24 of the Staff Regulations also requires that the actions in question stem from the applicant's position as an official and from his duties. The actions for which assistance is sought must have been perpetrated by reason of that position and those duties, with the institution seeking both to protect its staff and to safeguard its own interests. The Court of Justice has thus ruled that no duty of assistance may be relied upon in the case of coercive measures taken against an official by national police as a result of the personal conduct of the official, who is prosecuted for an offence unconnected with the performance of his duties (*Hamill* v *Commission*, paragraphs 16 and 17). Similarly, it has been held that the mere fact that a child was admitted to a crèche because one of his parents was a member of the European Union civil service, and was there the victim of extremely

serious assaults, does not support the conclusion that the link, for the purposes of Article 24 of the Staff Regulations, between the acts of the third parties concerned and the parent's position as an official is established (*K* v *Commission*, paragraphs 36 to 38).

224 In the present case, the applicant's son was not murdered by reason of his position and duties. As stated above, he was the target of a common criminal, who attacked him, his wife and his possessions without any knowledge of the victim's position as an official of the European Union or of the nature of his duties. The criminal probably thought that the occupants of the villa where he committed his crimes had a higher standard of living than the average inhabitant of Rabat, but neither that circumstance nor the posting of the applicant's son to Morocco nor the occupancy of accommodation chosen by the Commission establishes that the official was targeted because of that position and by reason of his duties.

225 The applicant therefore cannot rely on Article 24 of the Staff Regulations.

226 In any event, even if it could be recognised that the applicant's son was the victim of a murder committed by reason of his duties, the Tribunal considers that the benefits provided under the Staff Regulations in the event of the death of an official, in particular the provisions of the third indent of Article 7(2) of the Common Rules ('The following shall ... be regarded as accidents within the meaning of [the Common Rules]: the consequences of assaults on or attempts on the life of the insured party, ...'), give concrete form to the duty of protection that each institution, as employer and under Article 24 of the Staff Regulations, must provide for its officials and their heirs and successors. The applicant does not claim that he was unlawfully denied one of the guarantees provided under the Staff Regulations. Moreover, the Commission has made use of the option under Article 76 of the Staff Regulations to grant exceptional assistance to the persons concerned in special cases. The Commission thus duly complied with its duty to provide assistance and protection in accordance with Article 24 of the Staff Regulations.

227 In any event, the applicant is therefore not entitled to maintain that the Commission infringed that provision of the Staff Regulations. Consequently, the third plea must be dismissed, without there being any need to rule on the plea of inadmissibility raised against it.

228 It follows from all the foregoing that the action must be rejected in its entirety.

Costs

229 Under Article 87(1) of the Rules of Procedure, without prejudice to the other provisions of Chapter 8 of Title 2 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 87(2), the Tribunal may, if equity so requires, decide that an unsuccessful party is to pay only part of the costs or even that he is not to be ordered to pay any. Under Article 88 of the Rules of Procedure, a party, even if successful, may be ordered to pay some or all of the costs, if this appears justified by the conduct of that party, including before the proceedings were brought, especially if he has made the other party incur costs which are held to be unreasonable or vexatious.

230 In the present case, notwithstanding the legitimate confidentiality concerns it asserted, the Commission considerably delayed the proceedings by initially refusing to forward certain documents and information to the Tribunal and by obliging the Tribunal to arrange a second hearing. Moreover, on several points the Commission gave the Tribunal inaccurate answers, in particular claiming that no document existed on the security measures applicable to the accommodation of staff in the delegations in third countries and that the measures mentioned by the author of the written answer of 6 August 2007 were of no relevance to acts committed the previous year. The Commission's opposition to the Tribunal's taking into account of the 2006 document on security standards and criteria, which was important to the resolution of the dispute — opposition which was finally dropped at the second hearing — reflected an

attitude that was incompatible with the rules on a fair hearing. Such conduct on the part of the Commission in a case as distressing for the applicant as the present one is all the more inappropriate in that the institution had displayed dignity and concern before the action was brought.

231 Furthermore, the applicant could consider himself justified in bringing his action. First, the Tribunal found that the Commission had committed an error such as to incur liability. Secondly, the attitude adopted by the Commission in the course of the proceedings convinced the applicant that the institution had concealed some of the causes of the murder of his son and daughter-in-law.

232 Consequently, a fair assessment of the circumstances of the case requires that the Commission be ordered to pay, in addition to its own costs, the reasonable and duly justified costs of the applicant.

On those grounds,

THE CIVIL SERVICE TRIBUNAL (First Chamber)

hereby:

1. Dismisses the action;

2. Orders the extracts from the 2006 document on security standards and criteria, sent by the European Commission to the Tribunal in the course of proceedings, to be returned immediately to the European Commission in an envelope marked 'confidential' and 'classified EU restricted';

3. Orders the European Commission to pay all the costs.

Gervasoni Kreppel Rofes i Pujol

Delivered in open court in Luxembourg on 12 May 2011.

W. Hakenberg
Registrar

S. Gervasoni
President

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