

THE COURT (First Chamber)

hereby:

1. Annuls the decision in dispute.
2. Orders the defendant to pay the costs.

Ó Dálaigh

Donner

Mertens de Wilmars

Delivered in open court in Luxembourg on 30 October 1974.

A. Van Houtte

C. Ó Dálaigh

Registrar

President of the First Chamber

OPINION OF MR ADVOCATE-GENERAL WARNER
DELIVERED ON 9 OCTOBER 1974

My Lords,

It appears that the budget of the Secretariat-General of the Council for 1973 provided for five of the Sections of its Translation Service — namely the Dutch, English, French, German and Italian Sections — to become Divisions. Each of these Divisions was to be headed by an official of grade L/A 3 instead of, as the Sections had been, by one of grade L/A 4.

Thus it was that, on 3 April 1973, the Council, pursuant to Article 4 of the Staff Regulations, published Notice of Vacancies No 31/73, relating to five posts of Head of Translation Division of grade L/A 3. (The text of the Notice, as

published, is among the Annexes to the Answers, dated 28 June 1974, given by the Council to Questions put by the Court at the close of pleadings).

The conditions of eligibility for the posts were stated in the Notice to be as follows:

- University education... or equivalent professional experience;
- Perfect command of one of the languages of the Communities, including knowledge of economic and legal terminology with particular reference to the fields concerning the European Communities, and a thorough knowledge of three other languages of the Communities;

— Experience of several years as head of an administrative unit of some importance.'

The Notice concluded by saying that the posts would be filled in accordance with the procedure laid down in the Staff Regulations and it referred in this connexion to Articles 4 and 29 of those Regulations. In that respect it paid heed to the decision of the Court in Case 21/68 *Huybrechts v Commission* (Rec. 1969, p. 85, particularly at pp. 96-97).

There can be no doubt, however, that the Notice had been carelessly prepared. It was never submitted in draft either to the then Head of the Translation Service, Herr Noack, or to his Deputy, M. Battin. It seems that its author, whoever he was, blindly followed the precedent of the Notices of Vacancy that had earlier led to the appointments of Herr Noack and of M. Battin, both of whom were of grade L/A 3. Thus the original Notice actually signed by the Secretary-General, which was in French (Annex III to the Rejoinder) required 'une connaissance approfondie des trois autres langues des Communautés'. It was only after the Secretary-General had signed it, and before its publication, that someone noticed the anachronism and altered 'des' to 'de'. From this, and from the evidence that was given at the hearing, which I shall come to, I find the inference irresistible that, at the time when the Notice was drawn up, no real thought was given to the question what linguistic attainments were called for in the Head of one of the new Divisions.

Applying Article 29, the Secretary-General, who was the appointing authority, decided first to consider whether the posts could be filled by promotion within the institution. For that purpose he referred the matter to the Advisory Committee on Promotion for the L/A grades, a body whose function it was to advise him in his consideration of the relative merits of officials eligible for promotion under Article 45 (1) of the Staff Regulations. The constitution and procedure of this body were at the time

regulated by a Decision of the Secretary-General himself, No 344/73 of 23 March 1973 (Annex II to the Rejoinder) which had replaced an earlier Decision of 26 May 1964 and subsequent Decisions amending it. I should, I think, mention that the reference to the Advisory Committee was not confined to the five new posts of grade L/A 3, but covered also a number of more junior posts which had been declared vacant or which might become vacant as the result of promotions.

The Advisory Committee had before it particulars of the officials who were eligible for promotion together with the biennial reports on those officials, made under Article 43 of the Staff Regulations, for the period 1st November 1969 to 31 October 1971, and relevant extracts from their personal files. The officials from the Italian section who were eligible for promotion to grade L/A 3 (i. e. L/A 4s of at least two years' standing) were:

- Signor Giannino Ballasina;
- Signor Daniele Grassi, the Applicant;
- Signorina Maria Rosani; and
- Signor X who was the Head of the Section.

The Committee, of which the Chairman was Signor Ricoveri, the Director of Administration, and which included among its members Herr Noack and M. Battin, met on two occasions, on 9th and 27 April 1973. It made its report (Annex to Observations of the Council dated 8 March 1973) to the Secretary-General on 14th May 1973. For promotion to grade L/A 3 it recommended only four persons, one German, one French, one Italian, and one Dutch. I infer that it did not feel that the post of Head of the English Division could be filled by promotion. The person recommended for promotion from the Italian Section was Signor X. At this, the Applicant protested. He did so both orally, at an interview that he had with Signor Ricoveri on 23 May

1973, and in a written note of the same date, addressed to the Secretary-General. The text of this note is not before the Court, but the gist of it appears to have been that, unlike the Applicant, Signor X did not have the linguistic qualifications prescribed in the Notice of Vacancies. The note drew from the Secretary-General an answer dated 12 July 1973, the text of which is not before the Court either.

But, in the meantime, on 25 May 1973, the Secretary-General decided to promote Signor X (Annex I to the Rejoinder).

On 9 July 1973, the Applicant submitted to the Secretary-General a formal communication, which was in two parts (Annex I to the Application).

Part I of that communication was a complaint under Article 90 (2) of the Staff Regulations against the promotion of Signor X. It was put on two grounds, first that Signor X did not have the linguistic qualifications, and secondly that he did not have the administrative experience, respectively required by the Notice of Vacancies. As regards linguistic qualifications, the Applicant, whilst conceding, albeit grudgingly, that Signor X might be held to have a perfect command of Italian and a thorough knowledge of French, asserted that it would be impossible to hold that he had a thorough knowledge of either German or English. (There has been no suggestion at any time in the case that Signor X is acquainted with any language other than those four). The Applicant's attack on Signor X's administrative experience was based not so much on its length — we know from other evidence that he had been Head of the Italian Section since 1962, and had acted in that capacity for some before then — but on its quality. The Applicant, in essence, relied on the fact that Signor X had for substantial periods, or so the Applicant alleged, left the running of the Italian Section to subordinates, in particular to Signor Ballasina and to the Applicant himself,

whilst busying himself with other activities. These activities seem to have consisted of membership of the Staff Committee and of other work on behalf of the Staff, such as the organization and management of the canteen and bar, of provident funds and of cruises. The Applicant concluded that Signor X's promotion was 'absurd', 'scandalous' and 'inacceptable', and that it should be revoked.

Part II of the Applicant's communication to the Secretary-General was an application under Article 90 (1) of the Staff Regulations for his own promotion in the place of Signor X.

The Secretary-General's answer to the Applicant's communication (Annex II to the Application) was dated 13th September 1973. It was short. In substance it merely asserted that, in relation, to the promotion of Signor X, Article 45 of the Staff Regulations had been complied with. It made no reference to the Applicant's request to be promoted in Signor Valerio's stead.

By his Application to this Court, dated 5th December 1973, the Applicant claims:

1. A declaration that the Secretary-General's decision, embodied in that answer, was void;
2. A declaration that Signor X's promotion was void; and
3. Costs.

To those claims, the Applicant adds a fourth, which for fear of doing injustice to it, I refrain from trying to express in English. It is as follows:

'Donner acte au concluant qu'il se réserve, après l'accomplissement des formalités prévues aux articles 90 et 91 du Statut des Fonctionnaires, de prendre son recours devant la Cour en ce qui concerne le rejet explicite ou implicite de la demande figurant dans sa lettre du 9 juillet 1973.'

I take it that what this foreshadows is further proceedings by the Applicant in this Court by way of appeal against the rejection of the request contained in Part

II of his communication to the Secretary-General. The Council submits that this fourth claim is inadmissible. My Lords, I agree. It is no part of the function of this Court to make any sort of declaration about the right of a person to take future proceedings before it. I say nothing about the likelihood or otherwise of the Court entertaining, under Article 91, an appeal against a **refusal of promotion**, or even about the likelihood of its entertaining the view that Article 90 (1) goes so far as to entitle an official to apply for promotion.

I accordingly confine my attention to the Applicant's first three claims. In support of these he put forward, in his Application, three contentions. The first was that the Secretary-General's decision of 13 September 1973 was insufficiently reasoned. The second and third were the same contentions, relating to Signor X's linguistic qualifications and to his administrative experience respectively, as the Applicant had put forward in his complaint to the Secretary-General. My Lords, I will say at once that I have come to the conclusion, albeit reluctantly, that the Applicant is entitled to succeed on the basis of his second contention. This makes it, I think, strictly unnecessary for me to express any view on the first or on the third.

It is, I confess, not without some regret that I forgo the opportunity to discuss the first, for it gives rise to an interesting point of law. To discuss it properly would however involve a consumption of time wholly disproportionate to the importance of the point in this case.

But, with regard to the third, I must, in fairness to Signor X, say that, in my opinion, the attack mounted by the Applicant on his merits as an administrator, was unwarranted. The Applicant did not, in his pleadings, add anything of substance on this part of the case to what he had expounded in his complaint to the Secretary-General. This I have already referred to. Leaving aside the point that, having regard to the last

paragraph of Article 1 of Annex II to the Staff Regulations, it would be quite wrong to hold it against an official that he had been a member of the Staff Committee, the impression I derive from the Applicant's account of Signor X's activities outside the office is that he must be endowed with signal administrative talent and drive. This impression is confirmed by Signor X's biennial reports, which are before the Court, and in which his qualities as a leader and organizer are highly praised by his superiors, as is the performance of the Italian Section under his leadership. Your Lordships learnt at the hearing that, as one indeed would have expected, the functions of Signor X as Head of the Italian Translation Division do not differ in kind from his functions as head of the erstwhile Section, there being only an increase in the amount of work and in the number of staff. That being so, it seems to me that the Advisory Committee on Promotions came to the only possible conclusion when they held that he fulfilled the requirement as to administrative experience contained in the Notice of Vacancies.

The main argument put forward on behalf of the Council with regard to the Applicant's second contention was that the decision of an appointing authority to promote an official under Article 45 of the Staff Regulations involves a complex value judgment which, by its nature, is not open to review by this Court. In support of that argument, the Council referred in the first place to the terms of Article 45 itself, which are, so far as material, these:

'Promotion shall be by decision of the appointing authority. It shall be effected by appointment of the official to the next higher grade in the category or service to which he belongs. Promotion shall be exclusively by selection from among officials who have completed a minimum period in their grade, after consideration of the comparative merits of the officials eligible for promotion and of the reports on them.'

That wording, the Council submits, and to this extent I agree with it, confers, on the appointing authority a wide discretion in exercising its power of selection. The Council further relies on the decisions of this Court in Cases 35/62 and 16/63 *Leroy v High Authority* (Rec. 1963, p. 399), 27/63 *Raponi v Commission* (Rec. 1964, p. 247) and 94 and 96/63 *Bernusset v Commission* (Rec. 1964, p. 587). An attentive reading of those authorities, however, as well as of such cases as Case 10/55 *Mirossevich v High Authority* (Rec. 1955/56, p. 365), Cases 19 and 65/63, *Satya Prakash v Commission* (Rec. 1965, p. 677), Case 21/68 *Huybrechts v Commission* (Rec. 1969, p. 85) and Case 29/70 *Marcato v Commission* (Rec. 1971, p. 243) evinces that the Court has consistently drawn a distinction, in this and cognate contexts, between matters which, because they involve value judgments, must be left to the discretion of the competent administrative authority, and those which, on the other hand are susceptible of objective assessment and therefore of judicial review. Not surprisingly, one finds an apt and succinct summary of the latter in an Opinion of Mr Advocate-General Dutheillet de Lamothe, his Opinion — which the Court followed — in the last case that I mentioned. He there said (Rec. 1971; at p. 250) that the Court would review:

- la régularité de la procédure qui a conduit à l'appréciation des mérites du fonctionnaire,
- l'exactitude matérielle des faits sur lesquels l'administration a fondé cette appréciation ainsi que la "compatibilité" entre ces faits et cette appréciation (Prakash précité),
- enfin l'erreur de droit ou le détournement de pouvoir éventuels.'

We are concerned in the present case with the second head of jurisdiction referred to by Mr Advocate-General Dutheillet de Lamothe in that summary.

There is no escaping the fact that the Notice of Vacancies required that the

person to be appointed to the new post here in question should have besides a 'perfect command' of — if I may spell it out realistically — Italian, a 'thorough knowledge' of three other languages of the Communities. It occurred to me, at the outset of the case, that the Council might argue that this requirement, having been imposed by the Secretary-General himself, could be waived by him. Quite rightly, in my opinion, the Council eschewed any such argument. It repeatedly acknowledged, both in its pleadings, and by its Counsel at the hearing, that the Secretary-General was bound by the terms of the Notice of Vacancies. There being no dispute about this point, I need not pursue it. It was in any event concluded, in my opinion, by what Mr Advocate-General Roemer, said, and by what the Court in its Judgment implied, in the *Raponi* case (Rec. 1964, at pp. 269 and 281—282).

The question therefore becomes whether the facts as to Signor X's linguistic attainments were compatible with the requirements of the Notice of Vacancies, or, if you will, whether there was material on which the Advisory Committee and the Secretary-General could properly find that Signor X's linguistic attainments satisfied those requirements.

As to this, it is, I think, both convenient and right to start with the evidence that was before the Advisory Committee on Promotions. This essentially lay in Signor X's biennial reports drawn up in 1969 and 1971. The Court has had the advantage of seeing also his previous reports, drawn up in 1963, 1965 and 1967.

In order to understand the relevant parts of these reports, one must go back to a Decision, dated 25 May 1964, of the then Councils, laying down, pursuant to Articles 43 and 110 of the Staff Regulations, the manner in which biennial reports on officials were to be drawn up. (The text of this Decision, in each of the official languages of the Communities, is among the Annexes to

the Council's Answers, dated 28 June 1974, to which I have already referred). So far as directly material, the Decision laid down that the linguistic attainments of officials in the Translation Service should be assessed, in each case, as 'Passable', 'Good' or 'Very Good'. It seems that this system must have obtained, informally, before the promulgation of the Decision.

As far back as Signor X's reports go, his knowledge both of Italian and of French is assessed as 'Very Good'. His knowledge of English was assessed as 'Passable' in 1963, 1965 and 1967, but as 'Good' in 1969 and 1971. This resulted, Your Lordships were told, from his following a short intensive course in English in London. But his knowledge of German was throughout assessed as no more than 'Passable'. It is relevant that these were the joint assessments of Herr Noack and M. Battin, who were responsible for completing the material part of Signor X's reports, and that they were accepted by Signor X himself, who was entitled, under the Staff Regulations, to challenge them.

These assessments give rise at least to a doubt whether Signor X had, at the material time, 'a thorough knowledge' of German. One cannot but relate — without necessarily equating — the gradation 'Passable', 'Good' and 'Very Good', used in the biennial reports, to the gradation 'Satisfactory Knowledge', 'Thorough Knowledge' and 'Perfect Command' which is, in all the Community Institutions, the daily stuff of notices of vacancy.

It was urged by the Council (in the Answers to which I have referred) that there was no nexus between them.

It is true that, as the Council submitted, the two gradations have different legal origins. The origin of the gradation 'Passable', 'Good', 'Very Good', I have already described. The origin of the gradation 'Satisfactory Knowledge', 'Thorough Knowledge', 'Perfect Command' seems to lie in Article 28 (f) of the Staff Regulations, which requires of any

candidate for appointment to any part of the staff of any of the Community Institutions that he should produce 'evidence of a thorough knowledge of one of the languages of the Communities and of a satisfactory knowledge of another language of the Communities to the extent necessary for the performance of his duties'. These, the Council points out, are the minimum requirements for any member of the staff of any of the Institutions, and any Institution is entitled to require enhanced qualifications for any particular post. Hence the requirement of 'perfect command' in some cases.

Nevertheless, my Lords, words have their meanings. To describe a person's knowledge of a particular language at the same time as 'passable' and as 'thorough' is inconsistent. The Court (in the Questions to which I have referred) asked the Council how it resolved the inconsistency. The Council answered that the linguistic attainments of a candidate for a particular post must be judged in the light of the nature of the duties of the holder of that post. The duties of a Head of Division were almost entirely of an administrative nature, and Signor X was eminently qualified to discharge them.

That answer was echoed in the evidence of all three of the witnesses that the Court heard, namely Herr Noack, M. Battin and Signor Ballesina. All three of them were of the opinion that a reference in a notice of vacancy to a 'thorough knowledge' of a language must be interpreted with due regard to the characteristics of the post to be filled. In a way, of course, they were stating only the obvious. Words, though they have their meanings, must always, in practice, be interpreted in the context in which they are found, and, manifestly, a reference to a 'thorough knowledge' of a particular language does not connote exactly the same thing in the context of the recruitment of a chauffeur as it does in the context of the recruitment of a computer-programmer, let alone in the

context of the recruitment of the Head of a Translation Division.

This elasticity in the meaning of words is not, however, limitless. Some of the evidence, in particular of Herr Noack and of Signor Ballesina, in effect equated a 'thorough knowledge' of a language with a 'satisfactory knowledge' of it, for I do not know what the latter expression can mean, unless it be that the person concerned has a knowledge of the language in question adequate for the performance of the duties of the post to be filled. Thus, acceptance of that evidence would involve the destruction of any distinction between the concepts of 'thorough knowledge' and of 'satisfactory knowledge'.

My Lords, Your Lordships heard the evidence, so that I need not review it in detail. The two crucial facts that emerged from it seem to me to have been these. First that the expressions 'perfect command', 'thorough knowledge' and 'satisfactory knowledge', when used in relation to languages in notices of vacancy, do not have any esoteric technical meaning, but are intended to be understood as the man in the street would understand them. It follows from this that, as Counsel for the Applicant submitted, their interpretation is, at the end of the day, a matter for the Court. Secondly, it emerged that there was nothing whatever to suggest that Signor X's knowledge of German was any better than 'passable'. Certainly it was the unanimous view of the witnesses that his knowledge of it was sufficient for the performance of the duties of the post to which he was promoted, but that is only to say that that knowledge was 'satisfactory'. It is not to say that it was 'thorough'. Some additional documentary evidence put in by the Council after the hearing added nothing of substance on this issue.

I asked M. Battin, who was a witness of refreshing candour, whether he would draw the conclusion that the Notice of Vacancies went beyond what was necessary in requiring, for each post of

Head of Translation Division, not only a perfect command of one language of the Communities, but also a thorough knowledge of three others. He replied in the affirmative (Transcript p. 31). My Lords, that seems an inevitable conclusion. Counsel for the Applicant put forward at the hearing an argument to the effect that the Notice of Vacancies could not have required less, having regard to what was demanded of humble translators and revisors. To my mind the argument was unconvincing.

It is not however for this Court to decide whether the Notice of Vacancies was or was not advisedly drawn. The only question for Your Lordships — and it is, in my opinion, in the end, a pure question of fact — is whether the view was tenable that Signor X fulfilled the requirements of that Notice, in particular with regard to his knowledge of German. In my opinion, the only possible answer, on the evidence, is that he did not.

This is why I would, reluctantly, decide this case in favour of the Applicant. It were better that it should be a hard case than that it should make bad law.

In his Reply the Applicant advanced a number of further contentions in support of his claims.

The first of these was that the very institution of the Advisory Committee on Promotions was unlawful, because that Committee had been created without compliance with the procedure prescribed by Article 110 of the Staff Regulations. My Lords, of this contention, it need only be said that it flies in the face of the decision of the Court in Cases 27 and 30/64 *Fonzi v Commission* (Rec. 1965, at p. 637).

Then the Applicant contended that, assuming the Advisory Committee to have been validly created, its procedure had, in four respects, been faulty. First, he said that the Committee had not looked at the Notice of Vacancies. But his only ground for putting forward this startling suggestion, was that the

Committee had not expressly referred to the Notice in its Report. Next he said that the Committee had only examined the qualifications of the existing Heads of Section, to the exclusion of, in particular, his own. This is contradicted by the documentary evidence. Thirdly, he said that the Committee did not comply with an Article — Article 6 — of Decision No 344/73, which is, so far as material, in these terms:

‘When its work is completed, each Advisory Committee on Promotion shall send a written report to the appointing authority containing a list of the officials, classed in descending order of merit, whom it considers suitable for promotion or a statement that no officials qualify.’

I have already stated what recommendation the Committee made in the present case so far as regards the filling of the new L/A 3 posts. It is noteworthy that, in the case also of the more junior posts that it had to consider, the Committee did not recommend that all of them should be filled by promotion. Why should it have done? Fourthly, the Applicant contends that the Report of the Advisory Committee was not adequately reasoned, but this contention too flies in the face of the decision of the Court in the *Fonzi* case (see Rec. 1965, at p. 638).

The last of the new contentions advanced by the Applicant in his Reply was that the Secretary-General did not properly consider the Report of the Advisory Committee. Had he done so, the Applicant says, he must have called upon the Committee to amplify that

Report. My Lords, I can only say that, having read and re-read the Report, and placing myself in the position of the Secretary-General, I can see no ground for accepting this contention.

There remains the question of costs. This is governed by Articles 69 (2) and (3), 70 and 73 of the Rules of Procedure. It seems to me that the effect of these provisions, in the instant case, is that the costs are very much in the Court's discretion. They include of course the costs of the interim application made in the course of the action, which were reserved by Order dated 19 June 1974.

If your Lordships share my opinion on the questions of substance, I would think it just to let the Council bear its own costs and the costs recoverable under Article 73 (a), but to order it to pay only a part of the Applicant's costs, because, on that view, the Applicant has failed in his fourth claim, failed in his attack on Signor X's administrative ability, and failed in all the contentions that he raised in his Reply. This is by no means the first case where an applicant with one or two good or, at least, arguable points, has wantonly added to them a number of other points of a more or less flimsy nature and thereby wasted the time both of the Court and of his opponent. In my opinion it is time that the Court took steps to discourage that practice, by showing that it cannot be indulged in with impunity. This is to my mind particularly important in staff cases, where almost any point taken involves some criticism of the conduct or character of one or more of the applicant's fellow officials. Such criticism should not be lightly embarked upon.

I am therefore of the opinion that Your Lordships should:

1. Declare void the decision of the Secretary-General of the Council dated 13 September 1973 rejecting the complaint submitted by the Applicant under Article 90 (2) of the Staff regulations;

2. Declare void the decision of the Secretary-General of the Council dated 25 May 1973 promoting Signor X to grade L/A 3;
3. Order the Council to bear its own costs of the action and the costs recoverable under Article 73 (a) of the Rules of Procedure and to pay one half of the Applicant's costs, such costs to include in each case those reserved by the Order of the President of the First Chamber dated 19 June 1974 in Case 188/73 R; and
4. Declare that the fourth claim formulated by the Applicant is inadmissible.