OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 22 SEPTEMBER 1976

My Lords,

On 15 February 1975 the Council gave, in the Official Journal of the European Communities (C 36/7), notice of open competition 'Council/LA/108'. This was to be held to recruit what was quaintly described in the English text of the notice as a 'Legal/Linguistic Expert (translator)' of English mother tongue, and also to draw up a reserve list. It appears that that quaint phrase merely meant a legally qualified translator. The competition was to be on the basis of qualifications and tests, the latter including both written and oral tests. A form was prescribed for candidates to use in submitting their applications to take part in the competition. Applications were to be sent in by 1 April 1975.

The competition was also advertised in the legal press (see Annex I to the rejoinder). In response to such an advertisement, which appeared in the Law Society's Gazette, the applicant, Mrs Pearl Vivien Prais, who is a Solicitor in private practice in London, duly applied to take part in the competition (a copy of her application so to do is Annex I to the defence).

On 23 April 1975 the General Secretariat of the Council wrote to Mrs Prais informing her that the written tests would be held on 16 May 1975.

It is clear that Mrs Prais was under the impression that she had indicated in her application that she was of the Jewish faith, for on 25 April 1975 she wrote to the General Secretariat thanking them for their letter of 23 April and saying:

'As indicated in my application form, I am of the Jewish faith and 16 May is the first day of our festival Shavuot when we are not permitted to travel or to write and I will not therefore be able to take the examination on the 16 May.

I shall be grateful if you will let me have an alternative date for the examination.'

(Annex II to the defence).

In fact, as is now common ground, candidates were not required to state their religions in their applications, nor had Mrs Prais done so in hers.

On 5 May 1975 the General Secretariat replied to Mrs Prais, so far as material in these terms: —

'I am sorry to say that it is not possible to offer you an alternative date for this examination since it is essential that all candidates should undergo the examination using the same papers on the same day and arrangements have already been completed both in London and in Brussels for the examination on 16 May.'
(Annex I to the application).

The written tests were held in London and Brussels on 16 May 1975. Mrs Prais did not sit them in either place. Nor, according to the Council, did a number of other candidates who had written to say that they were unable to attend on that day. The reasons why these other candidates were unable to attend do not appear. At all events none of them have, it seems, complained about it.

The competition resulted in the appointment to the vacant post of Mr David Grant Lawrence, who has intervened in this action in support of the Council.

There is no indication that the competition in fact resulted in the drawing up of any reserve list.

On 14 July 1975 Mrs Prais submitted to the General Secretariat of the Council a complaint under Article 90 (2) of the Staff Regulations, by which she challenged the validity of the decision refusing her request for an alternative date on which to sit the written tests (Annex II to the application). She said that, as a result of this refusal, she was precluded from taking part in the competition by reason of her religion. She relied on Article 27 of the Staff Regulations, which provides, among other things, that 'Officials shall be selected without reference to race, creed or sex', and on Article 9 of the European Convention on Human Rights, which provides:

'(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'

Mrs Prais submitted that 'Respect for religious liberty should imply a preparedness to make the necessary administrative arrangements to enable candidates to take examinations in accordance with their religious convictions, as is the regular practice with public examinations in this country.' By 'this country' she meant of course the United Kingdom.

On 29 September 1975 the Secretary-General of the Council wrote to Mrs Prais rejecting her complaint (Annex III to the application). Among other things he said:

'I much regret that you should have been placed in a position in which you felt obliged, for personal religious reasons, not to attend the written tests.

The principle that officials shall be selected without reference to race, creed or sex has always been strictly observed in recruitment by the Council, no candidate being asked his religious belief and no cognisance being taken of information concerning it.

The refusal to arrange for you to take the examination on an alternative date was unfortunately unavoidable; it would have been unjust to the other candidates, at the request of one candidate, to postpone the written tests for all candidates to another date, on which, though it was acceptable to you, some of the others might be unable to attend; and it would be contrary to the basic principles of public examinations to allow one candidate to take the same papers on a different date or to take different papers. For these reasons such requests for an alternative date have invariably to be refused, whatever the grounds on which they are made. I am therefore bound to reject your complaint on this score.'

On 23 December 1975 Mrs Prais lodged her application initiating this action. Quite rightly in my opinion, the Council takes no point as to the admissibility of the action.

In her application Mrs Prais claimed among other relief 'the annulment of the results of the competition insofar as they may have been affected by' the refusal of her request for an alternative date to sit the written tests. At the hearing, however, it was made clear on her behalf (as indeed had been to some extent foreshadowed in her observations on Mr Lawrence's application to intervene) that what she really sought was not the annulment of Mr Lawrence's appointment but a decision of the Court upholding the principle for which she contended. She was not much concerned

as to the form of the Court's order so long as it upheld that principle.

It was at the hearing also that it became finally clear what was the principle for which Mrs Prais contended. It was that there should be equality of opportunity for candidates of all religions to enter the public service of the Communities. This entailed, it was submitted on her behalf, that the Community Institutions, in arranging competitions for entry into their service, should ensure that no candidate was precluded by his religion from taking part. Various methods were available to ensure that result; it did not matter which method was used so long as the result was secured. Thus Institutions could take care to avoid fixing tests on what were known to be holy days for 'prevalent' or 'principal' religions. Alternatively they could afford to candidates whose religions precluded them from sitting the tests on the day fixed either facilities for sitting them on a different day and being 'invigilated' during the period when the other candidates were taking them, or facilities for taking, on a different day, different but comparable tests. The experience of examining bodies in the United Kingdom showed, according to Mrs Prais's submission, that this was possible, and it was no answer to say that it might be administratively inconvenient.

Before this Court Mrs Prais relied, as she had done in her complaint under Article 90 (2) of the Staff Regulations, on Article 27 of those Regulations and on Article 9 of the European Convention on Human Rights. In her pleadings she relied also on 'the constitutions and laws of the Member States' protecting freedom of religion, and on Article 14 of the European Convention, which provides that —

'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

At the hearing Mrs Prais relied, in addition, on Article 21 (2) of the Universal Declaration of Human Rights and on Article 25 of the International Covenant on Civil and Political Rights. These, putting it shortly, recognize the right of all citizens to equal opportunity of access to the public service in their country regardless of race, colour, sex, language, religion or any other distinction.

I do not, for my part, think it possible to approach the interpretation of the provisions on which Mrs Prais relies except against the background of the law and practice in the Member States of the Communities.

As to that, I start with the United Kingdom, partly because it is of the position there that we are best informed (largely thanks to evidence put in on behalf of Mrs Prais) and partly because of the importance of the submission made on her behalf that experience there demonstrates that it is practicable to give effect to the principle for which she contends in the manner for which she contends.

That evidence consists of two letters (comprised in Annex II to the Reply) of which one is a letter to Mrs Prais from the Civil Service Commission and the other is a letter written by the Education Officer of the Board of Deputies of British Jews. This evidence shows that there is in the United Kingdom a difference in the practice of, on the one hand, professional and academic examining bodies and, on the other hand, the Civil Service Commission, which is the body mainly responsible for recruitment to the public service.

It seems to be the invariable practice of professional and academic bodies in the United Kingdom to make, when

requested, alternative arrangements for observant Jewish candidates whose examinations fall on Jewish holy days. The letter from the Education Officer of the Board of Deputies of British Jews explains:

'Alternative arrangements are generally either that

— an alternative paper is set to be taken by the candidates at an agreed date. Some professional bodies always have a second paper available for candidates who may have been ill or otherwise indisposed, and Jewish candidates are normally allowed to sit this paper.
or
— the Jewish candidate remains under the invigilation of an approved third party (for example, in the cases of Oxford and Cambridge an MA of the university, or in the case of the ICA a member of the Institute of Chartered Accountants) from the time that the examination is due to begin until he is escorted after Shabbat/Yom Tov to his own examination by the invigilator. If, for example, the examination was set on Shabbat and the student was given permission to sit the examination before, then he is invigilated from the time his examination finishes until all candidates have completed their examinations.

In all cases it is generally accepted that candidates seeking alternative arrangements on religious grounds will defray any expenses occasioned by the examining board.'

The letter from the Civil Service Commission shows that its practice is quite different. Under the heading of 'Criteria observed when setting examination dates' it states:

'Known factors which could affect particular groups of candidates would be taken into account as far as is possible when constructing the programme. For example, the Board of Deputies of British Jews have for many years provided the Commission with a list of dates on which Jewish Holy days are given and it has been possible to avoid those dates which, on the advice of the Board, would cause most difficulty.'

The letter then goes on to state categorically:

'(i) The Commission expects all candidates to make arrangements to attend the examination on the date(s) set.
(ii) An examination is not deferred, or the date altered, to suit the needs of individual candidates.
(iii) Special separate sittings are not arranged for individuals who cannot attend on the examination dates.
(iv) A candidate who is unable to attend on the specified date would be advised to sit the next similar examination in the programme.'

The evidence does not disclose why there is that difference between the practice of the Civil Service Commission and the practice of professional and academic examining bodies. One possible explanation is that the examinations set by the latter are designed only to ascertain whether each candidate has attained a certain level of proficiency, the level required for his admission to the profession in question or for the award to him of the degree he seeks. There is in such an examination no element of competition. Civil service examinations on the other hand are competitive. They are designed to ascertain which of the candidates are most suitable for appointment to a limited number of posts. Your Lordships will remember the argument put forward on behalf of the Council that, in the case of such a competition, unless all the candidates sit the same tests on the same day, direct comparison between them may be made less easy, and also its argument that, if special arrangements are made for particular candidates, it may be difficult to preserve the anonymity of their papers.

Be that as it may, two important conclusions may be drawn from the evidence as to the practice in the United Kingdom.

The first is that it falls far short of establishing the proposition, which forms I think an essential part of Mrs Prais's argument, that what happens in the United Kingdom is such as to demonstrate the practicability in fact of giving effect to the rule for which she contends, i.e. a rule that, come what may, arrangements must be made to give to all candidates, whatever their religion, an opportunity to take part in every competition. Manifestly it is the practice of the Civil Service Commission, rather than that of professional and academic bodies, that is in point here, for we are concerned with recruitment into the public service. The practice of the Civil Service Commission amounts to no more than seeking to avoid 'as far as is possible' fixing examinations on dates which it is 'known' would cause difficulty to 'particular groups of candidates'. Once those dates have been fixed there is no departure whatever from them.

The second conclusion is that what is done in the United Kingdom is not done in obedience to any legal requirement. It is simply the consequence of the exercise of common sense allied to a sense of fairness.

No evidence was placed before the Court as to the position in the other Member States. From such researches as I have been able to make, it appears to be as follows.

There are some Member States where recruitment to the public service is by interview only; there are no written tests. This seems to be so in Denmark, in the Netherlands and in the Federal Republic of Germany except Bavaria. I infer that in these countries the convenience of candidates is taken into account when fixing interviews. I understand that in Bavaria, where competitive examinations are held, the problem illustrated by the present case has never yet been encountered.

In Ireland the Civil Service Commission has no set practice of seeking to avoid particular dates, but, if it receives in good time from a candidate notice that he will be unable to compete on a particular date, it tries to accommodate him by, so far as practicable, not fixing examinations for that date.

It seems that in Belgium no account is taken of religious festivals in fixing the dates of written tests for entry into the public service. Some tests even take place on Saturdays and on Sundays. On no ground is the date fixed for a test ever departed from. Candidates' wishes are taken into account in arranging oral tests, though even for this purpose those wishes are not considered to be overriding. The position appears to be much the same in France, Italy and Luxembourg, with, at all events in the case of France, perhaps a lesser readiness to take account of candidates' wishes in fixing dates for oral tests.

Such is the background against which I approach the interpretation of the legal provisions on which Mrs Prais relies.

Article 27 of the Staff Regulations provides, Your Lordships remember, that 'Officials shall be selected without reference to race, creed or sex'. This provision follows that in Article 26 to the effect that 'An official's personal file shall contain no reference to his political, philosophical or religious views'.

Those provisions could be interpreted as meaning that a Community Institution was under a positive duty to remain ignorant of, or at all events wholly to disregard, the religion of any of its officials or of any candidate for entry into its service. This interpretation seems indeed to underlie what the Secretary-General of the Council wrote to Mrs Prais in his letter of 29 September

1975 (which I have cited) and also much of the argument put forward on behalf of the Council in the Defence, as epitomized in the following passages:

'The Secretariat in relation to the applicant has exercised no discrimination against her on religious or any other grounds. It has, as instructed by the Statute, taken no account of race, creed or sex. It has treated her on a basis of perfect equality with all other candidates in the Competition. It selected an ordinary working day as the date of the examination without any regards to religious considerations.

... It declined to offer an alternative date to her as it would have declined to offer an alternative date to any other candidate. In this regard it treated her again on a basis of perfect equality with other candidates.'
(Defence pp. 5 and 6).

and also in the submission that to invite candidates whose religious convictions might preclude them from competing on particular dates to say so 'would highlight the question of religion in a manner doubtfully consistent with the Statute'. (Defence p. 8).

After, however, it had been pointed out on behalf of Mrs Prais in the reply that discrimination could consist not only in treating differently those who were in the same position but also in treating in the same way those whose position was different, the Council changed its ground and (perhaps inspired by the practice in Ireland) argued that it was up to a candidate whose religion might preclude him from competing on a particular day to inform the Institution concerned of that fact in good time, so that that Institution could fix the tests for another day. The Council even went so far as to contend that such a candidate was under an obligation so to do.

In my opinion the Council was right to change its ground to this extent that Article 27 does not, any more than does Article 26, forbid a candidate from stating, for instance at the time when he sends in his application to take part in a competition, that he belongs to a religion whose tenets would preclude him from sitting tests on a particular day. In my opinion it is open to a candidate to do this, with a view to trying to secure that the tests shall be fixed for another day, when he is free to compete. An Institution that ignored such information, received before it had fixed the date for the tests, and which, despite the receipt of it, deliberately or wantonly fixed the tests for the 'forbidden' day would in my opinion be guilty of unlawful discrimination. The purpose of Articles 26 and 27 is, manifestly, to prevent discrimination. It would subvert that purpose to hold that those Articles should be interpreted in such a way as to be turned, if I may adapt a phrase familiar to English equity lawyers, into 'engines of discrimination'. But I think that the Council went too far when it submitted that such a candidate was under an obligation to supply that information. I cannot see how the existence of any such obligation can be spelt out of the wording of those Articles.

In my opinion Mrs Prais was equally in error in seeking to spell out of Article 27 a positive obligation on Community Institutions to guarantee to every candidate in any competition for entry into the service of such an Institution an opportunity of taking part in that competition, whatever his religious circumstances. As the argument in this case has abundantly demonstrated, to afford candidates such a guarantee would require elaborate administrative machinery. To attribute to the authors of the Staff Regulations, on the basis of their terse enactment in Article 27 that officials should be 'selected without reference to race, creed or sex', an intention that such machinery should be set up seems to me incompatible, first, with the fact that such machinery exists in no Member State and, secondly, with

the fact that Annex III to those Regulations contains detailed provisions governing the conduct of competitions. There is nothing in Annex III that even remotely touches the present problem. Yet, if the authors of the Staff Regulations had intended to deal with that problem, it is in that Annex, or in some similar fasciculus of provisions, that one would have expected them to do so.

I conclude that, if the obligation contended for by Mrs Prais exists, it must be because of some legal rule exterior, and superior to the Staff Regulations.

For the reasons that I have already indicated, no such rule can be derived from the Constitutions or laws of the Member States. None of them recognizes it.

So I turn to Articles 9 and 14 of the European Convention on Human Rights.

Here I will say at once that I regret the absence from that Convention of any power for this Court, or for national Courts, to refer to the European Court of Human Rights for preliminary ruling questions of interpretation of the Convention that arise in cases before them. However, in the absence of such a power, we must do our best.

I need not, I think, take up Your Lordships time in reviewing the decisions of the European Court of Human Rights and of the European Commission of Human Rights bearing upon the interpretation of Articles 9 and 14 of the Convention. None of them seems to me to touch the question that arises in the present case.

Of the decisions of national Courts that were cited in argument, there is only one, I think, to which I ought to refer. This is the decision of the Belgian Commission d'Appel (chômage) in *Office national de l'Emploi* v *Cymerman* (J. T., 1963, p. 285). Mrs Prais naturally relies on that authority. I do not however think that it is really in point. What the Commission d'Appel was essentially concerned with in that case was the interpretation of the Belgian legislation governing the circumstances in which a person was entitled to draw unemployment benefit. That legislation provided that, in order to draw such benefit, a person must be unemployed continuously for at least six working days and that a person who failed to report at the 'pointage' on any working day should be presumed to have been in employment on that day. The Commission d'Appel held that that presumption was rebuttable. The respondent was an orthodox Jew whose religion precluded him from doing anything (apart from attending religious services) on a Saturday, including attending at the 'pointage', but for whom Sunday was normally a working day. He proved this by means of a rabbi's certificate and it was held that he had rebutted the presumption. Of course the Commission d'Appel took into account, in reaching its conclusion, that otherwise the respondent, and all others in his position, would be placed in the dilemma of having either to forgo a social security benefit to which they were in principle entitled or to ignore a tenet of their religion, and one can see the analogy between that and the dilemma that confronted Mrs Prais in the present case: she must either give up taking part in the competition or give up observing a tenet of her religion.

But there the analogy ends. *Office national de l'Emploi* v *Cymerman,* as appears from the Judgment, turned principally on considerations of Belgian law and of what was administratively practicable in the particular situation created by that law.

In that state of the authorities, and having regard to the actual wording of Articles 9 and 14 of the European Convention, I find it impossible to conclude that those Articles have, or that either of them has, the effect for which

Mrs Prais contends. On the contrary, I am impressed by the consideration that so to conclude would be to conclude that most of the Member States of the Communities were consistently infringing the Convention — or, if you will, to hold that, in entering into the Convention, those States had unwittingly undertaken obligations quite inconsistent with their own internal practices. It must of course also be borne in mind that, outside the Member States of the Communities, there are many European countries, who are Contracting Parties to the European Convention, about whose internal practices we have no evidence at all, so that to interpret the Convention in the way Mrs Prais would wish might involve foisting on those States too obligations that they never meant to undertake.

What is true of the European Convention on Human Rights is, in my opinion, inevitably true also of those other international instruments on which reliance was placed on behalf of Mrs Prais at the hearing, namely the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

It follows, in my opinion, that this action must fail. But, when I say that it must fail, I mean only that it must fail in the legal sense: in the sense that no judicial remedy can in my opinion be awarded to Mrs Prais.

The action will not, I think, have proved fruitless.

In the first place it will have served, if Your Lordships share my view, to discredit the interpretation formerly accepted in the General Secretariat of the Council (and, I suspect, elsewhere in the Community Institutions) according to which Articles 26 and 27 of the Staff Regulations required such Institutions, willynilly, to shut their eyes and minds to any religious difficulties confronting candidates for entry into the service of the Communities. The action will have established that such difficulties may be taken into account and, indeed, that they may not be deliberately or wantonly ignored. In particular it will have established that a candidate may, when he sends in his application to take part in a competition, inform the Institution concerned that the tenets of his religion will preclude him from competing on a particular day, and ask the Institution, unless there are overriding reasons to the contrary, to fix the competition for another day. I take the point, which was made on behalf of Mrs Prais at the hearing, that a candidate may not know that he has that right. What is important, however, to my mind, is that he does have it.

Secondly, the action will have drawn to the attention of the Community Institutions the commendable practice of the Civil Service Commission in the United Kingdom of seeking to avoid, so far as possible, fixing competitions for dates that are likely to cause difficulties to particular groups of candidates. At one time it almost seemed as though the argument being put forward on behalf of Mrs Prais was that the Institutions were under a duty to ensure that no date was fixed for a competition that might be detrimental to any candidate. It was contended on behalf of the Council that the number and variety of religions and religious sects now potentially present in Western Europe was such that a requirement of that sort could not, realistically, be complied with (see Annex III to the Rejoinder). I agree. One cannot erect into a fundamental human right what is nothing more than the product of what I have ventured to describe as the exercise of common sense allied to a sense of fairness. I would add that, according to my interpretation of the evidence, it would seem that the avoidance of 'forbidden dates' by the Civil Service Commission in the United Kingdom is, either largely or wholly, the result of approaches made to it by religious authorities in that Member

State, particularly approaches made by the Board of Deputies of British Jews. I do not think that a greater burden than is shouldered by the Civil Service Commission should be considered to fall on the Community Institutions. In my opinion it is up to the religious authorities to inform those Institutions of the dates which, according to their respective tenets, ought to be avoided for tests.

I think that we can draw comfort also from the circumstance that, as was stated on behalf of the Council at the hearing, that Institution is shortly to hold another competition for the recruitment of a legally qualified translator 'of English mother tongue'. It will be open to Mrs Prais to take part in that competition and it would be surprising if, having regard to what has happened in this case, the tests for it were fixed for a day that she could not manage.

There remains the question of costs. There is of course no difficulty about costs as between Mrs Prais and the Council. The question that has been argued is as to the costs of Mr Lawrence, the Intervener. It was submitted on behalf of Mrs Prais that she should not in any event be ordered to pay his costs. The submission was put forward on two grounds.

The first was that Mrs Prais was entitled to assume by virtue of Article 70 of the Rules of Procedures of the Court that, if her action failed, the costs that she would incur would be limited to her own costs. The true purpose and intent of that Article, it was said on her behalf, would be defeated if persons affected by the Staff Regulations could be deterred from bringing actions under those Regulations by the risk of having to pay an intervener's costs.

The second ground put forward on Mrs Prais's behalf was that Mr Lawrence's costs were unnecessarily incurred because he did not advance any argument that had not already been placed before the Court by the Council.

There is scant authority in this Court on the question of an intervener's costs in a staff case. The only decision bearing on it that was cited to us was that in Case 24/71 *Meinhardt* v *Commission* (Rec. 1972 (1) p. 269). That was a case of an action that succeeded, and where the intervener was ordered to bear her own costs.

No doubt the reason for that scarcity of authority is that interventions in staff cases are, perhaps surprisingly, rare.

In my opinion Mrs Prais's submission should be rejected. Mr Lawrence, the validity of whose appointment was challenged by Mrs Prais, however tentatively, was certainly entitled to intervene. So much indeed was decided by the Order of the Court allowing his intervention. The fact that, in the events, he put forward no argument of his own is neither here nor there. He was entitled to be represented at the hearing so that anything that might need to be said on his behalf could be said. Nor is there anything in Article 70 that entitled Mrs Prais to make the assumption she suggests. That Article, in terms, applies only to the costs of a defendant institution. It means no more than that the applicant in a staff case is not to be ordered to pay that institution's costs, even if his action fails, unless he has unreasonably or vexatiously caused them to be incurred. The provision that is in point here is Article 69 (2) of the Rules of Procedure, which requires the unsuccessful party to an action to be ordered to pay the costs 'if they have been asked for'. The authentic English text of Article 69 (2) goes on to say 'in the successful party's pleading'. If the English text stood alone, an argument might be founded on it to the effect that an intervener was not strictly a 'party', so that his costs were not covered by Article 69 (2). It is to Mrs Prais's credit that she did not raise that argument, which would be untenable in view of the wording of

Article 69 (2) in the other authentic texts. It is therefore enough to entitle Mr Lawrence to his costs from Mrs Prais that she is, if Your Lordships agree with me, the unsuccessful party, and that he did ask for them.

In the result I am of the opinion that:

(1) This action should be dismissed;

(2) There should be no order as to costs as between the applicant and the defendant;

(3) The applicant should be ordered to pay the intervener's costs.