

On those grounds,

THE COURT (Third Chamber)

hereby:

1. Annuls the decision of the Selection Board for Competition No COM/B/328 to annul its own decision admitting the applicant to the tests for the competition;
2. Dismisses the remainder of the application;
3. Orders the Commission to pay the costs.

Everling

Galmot

Kakouris

Delivered in open court in Luxembourg on 22 September 1983.

P. Heim

Registrar

U. Everling

President of the Third Chamber

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
DELIVERED ON 14 JULY 1983

My Lords,

On the 4 February 1981 notice was given of a competition for Assistants in Grades

B 2 and B 3. The conditions of the competition stated that certain candidates would be excluded, namely those who possessed a diploma following a

course of studies at university level of three years or more, or candidates who were in the last year of a course of studies at university level of three years or more. The reason why these conditions were introduced is said to be that it was the policy of the Commission not to allow university graduates to compete with those who did not have a university education, for the purposes of B grade posts. It was also thought desirable to avoid the possibility of graduates remaining in posts of B grade for the rest of their career.

The competition in the present case was to be both by written and oral tests. Mrs Verli-Wallace, who at the time was engaged by the Commission as a probationary official in Grade B 4, applied on the 9 March 1981 to take part in the competition. In her application form she stated, under the heading "University studies accomplished", that she had attended the Law Faculty in the University of Athens from 1970 until "today". She added that she still had to take three subjects — civil, commercial and criminal law — before she received her diploma. The form of application shows that she had been employed in Athens in the European Community office from 1976 until the 24 February 1981 and that, subsequently, from the 25 February 1981 she was in the Documentation Service of DGV of the Commission in Brussels.

By a letter of the 15 April 1981 the Head of the Recruitment Division told Mrs Verli-Wallace that she had been admitted to the written tests. Following the results in those tests she was told by a letter of the 24 June that she was

admitted to the oral tests. She attended on the 13 July 1981 for those tests. In the course of the interview, and it is not clear at what stage the conversation took place, she was asked whether she could take her remaining exams in Athens and obtain her diploma by the end of 1981. There is some disagreement as to precisely what was said in reply. The Court has been told, on behalf of the Commission, that Mrs Verli-Wallace simply said that it was possible for her to get her diploma if she took her exams and passed them. On the other hand, her version of what happened is that, although she initially accepted that she could take the exams and, if she passed them, get her diploma that was only theoretically possible. In the light of the fact that she was now in Brussels working full-time, it was practically impossible for her to do so.

It seems likely on the facts that Mrs Verli-Wallace's version of what was said is substantially right and that even if she was willing to accept that theoretically she could finish during 1981 it was not a realistic possibility.

Following that interview, she was told on the 9 September 1981 that it was open to her to finish her studies in October 1981 in Athens and to get her degree so that, accordingly, she was not eligible for the competition. Accordingly, the selection board, it was said, were required to annul their decision admitting her to the competition. She made a complaint against that decision under the Staff Regulations, which was not answered and is therefore to be treated as implicitly rejected. She now asks the Court to set aside the decision of the

selection board, and the implicit rejection of her complaint by the Commission. She also asks the Court to order that she should be inscribed on the list of successful candidates in the competition since she alleges that she passed both the written and the oral examinations.

For the reasons given by the Commission in their written pleading I would reject as inadmissible her claim to annul the implied decision rejecting her complaint. That rejection merely confirmed the decision of the selection board. The essential question is whether the selection board decision can stand. In accordance with earlier decisions of the Court, her complaint to set that aside is to be treated as being within time for the purposes of these proceedings which were begun on the 26 May 1982.

The first claim which is made is that the jury cannot "annul" one of their previous decisions. Much argument has been addressed to the Court to show that a body taking a decision cannot, in law, annul its own decision. Although it is true that the word "annul" is used in the letter from the Head of the Recruitment Division, I would accept the argument of counsel for the Commission that the right approach is not to look at the form but at the substance. The reality in this case is that the selection board were purporting to withdraw or correct their earlier decision to admit her. It was done on the basis that a mistake had been made. I would also accept that if such a correction fell to be made it was for the jury, as counsel for the Commission contends, to make that correction

themselves. In my opinion the jury were clearly not *functus officio* and they were not seeking to annul their original decision in the technical sense. I would accordingly reject this first argument of the applicant.

Then it is said that, in any event, what was done was not done within a reasonable time. In the circumstances of this case it seems to me that if the correction was justified it was done within a reasonable time, as counsel for the Commission contends.

Thirdly, it is said that the selection board came to a wrong conclusion and that Mrs Verli-Wallace was not ineligible for the competition as a student who was in the last year of her studies.

The facts which the Court has been given are that she registered in February 1968 as a first year student for the academic year 1968/69. After a number of years' study, she was registered as a fourth year student for the year 1974/75. The Court is not aware of what precisely happened during those intervening years. It appears that in the normal way students who go through the four years of law studies take their written and their oral exams immediately during or after the course of studies. But it is possible for a candidate to take the oral examinations later and, even if exceptionally, this is done in fact. Mrs Verli-Wallace was accordingly obliged to take the oral examinations before she could get her degree but she was not required, under

the university regulations, to be registered as a student for the years while she was taking these oral examinations.

In fact, on eight occasions she took oral examinations in which she was successful: two in 1975; one in 1977; three in 1980 and, subsequently, she sat another paper in October 1981. It is, however, clear that even as late as 13 September 1982 she still had to pass the three subjects to which I have referred; one paper apparently coming from the third year and the others being part of the final diploma examination.

It is to be borne in mind when construing the condition which is laid down in the regulation that the exclusion is not simply of somebody who is a student, nor is it simply of somebody who is in a position to present himself for a final examination. It is solely of somebody who finds himself in the last year of university studies. Was Mrs Verli-Wallace, on the facts of the case, in this position?

At first glance it might seem that a student in the last year of studies must be someone actually engaged in a course of study at a university or an equivalent institution. It has been suggested that such a student must be "registered" in order to be considered in the last year. I would not accept that it is essential that a student should necessarily be registered or enrolled for the purpose of a particular year of study in order to be in the last year of study.

I would accept that the phrase need not be necessarily as limited as suggested since, clearly, it is possible for a student

to be studying for a degree either at home or by a correspondence course.

On the other hand, in my opinion, before a candidate can be excluded, it must be clear that the candidate was engaged in study and intended that the course of study would finish within 12 months and the examinations be taken which, if successful, would bring the course of study to an end. The fact that a student may not pass his examinations in one year and may have to re-sit them in a later year does not prevent him from being a student in his last years of study.

I would accept the opinion of both counsel that the relevant date to consider is the date when the candidate presents his application. In the present case it seems to me, on the facts before the Court, that there was no more than a theoretical possibility that Mrs Verli-Wallace would complete the exams and take her degree within the year. She had just begun to work with the Commission in Brussels. She had not shown a clear intention of taking the remaining examinations within the year and there is, indeed, no clear evidence that she was engaged in an active course of study. It seems to me unlikely that at the time she would have completed the examinations or her degree. Accordingly, on the evidence, whatever may have been the position between 1975 and 1981 I would hold, in this case, that she has not been shown to have been in the last year of a course of studies at the relevant time within the meaning of the condition laid down in the notice of competition.

In my opinion, to reach the converse result would be highly artificial. If it is desired to exclude candidates from a competition who find themselves in Mrs Verli-Wallace's position, then it seems to

me that different language must be used. Accordingly, I would hold that the selection board were right when they admitted her to the competition on the first occasion, and wrong when they sought to set aside their earlier decision.

Mrs Verli-Wallace says then that if, contrary to the conclusion I have reached, she was in her last year within the meaning of the notice, once she was admitted to the competition then she acquired a right to go on or a legitimate expectation that she would be allowed to continue. As a general proposition I would not accept this. It seems to me that, if the exclusion from a competition is clearly expressed, and a candidate initially admitted is shown clearly not to have been qualified, he can be removed from the list even after initially having been put on it, at any rate before the competition is finally concluded. Suppose, for example, that a competition advertised for graduates with an economics degree. If a candidate who merely put down that he had a degree was admitted to the competition and it was subsequently found that his degree was in engineering, it seems to me that whatever other rights he may have, he cannot be said to have acquired a right to continue with the competition or to have a legitimate expectation that he should continue.

On the other hand, if the condition which is expressed is regarded as having more than one possible meaning and if, with a full knowledge of all the relevant facts given by the candidate, a jury admits a candidate, then the candidate may well have a legitimate expectation that

he can continue and that it would not be open to a jury subsequently to decide to adopt another possible meaning of the conditions. Of course, if the full facts are not disclosed (as perhaps here, if Mrs Verli-Wallace had intended to do the exams but had not admitted it) then it seems to me quite unthinkable that a candidate in such a position should have a legitimate expectation of continuing, or an acquired right to continue.

If in the present case the Court came to the conclusion that she was in her last year of study, then it seems to me that since she clearly indicated in the form that her studies were going on and that examinations remained to be done, in view of the alternative interpretations of the meaning of the condition which are possible then, exceptionally it would be right to hold that she had here a legitimate expectation that she could continue.

For my part, however, I would prefer to put the basis of the annulment of the selection board's decision on the basis that she was not a person who, on a proper construction of the Commission's own language, was excluded.

It is also said, on Mrs Verli-Wallace's behalf, that she had the same acquired rights or legitimate expectation because she had been admitted to an earlier competition, No 303, when she had been accepted, both as a candidate and then, finally as a probationary official of the Communities. The terms of exclusion

there were the same in all material respects. She had indicated that her studies took place between 1970 and 1976 and that she had not yet obtained her diploma in law. For my part I would reject this. I do not consider that the fact that she had been admitted to the earlier competition and that she had been appointed, because of an error of interpretation of the conditions, gave her an acquired right to participate in the present competition.

Then, it is said on her behalf that in this case Mrs Verli-Wallace had the right to have her name put on the list of successful candidates. I, for my part, would not accept that. There was, even before today's hearing, no evidence to show

that the jury had decided that she passed the oral test. Now the Court has been told, and in my view should accept, that the jury here did not reach a decision on the merits of her case. Further, it has been argued that it is not logical that someone with a degree, or who is in the last year of university training, and who is already employed by the Commission should be excluded from a further competition. Whether that be logical or not, in my view that is not an argument which is open to the applicant in the present case since there is no attack on the notice of competition, either on grounds of discrimination or on the grounds that there is a breach of any principle of proportionality.

Accordingly, in this case I think it right that the decision of the jury to exclude her from the remainder of the competition should be set aside and that there should be a direction that the selection board, if it can be reconvened, should consider her as a candidate in the oral tests. If that selection board cannot be reconvened then it will be necessary for arrangements to be made for some other selection board to continue with the oral tests.

It seems to me to be right in this case that the Commission should pay the applicant's costs.