OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 17 December 1998 *

Introduction

1. This appeal concerns a challenge to the appointment by the European Parliament of the Head of Division of its Information Office in Madrid. The most difficult issue is whether an institution may set conditions of admission for an internal competition which depart from those contained in the initial Notice of Vacancy.

Legal and factual context

2. For two periods of 11 months each, in 1993 and 1994 to 1995, the appellant, an official at grade A 5, step 2, in the European Parliament's Information Office in Madrid, was asked to fulfil the function of acting Head of Division of that office.

3. On 10 January 1994, the European Parliament published Notice of Vacancy No 7424 in respect of post III/A/2743, Head of Division at the Information Office in Madrid, with a view to filling the post by promotion or transfer within the institution. The qualifications required were as follows:

'— A course of university education evidenced by a diploma or professional experience of an equivalent level;

— proven experience in public relations and journalism;

— an in-depth knowledge of the operation of communications media and the Spanish system of government;

— very good knowledge of European issues;

— a thorough knowledge of one of the official languages of the European Communities and a very good knowledge

* Original language: English.

of another. For practical reasons, a thorough knowledge of Spanish is required. Knowledge of other official languages of the European Communities will be taken into account.'

4. Neither of the candidates who applied for the post was considered to have the relevant experience. On 9 March 1994, the European Parliament published Notice of Competition Internal to the Institution A/88 (hereinafter 'Notice A/88'). The conditions for admission to the competition were fixed as follows:

'A. Qualifications and experience required

Candidates must have completed a course of university education and obtained a degree and have at least five years' uninterrupted service as an official or member of the temporary staff or auxiliary agent in the Community institutions

B. Knowledge of languages

Candidates must have complete command of Spanish and a very good knowledge of another language of the European Union.'

5. The appellant participated in the competition and was placed second by the selection board in the list of suitable candidates. The Director-General of the Directorate-General for Information interviewed the first three on the list; taking account in particular of the results of the competition and of the experience of each candidate in the field of information activities and of management, he proposed that the appellant be appointed to post III/A/2743. By note of 30 January 1995, the Secretary-General proposed to the appointing authority, the President of the European Parliament, that another candidate (hereinafter 'Mr X'), who had been placed first in the list of suitable candidates, be appointed. By decision of 21 February 1995, the President appointed Mr X to the post.

6. The appellant's complaint of 29 May 1995 was rejected by letter of 6 October 1995 and his action for the annulment of the decision appointing Mr X and of the decision not to appoint the appellant to the post was in turn rejected by the Court of First Instance on 12 June 1997. [1]

Analysis of the grounds of appeal

7. In his appeal to this Court, the appellant relies on six grounds, which I shall deal with in the order in which the equivalent

1 — Case T-237/95 *Fernando Carbajo Ferrero* [1997] ECR-SC II-429, hereinafter 'the contested judgment'.

grounds were dealt with by the Court of First Instance.

8. I should state at the outset, as a point of general application, that the European Parliament has made far too liberal use of the argument, in respect of all the grounds of appeal, that they are inadmissible because they simply repeat arguments made before the Court of First Instance. It is clear that this argument is not applicable in any case. The appeal identifies, in respect of each ground of appeal, those elements of the contested judgment of the Court of First Instance with which the appellant takes issue, and outlines his reasons for doing so. His arguments are, of course, based on arguments first submitted before the Court of First Instance. They would be inadmissible if they were not, pursuant to Article 113(2) of the Rules of Procedure of the Court of Justice.

The first ground of appeal

9. The essence of this ground of appeal, which is presented in a rather scattered fashion under the rubric of an alleged misuse of powers, is that the European Parliament did not respect the terms of Notice of Vacancy No 7424 in adopting Notice A/88; as a result, Mr X, who could not, at the time of the deadline for applying for the competition, claim to have 'proven experience in public relations and journalism', was able to take part in the competition.

10. The findings of the Court of First Instance in response to this argument are set out in paragraphs 45 to 60 of its judgment. [2] The central points may be summarised as follows:

— the conditions in Notice A/88 could lawfully have been confined to those specified in Article 5(1) of the Staff Regulations, namely a university education or equivalent professional experience. Thus, the Notice had undoubtedly set out with sufficient precision the conditions for occupying the post; compliance with these conditions could be assessed by the selection board (paragraphs 48 and 49); [3]

— where the appointing authority decides to extend the choice available to it by passing from one phase of the recruitment procedure to a later phase, in accordance with the order defined by Article 29(1) of the Staff Regulations, it must ensure that the conditions fixed by the notices in the later

2 — The paragraph numbers in brackets in the main text relate to the contested judgment.

3 — Case 44/71 *Marcato* v *Commission* [1972] ECR 427 (hereinafter '*Marcato*'), paragraph 14; Case 225/87 *Belardinelli and Others* v *Court of Justice* [1989] ECR 2353 (hereinafter '*Belardinelli*'), paragraphs 13 and 14.

phases correspond to those established by the Notice of Vacancy (paragraph 50); [4]

— in the present case, 'there was no significant change in the examination undergone by candidates', as the selection board tested them on their knowledge and professional qualifications at the second stage of the competition, the tests, rather than at the first stage, concerning compliance with the conditions of admission to the competition (paragraph 51);

— in any event, Notice A/88 was not modified in such a way as to prejudice the right of members of staff of the institution to apply and, hence, did not favour external candidates (paragraph 52). The European Parliament had contended that the reasoning in *Van der Stijl* did not apply where the interests of internal candidates were not prejudiced *vis-à-vis* external candidates;

— the appellant had not contradicted the assertion of the European Parliament that, in accordance with the decision of the Bureau of the Parliament of 15 March 1989, the only conditions of admission which could be set for an internal competition were seniority and a university degree and, if necessary, knowledge of a particular official language (paragraph 53);

— the appellant had not produced objective, relevant and consistent evidence of misuse of power in that the conditions in Notice A/88 were so framed as to permit Mr X to participate in the competition (paragraphs 54 and 55);

— the organisation of an internal competition was of benefit to the appellant, as he was not qualified to apply for promotion to the post (paragraph 56).

11. The appellant argues that the case-law cited by the Court of First Instance is irrelevant, as his complaint refers only to the appointment to a single post, and not several posts, as in *Marcato*, [5] or the establishment of

4 — Case T-140/94 *Gutiérrez* v *European Parliament* [1996] ECR-SC II-689, paragraph 43; Joined Cases 341/85, 251/86, 258/86, 259/86, 262/86, 266/86, 222/87 and 232/87 *Van der Stijl and Others* v *Commission* [1989] ECR 511 (hereinafter '*Van der Stijl*').

5 — Loc. cit.

a reserve list, as in *Belardinelli*. [6] The Court of First Instance was wrong, therefore, in holding that the Notice of Competition need only have contained the minimum conditions defined by Article 5(1), second subparagraph, of the Staff Regulations. Moreover, there was a substantial modification between the Notice of Vacancy and Notice A/88; the conditions defined by the former for occupying the post did not reappear in the latter. This change allowed other officials of the institution, including Mr X, to enter, although they would otherwise have been excluded. Tests of knowledge and professional qualifications at a later stage, as part of the competition itself, are irrelevant; this failed to respect the two-stage procedure established by Article 5 of Annex III to the Staff Regulations. The fact that the modification did not benefit external candidates is irrelevant, as there must be a correspondence between the conditions announced in the different phases even where the recruitment procedure remains internal to the institution. If the appointing authority had decided that the conditions in the Notice of Vacancy no longer met the needs of the service, the Notice should have been withdrawn and a new recruitment procedure commenced in accordance with different criteria. [7]

12. The European Parliament contends that this ground is unfounded, as nothing in the Staff Regulations justifies a distinction between recruitment procedures, or requires a greater or lesser precision in the drafting of the Notice of Competition, depending on the number of posts available.

13. The resolution of this question depends on the interpretation of Article 29(1) of the Staff Regulations. This provides that:

'Before filling a vacant post in an institution, the appointing authority shall first consider:

(a) whether the post can be filled by promotion or transfer within the institutions; [8]

(b) whether to hold competitions internal to the institution;

(c) what applications for transfer have been made by officials of other institutions of the three European Communities;

and then follow the procedure for competitions on the basis either of qualifications or of tests, or of both qualifications and tests. Annex III lays down the competition procedure.

6 — Loc. cit.

7 — Case C-81/88 *Müllers* v *ESC* [1990] ECR I-249.

8 — It is clear from both the remainder of the text and the other language versions of this provision that the singular 'institution' is intended.

The procedure may likewise be followed for the purpose of constituting a reserve for future recruitment.'

14. In *Van Belle*, the Court noted that Article 29 'forms part of the chapter devoted to recruitment' and 'governs the various means of filling a vacant post', and held that the institution must examine the three possibilities described in paragraph 1 'in order of preference'. [9]

15. It follows from the general scheme of the Staff Regulations that whenever an institution opts to fill a vacant post by promotion, in accordance with Article 29(1)(a), Article 45(1) applies concurrently. [10] In *Grassi* v *Council*, the Court established that, wherever an institution decides to appoint an official to a post by promotion, it enjoys a wide discretion, in particular as to the assessment of the respective merits of the candidates, but 'there is *ipso facto* an assumption that the exercise of this discretion will include careful examination of the files and meticulous regard to the requirements laid down in the Notice of Vacancy'. [11] This discretion must, however, be exercised 'within the self-imposed limits contained in the Notice of Vacancy'. As the basic function of the Notice of Vacancy, which must reflect 'the special conditions of eligibility required of the holder' of the post, is 'to give those interested the most accurate information possible about the conditions of eligibility for the post to enable them to judge whether they should apply for it', the institution may not modify these conditions *ex post facto*; where it finds that the conditions originally fixed were more exacting than required, the institution is entitled to withdraw and replace the original Notice of Vacancy. [12]

16. In *Van der Stijl*, [13] the Commission had decided to organise an open competition on the basis of a Notice of Competition establishing requirements for the post which were significantly less strict than those in the original Notice of Vacancy. The Court held that, though the principles laid down in *Grassi* were 'enunciated with regard to an internal promotion procedure, they are to be applied *all the more strictly* where the correspondence between a notice of vacancy and a notice of competition is concerned ... [and that a]ny other interpretation would deprive Article 29 of the Staff Regulations of its effect, that provision requiring the institutions to consider whether a post can be filled internally before they organise an open competition'. [14]

9 — Case 176/73 *Van Belle* v *Council* [1974] ECR 1361, paragraphs 5 and 6. In fact, the recourse to open competitions mentioned at the end of the first sentence of paragraph 1 is a fourth possibility.

10 — This view was espoused by the Court of First Instance in Case T-506/93 *Moat* v *Commission* [1995] ECR-SC II-147, paragraph 37.

11 — Case 188/73 [1974] ECR 1099 (hereinafter '*Grassi*'), paragraphs 26 and 38; see also Joined Cases T-178/95 and T-179/95 *Picciolo and Calò* v *Committee of the Regions* [1997] ECR-SC II-155 (hereinafter '*Picciolo*'), paragraph 85.

12 — *Grassi*, loc. cit., paragraphs 38 to 43; see also *Picciolo*, loc. cit., paragraph 87.

13 — Loc. cit.

14 — Ibid., paragraph 52, emphasis added.

17. In the present case, the European Parliament, having failed to fill the post by promotion or transfer within the institution, was entitled to pass to the stage of organising an internal competition. The question which arises is whether it was entitled to base the competition on conditions which were different from and less exacting than those defined in the Notice of Vacancy.

18. It seems to me to be clear, on the basis both of the scheme and wording of Article 29(1) and of the case-law of the Court, that the institution may not, in a Notice of Competition Internal to the Institution, modify the conditions already established by the Notice of Vacancy. The Article is designed to give precedence, in a graduated series of steps, to those already serving in the institution in question (first two steps) or in the institutions generally (third step). The procedure established by this provision must be followed where the institution intends to fill a vacant post; each successive step designed to fill the vacancy must take place with reference to that post, as already designated. The Notice of Vacancy sets the basic parameters of the procedure, in particular by defining the nature of the 'vacant post'; any subsequent modification of the conditions modifies the nature of the vacant post and hence distorts the entire procedure. So to act would be to 'move the goalposts'.

19. If an institution were to relax the original conditions in passing from the first stage to the holding of an internal competition, it would thereby exclude from promotion or transfer those officials of the institution in question who could have complied with the less strict conditions defined in the Notice of Competition. Such officials would, of course, be entitled to apply at the stage of the internal competition, but that is not relevant; Article 29(1) is designed to bestow on them the right to have their candidatures taken into consideration before the institution can decide to hold an internal competition. Furthermore, by relaxing the conditions in the Notice of Competition, the institution may admit to the competition officials who do not possess the qualifications for the post which the institution itself has fixed as being necessary in the interests of the service.

20. The problems to which such an approach to Article 29(1) gives rise do not stop there. For example, should the institution decide that neither promotion or transfer nor an internal competition was 'capable of leading to the appointment of a person of the highest standard of ability, efficiency and integrity', which is the basic objective of that provision, [15] it would be entitled to take account of applications for a transfer between the institutions, in accordance with subparagraph (c). However, the question would then arise as to whether this decision must be taken in the light of the vacant post as defined in the original Notice of Vacancy, or as defined in

15 — Case T-586/93 *Kotzonis* v *ESC* [1995] ECR II-665, paragraph 93.

the less strict Notice of Competition. If a variation in conditions between stages were permitted, the appointing authority could either relax the criteria still further or, alternatively, impose conditions even stricter than those in the original Notice of Vacancy, neither of which seems consistent with the scheme of Article 29(1) of the Staff Regulations.

21. In my view, the interpretation of Article 29(1) adopted by the Court of First Instance in the present case constitutes an error of law. I see no reason to deprive of general application the interpretation of this provision adopted by the Court in *Grassi*, to wit, that

'[w]hen the appointing authority has to fill a post, it must, when drawing up the Notice of Vacancy, take account of the special conditions of eligibility required of the holder; it does not satisfy the provisions of the Staff Regulations if the authority decides what these conditions should be only after the Notice has been published.' [16]

I might add that in the circumstances of *Grassi* no question of favouring external candidates arose, as the appointment procedure was entirely internal, and was based on Article 29(1)(a) and Article 45(1) of the Staff Regulations. This view is confirmed by the very wording of the judgment in *Van der Stijl*; the fact that the Court held that the principles established in *Grassi* were 'to be applied all the more strictly' where the institution had decided to hold an open competition does not, as the European Parliament has argued, in any way mean that they do not apply where the institution holds an internal competition. [17]

22. In paragraphs 48 and 49 of its judgment, the Court of First Instance held, on the basis of *Marcato* and *Belardinelli*, that it would have been sufficient for the Notice of Competition to fix, as conditions of admission, the minimum conditions established by Article 5(1), second subparagraph, of the Staff Regulations. I do not see the pertinence of these judgments to this aspect of the present proceedings. In *Marcato*, the four vacancies at issue were announced in the Notice of Competition, which was issued at the same time as the Notice of Vacancy; [18] no question of an inconsistency between them could or did arise. The dispute in *Belardinelli* concerned the conditions of admission to an internal

16 — Loc. cit., paragraph 39.

17 — Loc. cit., paragraph 52.

18 — Thus the applicant's first submission was described as concerning 'Notice of Competition No COM 484 to 487/70'; the Court's conclusion was that 'in so far as it refers to the notice of vacancy, the application must be dismissed' (paragraph 16).

competition held with a view to constituting a reserve list of B grade officials, rather than a single vacant post; it was not therefore necessary, or indeed possible, to define the conditions of admission having regard to any Notice of Vacancy. In any case, the appellant's complaint, in the present case, was not that Notice A/88 was insufficiently precise *per se*, but that it was at variance with Notice of Vacancy No 7424.

23. The Court of First Instance appears to assume that the institution can supplement any discrepancy between the Notice of Vacancy and the Notice of Competition by applying the conditions laid down in the former in carrying out the tests required by the latter (paragraphs 51 and 52). However, Article 5 of Annex III to the Staff Regulations provides that the selection board of an institution holding a competition must first 'draw up a list of candidates who meet the requirements set out in the notice of competition' before proceeding to the tests themselves. The stage at which a criterion is applied, and the strictness with which it is applied at that stage, may produce different results. It cannot be said to be irrelevant whether a particular criterion is used as a (strict) condition of participation in a competition or as a (less strict) guideline to the conduct of the competition by the selection board. By way of illustration, the appellant states that the European Parliament argued before the Court of First Instance that, had it maintained as conditions of admission in the Notice of Competition the conditions specified in the Notice of Vacancy, then Mr X would have been unable to participate in the competition, as he did not have, at the closing date for submission of the applications, the requisite proven experience in the area of public relations and journalism.

24. This argument of the European Parliament seems to me to indicate not only that the Notice of Competition did indeed relax the conditions of admission defined in the Notice of Vacancy, but that this modification was designed expressly to admit to the competition candidates who did not comply with those conditions.

25. In paragraph 56 of its judgment, the Court of First Instance stated, correctly, that the organisation of an internal competition benefited the appellant, who had been ineligible to apply for appointment by promotion or transfer. However, it is clear that that does not meet the appellant's argument, which is that a candidate was admitted who would not have been admitted to a competition organised in accordance with the Notice of Vacancy. The legitimacy of that type of argument is fully recognised in the case-law. [19]

26. The Court of First Instance relies, in paragraph 53 of its judgment, on a decision

19 — See, for example, the summary by Advocate General Jacobs in *Van der Stijl*, loc. cit., paragraph 28.

of the Bureau of the Parliament of 15 March 1989 defining the permissible conditions of admission to competitions internal to that institution. Whatever its terms, it does not appear to me that an internal decision of an institution can take precedence over the requirements of the Staff Regulations.

27. If follows from the foregoing, in my view, that the appellant's argument that the Court of First Instance erred in law in finding that the European Parliament had not, in the circumstances of the present case, breached the procedure established by Article 29(1) of the Staff Regulations in appointing Mr X should be upheld.

28. The appellant has sought to rely on the irregularities of the Notice of Competition as indicia of a misuse of powers, *in casu* the use of the recruitment procedure with a view to appointing a pre-selected candidate who does not possess the capacities to occupy the post. The Court must accept, and I see no reason to question, the Court of First Instance's finding of fact that the appellant had not produced objective, relevant and consistent evidence that the appointment was made, or the competition organised, for purposes other than those for which the power of recruitment was conferred on the appointing authority.

29. However, the irregularity in the setting of the conditions in the Notice of Competition appears to have had a direct impact on the outcome of the competition. For that reason, the Court should, in my view, grant the orders sought by the appellant. I should add, in order to allay any fears aroused by the possible annulment of the decision appointing Mr X to the post without his having been heard in these proceedings, that he had the opportunity of intervening as a third party with an interest in the result of the case. [20] He would necessarily have been aware of the application by the appellant through the summary published in the *Official Journal of the European Communities*, [21] and the Court cannot be prevented from granting the appropriate order in a case such as the present by the fact that an interested third party did not so intervene, [22] but, instead, relied upon the appointing institution to safeguard his rights adequately. [23]

30. In the light of the foregoing, I am of the opinion that the judgment of the Court of First Instance, in so far as it rejects the complaint of the appellant concerning the modification by the European Parliament of the conditions for appointment to post III/A/2743, Head of Division at the Information Office in Madrid, in Notice of Internal Competition A/88, should be

20 — Article 37 of the EC Statute of the Court of Justice, extended to the Court of First Instance by Article 46 of that Statute.

21 — Case T-1/90 *Pérez-Mínguez Casariego* v *Commission* [1991] ECR II-143 (hereinafter '*Pérez-Mínguez*'), paragraph 43.

22 — Case 12/69 *Wonnerth* v *Commission* [1969] ECR 577, paragraph 8; Case 184/80 *Van Zaanen* v *Court of Auditors* [1981] ECR 1951, paragraph 13; *Pérez-Mínguez*, loc. cit., paragraph 43; see also the Opinion of Advocate General Sir Gordon Slynn in *Van Zaanen*, loc. cit., p. 1971.

23 — *Pérez-Mínguez*, loc. cit., paragraph 42.

quashed and that the decisions appointing the successful candidate to that post and rejecting the candidature of the appellant should be annulled.

The second ground of appeal

31. This ground of appeal consists of a criticism of the Court of First Instance for its rejection of the appellant's complaint of a violation of the Notice of Competition by way of discriminatory conduct by the selection board of the language tests. In essence, that Court considered that this complaint had been advanced for the first time at the oral hearing. A brief review of the history of this complaint is thus necessary. It is important to recall that the outcome of the language tests appears to have played a crucial, possibly decisive, role in the ultimate choice of Mr X in preference to the appellant. As the appellant seems to have known from the outset, at the end of the tests only one point separated these two candidates and this difference was attributable to the language tests, where Mr X obtained five points and the appellant four. The Director-General recommended the appellant on the basis of his superior experience in public relations. The Secretary-General, noting, however, that the choice was extremely difficult, recommended adherence to the conclusions of the selection board, which resulted in the decision of the appointing authority in favour of Mr X.

32. In his application, as in his original complaint, the appellant maintained that, since the conditions of admission to the competition envisaged only that candidates 'have complete command of Spanish and a very good knowledge of another language of the European Union', the selection board violated these conditions by taking into account knowledge of a third and fourth language. In a sentence which is crucial to this issue, he went on to say that the selection board accorded discriminatory treatment to those candidates, including the plaintiff, 'who, legitimately, did not pay particular attention to the specific questions which might have been put to them by the selection board in a third or fourth language'.

33. The first point to make about the complaint as thus formulated is that, as pointed out by the European Parliament in its defence, and upheld by the Court of First Instance, the Notice of Competition, paragraph III. B.2. c, provided for 'conversation with the selection board to enable it to assess the candidates' knowledge of languages other than their main language'. The Court of First Instance thus held that the selection board had not gone outside the framework of the Notice of Competition in assessing candidates' knowledge of a third or fourth language. This finding has not been challenged on the appeal. It remains to consider the appellant's claim of discrimination in that Mr X was treated more favourably by being questioned in other languages, whereas the appellant was not. The first problem relates to the formulation of the discrimination claim as summarised in the preceding paragraph.

34. At the time of his application to the Court of First Instance, the appellant was necessarily aware, as the European Parliament has pointed out, of the facts of his own interviews by the selection board and, in particular, whether he was questioned in a third or fourth language. He was also aware and alleged in the application that the single point which separated Mr X from him arose from the language tests. He limited himself, however, to claiming the legitimate right to pay no particular attention to such questions. This is quite different from his current claim that he was not, himself, so questioned. In my view, the allegation made in the application was not independent of his then current, though incorrect, claim that third or fourth languages could not be considered. In view of the central role played by the language tests, I would have been sympathetic to the appellant on this issue, if he had made his position clear. However, the allegation made in the application is at best ambiguous. If anything, it implies that he was questioned in a third or fourth language, but that, for claimed legitimate reasons, he was unprepared. In the context, there can be no reasonable excuse for his failure to state, if it be the case, that he was not so questioned.

35. In his reply in the proceedings before the Court of First Instance, the appellant continued to insist that questioning in a third or fourth language was precluded and that paragraph III. B.2. c of the Notice meant only that a language other than Spanish would be taken into account. He went on, however, to claim, 'in the alternative', that he would probably have obtained more points in the language tests 'if he had been questioned in the same manner as [Mr X] on his knowledge of a third or fourth language — *quod non*'. He did not clarify whether he was now claiming that he had not been questioned at all in a third or fourth language. Again his allegation was ambiguous, where there was no justification for ambiguity.

36. Prior to the oral hearing, the Court of First Instance requested the production by the European Parliament of certain documents. Among these was the report of the selection board and a table in an Annex (No 5) thereto showing the points received by the candidates in the tests. The appellant relied on this document at the hearing (see paragraph 62 of the judgment) to support his case of unequal treatment. Mr X received three points for Italian and one each for French and English, whereas the appellant received three points for French and one for English. He relied on the fact that the relevant box contained only a dash to show that he was not questioned in other languages, viz. Italian and Portuguese, of which he had claimed knowledge in his application.

37. The Court of First Instance ruled that the appellant's argument that the selection board had not questioned the candidates on their knowledge of all the languages mentioned

in their applications for the post had been raised for the first time at the oral hearing, but did not treat the argument as inadmissible on this account (paragraphs 70 and 71). Rather it considered (paragraph 72) that the claims of irregularity in the language tests were 'unsubstantiated and were not sufficient to establish that the selection board failed to test his knowledge of all the languages of which he claimed to have knowledge in his application'.

38. The claim of the appellant at this stage is that the Court of First Instance was wrong in holding that he had advanced this claim for the first time at the oral hearing. He states for the first time explicitly that he was not questioned in a third or fourth language. I would dismiss this ground of appeal. Firstly, the Court of First Instance had the opportunity to hear the arguments and assertions of the parties at the oral hearing regarding the interpretation to be given to the table in Annex 5. This is an assessment of fact which cannot be reviewed on appeal. In reaching its conclusion, it was entitled to take into account the history of the appellant's pleadings and in particular the fact that the complaint had not been made in the original application. Secondly, in holding that the matter was introduced for the first time at the oral hearing, the Court of First Instance overlooked the reference in the reply to alleged different treatment *vis-à-vis* Mr X. However, the allegation there made was, as I have said, ambiguous. In any event, it was already inadmissible for failure to make it in the application. Thirdly, the references to a third and fourth language made by the appellant consistently prior to the hearing involved counting Spanish as the first. It transpires from Annex 5 that the appellant was indeed awarded a mark in English and was thus, presumably, questioned in that language. The inconsistency of his position highlights the difficulty confronting the Court of First Instance in reaching a conclusion on the facts. It is not the function of this Court to make findings in the absence of manifest error in the contested judgment. In my view, on this issue, there is none.

The third and fourth grounds of appeal

39. The appellant argued in his application to the Court of First Instance that it was normal practice for the appointing authority to act in accordance with the recommendation of the Director-General of the Directorate-General for Information, and that the appointing authority should not have departed from it without furnishing special reasons for having done so. Even though the European Parliament did not deny the existence of such a practice, the Court of First Instance stated that neither the Staff Regulations nor any other measure required that the appointing authority request, let alone follow, the advice of the relevant Director-General (paragraph 76). Article 30 of the Staff Regulations gave the appointing authority the right to decide amongst those on the list of suitable candidates drawn up by the selection board. If the appointing authority could decide to depart from the selection board's order of preference, he could, *a fortiori*, do so in respect

of a purely consultative recommendation, not provided for in the Staff Regulations, which was provided after the selection board's list had been drawn up (paragraph 77).

40. The appellant submits, as the third ground of his appeal, that the general practice of following the advice of the relevant Director-General has the character of 'an internal directive, by which the administration imposes on itself indicative rules of conduct from which it may not depart without specifying the reasons which led it to do so'. [24]

41. The fourth ground of appeal relates to the appellant's more general argument before the Court of First Instance regarding breach of the requirement that grounds be given for any decision adversely affecting an official, pursuant to Article 25, second indent, of the Staff Regulations. The Court of First Instance observed that the appointing authority is obliged to give reasons when he rejects a complaint by a candidate against a decision not to appoint him to a post. [25] The sufficiency of the reasons given had to be judged in the light of concrete circumstances, such as the content of the decision, the reasons cited and the interest of the addressee in receiving an explanation. [26] The reason given, in the response to the appellant's complaint, for appointing the successful candidate rather than the appellant to the disputed post was the appointing authority's desire to observe the order of preference in the list of suitable candidates prepared by the selection board (paragraph 85). This reasoning appeared to the Court of First Instance to be sufficient. This reasoning was already implicit in the statement, in the letter informing the appellant of the outcome of the competition, that the candidate who had been placed first on the selection board's list would be appointed (paragraph 86). The fact that the appellant was not informed before commencing proceedings that the difference between the marks awarded by the selection board to these two candidates arose from the tests of linguistic ability was not material, as the appointing authority's decision was based simply on their overall scores (paragraph 87). Regarding the recommendation of the Director-General, the Court of First Instance stated that the appointing authority was not obliged to consult him, that the candidates had already been ranked in order of merit by the selection board, and that there could be no additional obligation to give reasons where the appointing authority chose to adhere to the ranking submitted by that body (paragraph 88).

42. The appellant submits, further, in the fourth ground of his appeal, that he should have been informed of the reasons for the selection board's decision to rank him only in second place, and the successful candidate first, in the list of suitable candidates. In particular, he should have been informed of the decisive character of the linguistic tests, in order to enable him to detect the alleged discriminatory treatment regarding his third

24 — Case T-22/92 *Weißenfels* v *European Parliament* [1993] ECR II-1095, paragraph 40. He also relied on Case T-60/94 *Pierrat* v *Court of Justice* [1995] ECR-SC II-77 (hereinafter '*Pierrat*'), paragraph 33. The points referred to by the appellant appear, however, in paragraph 35.

25 — Paragraph 83 of the contested judgment; *Pierrat*, loc. cit., paragraph 30.

26 — Paragraph 82 of the contested judgment; Case T-280/94 *Lopes* v *Court of Justice* [1996] ECR-SC II-239, paragraph 148.

and fourth languages. [27] He also reiterates his argument regarding the reasons for the departure from the Director-General's recommendation.

43. The European Parliament's response to both grounds of appeal is that the reasons provided for the appointing authority's decision were sufficient, including in circumstances of departure from the Director-General's recommendation.

44. The decision in *Pierrat* concerned a consultative committee which was not provided for in the Staff Regulations but which was specifically established to assist the appointing authority with appointments, in the absence of any similar statutory body. [28] The position of such committees cannot, in my view, be compared with that of a senior official, such as the relevant Director-General, who was consulted as a matter of course by the appointing authority but who provided advice in the context of a competition for which a selection board had been established under the Staff Regulations themselves. Where the appointing authority prefers to adhere to the ranking chosen by the selection board, there is, thus, no need to provide any additional justification, beyond the normal statement of reasons, for his failure to accept advice solicited from other sources outside the requirements of the Staff Regulations.

45. More generally, it appears to me that the desire to adhere to the ranking chosen by a competition selection board is a valid and sufficient reason for the appointing authority to appoint one candidate rather than another. It is not the function of the appointing authority to explain how or why the selection board arrived at a particular order of merit, given the independence of the latter body. Regarding the alleged failure of the selection board to adhere to the Notice of Competition in respect of the linguistic tests, the appellant was, as I have already noted above, in a position to verify himself which languages he was tested in and whether this complied with the Notice of Competition. In my view, therefore, both of these grounds of appeal should be rejected.

The fifth ground of appeal

46. The appellant submitted to the Court of First Instance that the decision to appoint the successful candidate constituted a violation of the principles of good administration and of the interest of the service, as well as amounting to a manifest error of appreciation. He argued, in particular, that the selection board could not validly have admitted to the competition, and given first place to, a candidate who did not have the requisite qualifications and experience for the post in question, that the linguistic tests should not have been decisive given that they gave rise to a maximum of five marks out of a potential total of 105, and that the Italian language was not indispensable to the post in question. The appointing

27 — See the second ground of appeal discussed above.

28 — See also Joined Cases 44/85, 77/85, 294/85 and 295/85 *Hochbaum and Rawes* v *Commission* [1987] ECR 3259 and Case T-25/90 *Schönherr* v *ESC* [1992] ECR II-63.

authority should, instead, have followed the advice of the Director-General of the Directorate-General for Information.

47. The Court of First Instance rejected the argument based on the principle of good administration because there was no suggestion that the selection board was not qualified to assess the candidates for the post at issue. [29] As regards the interest of the service, it said that, in the light of the scope of the discretion which the appointing authority has in evaluating that interest, the review to be undertaken by the Court of First Instance was confined to the question whether the authority remained within the bounds of that discretion and did not exercise it in a manner which was manifestly incorrect. [30] Furthermore, the work of the selection board was comparative in nature, was based on the performance of candidates in the competition tests, and could be reviewed by the Community judicature only in the case of a manifest breach of the rules governing its work (paragraph 101). On the facts of the case, having examined the successful candidate's application for the competition and his curriculum vitae, the Court of First Instance concluded that he was not manifestly unqualified to take up the post at issue. The fact that the selection board had given him marks equal to those awarded to the appellant in all tests other than the linguistic tests indicated that he had demonstrated his ability to exercise the functions entailed by the post (paragraph 103).

48. The appellant submits, on appeal, that the Court of First Instance failed to take into account the advice given to the appointing authority by the relevant Director-General, which emphasised, in particular, the experience and proven competence of the appellant and recommended his appointment to the post. However, as the Court of First Instance pointed out, it was not part of its task to substitute its assessment of the candidates for that of the appointing authority (paragraph 99). The Court of First Instance found that there was nothing to indicate that the successful candidate was manifestly unqualified to be appointed to the post at issue. This finding is not undermined by the evidence of the Director-General's high opinion of the appellant. In any event, the Director-General was not a party to the tests administered by the selection board, which were an essential part of the procedure for the assessment of candidates provided for in the Notice of Competition. Therefore, there are no grounds for concluding that the appointing authority failed to observe the principle of the interest of the service, or committed a manifest error of appreciation, in adhering to the ranking set out in the list of suitable candidates prepared by the selection board. I would, therefore, reject this ground of appeal.

The sixth ground of appeal

49. The appellant claims that the Court of First Instance erred in law by rejecting his proof of alleged bias in the composition of the selection board. In his application he had claimed that one member of the board,

29 — Paragraph 98 of the contested judgment; see also Joined Cases T-32/89 and T-39/89 *Marcopoulos* v *Court of Justice* [1990] ECR II-281, paragraphs 37 and 40.

30 — Paragraph 99 of the contested judgment; Case T-589/93 *Ryan-Sheridan* v *FEACVT* [1996] ECR-SC II-77, paragraph 132.

his immediate superior, had made an unfounded accusation of nepotism against him by writing to the Director-General of the Directorate-General for Information to the effect that the appellant had proposed expenditure of Community funds in favour of an association presided over by his brother. The Director-General had shown the letter to the appellant and asked him to explain it. This should, he says, have disqualified the complainant from taking part in the selection board.

50. The European Parliament denied knowledge of the letter. The Court of First Instance held that the appellant had not furnished sufficient proof of its existence (paragraph 109) and dismissed the allegation.

51. I agree with the appellant that his declarations regarding the existence of the letter cannot be set aside because of his inability to produce a document which would, in any event, have been in the possession of the opposing party. None the less, I recommend that this ground be rejected as unfounded, because the allegation of bias has not, in any event, been substantiated. The appellant was, apparently, asked to explain the proposed application of funds to a body associated with a person bearing his family name. The correspondence of names was, apparently, a simple coincidence. The appellant does not suggest that he was unable to furnish this explanation or that it was rejected and is silent as to whether there were any further repercussions for him or whether the complainant exhibited any sign of bias or prejudice against him. In the absence of any claims to the contrary, the natural inference is that his explanation of an understandable misunderstanding was accepted. I would reject this ground of appeal as unfounded because unsubstantiated.

Costs

52. The appellant has been successful, in my view, in respect of one of his grounds of appeal. Furthermore, the Court is able to give final judgment on the ground in question and to grant the orders sought, without referring the case back to the Court of First Instance. [31] The Court must, therefore, make a decision as to costs. [32] Equity does not require in the present case that the costs of the proceedings be shared between the parties. [33] Thus, the European Parliament should be ordered to pay all the costs of the proceedings. [34]

31 — Article 54, EC Statute of the Court of Justice.

32 — Article 122, first subparagraph, Rules of Procedure of the Court of Justice.

33 — Article 122, second subparagraph, second indent, Rules of Procedure of the Court of Justice.

34 — Article 69(2), Rules of Procedure of the Court of Justice.

Conclusion

53. In the light of the foregoing, I recommend that the Court:

(1) quash the decision of the Court of First Instance in so far as it relates to the first ground of appeal;

(2) annul the decision of 21 February 1995 appointing the Head of Division of the European Parliament Information Office in Madrid and the corresponding decision not to appoint the appellant to the said post;

(3) order the European Parliament to pay all the costs of these proceedings, including those of the appellant.