OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 18 April 1989 *

Mr President,
Members of the Court,

1. The actions brought by Mr Caturla-Poch and Mr de la Fuente concern Internal Competition LA/103, held by the European Parliament for the purpose of filling two posts in Grade LA 3. The applicants were both candidates for one of those posts, that is to say the post of Head of the Spanish Translation Division. The applicants were excluded from the list of suitable candidates because they did not obtain sufficient points; consequently they submitted complaints pursuant to Article 90(2) of the Staff Regulations on 27 April and 15 April 1987 respectively. Those complaints were rejected by two decisions of the President of the European Parliament of 8 September 1987.

2. The actions brought by the applicants on 4 December 1987 seek primarily the annulment of the decision rejecting their candidatures or, in the alternative, the annulment of all the steps taken in the competition.

The main submission

3. With regard to the substance, the applicants submit first that Article 5 of Annex III to the Staff Regulations has been infringed. (The application refers to the sixth paragraph of the article, the reply refers to the third paragraph; it is in fact the first and third paragraphs which are at issue.)

4. The first paragraph of Article 5 provides:

'After examining [the] files, the Selection Board shall draw up a list of candidates, who meet the requirements set out in the notice of competition.'

5. The third paragraph provides:

'Where the competition is on the basis of qualifications, the Selection Board shall, after determining how candidates' qualifications are to be assessed, consider the qualifications of the candidates appearing on the list . . . '.

6. According to the applicants, the Selection Board was under an obligation first to determine how the candidates' qualifications were to be assessed, and only *then* to draw up the list of candidates admitted to the competition. However, it is clear from the wording of the provision in question that the Selection Board must first of all draw up the list, then establish how candidates' qualifications are to be assessed and, finally, it must apply those criteria to assess the qualifications of the candidates appearing on the list of those who have been admitted to the competition, drawn up beforehand. The Selection Board's reasoned report, adduced by the applicants, shows that the

* Original language: French

Selection Board followed that procedure to the letter.

7. However, the applicants refer to the judgment in Case 143/84 (Vlachou I) [1] in which the Court annulled an appointment after having established not only that the criteria used to assess the candidates' qualifications were established *after* the selection board had examined the qualifications in order to check that the candidates had at least six years' professional experience, which was one of the conditions of admission to the competition, but also that those criteria were established in such a way that the applicant's situation was not correctly assessed. The Selection Board took the view that the probative value of certain documents submitted by Mrs Vlachou as proof of the length of her professional experience was open to doubt. It therefore fixed the minimum number of points in such a way that the years of experience referred to in those documents could have no bearing on where the candidates were placed on the list. The Court held that the Selection Board ought either to have refused to consider those documents or to have evaluated them in the same way as the other qualifications produced by the candidates, but that by adopting, after having examined the qualifications of the candidates, a system of allocating marks for professional experience which objectively caused certain certificates produced by one of the candidates to be undervalued, the Selection Board had acted in breach of the general principle that candidates in a competition should be treated equally.

8. However, I consider that it was not the Court's intention in that judgment to order Selection Boards to reverse henceforth the order of the steps laid down in Article 5: the Court wished to emphasize that it was not permissible for a selection board to establish the criteria for assessing qualifications on the basis of the qualifications actually submitted by the various candidates, with the purpose of excluding a part of the professional experience which certain candidates could put forward.

9. Can it be said that the Selection Board in Competition LA/103 took a similar approach? It must be said first of all that, with regard to the allocation of marks for professional experience, the reasons for its decision are not clear because the Selection Board neglected to state the number of points it was going to award for each year of professional experience. Secondly, the decision is surprising in so far as the Selection Board required a minimum of only three years' experience specifically in the field of translation, even though the posts in question were for Heads of Division. The question must arise whether, by adopting a maximum of 12 points for professional experience, the Selection Board did not intentionally wish to exclude from consideration all experience of more than 12 years. Even if it is assumed that one year of experience is worth one point, it is difficult to understand how certain candidates with only five or six years of experience (based on their step in Grade A 5) were able to obtain the number of points awarded to them.

10. If, on the other hand, the Selection Board started with the professional experience which the applications submitted showed to be the longest, that is to say 18 years, and if it decided to award to that experience the maximum number of points, in other words 12, then it is difficult to

1 — Case 143/84 *Vlachou* v *Court of Auditors* [1986] ECR 459, at pp. 477 and 478.

understand on what basis candidates on step 1 or 2 in Grade A 5 could have obtained 11 or 12 points whereas, on that assumption, one year of professional experience could be worth only 0.67 points. Whatever the assumption made, it is totally incomprehensible that Mr de la Fuente should obtain only seven points when it is not in dispute that he has 18 years of experience, like Mr Caturla, who obtained 12 points.

11. Thus, from the number of points obtained by the various candidates it is not possible to deduce *a posteriori* an objective criterion which could have been used to award the points. If such a criterion was nevertheless used, the Parliament would surely have made it known during the proceedings. As it did not do so, it must be concluded that the points were awarded arbitrarily and that there was a breach of the general principle that candidates in a competition should be treated equally.

12. A second comment must be made with regard to the way in which the Selection Board performed its task of establishing the criteria on which it was to assess the candidates' qualifications (the third paragraph of Article 5 of Annex III).

13. Those criteria provide as follows:

(1) University education or at least five years' professional experience ensuring an equivalent level: 0-10 points

(2) At least three years' professional experience specifically in the field of translation: 0-12 points

(3) Knowledge of law, political science or economics, or in the field of science: 0-3 points

(4) Organizing ability: 0-15 points

14. The notice of competition made no provision for the verification of the knowledge mentioned under (3) above. Moreover, and in particular, the competition was published as a competition on the basis of qualifications alone. Thus, only (1) and (2), with a total of 22 points, could involve consideration of qualifications produced by the candidates. It is common ground that, with regard to (3) and (4), the Selection Board did not consider qualifications (how could it?), but it evaluated the candidates' knowledge and organizing ability in an interview lasting between 10 and 15 minutes with each of the candidates. The number of points which could be awarded on the basis of the interview was 18 out of a total 40, in other words 45%.

15. Therefore, the interview assumed the form of an actual oral test and the competition became a competition on the basis of qualifications and tests.

16. Moreover, an interview lasting a quarter of an hour at most, which was also concerned with the candidates' knowledge, could not enable the Selection Board to obtain a sufficiently clear idea of the candidates' various levels of organizing ability to the extent that it could award, fully aware of all the facts, points on a scale between 0 and 15.

17. By organizing its work in the way it did, the Selection Board did not comply with the notice of competition and committed a manifest error with regard to the methods of assessment which it used.

18. The applicants point out, moreover, that the notice of competition also included, among the qualifications and knowledge required, a heading 'knowledge of languages' which was not allocated any points. The defendant maintains that the Selection Board had taken knowledge of languages into consideration under the headings 'education' and 'professional experience'. It may be considered, in fact, that the assessment of qualifications and professional experience specifically in the area of translation enables valid conclusions to be drawn regarding knowledge of languages and it does not seem to me therefore that the Selection Board committed, in that regard, a manifest error of a kind which must be condemned by the Court.

19. I come now to the candidates' submissions based on the Selection Board's application of the criteria it laid down in relation to the headings other than professional experience, of which I have already spoken.

20. Mr Caturla criticizes the fact that in spite of all his organizing ability, which is evidenced by the fact that he was entrusted with the setting up of a division, he obtained only one point out of 15 for organizing ability.

21. It must be pointed out that the candidates' personal files were available to the Selection Board and that the report Mr Caturla received at the end of his probationary period, dated 20 January 1986 (I am ignoring the report of 23 January 1987 which was not yet available to the members of the Selection Board) shows that for 'organizing ability' the applicant received the assessment 'good' (which was confirmed incidentally by the report of 23 January 1987). Assessments received in reports at the end of the probationary period are graded as follows: very good — good — satisfactory — insufficient. If those assessments are transferred to a scale of 0 to 15 points, it appears that 'good' must be at least equivalent to the average, in other words 7.5 points. Therefore, by relying on a short interview and ignoring the comments in the applicant's probationary period report, the Selection Board committed a manifest error of assessment.

22. Mr de la Fuente, for his part, makes the following points:

23. With regard to the points awarded for university qualifications, he considers that by virtue of the principle of equal treatment he should have obtained 10 points rather than eight.

24. It is common ground that Mr de la Fuente has degrees of Master of Law and Master of Theology. The degree of Master of Law ought certainly to have been worth six points. Was the Selection Board justified in awarding him only two additional points for his degree of Master of Theology? It seems to me that the matter is at the Selection Board's discretion since the degree is in a field which is not directly related to the applicant's employment at the Parliament.

25. I have already stated that, in my opinion, the Selection Board's assessment of Mr de la Fuente's professional experience (7 points out of 12) is evidence of a breach of the principle of equal treatment.

26. The same applicant obtained 5.5 points for his organizing abilities and in that respect he was the second highest placed Spanish candidate. The fact remains that Mr de la Fuente has had a great deal of organizing experience acquired during the eight years he worked in the social and religious services of an organization for Spanish immigrants in Germany, and that he was entrusted with setting up the Spanish section of the European Parliament's Minutes Division and coordinating its work. In view of that experience, explicit reasons should have been given for the award of a below-average mark. However, neither the Selection Board's report nor the reply to the complaint contain any reasons. Nor were any reasons given during the proceedings before the Court.

27. More generally, with regard to the absence of reasons, it appears that the Selection Board did not inform the applicants of the reasons why their applications were rejected. No document of that kind can be found anywhere in the file of the case.

28. In reply to the complaint which they submitted to the President of the European Parliament, both parties were informed in identical terms that the Selection Board had based its assessment of their qualifications on the four abovementioned criteria. However, the letter did not mention the number of points which the Selection Board had decided to award for each of those criteria or the number of points obtained by the applicants. The President of the European Parliament simply informed them that 'you have obtained a mark of less than 24/40, due in particular to your score under criterion number 4'. However, as I mentioned above, there are considerable discrepancies in the number of points obtained by the applicants for organizing ability and professional experience.

29. Such grounds must be considered to be inadequate. As the Court has held, particularly in its judgment in Case 195/80 *Michel* v *Parliament* [1981] ECR 2861,

'the requirement that a decision adversely affecting a person should state the reasons on which it is based is intended to enable the Court to review the legality of the decision and to provide the person concerned with details sufficient to allow him to ascertain whether the decision is well founded or whether it is vitiated by an error which will allow its legality to be contested. It follows that the statement of reasons must in principle be notified to the person concerned at the same time as the decision adversely affecting him and that a failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the decision during the proceedings before the Court' (paragraph 22 of the decision).

30. In the present case the persons concerned managed to obtain the Selection Board's report before bringing the action. Even if a reprehensible indiscretion was thus committed by another official, it is none the less true that, even after having submitted a complaint, the applicants were not informed of the total number of points awarded for each criterion and the number of points

obtained by them. The decision not to include the applicants on the list of suitable candidates is therefore vitiated by a failure to state the reasons.

31. Finally, the applicants allege that there was a misuse of powers. They allege that they had disputes with a member of the Selection Board, that a member of the Selection Board was on questionably familiar terms with another candidate and that a more fortunate candidate verbally acknowledged that there had been a misuse of powers.

32. However, the Court has consistently held that a decision is vitiated by a misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken for purposes other than those stated. [2]

33. In the present case it is impossible not to be surprised by the way in which the Selection Board awarded the points, but there is no sufficiently objective and convincing evidence to support the conclusion that the Selection Board's purpose was to exclude the applicants from the list of suitable candidates at any cost.

34. On the other hand, the applicants' main submission must be upheld because the Selection Board's decision not to include them on the list of suitable candidates is vitiated by a breach of the principle of equal treatment, since it is the result of manifest errors of assessment and because the reasons for the decision have not been stated.

2 — See in particular the judgment in Case 69/83 *Lux* v *Court of Auditors* [1984] ECR 2447 (paragraph 30 of the decision, at p. 2465).

The alternative submission

35. In the alternative, the applicants request the Court to annul all the steps taken in the competition. According to the Parliament, that request is inadmissible since the complaints submitted to the President of the European Parliament related only to the applicants' exclusion from the list of suitable candidates. That observation is accurate only in so far as it concerns Mr Caturla. Mr de la Fuente, on the other hand, requested 'a review of the procedure with a different Selection Board, which must be composed of independent members'. That is equivalent to an application for the annulment of all the steps in the competition.

36. However, in the second *Vlachou* case (Case 162/84 *Vlachou* v *Court of Auditors* [1986] ECR 481, at p. 491, paragraph 3 of the decision) the Court stated that:

'the applicant cannot seek primarily the annulment of a decision not to admit her to a competition and, as an alternative claim, in the event that her principal claim is dismissed, the annulment of the competition'.

Here, too, it must be stated that an applicant cannot seek primarily the annulment of the decision not to include him on the list of suitable candidates and, in the alternative, the annulment of all the steps taken in the competition; his main claim must be directed against the measure which has the most far-reaching consequences. The alternative claim is therefore inadmissible.

Conclusion

37. For the reasons stated when considering the applicants' main claim, I propose that the Court should annul the decision of the Selection Board in the competition not to include them on the list of suitable candidates and order the European Parliament to pay the costs.