OPINION OF ADVOCATE GENERAL FENNELLY
delivered on 23 May 1996 *

Introduction

1. This case raises the question whether Community institutions are required to explain the marks awarded to candidates in staff recruitment competitions. It is an appeal by the European Parliament against a judgment of the Court of First Instance annulling the decision of a Selection Board to exclude Mr Angelo Innamorati from the latter stages of such a competition. The case is concerned with the obligation of the Community institutions to state the reasons for their decisions, with the extent to which the Community judicature will review the assessment by Selection Boards of the respective merits of participants in staff recruitment competitions, and with a purported distinction, as regards the obligation of disclosure, between the general criteria published in a notice of competition and the more specific criteria according to which the various competition tests are corrected.

Factual and legal context

2. Mr Innamorati (hereinafter 'the respondent'), a member of the auxiliary staff (Category A, Group II, Step 2) of the Commission, participated in an open competition (PE/59/A) organized with a view to drawing up a reserve list of Italian-language administrators for the Secretariat of the European Parliament (hereinafter 'the appellant'). The notice of competition provided for six eliminatory written tests. [1] The third of these (test 1(c)) required participants, in a maximum period of 45 minutes, to write a summary, of one-tenth of its length (with a maximum tolerance of 10%), of a 2-to 3-page document. The object of the test was stated to be the evaluation of candidates' analytical and summarizing abilities, objectivity and accuracy. The test was to be marked from 0 to 20 and candidates obtaining a mark of less than 10 were to be eliminated.

3. The chairman of the Selection Board informed the respondent, on 20 April 1994, that he had obtained a mark lower than the minimum required for test 1(c), and that the Selection Board could not, therefore, mark his other written tests. There followed an exchange of correspondence between the respondent and his counsel, on the one hand, and the chairman of the Selection Board and the Head of the Competitions Unit of the European Parliament, on the other, relating to the reconsideration of the respondent's test paper and to the communication to him of the reasons for the marks awarded to him

* Original language: English.

1 — Part III. B.1 of the notice of competition, OJ 1992 C 275A, p. 8.

for the test. [2] As regards the reasoning, the respondent requested the chairman of the Selection Board to explain to him the criteria adopted by the Board in considering whether candidates had satisfied the conditions set out in the notice of competition and in evaluating their tests, including the instructions given to the examiners with regard to compliance with the particular conditions of test 1(c). [3]

4. The chairman of the Selection Board confirmed the Board's decision. [4] He stated that, on the basis of the parameters adopted and the strict criteria decided on by the Board before marking — account having been taken of a number of factors set out in the notice of competition — the respondent's mark in test 1(c) was below that required to go through to the next stage of the competition. He had received 8.33 points, whereas the minimum required was 10 points.

5. Counsel for the respondent responded that this statement did not indicate the reasoning of the Selection Board's decision, [5] and that an action would be brought before the Court of First Instance if this was not supplied. The Head of the Competitions Unit stated that this information would be provided after the Board's report was signed, in accordance with the duty to give reasons for decisions, as set out by the Court of Justice, and with due regard to the secrecy of the Board's proceedings. [6] After the report had been signed, he stated that tests 1(c)(1) (objective tests) and 1(c)(2) (cultural tests) had been marked by optical scanner under the supervision of the Selection Board. [7] All the other tests had been brought to the attention of the seven members of the Selection Board and were marked by at least three of them. The Selection Board reconsidered the respondent's test papers, in response to his request, and checked that no error had crept into the marking. It therefore confirmed its initial decision. The marking criteria used by the members of the Board had been defined prior to marking, and had been respected, in accordance with the provisions of the notice of competition. [8]

6. On 15 September 1994, the respondent commenced before the Court of First Instance an action for the annulment of the decision of the Selection Board awarding him, for the summarizing test, a mark inferior to the minimum required and refusing to admit him to the later stages of the competition (hereinafter 'the decision'). The Court of First Instance annulled the

2 — This correspondence also concerned the respondent's allegation that candidates who had not respected the maximum number of words for test 1(c) had not been eliminated by the Selection Board, and questions about the measures taken to ensure the anonymity of candidates. These aspects of the case are not material to the present appeal.

3 — Letter of 13 June 1994, from counsel for the respondent to the chairman of the Selection Board.

4 — Letter of 14 June 1994.

5 — Letter of 4 July 1994.

6 — Letter of 4 July 1994, in response to counsel for the respondent's letter of 13 June 1994.

7 — There seems to be a typographical error in the letter in question, as this statement apparently refers to tests 1(a)(1) and 1(a)(2), which were multiple-choice objective and cultural tests; test 1(c), on the other hand, was in only one part, as described above, and by its nature was not machine-readable.

8 — Letter of 19 July 1994.

decision, for failure to disclose its reasoning, by a judgment of 30 May 1995 (hereinafter 'the contested judgment'). [9]

7. The Court of First Instance recalled that the obligation to give reasons for decisions adversely affecting an official or other Community servant has the purpose of enabling its addressee to ascertain whether it was well founded and of facilitating judicial review. In the case of competitions with a large number of participants, individual explanations of the Selection Board's decisions did not need to be provided to candidates save at their express request. [10] The respondent expressly requested such an explanation and the disclosure of the Board's marking criteria, in the abovementioned correspondence, and the appellant was bound to comply with this request. However, the appellant failed to communicate either an explanation or the marking criteria which it claimed to have observed, and had, therefore, failed in its duty to give reasons for the decision. [11]

8. The Court of First Instance held that explanations provided by the appellant after the making of the application for annulment could not remedy this omission, as they did not, at that point, fulfil their function. In any event, the explanations provided did not constitute a sufficient statement of reasons. Attribution of the respondent's failure to 'the poor quality of the summary' did not explain, even in summary fashion, either the reason for which the Selection Board reached this conclusion, or the relationship between the marking criteria adopted by the Selection Board, which were not disclosed, and the mark actually awarded. The unsubstantiated reference made by the appellant, during the oral hearing, to certain marking criteria was too vague to make up for this omission. [12]

9. The appellant has brought an appeal pursuant to Article 49 of the Statute of the Court of Justice of the EC and the corresponding provisions of the ECSC and EAEC Statutes, seeking the annulment of the contested judgment, the rejection of the respondent's application, and a decision on the costs at first instance in accordance with the relevant legal provisions, while submitting to the discretion of the Court as regards the costs of the appeal. [13] The appellant applied separately for suspension of the execution of the judgment. [14] The President of the Court rejected the latter application by order and reserved the issue of costs. [15]

9 — Case T-289/94 *Innamorati* v *European Parliament* [1995] ECR-SC II-393. The respondent also submitted that the Selection Board had violated the principle of equal treatment and the notice of competition by failing to eliminate candidates who had breached the maximum number of words in the summarizing test, an argument rejected by the Court of First Instance for want of evidence (paragraph 22 of the judgment), and that the Board had committed an error of assessment, had lacked impartiality and had violated the principles governing its work, which arguments were withdrawn at the oral hearing in the light of information provided by the appellant to the Court of First Instance at its request (paragraph 18).

10 — Paragraphs 26 and 27 of the contested judgment.

11 — Paragraphs 28 to 30 of the contested judgment.

12 — Paragraphs 31 and 32 of the contested judgment.

13 — The appeal was deposited at the Registry of the Court on 24 July 1995.

14 — Application for interim measures of 24 July 1995.

15 — Order of 15 September 1995, Case C-254/95 P-R *European Parliament* v *Innamorati* [1995] ECR I-2707.

10. The respondent requests the Court to reject the appeal as inadmissible and to condemn the appellant to pay the costs of the proceedings, including those relating to the application for interim measures.

Contentions of the parties

11. It is opportune, before examining the arguments submitted to the Court by the parties, to quote two provisions of the Staff Regulations. Article 25 of those Regulations states, in part, that '[a] ny decision adversely affecting an official shall state the grounds on which it is based'. Article 6 of Annex III (entitled 'competitions') to the Staff Regulations states that '[t] he proceedings of the Selection Board shall be secret'.

12. The appellant claims that the Court of First Instance erred in law in three respects: (i) as regards the scope of the obligation to give reasons for the decisions of Selection Boards in recruitment competitions; (ii) as regards the consideration to be given to reasons for the decision provided during the course of the annulment proceedings; and (iii) as regards the annulment of the decision for lack of reasoning, when it would be automatically replaced, in any event, by a decision with the same substantive effect. As the respondent's other arguments were either rejected by the Court of First Instance, or withdrawn, the appellant submits that he has no legitimate interest in the annulment of the decision. The respondent counters that all of the appellant's arguments are inadmissible, either for novelty or because they seek to challenge findings of fact by the Court of First Instance, contrary to Article 168A of the EC Treaty and to Article 51 of the Statute of the Court of Justice of the EC. [16] He also raises a number of counter-arguments of substance. I will outline, in turn, the arguments of the parties under these three rubrics.

(i) The scope of the obligation to give reasons

13. The appellant argues that the contested judgment confuses the *general evaluation criteria*, which are set out in the notice of competition (such as, in the instant case, those of analysis, synthesis, objectivity and accuracy) and which can be elaborated upon by the Selection Board, with the *marking criteria* for tests (such as the requirement that a summary contain a number of 'key ideas'), which are an integral part of the marking process and are therefore covered by the secrecy of its deliberations. [17] Only the former need be communicated to candidates at their request. Furthermore, the contested judgment is founded on case-law relating to the giving of reasons for refusal to admit a candidate to a competition, whereas the case-law on the failure of a candidate in

16 — Case C-136/92 P *Commission* v *Brazzelli Lualdi* [1994] ECR I-1981, paragraphs 47, 49, 66 and 79 of the judgment.

17 — Case T-291/94 *Pimley-Smith* v *Commission* [1995] ECR-SC II-637, paragraph 67 of the judgment.

competition tests requires only the communication to the candidate of the numerical marks obtained. [18] Any wider obligation would enable candidates to seek, not only the criteria employed in correcting competition tests, but also explanations of how these criteria were applied in their own cases. This is evidenced by the fact that the appellant's general reference at the oral hearing in the Court of First Instance to a marking scheme according to the identification by candidates of specified 'key ideas' was not sufficient, and that that court took the view that the actual 'key ideas' in the passage set for the summarizing test should be disclosed.

14. The respondent submits that this argument is inadmissible for two reasons. First, the purported distinction between evaluation criteria and marking criteria has been introduced for the first time at the appeal stage. Second, the assessment of the sufficiency of the reasoning of the decision is a question of fact, to be decided in the light of the circumstances of every case, and does not fall within the jurisdiction of the Court when hearing an appeal.

15. As to substance, the respondent argues that a Selection Board is obliged, under Article 5 of Annex III to the Staff Regulations, to submit to the appointing authority a reasoned report outlining the general criteria followed by the Board and the manner of their application to the candidates. These criteria should be disclosed to the candidates, and should permit judicial review of the Board's decisions. [19] Furthermore, the judgment of the Court of First Instance in *Pimley-Smith* [20] recognizes the right of candidates to information on the procedures followed by the Selection Board, such as the objective criteria used to evaluate test papers (which is to be distinguished from explanations of the value-judgement on a test paper actually reached by the Selection Board). The refusal of such information in the present case gives rise to a presumption of irregularity in the work of the Selection Board.

16. The appellant denies that it is contesting the findings of fact of the Court of First Instance; it criticizes, rather, that court's interpretation of the case-law on the scope of the obligation to give reasons for decisions. It submits that no reliance can be placed on a number of the cases cited by the respondent, [21] as they relate to admission to competitions (which normally involves an examina-

18 — Case T-156/89 *Valverde Mordt* v *Court of Justice* [1991] ECR II-407, paragraph 130 of the judgment; Case T-27/92 *Camera-Lampitelli* v *Commission* [1993] ECR II-873, paragraph 52; *Pimley-Smith*, cited in footnote 17 above, paragraph 61.

19 — Case 195/80 *Michel* v *European Parliament* [1981] ECR 2861; Case T-115/89 *Holguera* v *European Parliament* [1990] ECR II-831, paragraphs 39 and 40 of the judgment; Case T-6/93 *Pérez Jiménez* v *Commission* [1994] ECR-SC II-497, paragraph 42; Case T-44/91 *Smets* v *Commission* [1994] ECR-SC II-319. In his written reply, the respondent relied, additionally, on Case 21/65 *Morina* v *European Parliament* [1965] ECR 1033, p. 1040, and Joined Cases 361/87 and 362/87 *Caturla-Poch and de la Fuente Pascual* v *European Parliament* [1989] ECR 2471, paragraph 24.

20 — Cited in footnote 17 above.

21 — *Michel*, *Holguera* and, in part, *Pérez Jiménez*, cited in footnote 19 above.

tion of candidates' qualifications) rather than to the results of competition tests. In so far as one of these cases, *Pérez Jiménez*, also relates to the failure of a candidate in competition tests, the criteria which the Court of First Instance stated should be known to all the candidates were the general evaluation criteria published in the notice of competition. [22] If the respondent's arguments were accepted, the 'key ideas' identified by the Selection Board for a summarizing test such as that at issue would have to be disclosed, which would expose those marking criteria, and thus the adjudication of the jury, to judicial review. The reasons for the failure of candidates are quite unrelated to the obligation of the Selection Board to prepare a reasoned report on the competition for the appointing authority. The appellant denies that failure adequately to state the reasons for a decision gives rise to a presumption of irregularity, as it is always for the applicant in such cases to prove that the relevant rules have been violated. In fact, the Court of First Instance found no proof of a breach of the notice of competition. [23]

17. The respondent counters that the secrecy of the Selection Board's proceedings does not prevent the disclosure of a procedural decision concerning the correction of competition tests. [24] As the Selection Board must base its assessments on objective criteria, the Community judicature must be in a position to ensure that the Board has complied with this requirement, which entails access to the correction criteria.

(ii) Reasons given during the course of the proceedings

18. The appellant argues that any deficiency in the reasoning of a decision of a Selection Board can be remedied by the communication to the candidate, during subsequent contentious proceedings, of the numerical marks obtained in the relevant tests, [25] and that the Court of First Instance should, accordingly, have taken account of the explanations proffered by the appellant in its written and oral pleadings.

19. The respondent argues that the appellant seeks to question findings of fact by the Court of First Instance as to the adequacy of the reasoning provided, and this is not within the jurisdiction of the Court when hearing an appeal. He admits that if the appellant had furnished the explanations requested to the Court of First Instance, that court would probably have taken them into account in order to assess for itself whether there had been a breach of a substantive rule which would justify annulment of the decision. [26]

22 — Cited in footnote 19 above, paragraph 42 of the judgment.

23 — Paragraph 22 of the contested judgment.

24 — Case 40/86 *Kolivas* v *Commission* [1987] ECR 2643, paragraphs 18 and 19 of the judgment.

25 — *Valverde Mordt*, cited in footnote 18 above, paragraphs 131 and 132 of the judgment.

26 — *Valverde Mordt*, cited in footnote 18 above.

(iii) Immediate replacement of the impugned decision

20. The appellant argues that, even if the decision is not properly reasoned, an individual does not have a legitimate interest in the annulment for an error of form of a decision the substantive content of which is, in any event, certain to be confirmed. It submits that this is the case as regards the decision at issue in the present proceedings.

21. The respondent submits that the appellant's argument challenges the Court of First Instance's assessment of the consequences of the failure to give reasons for the decision at issue, which relates to its findings of fact, and is thus inadmissible.

Analysis

Admissibility

22. I do not accept the respondent's arguments of inadmissibility.

23. As regards the argument of novelty in respect of the appellant's first ground, it cannot be said that it does any more than develop its original argument before the Court of First Instance. The appellant's contention at first instance was that the decisions of Selection Boards, when correcting competition tests, were not subject to judicial review save in cases of manifest breach of the rules governing the work of the Board. It was implicit in this argument that the respondent's claims for disclosure of the marking criteria for the summarizing test were directed towards review of the Board's decision in this regard and were thus unacceptable. This remains its chief contention, although it has supported this by referring to the distinction made in the intervening *Pimley-Smith* case between decisions on admission to competitions and decisions on the marking of competition tests. [27] The appellant disputes the reliance by the Court of First Instance on a number of cases which concern the first category of decision. Neither this nor its reference to the *Pimley-Smith* distinction alters the essential content of its argument; [28] nor can it be said to change the subject-matter of the proceedings. [29]

24. Nor am I convinced by the respondent's submission that the appellant's three grounds

27 — Cited in footnote 17 above, paragraph 61 of the judgment. Such a distinction was pleaded in *Valverde Mordt*, cited in footnote 18 above, paragraph 129 of the judgment, but was not addressed by the Court; and may have been suggested by the Court of First Instance in Case T-55/91 *Fascilla* v *European Parliament* [1992] ECR II-1757, paragraph 32.

28 — See Article 48(2) of the Rules of Procedure of the Court of First Instance, and *Brazzelli Lualdi*, cited in footnote 16 above, paragraphs 57 to 60 of the judgment.

29 — See Article 113(2) of the Rules of Procedure of the Court of Justice.

of appeal challenge the findings of fact of the Court of First Instance (although this may be true, only in certain circumstances, of the second ground). As regards the first, it is clear that the appellant challenges the legal assessment by the Court of First Instance of the level of reasoning to be provided in support of Selection Board decisions on tests — numerical marks, general evaluation criteria, specific marking criteria, [30] explanations of the mark awarded in an individual case — rather than that court's finding that the appellant had not complied with the particular rule identified by the Court of First Instance. If the Court agrees with the legal assessment of the Court of First Instance as to the level of reasoning required, it will, of course, be bound by that court's finding of fact that such reasoning did not accompany the decision at issue in the instant case.

25. The admissibility of the appellant's second ground of appeal is contingent on whether the judgment of the Court of First Instance is upheld as regards the level of reasoning required in law for test results, which is the subject of the first ground of appeal. There are, broadly speaking, three possibilities:

(a) If the Court of First Instance correctly identified the level of reasoning required, this ground of appeal will be devoid of purpose. The challenge to the decision of the Court of First Instance that it should not take account of late information would be irrelevant if, as that court found as a fact, that information was insufficient, in any event. A legal argument on appeal which is dependent on facts expressly rejected by the Court of First Instance is not admissible. [31]

(b) If it is found that the Court of First Instance erred in law and that the reasons initially provided by the Selection Board before the commencement of contentious proceedings (essentially the numerical mark) were sufficient, the argument is superfluous and will not need to be addressed.

(c) If a middle course is taken, and it is found in response to the first ground of appeal that the degree of reasoning required of the appellant was less than that favoured by the Court of First Instance, but greater than that contended for by the appellant (with which it complied before the contentious proceedings), the question whether further reasoning supplied after the commencement of the contentious proceedings before the Court of First Instance should have been taken

30 — For example, the specific 'key ideas' identified by the Selection Board in the actual text to be summarized, and in accordance with which the test was marked.

31 — See Case C-26/94 P *X* v *Commission* [1994] ECR I-4379, paragraph 13 of the judgment; Case C-244/92 P *Kupka-Floridi* v *Economic and Social Committee* [1993] ECR I-2041, paragraphs 7 to 10 of the judgment; Case C-354/92 P *Eppe* v *Commission* [1993] ECR I-7027, paragraph 8; Case C-338/93 P *De Hoe* v *Commission* [1994] ECR I-819, paragraph 19.

into account will be central to the question whether the decision should be annulled for deficient reasoning.

As the question of admissibility is contingent, therefore, on the determination of issues of substance, this ground should not be ruled inadmissible from the outset. The question of admissibility should instead be examined in the context of the discussion of the merits of the appeal.

26. Nor do I see how the third ground of appeal can be categorized as a challenge to the Court of First Instance's findings of fact. Even the case-law cited by the respondent states that formulations of the legal consequences of findings of fact are subject to review on appeal. [32] The Court did state in *Brazzelli Lualdi* that it could not accept pleas in law seeking to criticize the assessment by the Court of First Instance of damage suffered by certain officials. [33] However, the Court thereby rejected as inadmissible a challenge to the assessment of the compensation to which the Court of First Instance had found the officials in question had a legal right. The rejected argument related only to proof of damage — which the Court of First Instance accepted as proved, as a fact, in a certain amount — and not to the prior question of a legal right to compensation. [34]

27. In any event, I fail to see how the appellant's argument is supposed to relate to findings of fact by the Court of First Instance, as that court did not address the question whether there was any substantive flaw in the Selection Board's decision (other than that which it rejected relating to adherence to the prescribed maximum length of summaries). The finding by the Court of First Instance that the decision was insufficiently reasoned, even if upheld as a matter of law, cannot deprive the Court of jurisdiction to review that court's view on the legal consequences to be drawn from that deficiency.

Substance

(i) Scope of the obligation to give reasons

28. I think that the arguments of the appellant with regard to this ground of appeal should be accepted and that the contested judgment should consequently be annulled in relevant part. In the light of the stated

32 — *Brazzelli Lualdi*, cited in footnote 16 above, paragraph 49 of the judgment.

33 — Paragraph 66 of the judgment.

34 — See paragraphs 61 to 63 of the judgment.

justification of the obligation to give reasons, the issue of the scope of the obligation to give reasons should be approached from the perspective of the scope of judicial review of Selection Board decisions.

29. A Competition Selection Board is obliged to follow correct and objective procedures. This obligation is designed to ensure equal treatment of candidates, and is subject to judicial review. This obligation underlies, *inter alia*, the following requirements: adherence to the notice of competition; [35] the setting of an identical test at all test centres; [36] the proper resolution of differences between examiners; [37] the examination of all candidates over a reasonable time period; [38] the presence of examiners throughout oral tests; [39] and appropriate composition of the Selection Board to assess the qualities sought of the candidates in the competition. [40] For this reason, in *Pimley-Smith*, as in other cases, candidates are stated to be entitled to information, at their request, on the procedures observed by the Selection Board. [41]

30. On the other hand, the specification of the precise content of tests and the evaluation of candidates' test papers lies within the wide power of appreciation of the Selection Board, and will be subject to review only in cases of manifest error or misuse of powers. [42] This limited review, combined with the expressly stated secrecy of the Selection Board's proceedings in Article 6 of Annex I-II to the Staff Regulations, justifies a more limited level of disclosure of reasons under Article 25 of the Regulations. In *Valverde Mordt*, the Court of First Instance treated these provisions as having been reconciled, in the context of competition tests, by the communication to the aggrieved candidate of the numerical marks awarded for those tests. This satisfied the dual rationale for disclosure of the reasons for a decision, as it gave the candidate the opportunity, in that case, to confirm that the overall mark which he obtained in all the tests was lower than the pass mark set in the competition notice for inclusion on the list of suitable candidates and enabled the Court to review the regularity of that list to an extent consistent with the broad discretion enjoyed by any Selection Board when making value judgements. [43] Practical considerations such as those raised by the appellant also weigh in favour of such a degree of disclosure, especially in competitions in which a large number of candidates participate. In such cases, 'the statement of the reasons for the rejection of applications must not be so voluminous

35 — Case 144/82 *Detti* v *Court of Justice* [1983] ECR 2421, paragraph 27 of the judgment.

36 — *Detti*, paragraph 28 of the judgment.

37 — *Pérez Jiménez*, cited in footnote 19 above, paragraph 42 of the judgment; *Kolivas*, cited in footnote 24 above, paragraphs 12 and 13.

38 — *Smets*, cited in footnote 19 above, paragraphs 55 and 60 of the judgment.

39 — *Smets*, cited in footnote 19 above, paragraphs 56 to 60 of the judgment.

40 — *Smets*, paragraphs 47 to 54 of the judgment; *Valverde Mordt*, cited in footnote 18 above, paragraphs 105 to 109.

41 — *Pimley-Smith*, cited in footnote 17 above, paragraph 66 of the judgment; Case T-125/95 *Belhanbel* v *Commission* [1996] ECR-SC II-115, paragraph 22.

42 — As regards the correction of tests, see *Pimley-Smith*, cited in footnote 17 above, paragraph 63 of the judgment; *Pérez Jiménez*, cited in footnote 19 above, paragraph 42; *Detti*, cited in footnote 35 above, paragraph 27; Case 12/84 *Kypreos* v *Council* [1985] ECR 1005, paragraph 10; and Case T-46/93 *Michaël-Chiou* v *Commission* [1994] ECR-SC II-929, paragraph 48. As regards the specification of test content, see Case 228/86 *Goossens* v *Commission* [1988] ECR 1819, paragraph 14.

43 — *Valverde Mordt*, cited in footnote 18 above, paragraphs 130 to 132 of the judgment.

as to place an intolerable burden on the proceedings of the selection boards and the work of the personnel administration'. [44]

31. The Court of First Instance relied upon a number of earlier cases in its judgment, [45] to demonstrate, firstly, that the statement of reasons for a decision is necessary to enable the individual concerned to assess whether the decision is well founded, and for the operation of judicial review, and, secondly, that individual explanations need be provided, in the case of competitions with numerous participants, only pursuant to an express request. Thirdly, it appears that they were also cited to justify the crucial conclusion that a sufficient statement of reasons was not made in the instant case, either pursuant to the respondent's request or during the contentious procedure: the statement should have included the reason for the Selection Board's decision that the respondent had failed to reach the required standard and/or an explanation of the relationship between the (undisclosed) marking criteria adopted by the Board and the mark awarded to the respondent. [46]

32. Examination of those cases indicates that they establish the first two points mentioned. However, I do not think that they support the third conclusion, namely the level of detailed reasoning favoured by the Court of First Instance in the instant case. In one of them, *Camera-Lampitelli*, the Court of First Instance indicated that a statement of the numerical mark awarded to a candidate in competition tests was sufficient. [47] The other cases concerned decisions on admission to competitions. In such circumstances, the Selection Board does not evaluate individual responses to common tests, which entails a considerable degree of judgement, but seeks, by more readily quantifiable means, to assess the equivalence of degrees and diplomas, compliance with specified periods of experience and so on. In *Michel*, selection was based on a detailed scheme of points for various educational qualifications; [48] *Holguera* involved the checking of supporting documents to ensure that the requirement of a certain number of years' experience was satisfied; [49] *Fascilla* concerned the aggregation of periods of education and training and experience; [50] *Belardinelli* related to the comparability of admission criteria of education and experience, which had actually been reduced to a guideline matrix. [51] In such cases, it has been made clear that the Selection Board must inform the rejected candidate, upon his request, ofthe condition in the notice of competition which he has not satisfied. This enables him

44 — *Michel*, cited in footnote 19 above, paragraph 25 of the judgment; see further, for example, *Camera-Lampitelli*, cited in footnote 18 above, paragraphs 51 and 52.

45 — Paragraphs 26 and 27 of the contested judgment. The Court of First Instance cited *Michel*, cited in footnote 19 above; Case 225/87 *Belardinelli* v *Court of Justice* [1989] ECR 2353; *Holguera*, cited in footnote 19 above; *Fascilla*, cited in footnote 27 above; *Camera-Lampitelli*, cited in footnote 18 above.

46 — Paragraphs 28 to 30 and 32 of the contested judgment. It is not clear whether the Court of First Instance saw the two types of reasoning required as cumulative or alternative, as it states, at paragraph 32, that neither one nor the other was provided.

47 — Cited in footnote 18 above, paragraph 52 of the judgment.

48 — Cited in footnote 19 above, paragraph 20 of the judgment.

49 — Cited in footnote 19 above, paragraphs 41 and 44 of the judgment.

50 — Cited in footnote 27 above, paragraphs 35 to 37 of the judgment.

51 — Cited in footnote 45 above, p. 2356 of the Report for the Hearing.

to check the supporting documents provided against the admission criteria. [52]

33. I do not think that the *ratio decidendi* of these cases, to use a common law term, can be extended without modification to the correction of competition tests, written or oral, and, in particular, to support the requirement of individualized explanation set out by the Court of First Instance in paragraph 32 of the contested judgment. First, they do not suggest, even in the context of admission to competition, that the Selection Board must explain the relationship between the admission criteria and the candidate's supporting documents, because a candidate should be able to check for himself the correspondence (or lack of it) between the two. This will not be true of competition tests, which must invariably be interpreted by the examiner. Secondly, judicial review will inevitably operate differently in the two situations, even if it adheres to a common standard. In the case of admission to competition, the application of a standard matrix on qualifications and experience will be capable of objective assessment; thus, disclosure of such criteria assists judicial review on the part of the Community judicature. On the other hand, it is in the nature of the assessment of tests that disclosure of the reasons for examiners' evaluations in individual cases will more rarely yield up manifest error. The case for disclosure is much weaker in respect of information which is not likely, in itself, greatly to assist judicial review of decision-making. Thirdly, the standard of disclosure favoured in the contested judgment would be a great deal more burdensome in the examination context than in that of admission to competition, precisely because detailed, individualized explanation would be necessary in most cases for such disclosure to be useful.

34. The Court of First Instance has distinguished in *Pimley-Smith* and in *Belhanbel* v *Commission* between cases relating to admission to competitions and those dealing with the correction of competition tests. [53] For the reasons set out above, I think that a different standard of reasoning is indeed required in relation to decisions on competition tests, and that the simple requirement that numerical test results be given to candidates upon request is consistent both with the underlying interest in the accountability of Selection Boards, to candidates and to judicial review by the Community judicature, and with the case-law to date — *Pimley-Smith* and *Belhanbel*, as well as *Camera-Lampitelli* [54]

52 — See *Fascilla*, cited in footnote 27 above, paragraphs 36 and 37 of the judgment (this requirement was not fulfilled); *Belardinelli*, cited in footnote 45 above, paragraph 9; and *Holguera*, cited in footnote 19 above, paragraph 44 (in both of which the condition was satisfied).

53 — Respectively, cited in footnote 17 above, paragraphs 62 to 64 of the judgment; and Case T-125/95, cited in footnote 41 above, paragraph 22. The operation of a distinct standard in respect of admission to competitions may also have been suggested by the Court of First Instance in *Fascilla*, cited in footnote 27 above, paragraph 32.

54 — Cited in footnote 18 above, paragraph 52 of the judgment.

and *Valverde Mordt*. [55] Of the other cases cited in argument by the respondent, a statement of the points awarded to candidates in a competition by qualifications was deemed sufficient in *Caturla-Poch* for the reasoned report required under Article 5 of Annex III to the Staff Regulations; [56] *Smets* [57] concerned only procedural points, outlined above; and *Pérez Jiménez* [58] related to admission to a competition and to procedural aspects of the correction of competition tests.

35. The respondent in the instant case sought to rely on the statements in *Pimley-Smith* and *Belhanbel* that candidates would in any case be entitled to information on the procedures observed by the Selection Board, [59] and to argue that information relating to test correction criteria was procedural in nature rather than inextricably related to the examiners' value judgements on individual test papers. However, this is unconvincing. As I have pointed out above, the Community judicature has reviewed a wide variety of procedural aspects of the running of staff competitions, such as the composition of Selection Boards, the resolution of differences among examiners, and the setting of identical tests at all centres. In my view, the criteria for correcting a summarizing test do not fall into this category; they are, instead, inextricably connected with the exercise of the Selection Board's wide power of appraisal in designing tests and in evaluating candidates' performance in those tests. In fact, they link the substantive elements of content selection and candidate assessment.

36. If the respondent and other aggrieved eliminated candidates were to have access, not only to the general outline of the objectives of the summarizing test which is set out in the notice of competition (which referred to analytical and summarizing abilities, objectivity and accuracy), but also to the actual marking criteria used in respect of the particular test (i. e. the identification of key ideas A, B, C and D in the assigned text), it would only be of use either for a review of the appropriateness of those key ideas in the light of the content of the text to be summarized, or for a review of the examiner's judgment of whether those key ideas did indeed appear in the summary attempted by the candidate. In the absence of manifest error, these avenues of review would trench, directly and impermissibly, either on the Selection Board's choice and analysis of test content, or on its evaluations of candidates, respectively. Disclosure to the degree sought by the respondent is not necessary to enable the Community judicature to perform its task of judicial review. It should not, therefore, be required, in the light of the competing requirement of secrecy in relation to Selection Board proceedings, which protects the independence of such Boards' opera-

55 — Cited in footnote 18 above, paragraphs 130 to 132 of the judgment.

56 — Cited in footnote 19 above, paragraphs 25 and 26 of the judgment.

57 — Cited in footnote 19 above.

58 — Cited in footnote 19 above.

59 — Cited, respectively, in footnote 17 above, paragraph 66 of the judgment, and in footnote 41 above, paragraph 22.

tions. [60] I should add that progressive extension of disclosure requirements relating to the marking of individuals would necessarily tend to invade the confidential interests of other candidates.

37. For these reasons, I conclude that the appellant should succeed on the first ground of appeal. I recommend, therefore, that the Court annul the judgment of the Court of First Instance, in so far as it relates to the purported absence of reasoning in the decision of the Selection Board, and confirm the validity of that decision. However, in case the Court should conclude otherwise, I will address briefly the other two grounds of appeal.

(ii) Reasons given during the course of the proceedings

38. As I indicated when discussing the question of admissibility above, this ground of appeal is only relevant and admissible if the Court concludes that the partial information supplied at the oral hearing about the general marking scheme for the summarizing test was both necessary and sufficient reasoning for the Selection Board's decision: necessary in order to supplement the reasons given to the respondent before the commencement of the contentious procedure, and sufficient for that purpose. Where the supplementary statement of reasons made during contentious proceedings fulfils these conditions, it gives an unsuccessful candidate such as the respondent the opportunity to confirm that the marks which he was awarded in the tests were lower than the prescribed pass mark, and will reveal, albeit tardily, such evidence as may be required for judicial review. [61] It would, therefore, be counter-productive to refuse to take account of such a statement. This conclusion is complementary to my view on the third ground of appeal. However, late disclosure of the reasons for a decision may rebound on the party responsible in the allocation of liability for costs, as the aggrieved candidate might not have brought proceedings against the decision in question had he been made aware at the outset of the underlying reasoning. [62]

(iii) Immediate replacement of the impugned decision

39. If it is accepted that a full statement of reasons was made for the impugned decision only during the contentious proceedings, which did not, however, indicate any substantive flaw in the decision, annulment of the decision on the ground that it did not contain an adequate statement of reasons

60 — See *Kolivas*, cited in footnote 24 above, paragraphs 18 and 19 of the judgment.

61 — See *Valverde Mordt*, cited in footnote 18 above, paragraphs 131 and 132 of the judgment; Case 12/84 *Kypreos*, cited in footnote 42 above, paragraphs 5 and 8.

62 — *Valverde Mordt*, cited in footnote 18 above, paragraph 166 of the judgment.

could only result in the adoption of a fresh decision which would be identical in substance to the annulled decision, but which would be accompanied by the reasons initially revealed only before the Court of First Instance. The Selection Board would not have any discretion. Accordingly, the respondent would have no legitimate interest in seeking the annulment of the decision at issue for breach of a procedural requirement. In such circumstances, the originally insufficient statement of the reasons for the impugned decision could no longer be regarded as a breach of an essential procedural requirement that would in itself justify the annulment of that decision. [63]

40. On the other hand, if the statement of reasons is not sufficient even at the contentious stage, the aggrieved candidate is never given the opportunity to verify for himself that the decision is well founded, and the Community judicature is hindered in the exercise of its function of judicial review. In such circumstances, the impugned decision should be annulled for breach of an essential procedural requirement. [64]

Costs

41. Article 88 of the Rules of Procedure of the Court of First Instance and Article 70 of the Rules of Procedure of the Court of Justice provide, by way of exception to the general rule that the unsuccessful party be ordered to pay the costs of proceedings, [65] that in proceedings between the Communities and their servants the institutions shall bear their own costs. By virtue of Article 122 of the Rules of Procedure of the Court of Justice, Article 70 of those Rules applies to appeals brought by institutions. Thus, having regard to the successful appeal, the appellant and the respondent should bear their own costs as regards the main proceedings before the Court of First Instance and before this Court. However, in the light of the rejection of the appellant's application for interim measures, it is my view that the appellant should pay the costs of both parties arising from that application.

Conclusion

42. For the reasons outlined above, I conclude that the appellant should succeed on the first ground of appeal. I recommend, therefore, that the Court annul the

63 — *Valverde Mordt*, cited in footnote 18 above, paragraph 133 of the judgment; *Camera-Lampitelli*, cited in footnote 18 above, paragraph 53; Case 432/85 *Souna* v *Commission* [1987] ECR 2229, paragraph 20; Case 117/81 *Geist* v *Commission* [1983] ECR 2191, paragraph 7.

64 — See, for one example from the extensive case-law, *Michel*, cited in footnote 19 above, paragraphs 33 and 34 of the judgment.

65 — See Article 87(2) of the Rules of Procedure of the Court of First Instance and Article 69(2) of the Rules of Procedure of the Court of Justice.

judgment of the Court of First Instance, in so far as it relates to the purported absence of reasoning in the decision of the Selection Board, and confirm the validity of that decision.

43. The appellant and the respondent should bear their own costs as regards the main proceedings before the Court of First Instance and before this Court. The appellant should pay the costs of both parties arising from its application for interim measures.