OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN delivered on 29 November 1984

My Lords,

On 3 December 1981 Miss Samara was appointed by the Council as a probationer official of the Community in Grade C5 Step 3, her employment being that of a typist. In that capacity she was subsequently transferred to the Commission and on 1 June 1982 became an established official. She then took part in general competition No COM/C/365 following notice of vacancy COM/1268/81. The notice of competition stated that the object was to constitute a reserve of shorthand typists in career bracket Category C3/C2. She took first place in the competition.

By a decision of 21 December 1982, the Commission 'having regard to the Staff Regulations of officials of the Communities, and in particular Articles 1, 2, 29 and 30 thereof' said that it 'hereby appointed' Miss Samara as a Secretary/Shorthand Typist in Grade C3 Step 1 with effect from 1 January 1983.

She then found that the two candidates in the competition who had taken second and third places, who were not at the time officials of the Community and who had substantially less work experience than she had, were appointed respectively to Grade C 3 Step 2 and Grade C3 Step 3.

It is hardly surprising that she took the view that her classification in Step 1 was wrong and that she too should have been classified in Grade C3 Step 3 in the light of her 17 years experience and her result in the competition. She asked that her classification be reconsidered, but was told by letter from the Commission dated 16 February 1983 that she could only be graded according to Article 46 of the Staff Regulations since she was already an official. The other two successful candidates could be graded under Article 32 because they were being recruited for the first time for the staff of the Community.

A complaint against that decision, dated 26 April 1983 and made pursuant to Article 90 (2) of the Staff Regulations, having been rejected by a decision dated 5 August 1983, she brought the present action on 28 November 1983.

In her application she asks the Court to set aside the rejection of her complaint, to rule that she is to be considered as having been recruited pursuant to Articles 29-32 of the Staff Regulations and that Article 46 is inapplicable. She also asks for the case to be sent back to the appointing authority for them to give effect to the Court's judgment.

She puts her case under two main headings. In the first place, she was 'recruited' to her new job not 'promoted' into it, so that under Article 32 second paragraph of the Staff Regulations the appointing authority had power 'taking account of the training and special experience for the post of the person concerned' to allow her additional seniority not exceeding 48 months, in the grade. This meant that she should have been

given, in all the circumstances, two steps and placed in Step 3. Secondly she says that not to place her in Step 3 violates the principles of equality, good administration and non-discrimination which must be applied. It is also a breach of Article 5(3) of the Staff Regulations which requires that 'identical conditions of recruitment and service career shall apply to all officials belonging to the same category or the same service'.

The first point taken is not without difficulty, and, perhaps curiously, in view of the time which has elapsed since the Regulations were adopted, the Court has not had to rule specifically on it. The point involves a consideration of the scope of Articles 27-32 on the one hand and Articles 45 and 46 on the other.

Title III of the Regulations, headed 'Career of Officials', has two relevant chapters, '1 Recruitment' and '3 Reports, Advancement to a Higher Step and Promotion'.

In Article 27, in Chapter 1, it is said that recruitment is 'directed to securing for the institution the services of officials of the highest standard of ability, efficiency and integrity, recruited on the broadest possible geographical basis from among nationals of the Member States'. Officials are to be 'selected' without reference to race, creed or sex. In the ordinary way an official may only be 'appointed' if he has passed a competition, and the appointing authority must consider, before it fills a vacant post, firstly, whether the post 'can be filled by promotion or transfer within the institution', secondly 'whether to hold competitions internal to the institution', and thirdly, 'what applications for transfer' have been made by officials of the other Community institutions. Only then does it follow the procedure for competitions of the kind which was held here.

In Chapter 3 (Article 44) 'advancement' is said to be the automatic moving along of one step in the existing grade after two years service by the official in a particular step. By Article 45 'promotion . . . shall be effected by appointment of the official to the next higher grade in the category or service to which he belongs. Promotion shall be exclusively by selection from among officials who have completed a minimum period in their grade, after consideration of the comparative merits of the officials eligible for promotion and of the reports on them'. Yet '2. An official may be transferred from one service to another or promoted from one category to another only on the basis of a competition'.

By Article 46 'an official appointed to a higher grade shall, in his new grade, have the seniority corresponding to the notional step equal to or next above the notional step reached in his former grade, plus the amount of the two-yearly increment for his new grade . . . An official appointed to a higher grade shall be classified not lower than the initial step for that grade'.

Thus, on the face of it, 'promotion' within the meaning of Article 45 (1) is not the

automatic increase of step for years of service; it requires a decision of the appointing authority but not the passing of a competition. Promotion for the purpose of Article 45 (1) is to be only to 'the next higher grade' in the category to which the promoted official belongs; the eligible officials who must be considered when a promotion is being contemplated are, as I read it, those officials who have completed a minimum period in the grade immediately below that to which the promotion is to be made.

Article 45 (2) refers to a different kind of promotion — that from one category to another. This can, unlike the promotion by one grade, be made only on the basis of a competition. It is interesting to note that the French text which speaks of 'promotion' in Article 45 (1) changes to 'passage' when referring to movement between categories.

Article 46 provides for the seniority of 'an official appointed to a higher grade'. This must, in my view, plainly be read with Article 45 (1); 'a higher grade' in Article 46 for any individual means specifically 'the next higher grade' to which he is promoted and the only grade to which he can be promoted under Article 45 (1). Article 45 (1) thus defines eligibility for and the extent of promotion by grade within a category. Article 46 does not extend that definition in relation to grades; it merely provides for the consequences of the promotion in regard to seniority by step. It applies only where there is a promotion to the next higher grade under Article 45. It does not apply where there is a 'promotion' or 'passage' from one category to another after a competition. So far as concerns the reference to the higher grade I read the French language version of Articles 45 and 46 in the same sense and I understand that the German language version is to the same effect.

There is thus no express provision in the articles relating to promotion which deals with the present situation — one where an official (a) takes part in a general competition and (b) is 'nominated' (to use a neutral word) to a grade higher than the next higher grade to that in which she was previously employed.

Turning to Chapter 1, it would seem that as a matter of ordinary language 'recruitment' suggests the obtaining of new staff for the first time. Article 27, particularly with its reference to geographical basis, Article 28, Article 29, which distinguishes promotion and transfer and appointment by internal competitions from open competitions and the requirements of a medical examination and a probationary period laid down by Articles 33 and 34 would appear to support this interpretation.

On the other hand it can be said that open competitions are available to officials already in posts. The requirement of a medical examination and a probationary period have already been complied with on the intitial appointment or they must be

repeated. It is clearly arguable that there is nothing in the Chapter which prevents a wider meaning being given to 'recruitment' than the normal everyday meaning, so that each appointment to a vacant position in an institution, irrespective of whether the successful candidate comes from within or outside the institution concerned, is included.

This latter approach is clearly supported by the view of Mr Advocate General Reischl in Case 176/73 *Van Belle* v *Council* [1974] ECR 1361 at p. 1375 where he said 'Analysis of the general scheme of the Staff Regulations shows that the concept of "recruitment" must in fact not be understood in the narrow sense of appointment to the service, that is to say in the sense of external appointment. Rather, it is a general concept which, understood correctly, embraces all possible forms of appointment to posts'.

On the other hand, in Case 15/63 *Lassalle* v *European Parliament* [1964] ECR 31, Mr Advocate General Lagrange took a somewhat narrower view. Recruitment does not cover every form of appointment. On the other hand, it is not limited to first entry into employment by the Community. It covers also a subsequent first entry into a new category or into a new service. Preferment within a category, however, is not to be treated as a recruitment. It seems that Mr Advocate General Darmon in his Opinion in Joined Cases 20 and 21/83 *Vlachos* v *Court of Justice* [1984] ECR 4168 accepted this approach.

In cases such as Case 88/71 *Brasseur* v *European Parliament* [1972] ECR 499 and Cases 112, 144, 145/73 *Campogrande and others* v *Commission* [1974] ECR 957 the Court refers to internal competitions as providing a means of recruitment. On the other hand, it has to be accepted that the distinction between recruitment and promotion was not discussed in these cases.

More recently in Case 17/83 *Angelidis* v *Commission* [1984] ECR 2907 the applicant was, as in this case, seeking an increase in step not in grade, and an open competition had in fact been held. The applicant was, however, prior to moving to his new post, a temporary agent, and his first appointment as an official of the Comission was regarded as being the result of a recruitment procedure, so that he could rely on Article 32. The Court found that the provisions concerning promotion of which Article 46 was a part did not apply because 'whether from the point of view of their terms or from that of their context [they] are intended to govern the advancement, in their respective categories and services, of employees of the Community who, at the time of their promotion, already have the status of officials'.

Against this background of previous cases, it seems to me that the starting point in the present case is that Article 45 is concerned with promotions only to the next higher grade and these can be made without competition. A situation like the present, where the applicant does take part in a general competition for a post two grades higher, is 'nominated' to a post two grades higher and was not in any event eligible by length of service to be promoted to the next higher grade, is not covered by Articles 45 or 46. No appointment of the kind actually made here could validly be made under Article 45.

So far as recruitment is concerned, the differences between the language service and the general service are such that it

seems both reasonable and right to regard an appointment to one of an official employed in the other as being 'a recruitment' for the purposes of Article 32. There is clearly also force in the argument that the distinction between duties and educational requirements for the various categories (as set out in Article 5 of the Staff Regulations) is such that a movement from one to the other after a competition is to be seen as a recruitment or a new appointment. Adopting this approach, preferment within a category is not recruitment.

It this is right, what happened here does not fall into either category. That does not seem to me to be fatal. On the contrary, it seems to me that what happened here as a matter of language and fact was that she was 'promoted' after a competition in a way not dealt with by the Staff Regulations. The Commission was not limited by Article 45 as to her eligibility for promotion nor confined to promoting her by only one grade under that Article. Equally she was not limited by seniority to that contemplated by Article 46 which in the present case meant that she had to be appointed to the first step.

In making the appointment, following the competition, to a post which was in a grade two above that in which she was previously employed, the Commission had a discretion as to the step in which she should be placed. It is, however, relevant to the exercise of that discretion that she had taken part in an open competition and that those who were recruited from outside might, in the light of their training and special experience, be given up to four years allowance producing a starting position in Step 3.

In my view, the principle of fairness, good administration and non-discrimination as well as the provisions of Article 5 (3) of the Staff Regulations require that those who succeed in the competition and are appointed should be assessed according to the same criteria, whether they are existing officials of the Community or not. In Case 9/81 *Williams* v *Court of Auditors* [1982] ECR 3301 at p. 3315 the Court said that 'Article 5 (3) of the Staff Regulations, expressing as it does the principle of equality of treatment as between officials of the same category or in the same department, is of central importance to the legal provisions governing employees of the European Communities'. Mr Advocate General Reischl at p. 3324 also emphasized the importance of ensuring that the principle of equality of treatment overrides an inflexible application of the rules.

I do not accept the Commission's argument that these principles, and particularly Article 5 (3) only demand that this particular applicant should be treated equally or identically with other officials in that grade. Those officials who did not take the competition are irrelevant; those who did and who were appointed as a result of the competition are, in my view, entitled to be treated on the same basis as outsiders when it comes to fixing the step at which they should take up their new posts. It is not, in my view, an answer to this to say that Miss Samara is an established official whereas the candidates appointed for the first time have to perform a probationary period and that this difference justifies the

distinction in treatment. Assuming that the probationary period is concluded satisfactorily, all the cadidates will be established, yet the newcomers will remain two steps ahead of Miss Samara in seniority and she may never be able to catch up unless there is promotion under Article 45 of further movement following a competition.

Accordingly, in my opinion, Miss Samara is entitled to have her classification by step assessed according to the same criteria as those which affected the assessment of the other successful candidates.

If, contrary to my view as to what in reality happened here, the facts have to be classified either as promotion within Article 45 or as recruitment, for the purposes of Article 32, the overriding position seems to me to be that this cannot fit into the language of Article 45 or 46, a result which seems to me to accord with the opinion expressed by Mr Advocate General Lenz in *Angelidis*. They must, accordingly, be taken as falling within Article 32, even if this involves going further than Mr Advocate General Lagrange went. It does not seem to me that he had in mind a situation like the present; in any event the distinction between moving between categories and moving between grades, particularly where an official after a competition moves up several grades, can be overstated.

The Commission's own form of appointment of this particular official refers to articles in the chapter on recruitment and not to articles dealing with promotion. They plainly did not think and have not sought to argue that what happened was within the express terms of Articles 45 and 46. In effect it is only by applying these articles *lato sensu* that the Commission is able to suggest that this case falls within it.

Accordingly on either approach, preferably on the first, it seems to me that the Commission erred in thinking that it could only fix Miss Samara's step in accordance with Article 46 of the Staff Regulations. It is not suggested here that on the merits there was any reason why she should not have been considered for an allowance for seniority like the other candidates. It is difficult to see from the evidence at present before the Court how she could have been treated differently from the candidate who was put into category C5 Step 3. This, however, is a matter for the Commission to assess.

In the light of the relief claimed it seems to me that the appropriate order is to annul the Commission's decision dated 5 August 1983, which rejected the applicant's complaint about the step given to her, and to award the applicant her costs against the Commission.