JUDGMENT OF THE COURT (Fifth Chamber)
6 July 1993 *

In Case C-242/90 P,

Commission of the European Communities, represented initially by Henri Étienne, Principal Legal Adviser, and Sean van Raepenbusch, of its Legal Service, and subsequently by Gianluigi Valsesia, Principal Legal Adviser, and Sean van Raepenbusch, acting as Agents, with an address for service in Luxembourg at the office of Nicola Annecchino, of its Legal Service, Wagner Centre, Kirchberg,

appellant,

supported by

John Allen, Georges-Marc André, Balthasar Benz, Ludger Blasig, Jean-Louis Chomel, David Daly, Marc Debois, Bertrand Delpeuch, Donatella Diane, Martin Dihm, Evangelos Divaris, Michael Gowen, Agnès Guillaud, Anastassios Haniotis, Jill Hanna, Chantal Hebberecht, Jacques Humières, Gerard Kiely, Dirk Lange, Guy Ledoux, Michèle Lemasson, Frédérique Lorenzi, Josefine Loriz-Hoffmann, Christian Rambaud, James Russell, Hermann Spitz and Gerrit Verhelst, officials of the Commission of the European Communities, represented by John E. Pheasant, Solicitor, with an address for service in Luxembourg at the chambers of Loesch & Wolter, 8 Rue Zithe,

and by

Purificación Alberdi Anchia, Arnaud Bordes, Aldo Longo, Félix Lozano Gallego, F. Javier Maeztu, Jens A. Munch, Adriaan H. Van Der Meer, Rudy Van Der Stappen, Robert Vanhoorde and Jesús Zorrilla Torrás, officials of the Commission of the European Communities, represented by Georges Vandersanden and

* Language of the case: French.

Sylvie Dubois, of the Brussels Bar, with an address for service in Luxembourg at the chambers of Alex Schmitt, 62 Avenue Guillaume,

and by

Iñigo Ascasibar Zubizarreta, Patric Buggenhout, Peter Blancquaert, Juan Carlos Boixo Pérez-Holanda, Elisabeth Bradbury, Anthony John Stefan Chojecki, Aloys De Troch, D. Antonio Fernández Aguirre, Victoria Fleming, Jean-Claude Kirpach, Ingrid Lagneaux-Vencken, Matthias Lösch, Paul Mathieu, Bart Meuleman, Heino von Meyer, Susanne Nikolajsen, Eric-Michel Reversat, Stefaan Swinnen and Constandinos Vardakis, represented by Denis Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the chambers of Ernest Arendt, 4 Avenue Marie-Thérèse,

and by

Fédération de la fonction publique européenne (FFPE), represented by François Jongen, of the Brussels Bar, with an address for service in Luxembourg at the chambers of Alex Schmitt, 62 Avenue Guillaume,

interveners,

APPEAL against the judgment of the Court of First Instance of the European Communities (Third Chamber) of 12 July 1990 in Case T-35/89 *Albani and Others* v *Commission* [1990] ECR II-395 seeking to have that judgment set aside,

the other parties to the proceedings being:

Alessandro Albani, Alberto Caferri, Claudio Caruso and Bruno Buffaria, represented by Gérard Collin, of the Brussels Bar, with an address for service in Luxembourg at the office of Fiduciaire Myson SARL, 1 Rue Glesener,

supported by

Union Syndicale — Bruxelles, represented by Jean-Noël Louis, of the Brussels Bar, with an address for service in Luxembourg at the office of Fiduciaire Myson SARL, 1 Rue Glesener,

intervener,

THE COURT (Fifth Chamber),

composed of: G. C. Rodríguez Iglesias, President of the Chamber, M. Zuleeg, R. Joliet, J. C. Moitinho de Almeida and F. Grévisse, Judges,

Advocate General: W. Van Gerven,
Registrar: J.-G. Giraud,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 23 March 1993,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 7 August 1990, the Commission of the European Communities brought an appeal under Article 49 of the Protocol on the Statute of the Court of Justice of the EEC and the corresponding provisions of the ECSC and EAEC Statutes against the judgment delivered by the Court of First Instance on 12 July 1990 in Case T-35/89 *Albani and Others* v *Commission* [1990] ECR II-395 to the extent to which it annulled all the acts in the procedure in competition COM/A/482 as from correction of the second written text and did not limit the consequences of that annulment to reinstatement of the rights of the original applicants, namely Messrs Albani, Caferri, Caruso and Buffaria.

2 According to the contested judgment, the facts of the case are as follows:

'1. By Notice of Open Competition COM/A/482, published on 12 February 1987 (Official Journal C 34, p. 15), the Commission commenced an open competition, based on qualifications and tests, to constitute a reserve of administrators in Grades 7 and 6 of Category A in the field of agriculture, fisheries and cooperation with developing countries.

2. According to the notice of competition, the tests were to take place in two stages: the first written and the second oral.

3. The written test was also divided into two stages: a first written test consisting of a series of multiple-choice questions to test candidates' general knowledge in the fields covered by the competition; and a second written test which was a drafting test designed to test candidates' analytical ability and their experience of dealing with case studies. Candidates could take part in the second written test only if they passed the first.

4. Candidates who obtained an aggregate of at least 60 marks out of 100 in the two written tests with a pass mark in both tests were admitted to the oral test.

5. The four applicants were among the 877 candidates who were allowed to take the written tests. The first written test was held on 20 November 1987 in 19 different centres in Europe, South America and Australia. The candidates obtained a pass mark in the eliminatory test and took the second written test.

6. In that second written test, for which three-and-a-half hours were allowed, the selection board asked candidates to write a memorandum, based on a case study, containing not more than 800 words in total. The memorandum,

addressed to the President of the Commission, was to include a summary of the Court of Auditors' special report on the system for paying agricultural export refunds and the candidates' own views on the problem in question.

7. Of the 800 words in the memorandum, 300 were to be used to express the candidate's own opinions. Candidates were to count the number of words used themselves and enter those figures in a table. Candidates who failed to observe the abovementioned conditions or whose answers were illegible would not have their papers marked.

8. After the second written test had been held but before it was marked, the selection board instructed markers not to mark papers which were obviously too long, that is to say in excess of 1 200 words.

9. The applicants failed at the stage of the second written test, having failed to achieve the pass mark of 60% for the two tests. Consequently, they were not allowed to take part in the oral test, as the Head of the Recruitment Division informed them by a letter of 21 March 1988.

10. Only 172 candidates were admitted to the oral test, and 167 in fact took part.

11. Finally, a list of suitable candidates was drawn up on 26 May 1988, comprising 67 successful candidates.'

3 In those circumstances, by an application lodged at the Court Registry on 25 May 1988, the original applicants brought an action against the Commission for annulment of the marking of the written tests in competition COM/A/482 or, at least, annulment of the decision of the selection board not to admit the applicants to the oral tests in that competition. Their claim was based principally on the fact that,

after deciding to allow candidates a limited time, imposing a maximum limit of 800 words and obliging them to count them themselves, the selection board departed from its instructions and asked the markers not to correct tests containing more than 1 200 words.

4 By order of 15 November 1989, the Court of Justice referred the case to the Court of First Instance pursuant to Article 14 of Council Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1).

5 Before the Court of First Instance, the Commission stated that only five candidates had benefited from the contested instruction to the markers and that they were not on the list of suitable candidates. Nevertheless, it was unable to provide the Court of First Instance with proof to that effect since all the files concerned had disappeared.

6 The Court of First Instance annulled 'the marking of the second written test, and the subsequent acts in the competition procedure' and ordered the Commission to pay the costs.

7 In support of its appeal, the Commission put forward three pleas in law alleging, respectively, breach of the principle of legal certainty, breach of the principle of proportionality, those principles necessarily being balanced against the requirements of the principle of legality, and the general obligation to state the grounds of judgments. It states that the appeal against the contested judgment is based not on the fact that it annulled the marking of the second written test in competition COM/A/482 but on the fact that it extended the consequences of that annulment beyond mere restoration of the rights of the original applicants. In its view, the judgment has to be read as also invalidating the acts of the subsequent procedure, in particular the list of suitable candidates and the appointments decided upon on the basis of that list.

8 Reference is made to the Report for the Hearing for a fuller account of the procedure, the pleas in law and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court of Justice.

9 At the outset, it should be noted that, contrary to the Commission's contention, neither the proceedings before the Court of First Instance nor the operative part of its judgment were or are concerned with the appointments made following the competition at issue.

10 The competition procedure, as provided for in Annex III to the Staff Regulations, ends with the drawing up of the list of suitable candidates and the forwarding thereof to the appointing authority together with the selection board's reasoned report. The decision of the Court of First Instance to annul, in addition to the marking of the second written test, the 'subsequent acts in the competition procedure' cannot therefore be construed as including the annulment of the appointments.

11 It follows that the appeal must be rejected in so far as it relates to the Commission's supposed obligation to withdraw the appointments made following the competition at issue.

12 The Commission claims that the Court of First Instance did not weigh the personal interest of the four original applicants in seeking annulment of the entire competition procedure against the legitimate expectations of the persons entered on the list of suitable candidates in that competition.

13 According to settled case-law of the Court of Justice, where, in an open competition for the purpose of constituting a reserve for future recruitment, a test is

annulled, an applicant's rights will be adequately protected if the board and the appointing authority reconsider their decisions and seek a just solution in his case, without its being necessary to call in question the entire results of the competition or to annul the appointments made as a result thereof (Case 144/82 *Detti* v *Court of Justice* [1983] ECR 2421, paragraph 33).

14 That principle is based on the need to reconcile the interests of the candidates put at a disadvantage by an irregularity committed in the course of a competition and the interests of the other candidates. The Court is required to take account not only of the need to restore the rights of the candidates who have been adversely affected but also of the legitimate expectations of the candidates already selected.

15 As regards the four original applicants, the Court of First Instance did not indicate that the sanction imposed was necessary to preserve their rights.

16 In those circumstances, the Court of First Instance erred in law by annulling in its entirety the second written test in competition COM/A/482.

17 The judgment of the Court of First Instance in Case T-35/89 *Albani and Others* v *Commission* [1990] ECR II-395, which annulled the decision of the selection board in competition COM/A/482 concerning marking of the second written test and the subsequent acts in the competition procedure, should therefore be set aside to the extent to which it does not limit the consequences of such annulment to reinstatement of the rights of the four original applicants.

Costs

18 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. In this case it should be noted, first, that the forms of order sought by the Commission must be rejected in so far as the contested judgment does not place it under any obligation to withdraw the appointments made following the competition at issue and, secondly, that, since the judgment of the Court of First Instance has been set aside to the extent to which it does not limit the consequences of the annulment of the second written text to reinstatement of their rights, Mr Albani and the other applicants must be regarded as having been unsuccessful.

19 Under Article 69(4) of the Rules of Procedure, the Court may decide that interveners other than the Member States and the institutions are to bear their own costs.

20 In those circumstances, it is appropriate to order each party, including the interveners, to bear their own costs, including those of the application for interim measures.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Sets aside the judgment of the Court of First Instance in Case T-35/89 *Albani and Others* v *Commission* [1990] ECR II-395, which annulled the decision of the selection board in competition COM/A/482 concerning

marking of the second written test and the subsequent acts in the competition procedure, to the extent to which it does not limit the consequences of such annulment to reinstatement of the rights of the four original applicants;

2. For the rest, dismisses the action;

3. Orders the parties, including the interveners, to bear their own costs in this case, including those of the application for interim measures.

Rodríguez Iglesias Zuleeg

Joliet Moitinho de Almeida Grévisse

Delivered in open court in Luxembourg on 6 July 1993.

J.-G. Giraud G. C. Rodríguez Iglesias

Registrar President of the Fifth Chamber