On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the parties to bear their own costs including those of the interim application.**

Bahlmann Pescatore Due

Delivered in open court in Luxembourg on 5 April 1984.

J. A. Pompe
Deputy Registrar

K. Bahlmann
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 1 MARCH 1984 [1]

Mr President,
Members of the Court,

1. Introduction

The action that I have to consider today is the application by Mr Alvarez for the annulment of the European Parliament's second decision, dated 6 December 1982, to dismiss him under Article 34 (2) of the Staff Regulations and for damages of at least BFR 500 000.

1 — Translated from the Dutch.

That decision was taken by the European Parliament following the Court's annulment, by judgment of 6 October 1982 in Case 206/81, of the first decision to dismiss Mr Alvarez, which had been taken on 19 June 1981. It appears from paragraphs 5 and 6 of the decision in that case that the Court considered that there had been a failure to observe the adversary procedure laid down under Article 34 (2) of the Staff Regulations. Although his probation report was communicated to Mr Alvarez, he did not receive the supplementary memoranda by Mr Mestat, Mr van Schelven and Mr van den Berge, dated 18, 20 and 21 May 1981 respectively, that the administration had caused to be drawn up following Mr Alvarez's comments on the report. Accordingly the dismissal decision was improperly based jointly on the probation report, which the Court held to be "incomplete" and "unusually laconic", and on the supplementary memoranda. It therefore failed to respect the adversary procedure provided for under Article 34 (2) of the Staff Regulations.

Following that judgment, the European Parliament again sent the probation report to the applicant for his comments, together this time with the supplementary memoranda. From the exchange of letters it appears that neither the applicant nor his legal representative would accept the documents, arguing that the same documents could not be used for a second time against Mr Alvarez following the first judgment, in Case 206/81. After a number of fruitless attempts to obtain a response, the European Parliament finally wrote to the applicant on 17 November 1982 informing him that if he failed to submit his comments on the documents in question before 25 November, it would consider that the documents had met with his approval. The applicant stated in reply that the documents at issue could not be used against him a second time and that the European Parliament should finally comply with the judgment properly by assigning a post to him and paying him the salary due under the Staff Regulations. As far as the contents of the supplementary memoranda were concerned, the applicant merely referred to his reply lodged in Case 206/81 and, in particular, to paragraphs 7, 8, 9 and 12 thereof.

Subsequently, in letters of 7 and 10 December 1982, the European Parliament notified the applicant that, having regard to his probation report as supplemented by the above-mentioned memoranda, he would be dismissed with effect from 25 December under Article 34 (2) of the Staff Regulations. It is against that decision that the present action is brought.

I shall proceed on the assumption that the Court is aware of the other facts of this case as a result of the first case involving Mr Alvarez and of the order of 29 September 1983 (Case 206/81A) interpreting the judgment in the first case. I would also refer to report for the hearing.

2. The applicant's arguments

In my view, the applicant's arguments, although set out as several submissions, essentially come down to claiming that the same documents, namely his probation report and the supplementary memoranda, which formed the basis for the first dismissal, may not be used again as the basis for a second dismissal. In this connection, the applicant is assuming

that the first judgment decided that the documents at issue cannot be used against him. Further, he considers generally that a procedural defect may not be rectified after the event. Lastly, he makes a number of claims regarding the substance, which were developed principally in the course of the oral procedure.

3. Assessment

For an analysis of the judgment in Case 206/81, I would refer to my observations of 22 September, 1983 preceding the above-mentioned order of 29 September 1983 interpreting that judgment.

In those observations I pointed out that the probation report was unaffected by the judgment of 22 September, although the applicant had expressly asked for it to be annulled. Mr Advocate General Reischl had also considered, in his opinion in Case 206/81, that it was necessary for the probation report to be annulled. However, the Court did not follow his opinion in that respect.

In the judgment in Case 206/81, the Court based the annulment of the first dismissal solely on the failure to comply with the prescribed adversary procedure as regards the memoranda supplementing the probation report.

Before dismissing Mr Alvarez for the second time, the European Parliament complied with the prescribed procedure by submitting the probation report again, together with the supplementary memoranda, to the applicant for his comments. The fact that the latter's only response to the contents of the supplementary memoranda was to refer to his reply in Case 206/81 is attributable solely to his attitude.

I shall not discuss in detail the applicant's argument that a procedural defect cannot be rectified after the event. In my view, reference to the decisions of the Court is enough to refute that argument. I would refer in the first place to the judgments, cited by the applicant himself, in Cases 35/67 and 13/69 *(van Eick* [1968] ECR 329, and [1970] ECR 3, respectively), in which the first dismissal decision was annulled because the appointing authority had not itself heard the official, as it was obliged to do under the third paragraph of Article 7 of Annex IX to the Staff Regulations, but had delegated its powers to a third party. Subsequently, a second decision was adopted, this time in conformity with the procedure as prescribed above. In addition, I would refer to the Court's judgments in the "Isoglucose cases", in which a regulation was declared void because it had been adopted without the European Parliament having delivered an opinion. The Council subsequently adopted the regulation in conformity with the prescribed procedure (see, in particular, Case 138/79 *Roquette Frères* [1980] ECR 3333, and Case 110/81 *Roquette Frères* [1982] ECR 3159).

As far as the substantive complaints are concerned, I consider that the applicant acted unreasonably by failing to actually comment on the substance of the documents communicated to him in the administrative phase of the second dismissal procedure. His comments are now limited to those submitted to the Court in the first case; I would mention, in particular, the allegation made in the applicant's letter of 23 November 1982 to the European Parliament and repeated in his reply, that he was unable to agree with the supplementary memoranda from Mr Mestat, Mr Van Schelven and Mr

Van den Berge. He referred in that connection to what he had already pointed out on the subject in paragraphs 7, 8, 9 and 12 of his reply in Case 206/81 (the first case). From a second reading of his objections to those memoranda at that time, it appears that those objections were more concerned with possible obscurities and queries than a genuine contestation of the contents. Moreover, the relevance of the supplementary memoranda is not affected by the fact that they refer on several occasions to memoranda and statements by Mr MacKeever, who, the applicant alleges, was himself the subject of some criticism in the department. In the oral procedure, counsel for the applicant focused primarily on this point, treating it at some length. I consider, however, that those references are not of crucial importance, given that the authors of the memoranda were themselves expressly giving their personal views of the applicant.

Furthermore, it should be observed that the Court's power to review dismissal decisions taken pursuant to Article 34 (2) is restricted to manifest errors (Case 98/81 *Munck* [1982] ECR 1155). However, there is no evidence of a manifest error in this instance.

The last submission, regarding the alleged misuse of powers, does not need to be discussed further since the applicant withdrew it in the course of the oral procedure on the ground that he had merely acted on the hypothesis that after the judgment he should no longer be considered an official on probation but an established official and, therefore, could only be dismissed under Article 51 of the Staff Regulations and not under Article 34. In the course of the oral procedure, however, it became apparent that the two parties were agreed that the judgment in Case 206/81 had the effect of restoring the *status quo ante*, with the result that the applicant once again had to be considered a probationary official.

4. Conclusion

My opinion is, therefore, that the application for the annulment of the second decision dismissing Mr Alvarez and the application for damages should both be dismissed.

Under Article 70 of the Rules of Procedure, each party should bear its own costs.