36 However, under Article 70 of the Rules of Procedure, in proceedings by servants of the Communities, institutions shall bear their own costs.

On those grounds,

THE COURT (First Chamber)

hereby

1. **Dismisses the application;**

2. **Orders the parties to bear their own costs.**

Bosco Mertens de Wilmars O'Keeffe

Delivered in open court in Luxembourg on 1 June 1978.

A. Van Houtte
Registrar

G. Bosco
President of the First Chamber

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 27 APRIL 1978

My Lords,

Essentially, the applicant in this case challenges a decision of the Commission whereby he was discharged from its service at the end of his probationary periods as an official.

The applicant is Dr D. A. P. D'Auria. He is a British subject. He was born in London in 1946 and his schooling took place in London. In 1968 he went to Trinity College, Dublin, where, after taking a B.A. degree in History and Fine Arts, he read medicine and became a Doctor of Medicine. When, in 1974, he was being considered for an appointment on the staff of the Commission, he was given flattering testimonials by distinguished physicians and surgeons under whom he had worked in hospitals in Dublin and in Cork.

The appointment in question was that of Head of the Medical Service Lab-

oratories of the Joint Research Centre at Ispra. He was interviewed for it by Dr Claude Vigan, the Head of that Service. On Dr Vigan's recommendation, Dr D'Auria was accepted for the appointment, which he took up on 15 November 1974. He was given a contract as a member of the temporary staff of the Commission, in Grade A 6.

In May 1975 Dr Vigan made a report on Dr D'Auria under Article 14 of the "Conditions of Employment of other servants of the European Communities". (That report is Annex 1 to the Defence). It was a favourable report, but it contained reservations. Thus, although Dr Vigan rated Dr D'Auria's "Intelligence, adaptability and judgment" as "Very good", he remarked: "A reservation is made regarding adaptability". Again, whilst rating Dr D'Auria's "Initiative" as "Very good", Dr Vigan remarked that it was "Excellent when constructive and realistic". Dr Vigan also recorded that Dr D'Auria had "Language difficulties". (As to that it may be fair to mention that Dr D'Auria had, in the curriculum vitae that he had supplied to the Commission when applying for the appointment, claimed only that "Besides English, which is my native tongue, I am familiar with Italian, which is my ancestral language, and to a lesser extent with French". So far as one can discern from the papers, Dr Vigan's own language is French, but he has a good command of English and normally communicated with Dr D'Auria in English). Dr Vigan concluded his report with these "General Remarks":

"Good basic professional education, to be completed necessarily by practical experience in our laboratories.

He must make the effort in the future to obtain an official qualification in his speciality.

From him is expected the effort of adaptation to the concepts and habits in force in the Division as well as a good mixation into the group; this should be facilitated by a rapid improvement of linguistic capabilities."

It appears from a document that is much later in date, namely the report of a Medical Committee to which Dr D'Auria's case was eventually referred in circumstances to which I shall come, that what Dr Vigan had in mind was that Dr D'Auria should attend a course in clinical biology at Pavia, which should, in Dr Vigan's opinion, enable him both to obtain the specialist qualification that Dr Vigan thought desirable and to improve his Italian (see Annex 5 to the Defence). Whilst, however, it seems clear from that document that Dr Vigan thought that he had expressed that wish to Dr D'Auria, there is no evidence that Dr D'Auria ever "got the message", if I may so put it. In his own remarks, appended to his report, he discussed only, albeit at some length, the difficulties with regard to his obtaining specialist qualifications in the United Kingdom, suggesting that the most appropriate qualification for him to seek would be a diploma from the newly formed Faculty of Community Medicine of the Royal College of Physicians.

At all events, soon thereafter, the Commission published a "Notice of Vacancy/Internal Competition" (COM/476/75) for Dr D'Auria's post. Dr D'Auria put in an application in response to that Notice, underwent the tests (they were only oral) and was successful in them, with 28 marks out of 40.

In anticipation of Dr D'Auria's status being changed, as a result of the competition, from that of a member of the temporary staff to that of a probationary official, Dr Vigan wrote to him, on 29 January 1976, a long letter revealing his (Dr Vigan's) anxieties as to the way in which Dr D'Auria was adapting to his job (Annex 3 to the Reply).

Dr D'Auria was appointed a probationary official as from 1 March 1976. This meant, having regard to the provisions of paragraph 1 of Article 34 of the Staff Regulations, that his probationary period would end on 30 November 1976.

This is, I think, a convenient point at which to set out the terms of Article 34. They are these:

"1. Officials other than those in Grades A 1 and A 2 shall serve a probationary period before they can be established. The period shall be nine months for officials in Category A, in the Language Service or in Category B, and six months for other officials.

2. Not less than one month before the expiry of the probationary period, a report shall be made on the ability of the probationer to perform the duties pertaining to his post and also on his efficiency and conduct in the service. This report shall be communicated to the person concerned, who shall have the right to submit his comments in writing. A probationer whose work has not proved adequate for establishment in his post shall be dismissed.

A report on the probationer may be made at any time during the probationary period if his work is proving obviously inadequate. The report shall be communicated to the person concerned, who shall have the right to submit his comments in writing. On the basis of the report the appointing authority may decide to dismiss the probationer before the end of the probationary period, giving him one month's notice; the period of service may not, however, exceed the normal probationary period.

Except where he is entitled forthwith to resume his duties with the civil service to which he belongs a dismissed probationer shall receive compensation equal to two months' basic salary if he has completed at least six months' service and to one month's basic salary if he has completed less than six months' service.

The provisions of this paragraph shall not apply to officials who resign before the end of their probationary period."

In May 1976 Dr Vigan placed Dr D'Auria in charge of a small team sent from the JRC at Ispra to Friuli, as a contribution to the rescue operations following the earthquake there. This led to an exchange of memoranda between Dr Vigan and Dr D'Auria (Annexes 5 and 7 to the Reply), in which the former rebuked the latter for having returned to Ispra without consulting him, and the latter explained to the former, in vigorous terms, why he had done so.

Nor was that the only exchange of memoranda between Dr Vigan and Dr D'Auria at that time: see Annexes 6, 8, 9 and 10 to the Reply. Having read and re-read those memoranda, I find it, I confess, surprising that two professional men should have felt compelled to write them to each other. It is not, however, necessary to dwell upon them. I agree with Counsel for Dr D'Auria that they evince a growing incompatibility ("une incompatibilité d'humeur") between Dr Vigan and Dr D'Auria and I agree with Counsel for the Commission that they evince an incapacity on Dr D'Auria's part to adapt himself to Dr Vigan's views.

In the upshot, when Dr Vigan came to draw up Dr D'Auria's report at the expiry of his probationary period (Annex 2 to the Defence), it was an adverse report. I need not, I think, go into the details of it. Dr Vigan recommended that Dr D'Auria should be discharged at the end of his probationary period. Dr Vigan signed

the report on 25 October 1976, having, prior to doing so, consulted Mr Baxter, the Director of Personnel of the Commission, as to its form. On 19 November 1976 Dr D'Auria appended his own remarks to the report. They consisted of a strongly worded, point by point, critique of it, concluding that "the report appears to be totally misguided and to be based upon personal feeling rather than objective judgment".

In the meantime, by a memorandum dated 29 October 1976 addressed to the Director General of Personnel and Administration of the Commission, and which was received at the Directorate General on 8 November 1976, Dr D'Auria complained, pursuant to Article 90 of the Staff Regulations, about the report and asked that the recommendation contained in it should be reversed.

The report, complete with Dr D'Auria's remarks, was dispatched by Dr Vigan to the Directorate General on 19 November 1976. It arrived there on 26 November.

On 8 December 1976 Dr D'Auria had an interview with Mr Baxter in Brussels. The parties' respective accounts of that interview, supplied in writing at the Court's request, were supplemented by oral evidence given by Mr Baxter and Dr D'Auria at the hearing. The purpose of the interview was twofold: first Mr Baxter wished, if I may use his own words, "to form an idea" as to the reasons for the conflict between Dr D'Auria and Dr Vigan and, secondly, he wished to explore the possibility of avoiding a formal dismissal of Dr D'Auria.

On the first point the discussion appears to have been brief. Dr D'Auria described it as "minimal" and Mr Baxter said in effect that it did no more than to confirm the impression he had gained from the papers that Dr D'Auria's and Dr Vigan's views as to how the Medical Service at Ispra should be run were irreconcilable.

The effect of what was said on the second point was summarized in a note written by Mr Baxter to Dr D'Auria on the same day (Annex 3 to the Defence). That note was in these terms:

"Following our discussion this morning I must confirm that your file with its recommendation that your services should no longer be retained is due now to go forward to the President of the Commission for his decision.

If however you can let me have by Friday 17 December at the latest a letter from you giving your resignation effective from a date on or before 1 April 1977 we can withdraw the above procedure.

I will also, when accepting your letter of resignation, notify you by separate letter that all reports made on you by Dr Vigan subsequent to that of May 1975 are cancelled and destroyed. In other words the documents remaining in your personal file will be the report of May 1975, your resignation letter of December 1976 and subsequent letter from the Commission accepting the resignation. This last letter will incude the usual expression of thanks for your services to the Commission. Needless to say I will have to make this action on our part conditional on your dropping at the same time the complaint which you tell me you are making under Article 90 of the Staff Regulations."

To that suggestion Dr D'Auria made no response.

On 14 December 1976, the Director General of Personnel and Administration addressed a note to the President of the Commission, as appointing authority, recommending Dr D'Auria's dismissal (Annex 4 to the Defence). On 20 December 1976 the President decided upon Dr D'Auria's dismissal as from 1 January 1977 (Annex to the Application).

On 19 January 1977, by a document addressed to the "Members of the Commission", Dr D'Auria renewed the complaint he had made in his memorandum of 29 October 1976 to the Director General of Personnel and Administration (Annex to the Application).

As a result, it seems, of trade union intervention, Dr D'Auria's complaint was referred for advice to an informal Medical Committee consisting of seven doctors in the service of the Commission. The Committee met twice. On each occasion Dr D'Auria was invited to attend, but did not do so. On 18 March 1977 the Committee made its report, which was adverse to Dr D'Auria (see Annex 5 to the Defence).

Also on 18 March 1977 a further complaint under Article 90 (2) of the Staff Regulations was lodged on Dr D'Auria's behalf, this time against the decision of the President of the Commission of 20 December 1976 (Annex to the Application).

There was no reply to any of Dr D'Auria's complaints within the four-month period prescribed by Article 90 (2) and on 1 August 1977 he commenced the present action. Subsequently, on 30 August 1977, a letter was addressed to him on behalf of the Commission containing a reasoned rejection of his complaints (Annex 6 to the Defence).

The contentions put forward on behalf of Dr D'Auria in this action are in two parts: first contentions concerning the validity of this probation report and second contentions concerning the validity of the decision to dismiss him.

As regards the validity of the probation report, two contentions are put forward on his behalf.

The first is that Dr Vigan, who was an official of Grade A 3, was not authorized to sign the report; that it should have been signed by an official of Grade A 2.

I fear that, as to that, Counsel for Dr D'Auria were misled by something that I said in Case 92/75 *Van de Roy* v *Commission* [1976] ECR at p. 353. I there said: "By virtue of rules made by the Commission under the Staff Regulations, a probation report on an official of Category A or LA must be signed by 'the Director concerned'". That was an inference drawn from the form prescribed by the Commission for probation reports and in particular from footnote (2) on the third page of that form, which states unequivocally that in the case of "probationer officials in category A and LA" the official "authorized" to draw up the report is "the director concerned". I had assumed, wrongly as it now transpires, that there was due authority for that statement. In fact, in the *Van de Roy* case, on the arguments that had been presented to us, the point was not in issue, so that it was not gone into carefully.

Here it is very much in issue.

It is common ground that, as is manifest, the Staff Regulations themselves do not lay down who is to sign a probation report. It is also common ground that no provisions have been adopted under Article 110 of those Regulations on the matter. The argument put forward on behalf of Dr D'Auria, as I understand it, is, essentially, that such provisions should have been adopted and that, in their absence, the Commission is bound by the footnote that I have mentioned. The maxim "patere legem quam ipse fecisti" is cited in that connexion. In my opinion, however, quite apart from the fact that it seems somewhat excessive to equate a footnote with a "lex", the Commission was under no obligation to legislate about the matter under Article 110. It was open to the Commission to deal with it administratively, according to the dictates of common sense.

That is what the Commission did. It issued an informal "Guide à l'intention

des notateurs des fonctionnaires-stagiaires". A copy of this was produced to the Court at its request. So informal is it that it is signed by no higher an authority than Mr Baxter himself and that, apparently, it exists only in French. At p. 4 of it, under the heading "II — Commentaires sur le formulaire de stage et sur le notateur", one finds this:

"1. *Qui est 'notateur'*

Aucune réglementation spécifique n'existe à ce jour en ce domaine. Il est recommandé de s'inspirer dans toute la mesure du possible des directives arrêtées pour la notation périodique, à savoir:

— pour les fonctionnaires de la catégorie A et ceux relevant du cadre linguistique: par le directeur compétent (ou le conseiller principal).

— pour les fonctionnaires des autres catégories . . ."

That shows beyond question that there was no hard and fast rule. We were told on behalf of the Commission that in fact probation reports are normally made by an official of Grade A 2 but that, in the case of certain small detached services headed by officials of Grade A 3, they are made by them as the only persons with actual knowledge of the probationers concerned. The Medical Service at Ispra is an example of this. The Medium and Long Term Translation Division in Luxembourg was cited as another.

How sound the practice is is illustrated by the facts of this case. It was submitted on behalf of Dr D'Auria, on the strength of the fact that the Medical Service at Ispra comes administratively under the Directorate General of Personnel and Administration, that Dr D'Auria's report should have been signed by Mr Baxter. Mr Baxter, however, had never met Dr D'Auria until their interview on 8 December 1976. How could he have reported on him?

In the result I am of the opinion that the first contention put forward on behalf of Dr D'Auria should be rejected. But I express the hope that the Commission will amend the footnote that has given rise to so much misunderstanding.

The second contention advanced on Dr D'Auria's behalf as to the validity of his probation report is that it was founded on material errors of fact. These are put under three heads.

The first relates to the episode when Dr D'Auria returned to Ispra from Friuli without Dr Vigan's express authority. That episode is not, however, referred to in the report, nor is there any evidence that Dr Vigan did not accept Dr D'Auria's explanation of it.

Under the second head it is said that Dr Vigan erred as to the extent and variety of Dr D'Auria's research activities. No particulars are however given of that allegation.

Thirdly, by reference to the contents of the complaints lodged by Dr D'Auria under Article 90 (2) of the Staff Regulations, various allegations are made of inconsistency on Dr Vigan's part, in particular inconsistency between the contents of the reports that he made on Dr D'Auria in May 1975 and in October 1976 respectively. But, in my opinion, one cannot, from the circumstance that a man's judgment of a junior colleague has evolved over such a period, conclude that he must have made an error of fact about him. The rest of the allegations made by Dr D'Auria under this head amount, upon analysis, to no more than a submission that Dr Vigan's judgment of him was wrong so that it must have been based on wrong or incomplete facts.

I would accordingly reject that second contention.

On the question of the validity of the decision of 20 December 1976, four contentions are advanced on Dr D'Auria's behalf.

The first is that it was out of time. Your Lordships will remember that Dr D'Auria's probationary period began on 1 March 1976 so that, being of nine months, it ended on 30 November 1976. The contention is that no decision to dismiss him could validly be made after the latter date.

That is at first sight a startling contention because there are at least two decisions of this Court to the effect that an appointing authority is entitled to a reasonable time after the end of an official's probationary period in which to decide whether to establish or dismiss him. Those are the decisions in Case 52/70 *Nagels* v *Commission* [1971] 1 ECR 365 (paragraphs 22 and 23 of the Judgment) and in Cases 10 & 47/72 *Di Pillo* v *Commission* [1973] 2 ECR 763 (paragraphs 8 to 10 of the Judgment).

But it is submitted on behalf of Dr D'Auria that those decisions are no longer authoritative because the events with which they were concerned occurred before Article 34 of the Staff Regulations had been amended by Council Regulation (Euratom, ECSC, EEC) No 1473/72 of 30 June 1972. By that Regulation (1) an appointing authority's power to extend, in "exceptional cases", an official's probationary period was abolished and (2) the subparagraph was introduced under which a report on a probationer may be made before the normal time "if his work is proving obviously inadequate". The last sentence of that subparagraph provides, Your Lordships remember, that on the basis of such a report "the appointing authority may decide to dismiss the probationer before the end of the probationary period, giving him one month's notice"; it adds that "the period of service may not, however, exceed the normal probationary period".

It is on the circumstances that those two amendments were made that Counsel for Dr D'Auria based their argument that Regulation No 1473/72 had reversed the law as laid down in the *Nagels* and *Di Pillo* cases.

In my opinion, it did not. The first amendment, whilst it abolished an appointing authority's power to extend the length of a probationary period, did not reduce that authority's discretion to decide either during that period or within a reasonable time after the end of it what the probationer's fate should be. The second amendment introduced an obviously sensible element of flexibility, but one that can, in the nature of things, be applicable only in rare cases. The last limb of the last sentence of it clearly means no more than that the requirement of one month's notice may not, in itself, lead to an extension of the probationary period.

The facts of the present case illustrate vividly the absurdities to which acceptance of the contention advanced on Dr D'Auria's behalf might lead. His probation report was signed by Dr Vigan on 25 October 1976, i.e. well within the time limit laid down by Article 34 (2). There is however no time limit laid down for the exercise by the probationer concerned of the right conferred on him by the same provision to submit in writing his comments on the report. It so happens that, in the present case, Dr D'Auria exercised that right on 19 November 1976. But there was nothing in the Regulations to preclude him from delaying those comments until 1 December 1976, by which time, according to the argument submitted on his behalf, it would have become impossible for the appointing authority to dismiss him. In fact his report, complete with his comments, which were, under the Regulations, an essential part of it, arrived in Brussels on 26 November 1976. He was seen by Mr Baxter on 8 December. The recommendation for his dismissal went forward to the President of the Commission on 14 December and the President's decision was signed on 20

December. Manifestly those events could not, with justice to Dr D'Auria, have happened much faster.

In the argument on this point reference was made again to the *Van de Roy* case. It was submitted on Dr D'Auria's behalf that that case was distinguishable because there the Court (in paragraphs 12 and 13 of the Judgment) adverted only to the date of notification of the decision, rather than to the date of the decision itself. So be it. I do not think that one needs the authority of the *Van de Roy* case to reject the contention advanced on Dr D'Auria's behalf that I am now considering. There are, as I have shown, ample other reasons for doing so. But I cannot refrain from pointing out that, in the *Van de Roy* case, the Court was never told the date of the decision, so that the distinction seemingly drawn in the Judgment between the date of the decision and the date of its notification cannot be regarded as having had any significance.

I would therefore reject the first contention put forward on behalf of Dr D'Auria on this second part of the case.

The second contention put forward on his behalf on this part of the case is that the decision was void because it was taken without the opinion of the Reports Committee having been sought pursuant to Article 9 (5) of the Staff Regulations. The answer to that is that no Reports Committee has ever been set up within the Commission so that Article 9 (5) is inapplicable. In the *Nagels* case (already cited), where a similar point was taken, the Court held that:

"Since it is not compulsory to set up a Reports Committee as provided in Article 9 of the Staff Regulations, it cannot be complained that the Commission has not yet made use of its option to set up this Committee."

(Paragraph 21 of the Judgment).

It was argued on Dr D'Auria's behalf that the use there of the word "yet" imported that in the Court's view a time would come when each Institution would become bound to set up a Reports Committee and that that time had, by 1976, arrived. I do not think so. The words "if required" in paragraph 1 (a) of Article 9 ("éventuellement" in the French text) clearly indicate that it is for each Institution to decide in its discretion when, if ever, it may become expedient to set up a Reports Committee.

The third contention is that the decision of 20 December 1976 was void because based on an invalid probation report. If I am right in Thinking that the challenge to the validity of Dr D'Auria's probation report must fail, this contention must fail with it.

Lastly it is contended that the decision constituted a misuse of power in that it was taken by reason of the failure of Mr Baxter's attempt to persuade Dr D'Auria to resign. If, so the argument runs, the purpose pursued by the Commission had been a lawful one, that attempt would not have been necessary. It is suggested that the Commission's true purpose in seeking to persuade Dr D'Auria to resign was threefold:

(1) to get over the difficulty that his probation report had been signed by an unauthorized person,

(2) to get over the difficulty that the time had expired within which it was open to the Commission to dismiss him and

(3) to save the two months' basic salary to which he was entitled under the penultimate subparagraph of Article 34 (2).

In fact there is not the slightest reason for thinking that the Commission ever doubted Dr Vigan's competence to sign Dr D'Auria's probation report, or doubted the power of the appointing authority to dismiss him within a

reasonable time after the expiry of his probation period. Moreover, had Dr D'Auria accepted Mr Baxter's offer, he could have received, not two months basic salary, but three months full salary and allowances.

One may doubt the propriety of Mr Baxter's offer (in particular that part of it that envisaged the removal of documents from Dr D'Auria's personal file and the production of a document that might mislead a prospective employer of Dr D'Auria) but there is, I think, no doubt what Mr Baxter's motives were in making it. They were explained in the Commission's letter of 30 August 1977 in these terms:

"With regard to the letter to you from the Director of Personnel dated 8 December 1976, the Commission cannot agree that it proves any misuse of powers. As appears clearly from its terms, this letter was written in order to confirm what was said to you in the course of a confidential discussion during which a possible means of avoiding your dismissal at the end of your probationary period was explored; that is to say your resignation which, while it would of course have had the effect of disentitling you to certain pecuniary advantages would have ensured, on the other hand, that no adverse effects ensued as regards your professional reputation. No pressure, moral or otherwise, was put on you. An idea was explored between you and the Director of Personnel which you were free to take up or reject."

Nor can I see how any unlawful purpose that might have inspired Mr Baxter's offer could logically be attributed to the President of the Commission in such a way as to render his decision a misuse of power.

So I would reject too this last contention.

In the result I am of the opinion that this action should be dismissed, each side bearing its own costs.