2. Orders the parties to bear their own costs.

Trabucchi Pescatore Kutscher

Delivered in open court in Luxembourg on 12 May 1971.

A. Van Houtte
Registrar

A. Trabucchi
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL DUTHEILLET DE LAMOTHE DELIVERED ON 1 APRIL 1971[1]

Mr President,
Members of the Court,

Mr Reinarz has been Director in the Directorate-General for Transport of the Commission since 1959.

On the merger of the executives this Directorate-General was reorganized and it is with this reorganization that the career difficulties experienced by Mr Reinarz began.

Until the merger this Directorate-General had four Directors but in the new detailed list of posts it had only three.

The applicant's candidature for one of these Directorates was not accepted and in 1968 he was appointed Principal Adviser on a temporary basis and then some months later he was dismissed under the provisions of Regulation No 259/68, the purpose of which was to provide for personnel problems arising from the merger of the executives.

However by a judgment of 6 May 1969, to which I shall return later, the Court annulled the decision appointing Mr Reinarz temporary Principal Adviser and the decision terminating his service.

Following that judgment the Commission once again appointed Mr Reinarz as Principal Adviser but this time on a permanent and not temporary basis.

This decision however did not satisfy Mr Reinarz, especially as during the time of his irregular dismissal from the service, the Directorate which he had wanted to obtain had been given to another official, Mr Dousset.

Mr Reinarz then asked the Court to annul first his appointment as Principal Adviser and secondly the appointment of Mr Dousset as Director.

In its judgment of 13 May 1970, which I shall likewise mention later, the Court rejected the submissions of Mr Reinarz directed against his appointment as Principal Adviser, but on the other hand annulled the appointment of Mr Dousset as Director.

Following this second judgment, the Commission reconsidered the question and once again appointed Mr Dousset as Director. It is this appointment which the applicant is asking the Court to annul in the present application.

In support of his application he relies on numerous pleas which I think may be classified into three groups.

A — The first group of pleas relates to formal defects or procedural irregularities which are claimed to exist.

(a) First of all the applicant maintains that there are insufficient grounds for

1 — Translated from the French.

the Commission's decision since in particular it does not refer to or consider the Court's judgments.

However, as the Legal Department of the Commission observes, according to the established case-law the appointing authority is under no obligation to give grounds for its decisions of appointment or promotion.[1]

It is true that the Commission had to take into account the principles laid down by those judgments, but this is a question of substance, as I shall later show, and not a question of form.

(b) The applicant likewise maintains that the Commission did not consider all the officials who were candidates for the post of Director.

But this submission is due to a misunderstanding based, it is true, on a very regrettable mistake by the Administrative Department.

It appears from the minutes of the Commission's meeting on 17 June 1970 that the Commission did in fact consider the six applications of candidature made to it.

The source of the confusion is that when the list of six candidates was sent to the Commission there was an interchange of the note covering this list.

Instead of attaching the list of six candidates for this post to the note relating to the post in question it was attached to a note relating to another post for which in fact there were only four candidates.

However the minutes of the Commission show that, however regrettable this error was, it in no way influenced the deliberations of the Commission and that the six candidates were in fact considered for the post of Director which was vacant.

The applicant maintains, it is true, that the Commission considered only the case of officials of Grade A 3 who were candidates for the vacant post (which was a post in Grade A 2) on the basis of promotion and did not consider the case of officials already established, as he was, in Grade A 2 and who were candidates for the same post, albeit on the basis of transfer.

However the alleged irregularity does not appear from the file.

It is true that, as the applicant states, the minutes mention consideration of reports only in respect of officials of Grade A 3, but this is explained on the sole and simple ground that there are no reports in respect of officials of Grade A 2.

The minutes expressly mention on the contrary that on the one hand all the individual files of all the candidates, whether they are of Grade A 3 or A 2, had been made available to the Members of the Commission and, on the other hand, that there had been an examination of the comparative merits of *all* the candidates.

None of the pleas based on formal or procedural defects appears therefore to me to be well founded.

B — The second group of pleas is founded on the fact that on a threefold basis Mr Reinarz should have benefited from a *kind of 'priority'* for the purpose of being appointed to the vacant post of Director.

(a) This priority arises in the first place from Article 8 of Regulation No 259/68. Paragraph 1 of this article allows an official whose dismissal is contemplated to remain in active employment if he accepts transfer to a post corresponding to the career bracket immediately below that applicable to his grade.

The second paragraph of the same article provides that the official who accepts such a *diminutio capitis* retains his grade and, subject to certain reservations, has a priority right of transfer to any post corresponding to his grade which may subsequently fall vacant.

However I think it clearly appears from the Court's judgment of 13 May 1970 that this provision does not apply to

1 — Cf. Case 27/63, *Raponi* [1964] ECR 129; finally Case 21/68, *Huybrechts* [1969] ECR 85.

Mr Reinarz. The Court ruled that 'the posts of Director and of Principal Adviser fall within the same grade and the difference between their respective powers and duties, whilst it may justify a personal preference for one or the other post, yet does not infringe the rules of equivalence between grade and post on which officials are entitled to rely'.

It follows, I think, that by accepting a post of Principal Adviser Mr Reinarz has in no way accepted a post corresponding to a career bracket below that applicable to his grade and that therefore he cannot rely on Article 8 of Regulation No 259/68.

(b) The priority which Mr Reinarz should have had arises likewise, according to him, from the fact that since he was already established in Grade A 2 he could have been appointed to the post of Director by way of transfer, whereas Mr Dousset wso was established only in Grade A 3, could have been appointed to this post only by way of promotion.

However, the Court has already expressly ruled in its judgment of 3 February 1971, *Rittweger*, that transfer and promotion are provided for by the Staff Regulations on an equal footing and that the authority concerned is not required to fill vacant posts by way of transfer rather than promotion.

(c) Finally, in the alternative, to support the priority which he claims, Mr Reinarz relies on a kind of general principle of good administration according to which 'when an administrative body issues a decision it must repair as far as possible the fault or omission of which it has been previously guilty'.

I do not understand this reasoning. The annulment which the Court ordered in 1970 of the appointment of Mr Dousset did not in any way give a right for the applicant to be appointed in the place of Mr Dousset; it merely gave him a right to submit his candidature for this post and to have this candidature properly considered.

From this point of view the rights of Mr Reinarz have been, it appears, perfectly respected.

C — The third group of pleas raises problems which, I will not seek to conceal from the Court, appear to me more delicate.

These pleas are based on the fact that the disputed appointment of Mr Dousset is inspired by the desire of the Commission to appoint to this post an official of French nationality and thus its main, if not sole, ground is not the interest of the service but the concern to maintain a geographical balance (since this is the expression in current use) in the posts of Directors in the Directorate-General for Transport.

In acting thus, the Commission, according to the applicant, has violated both the principles propounded by the Court's first judgment of 6 May 1969 and by Articles 7 and 27 of the Staff Regulations.

As regards the principles propounded by the judgment of 6 May 1969, I do not think that they can be properly relied on in the present case.

It is true that in this judgment the Court stated that, as regards the measures taken in respect of officials consequent on the merger of the executives, the concern to maintain them in a post corresponding to their grade must 'take precedence over considerations relating to the maintenance of a geographical balance in the composition of the staff of the Communities'.

It was a common sense solution involving, as it did, a statement that to pronounce a measure as serious as a dismissal the appropriate authority could not base itself on the desire to ensure a better geographical balance in the posts available.

But the position of the present case is very different from that which the Court had to consider in 1969.

It was not a question of selecting from among officials those who would be dismissed and those who would not.

It was a question of selecting from

among officials, who were all in a permanent position, the one who should occupy such and such a post.

These two cases are very different and I do not think that the principles propounded by the Court's judgment of 1969 are applicable in the present case.

The question remains whether or not geographical considerations have been decisive in the present case.

As the Court decided in its judgment of 4 March 1964, *Lassalle*, only where the qualifications of the candidates are equal can the administration allow nationality to play a 'decisive role' but they obviously cannot make it the main or sole criterion.

What has been its position in the present case?

It is obviously a question on which doubts are possible.

The Commission claims that the nationality of Mr Dousset has not played any part in his appointment.

Mr Reinarz, on the other hand, sees in the various factors in the file indications to the contrary.

He relies first and foremost on a passage in the Court's judgment of 1969 in which it stated that Mr Dousset's predecessor had been kept in his post, I quote, 'even though he was near the end of his career, mainly to facilitate his replacement at a later date by a servant of the same nationality'.

This fact is certainly disturbing, but it does not necessarily show, as the applicant seems to think, that any appointment of a French national to this post is necessarily determined by his nationality.

The wording in the Court's judgment is limited, I think, to finding a situation obtaining in 1968 and cannot prejudice the events which have arisen several years later.

To see in this fact a presumption it would at least have to be supported by other presumptions.

The only one on which the applicant relies is that he could have been appointed by way of transfer whereas Mr Dousset had to be promoted and this cannot be accepted for the reasons which I have already given.

Thus in spite of a certain doubt which I shall not conceal from the Court, I propose that it dismiss this argument of the applicant also.

It follows that none of the pleas in the application appears well founded and in these circumstances my opinion is that

— the application should be dismissed;

— the parties should bear their own costs.