OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 17 SEPTEMBER 1981

My Lords,

On 6 June 1979 the European Parliament gave notice of an open competition No PE/21/A based on qualifications and tests for the purpose of drawing up a reserve list for the recruitment of French language and Dutch language administrators in Grades 7 and 6 of category A. Mr Bernard Michel, who was then employed in the Commission in Grade B 3, applied to enter the competition. He was admitted by the Selection Board to the competition, but failed on his qualifications, and was not admitted to take the tests. He complained about this rejection pursuant to Article 90 of the Staff Regulations. The prescribed time having run without his receiving an answer, he appealed to the Court against the implied decision rejecting his complaint on the ground that his exclusion from the tests was wrongful, since he had the necessary qualifications. He also claimed compensation. In his reply, and at the oral hearing, he sought a more extensive order, namely that the whole competition be annulled.

The notice of competition stipulated certain conditions of eligibility. The relevant one of these was a university degree in specified subjects "or equivalent professional experience". Mr Michel had such a degree. The second stage in the procedure was "selection on the basis of qualifications". Marking was to be out of 40, and to be admitted to the tests each candidate had to obtain an overall mark of at least 60 % of the possible total. It was stated that after deciding the criteria for assessing the candidates' qualifications, the Selection Board would examine the qualifications of each candidate. The criteria were not further identified.

Mr Michel stated in his application for the competition that in addition to his degree in commercial and consular sciences he had obtained the grade of "agrégé de l'enseignement secondaire supérieur pour les sciences commerciales". After graduation he had also completed a course at the Institut d'Études Européennes in the Université Libre de Bruxelles between 1978 and 1979 without a diploma being awarded. He gave details of papers he had written and of his employment both with "Hoechst-Belgium" between 1969 and 1975 and with the Commission between 1975 and 1979.

2 140 candidates applied altogether. This number was reduced to 1 740 by the elimination of those who lacked the qualifications for eligibility. 1 455 of

these were not admitted to the tests. Mr Michel, being amongst these, received a standard form of letter dated 21 February 1980 from the Chairman of the Selection Board. This said that his qualifications had been assessed on the basis of the documents annexed to his application form in accordance with Section IV of the Notice of Competition; the Selection Board had taken into account the nature and level of any university degrees obtained, post-university training and professional experience, but Mr Michel had not obtained the minimum number of marks required (24 out of 40) and so the Board had decided not to admit him to the tests. A postscript stated that the Selection Board would reply to any request for information.

Upon receiving this letter, Mr Michel wrote to the Chairman of the Selection Board on 4 March 1980 asking what were the criteria adopted by the Board when assessing the qualifications of candidates and the number of marks he had obtained in respect of each. No reply having been received by the beginning of June, he sent off his complaint dated 2 June 1980 under Article 90 of the Staff Regulations against the Board's decision. A few days later, he received the Chairman of the Selection Board's reply dated 9 June 1980. This took the form of another standard letter stating that he had been rejected because of insufficient professional experience. It was said that no other information could be given on the ground that the secrecy of the Board's deliberations had to be respected. It appears that the same standard form letter was sent to every disappointed candidate who asked for further information.

Mr Michel was dissatisfied and these proceedings began on 6 October 1980.

The Parliament takes an initial objection that the application is inadmissible because Mr Michel lodged his complaint under Article 90 more than three months from the date of the notification of the decision adversely affecting him. It is said that the latter is date-stamped 21 February and must have been posted on that day because it is the practice of the Parliament to date-stamp the letter on the date of posting. Accordingly, it would have arrived in the ordinary course of post on 25 February. In this case I should need clearer evidence to be satisfied that this letter was posted on 21 February, not least because the second letter of 9 June was received in an envelope date-stamped apparently by the Post Office 6 June.

Mr Michel says that he received the letter of 21 February on 3 March. The Court has heard a number of arguments as to why it should not be presumed to have taken so long to arrive on the one hand, and how it may have gone astray on the other. I have seen nothing which casts doubt on Mr Michel's statement that he received the notification on 3 March and I would take this as a starting date for the three months' period. If an institution wishes to establish the beginning of the limitation period, it must, in my view, produce better evidence of posting, e.g. by registration of the letter.

That, however, is not the end of the objection. The complaint was not received until 4 June — outside the period of three months beginning on 3 March. Mr Michel's counsel contends first that it was posted on 2 June and that is sufficient. In my view it is not sufficient. The complaint must be "lodged" within three months. It is not lodged when it is posted but when it is received.

It was further argued that Mr Michel can rely on Article 80 of the Court's Rules of Procedure which provides that if the period prescribed by the Treaty, the Statutes of the Court or those Rules for taking any procedural step would otherwise end on a Sunday or on an official holiday, it shall be extended until the end of the first following working day. This does not, in my view, avail Mr Michel, firstly, because Article 80 does not apply to the Staff Regulations, and secondly because the day when the period expired, 3 June, was neither a Sunday nor an official holiday. Article 81 of the Court's Rules of Procedure is not relevant because it does not, in my view, apply to periods stipulated by Article 90 of the Staff Regulations.

Accordingly, it seems to me that the Parliament's contention that the application is inadmissible is well-founded.

If I had come to the opposite conclusion I should have accepted a number of the grounds put forward by Mr Michel but rejected others.

I would have rejected his contention that the whole competition be annulled on the ground that the notice of competition spoke of filling vacancies and establishing a reserve list, whereas the reality was that it was merely to create a reserve list. Although the notice is not entirely clear it seems that the essential objective was to create a reserve list as appears in the opening words. In any event, this and other attacks on the whole competition were in this particular case introduced too late in the proceedings.

Nor would I accept the argument that in looking at experience as well as a degree the Selection Board has erred when assessing qualifications. This argument is substantially based on that section of the notice which deals with eligibility. It is clear from that section that the admission ticket is a degree or (in the French text "éventuellement") professional experience. At that stage clearly experience might be relied upon if the requisite degree had not been obtained. Mr Michel was admitted on his degree and he did not need to rely upon his experience. The second stage is the assessment of the qualifications. The Selection Board is to lay down criteria for this purpose. Although, in my view, it would have been much better if qualifications had been said in Part III of the notice to include post-graduate work and practical experience, it cannot be said, in my view, that the Selection

Board erred in law in looking at these when assessing the qualifications of candidates particularly where such a large number of candidates was concerned, who were eligible for the competition.

Nor would I accept the arguments put forward that it has not been shown who made the preliminary selection and that this may vitiate the result. Nor do I consider in this case that the application to compare the papers of another successful candidate should be granted. There may be situations where a *prima facie* case of discrimination would justify such a course. It does not begin to arise here.

On the other hand there are features of this case which in my view are unsatisfactory.

It is plain that the body entrusted with the assessment of the candidates is primarily the Selection Board. The Court will not substitute its views for those of the Board, merely because it disagrees. Yet the Court may set aside a decision or award compensation if the conditions of the competition have not been complied with or if a conclusion wholly unreasonable on the available material has been reached. Equally, if insufficient or unacceptable reasons have been put forward, the Court may intervene either by setting aside the decision or maybe calling for fuller reasons in order to satisfy itself that there has been no vitiating error of law.

The Court has, on a number of occasions held that, where large numbers of candidates are involved, a Selection Board may give a summary of the reasons for rejecting a candidate (see, for example, Cases 4, 19 and 28/78 *Salerno* v *Commission* [1978] ECR 2403 at 2417 paragraph 29, and Case 89/79 *Bonu* v *Council* [1980] ECR 553 at 563, paragraph 6). Nevertheless, "a mere reference to the condition which was not fulfilled cannot however satisfy the requirement to state reasons in view particularly of the fact that such a reference is not capable of providing the person concerned with a sufficient indication to allow him to know whether the refusal is well-founded or on the other hand whether it is vitiated by a defect which would make it possible to contest its legality". (The *Salerno* case ibid.). A Selection Board cannot rely on the secrecy of its proceedings to justify withholding the reasons for its decision (the *Bonu* case at paragraph 5). On this basis, neither of the letters sent by the Chairman of the Selection Board can be regarded as having satisfied the requirement to state reasons. The first enumerated the factors taken into consideration by the Board but failed to point out the aspects in which Mr Michel was found to be deficient. The second isolated sufficient professional experience as the qualification which he lacked, but gave no indication at all of the basis upon which the assessment was laid down.

Moreover, the second letter does not deal at all with two other of the prescribed criteria.

During the proceedings the Parliament disclosed extracts from the reports drawn up by the Selection Board. Fron these it appears that the Board had adopted four criteria for assessing the qualifications of the candidates and had allotted marks: (i) A university first degree which attracted between 19 and 22 marks, (ii) further university qualification (between 1 and 3 marks), (iii) post-university training (between 1 and 3 marks), (iv) professional experience (between 1 and 12 marks). Mr Michel, it appears, was awarded the maximum of 22 marks under the first heading and nothing under the others. It is therefore not accurate to say in the letter of 9 June, as it appears to say, that he was rejected only on the ground of lack of sufficient professional experience. It was as much the failure to give him any marks for a further university qualification or post-university training that deprived him of the two marks he needed to reach 24 marks, the minimum for admission to the tests.

It may be that there were reasons why his post-graduate course and diploma were rated at zero. Mr Michel and the Court are, however, left in doubt as to whether they were looked at at all or, if they were, why they were totally rejected. Moreover, no reason is given as to why his long work experience was given no marks. There may be an explanation. It seems on the present state of the case quite remarkable that he did not get a single mark out of the 12 available for this criterion.

Whilst giving full weight to the enormous task imposed on the Selection Board in this competition, it cannot be ignored that Mr Michel needed only two marks out of the available 18 to enable him to take the tests. The failure to deal with his post-graduate course and diploma at all, and the failure to explain why his practical experience was left out of account, seem to me errors on the part of the Board which would have justified the Court in intervening, had the application been admissible — by annulling the decision in his case and/or by awarding compensation, though by no means necessarily the compensation which he claims.

In the event, however, in my opinion this application must be rejected as inadmissible.