JUDGMENT OF THE COURT (Fifth Chamber)

13 July 2000 *

In Case C-174/99 P,

European Parliament, represented by J. Sant'Anna, of its Legal Service, acting as Agent, assisted by D. Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the Secretariat General of the European Parliament, Kirchberg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fifth Chamber) of 9 March 1999 in Case T-273/97 *Richard* v *Parliament* [1999] ECR-SC I-A-45 and II-235, seeking to have that judgment set aside,

the other party to the proceedings being:

Pierre Richard, an official of the European Parliament, residing in Luxembourg, represented by A. Lutgen and J. Feltgen, of the Luxembourg Bar, with

* Language of the case: French.

an address for service in Luxembourg at their Chambers, 1 Rue Jean-Pierre Brasseur,

applicant at first instance,

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, P.J.G. Kapteyn, P. Jann, H. Ragnemalm (Rapporteur), and M. Wathelet, Judges,

Advocate General: J. Mischo,
Registrar: H.A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 27 January 2000,

after hearing the Opinion of the Advocate General at the sitting on 16 March 2000,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 10 May 1999, the European Parliament brought an appeal pursuant to Article 49 of the EC Statute and the corresponding provisions of the ECSC and Euratom Statutes of the Court of Justice against the judgment of 9 March 1999 in Case T-273/97 *Richard* v *Parliament* [1999] ECR-SC I-A-45 and II-235 (hereinafter 'the contested judgment'), in which the Court of First Instance annulled the decision appointing Mrs S. Head of Division in Grade A 3.

Facts and legal background

2 On 24 June 1996 the Parliament published Vacancy Notice No 8011 for the purpose of filling the post (Grade A 3) of Head of Division 'Equipment and internal service' of Directorate A 'Infrastructures and internal service' of the Directorate-General 'Administration' (hereinafter 'DG VI'), which was amended by a corrigendum of 28 June 1996 removing the requirement for knowledge of French (paragraph 1).

3 Mr Richard, a principal administrator in Grade A 4, and 11 other persons submitted their candidatures for the vacant post. By memorandum of 25 July 1996 the Director-General of DG VI proposed that Mr Richard be promoted to the vacant post (paragraphs 2 and 3).

4 The Head of the Personnel Division, who had become aware of the choice of the Director-General of DG VI, sent him a memorandum on 23 September 1996 requesting him to extend the range of potential candidates and, in accordance with the directions of the President of the Parliament, to consult the reserve lists drawn up following the open competitions for Grade A 3 posts reserved for nationals of the new Member States before taking a final decision (paragraph 4).

5 In a memorandum of 11 October 1996 the Director-General of DG VI set out the practical criteria justifying his proposal that Mr Richard should be appointed and, in that regard, stated that if the appointing authority should consider that those practical qualifications were less important than more geographical criteria, he had formed the view after examining the reserve lists that two candidates, the first of whom in order of preference was Mrs S., of Swedish nationality, might, if absolutely necessary and after what would no doubt be a long and arduous period of adaption, be suitable for the vacant post (paragraph 6).

6 On 8 January 1997 the Secretary-General of the Parliament proposed to appoint Mrs S. to the vacant post. The appointing authority accepted that proposal on 9 January 1997 (paragraph 7).

7 By letter of 11 February 1997 the recruitment service informed Mr Richard that the appointing authority had not accepted his candidature (paragraph 8).

8 On 6 May 1997 Mr Richard lodged a complaint seeking annulment of the appointing authority's decision. That complaint was rejected by decision of 17 July 1997 (paragraphs 9 and 10).

9 Article 7(1) of the Staff Regulations of Officials of the European Communities (hereinafter 'the Staff Regulations') provides as follows:

'The appointing authority shall, acting solely in the interest of the service and without regard to nationality, assign each official by appointment or transfer to a post in his category or service which corresponds to his grade.

...'

10 According to the third paragraph of Article 27 of the Staff Regulations:

'No posts shall be reserved for nationals of any specific Member State.'

11 Article 29(1) of the Staff Regulations provides:

'Before filling a vacant post in an institution, the appointing authority shall first consider:

(a) whether the post can be filled by promotion or transfer within the institutions;

(b) whether to hold competitions internal to the institution;

(c) what applications for transfer have been made by officials of other institutions of the three European Communities;

and then follow the procedure for competitions on the basis either of qualifications or of tests, or of both qualifications and tests. Annex III lays down the competition procedure.

The procedure may likewise be followed for the purpose of constituting a reserve for future recruitment.'

12 Article 1(1) of Council Regulation (EC) No 626/95 of 20 March 1995 introducing special and temporary measures applicable to the recruitment of officials of the European Communities as a result of the accession of Austria, Finland and Sweden (OJ 1995 L 66, p. 1), provides:

'Notwithstanding the second and third paragraphs of Article 4, Article 5(3), Article 7(1), the third paragraph of Article 27, Article 29(1)(a), (b) and (c) and Article 31 of the Staff Regulations of Officials of the European Communities, provision may be made until 31 December 1999 for vacant posts to be filled by Austrian, Finnish and Swedish nationals up to the limits set in the context of budgetary discussions within the institutions responsible.'

The contested judgment

13 On 16 October 1997 Mr Richard brought an action before the Court of First Instance.

14 Mr Richard put forward five pleas in law, alleging, first, breach of Article 29(1) of the Staff Regulations, second, breach of Article 25 of the Staff Regulations and consequent misuse of powers, third, breach of Article 7 of the Staff Regulations, fourth, a manifest error of assessment and, fifth, breach of certain principles established by case-law (consideration of the interest of the service, assessment based on comparable sources of information and observance of the selection criteria set out in the vacancy notice).

15 By his first plea Mr Richard contended, in particular, that pursuant to Article 29(1) of the Staff Regulations the appointing authority can open the external recruitment procedure only after considering whether the vacant post can be filled by means of the other internal recruitment procedures, in keeping with the principle that officials should have reasonable career prospects.

16 Mr Richard further claimed that both the letter of Article 29(1)(a) to (c) of the Staff Regulations and the case-law of the Court of Justice and the Court of First Instance require that the appointing authority consider separately and in turn the various possibilities of filling a vacant post, which prohibits any competition between internal and external candidates.

17 The Parliament replied that under Article 29(1)(a) to (c) of the Staff Regulations the appointing authority is required to carry out a simple examination designed to ascertain whether, pursuant to that article, a person of the highest standard of ability, efficiency and integrity can be appointed. For that purpose, case-law has also acknowledged that an internal vacancy notice and an interinstitutional vacancy notice may be published simultaneously for the same post, or even that it

is possible to proceed directly from the procedure laid down in Article 29(1) to that laid down in Article 29(2) of the Staff Regulations.

18 According to the Parliament, it is also possible for the appointing authority to extend its choice by adding other candidatures to those referred to in Article 29(1) of the Staff Regulations if it does not have sufficient choice to be able to recruit a person who to the greatest possible extent satisfies the requirements of the vacant post.

19 In paragraph 40 of the contested judgment the Court of First Instance found that in this case the appointing authority had established that Mr Richard's candidature satisfied the requirements of the vacant post. It therefore held in paragraph 41 of the judgment that, notwithstanding its broad discretion, the appointing authority could not legitimately consider that it did not have a sufficiently wide choice to ensure that the post could be filled in accordance with the vacancy notice.

20 The Court of First Instance also found in paragraph 42 of the contested judgment that in any event if the appointing authority considered that Mr Richard's candidature was not satisfactory it was required to reject his candidature and then to consider the possibilities available under Article 29(1)(b) and (c) of the Staff Regulations before following the recruitment procedure. The Court further stated, in the same paragraph, that if the appointing authority proposed to consult the reserve list of nationals of the new Member States it must annul the procedure initiated and determine new conditions for filling the post.

21 However, the Court of First Instance found in paragraph 43 of the contested judgment that it was apparent from the file that Mr Richard's candidature had not been rejected but had been treated as competing with Mrs S.'s candidature, and that the appointing authority had decided to consult directly the reserve lists of nationals of the new Member States.

22 The Court of First Instance concluded in paragraph 45 of the contested judgment that by not formally rejecting Mr Richard's candidature and by treating his candidature as competing with Mrs S.'s candidature the appointing authority had infringed Article 29(1) of the Staff Regulations.

23 Without examining the other pleas put forward by Mr Richard, the Court of First Instance therefore annulled the procedure for the appointment of Mrs S. to the post of Head of Division in Grade A 3 and the appointing authority's decision of 9 January 1997.

The appeal

24 In its appeal the Parliament requests the Court, first, to annul the contested judgment and to refer the case back to the Court of First Instance and, second, to reserve the costs pending the final decision.

25 The Parliament contends that the Court of First Instance misconstrued the case-law of the Court of Justice and the Court of First Instance on the application of Article 29 of the Staff Regulations.

26 Mr Richard requests the Court to dismiss the appeal as inadmissible or unfounded and to order the Parliament to pay the costs of the proceedings.

Findings of the Court

Admissibility

27 Mr Richard disputes the admissibility of the appeal on two distinct grounds.

28 First, he relies on the fact that the Parliament's appeal is not accompanied by a decision of the appointing authority proposing the filing of an appeal.

29 In that regard, it should be pointed out that it follows from Article 91 of the Staff Regulations that any actions by officials are to be brought against the institution to which the appointing authority is answerable. Since, according to Article 49 of the EC Statute of the Court of Justice, an appeal may be brought by any party which has been unsuccessful in its submissions, the first ground of inadmissibility must be rejected.

30 Second, Mr Richard claimed at the hearing that the appeal was inadmissible on the ground that the Parliament had no interest in bringing proceedings. Mr Richard alleged that the post as Head of Division in Grade A 3 to which Mrs S. had been appointed had been abolished by decision of the Parliament of 22 April 1999.

31 Mr Richard stated, without being contradicted by the Parliament, that he had only been informed of the existence of that decision on 4 October 1999, after he had submitted his reply.

32 In those circumstances, the Court finds that Mr Richard was entitled, pursuant to Article 42(2) of the Rules of Procedure of the Court of Justice, to introduce that new plea of inadmissibility at the hearing.

33 As to whether the plea is well founded, it should be observed at the outset that for a person to have an interest in bringing appeal proceedings the appeal must be likely, if successful, to procure an advantage for that party (Case C-19/93 P *Rendo and Others* v *Commission* [1995] ECR I-3319, paragraph 13).

34 In the present case, as the Advocate General has observed in point 34 of his Opinion, it must be held that a judgment setting aside the contested judgment would procure a distinct advantage to the Parliament, since such a judgment would be capable of protecting the Parliament against any claim by Mr Richard for damages in respect of the harm allegedly sustained as a result of the contested appointment decision.

35 In those circumstances, the appeal must be declared admissible.

Substance

36 By its single ground of appeal the Parliament submits that the Court of First Instance misconstrued the case-law of the Court of Justice and the Court of First Instance on the application of Article 29 of the Staff Regulations, first by holding that the appointing authority was prohibited from extending its choice where there is a candidate worthy of promotion, then by considering that it was necessary formally to reject Mr Richard's candidature before consulting the reserve lists of nationals of the new Member States and, last, by holding that

consultation of the reserve list required annulment of the procedure initiated and the fixing of new conditions for the filling of the post.

37 As regards the Parliament's first ground of complaint, it should be pointed out that the appointing authority has a wide discretion for the purpose of finding the candidates with the highest standard of ability, efficiency and integrity (see, in particular, Case 135/87 *Vlachou* v *Court of Auditors* [1988] ECR 2901, paragraph 23).

38 The use of the formulation 'whether ... can' in Article 29(1) of the Staff Regulations clearly indicates that the appointing authority is not bound absolutely, where a vacant post is to be filled, to fill that post by way of promotion or transfer, but merely to consider in each case whether those measures are capable of resulting in the appointment of a person of the highest standard of ability, efficiency and integrity (see the judgment in Joined Cases 12/64 and 29/64 *Ley* v *Commission* [1965] ECR 107, at 121).

39 Although the subdivision of Article 29(1) requires the appointing authority to consider the possibility of promotion with the utmost care before going on to the following stage, it does not prevent the authority, in the course of such an examination, from also taking account of the possibility of obtaining better candidates by using the other procedures mentioned in that paragraph. Consequently the appointing authority is at liberty to consider the subsequent options (Case 10/82 *Mogensen and Others* v *Commission* [1983] ECR 2397, paragraph 10).

40 It follows that the appointing authority may go on to a subsequent stage of the recruitment procedure, even where there are one or more candidates who satisfy all the conditions and requirements set out in the vacancy notice for the post to be filled.

41 As regards the second ground of complaint, it should be pointed out that where the appointing authority goes from one recruitment stage to a subsequent stage it does so in order to widen its choice in order to find a candidate of the highest standard of ability, efficiency and integrity.

42 That objective would be jeopardised if before going on to a subsequent stage of the procedure the appointing authority had to reject the candidatures already submitted during the earlier stages without being able to compare them with those submitted during the subsequent stages.

43 It follows that the appointing authority is not required to adopt a decision rejecting existing candidatures before going on to a subsequent stage.

44 As regards the third ground of complaint, it should be pointed out that where a vacant post in an institution is to be filled in accordance with the Staff Regulations, the appointing authority must observe, in particular, the obligation set out in Article 7(1) of the Staff Regulations to assign officials solely in the interest of the service and without regard to nationality, the prohibition in the third paragraph of Article 27 of the Staff Regulations on reserving posts for nationals of any specific Member State and the obligation to follow the order laid down in Article 29(1) of the Staff Regulations.

45 It must be pointed out that those provisions must be observed at each stage of the recruitment procedure, and in particular when, following an open competition, a reserve list which may serve as the basis for recruitment is drawn up.

46 Although Regulation No 626/95 provides in Article 1 that vacant posts may be filled by appointing Austrian, Finnish and Swedish nationals, notwithstanding

certain provisions of the Staff Regulations and, in particular, Article 7(1), the third paragraph of Article 27 and Article 29(1)(a) to (c), it is clear from the Parliament's oral submissions to the Court and also from paragraphs 26 and 44 of the contested judgment that that regulation was not applied during the recruitment procedure in issue.

47 In those circumstances, it must be held that successful candidates on reserve lists drawn up following open competitions reserved for nationals of the new Member States cannot be taken into consideration in a recruitment procedure initiated pursuant to Article 29 of the Staff Regulations.

48 The Court of First Instance was therefore correct in holding in paragraph 42 of the contested judgment that if the reserve list were to be consulted the procedure initiated would have to be annulled.

49 It should further be pointed out that the Parliament's grounds of complaint do not call in question the finding of the Court of First Instance in paragraph 34 of the contested judgment that the appointing authority, without considering the possible courses of action offered by Article 29(1)(b) and (c) of the Staff Regulations, had decided to consider the comparative merits of the candidatures of Mr Richard, a candidate for promotion, and Mrs S., who was on one of the reserve lists of nationals of new Member States.

50 As the Court of First Instance held in paragraph 42 of the contested judgment, the appointing authority is required, when it considers that candidatures for promotion or transfer are not satisfactory, to consider the possibilities offered by Article 29(1)(b) and (c) of the Staff Regulations before following the recruitment procedure (see, in particular, Case C-304/97 P *Carbajo Ferrero* v *Parliament* [1999] ECR I-1749, paragraph 29).

51 Since the appointing authority had not satisfied that obligation, the Court of First Instance was correct in concluding in paragraph 45 of the contested judgment that there had been a breach of Article 29(1) of the Staff Regulations.

52 In light of the foregoing, it must be held that although the first two grounds of complaint which the Parliament has raised against the reasoning of the Court of First Instance are justified, the fact remains that the third ground of complaint is unfounded.

53 Accordingly, it must be held that the reasoning adopted by the Court of First Instance in that regard is sufficient to justify the operative part of the contested judgment and that such defects as might vitiate the reasoning in the contested judgment in other respects are of no consequence (see Case C-35/92 P *Parliament* v *Frederiksen* [1993] ECR I-991, paragraph 31).

54 It follows that the appeal must be dismissed as unfounded.

Costs

55 Under Article 69(2) of the Rules of Procedure, which is applicable to the appeal procedure by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Mr Richard applied for costs and the Parliament has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber),

hereby:

1. **Dismisses the appeal;**

2. **Orders the European Parliament to pay the costs.**

Edward Kapteyn Jann

Ragnemalm Wathelet

Delivered in open court in Luxembourg on 13 July 2000.

R. Grass — D.A.O. Edward

Registrar — President of the Fifth Chamber