OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 21 October 1986

My Lords,

By Notice LA/250 (Official Journal C 51 of 23. 2. 1983, p. 10) the Council announced a competition for the post of Head of the Greek Language Translation Division in Grade LA/3 and to constitute a reserve list.

The appointee's task would be principally to organize, direct and control the work of the division and to train and report on personnel.

The competition was to be by qualifications and tests. Admission to the tests depended on a university qualification and at least 10 years' professional experience in translating and revising texts. It is expressly stated that that experience might include partly experience in other linguistic activities.

Those admitted by the Selection Board to the competition were to take eight written tests. If they obtained a minimum pass mark in each paper, they proceeded to two oral tests. Those who obtained the pass mark in the oral tests and a total of 276 out of 400 for the whole competition were placed on a reserve list.

In the result, only two candidates were placed on the reserve list. The first was Mr Kotsonis, who obtained 297 points. The second was Mr Constantinopoulos, who obtained 276 points, the minimum qualifying number.

By Decision 11/83 of 13 December 1983, the relevant authority appointed Mr Constantinopoulos to the post.

Having made a complaint under Article 90(2) of the Staff Regulations, which was not upheld, Mr Kotsonis now asks the Court to annul that decision so that he may be appointed to the post with effect from 1 December 1983. He also asks that damages may be awarded to compensate him for the loss of the salary which he would have earned had he been appointed and he asks for BFR 1 as nominal damages for non-material injury.

His counsel at the hearing today has complained of delay in sending to him decisions, documents and in particular translations into Greek. The delay in respect of the sending of some of those documents has already been explained in the written pleadings, although it seems to me that other delays really did exist and have not been fully explained. None the less, it does not seem to me that Mr Kotsonis' position, either in the competition or in these proceedings, has been in any way prejudiced by those delays.

His first ground of complaint in the written proceedings is that the Council has infringed Article 27 of the Staff Regulations. That provides, so far as relevant, that 'recruitment shall be directed to securing for the institution the services of officials of the highest standard of ability, efficiency and integrity'.

Moreover, he says that there was in this case a breach of the principle of the equal treatment of employees and of the principle of impartiality in the selection of the appointee. There was also a misuse of powers, not least in that the decision taken was no more than a confirmation of what the Council had already decided, regardless of the competition and in order to give recognition to a position which already existed.

Finally, although this was not raised in the application, Mr Kotsonis says as a result of documents produced to him during the proceedings by order of the President of the Court that Mr Constantinopoulos was not qualified for the competition since he did not have the necessary 10 years' experience.

Both men began their careers in the General Secretariat of the Council as revisers in grade LA/5 in 1980 when the Greek Translation Division was being set up. Mr Constantinopoulos began two weeks earlier than Mr Kotsonis, which is not a material difference, and was eventually promoted to LA 4 earlier than Mr Kotsonis.

After they had begun their work, since the post of Head of Division was vacant, it was decided to appoint Mr Constantinopoulos *ad interim* as the head of the division in grade LA 3 with effect from 1 April 1982. That *ad interim* appointment was approved by the Consultative Promotion Committee, although without prejudice to the results of the competition which was to be organized.

When the *ad interim* year expired, Mr Constantinopoulos continued *de facto* to act as head of the division. It is to be noted that when he was absent Mr Kotsonis deputized for him and acted as head of the division for a total period of some 22 weeks.

There is no doubt that, as acting head of the division, Mr Constantinopoulos carried out his task well. His organizational abilities, his capacity to handle people and his drive are all commented on favourably in the documents.

There is also no doubt, on the documents, that the applicant did his job well as a reviser. The quality of his work is highly praised, though it is suggested that perhaps he lacked the dynamism of Mr Constantinopoulos. It is also plain that Mr Kotsonis had considerable linguistic and legal qualifications and experience before he went to the Council.

In the competition the applicant received higher marks than Mr Constantinopoulos in all the written papers, including, it is to be noted, that designed to assess organizational qualities and the ability to run an important organizational unit, where the applicant received 28 points against Mr Constantinopoulos' 24 points out of a maximum of 40.

In the oral tests Mr Constantinopoulos did better, gaining 28 points out of 30 against the applicant's 22 points in the general

cultural test, though again it is to be noted that, in the oral test designed to assess organizational ability, Mr Constantinopoulos was only two points ahead, 26 against 24 out of 30.

Thus, even though the Selection Board thought that the system of marking gave undue weight to the written linguistic tests and undue weight to the oral culture test, Mr Kotsonis did well in the tests directed to assessing organizational abilities.

His primary case is then that, if the competition was to have any meaning, it is he who should have been appointed, not least since Mr Constantinopoulos only achieved the minimum number of points.

However, those who were consulted by the appointing authority prior to the taking of the decision were unanimous that Mr Constantinopoulos should be appointed. They were impressed by his record as interim head of division, by his flexibility and his organizational skills. They were also plainly anxious that in a small, newly created division which had, it seems, its problems, they should appoint someone who had done well rather than to make a change.

It is clear from the judgments of the Court that the appointing authority must give due weight to the results of the competition; on the other hand, it is not bound automatically to accept the first candidate on the list. It retains a discretion to appoint the most suitable person whilst taking fully into account the results of the competition. As counsel for the Council pointed out this morning, Article 30 of the Staff Regulations in terms says that the appointing authority shall decide which of the candidates on the list of suitable candidates produced by the Selection Board is to be appointed to the vacant posts.

In Case 62/65 *Serio* v *Commission* [1966] ECR 561 the Court said this: 'Although it is entitled in making its selection to ignore the precise order of merit in the competition for reasons which it is incumbent upon the administration to evaluate and justify before the Court, nevertheless it may not destroy the very concept of competition by departing substantially from the results of the competition without serious reasons.'

However in Case 26/68 *Fux* v *Commission* [1969] ECR 145, the Court stressed that the person who comes first on the list does not have an automatic right to be appointed.

As to the first point taken by the applicant, it seems to me that the provisions of Article 27 of the Staff Regulations are quite general and are qualitative in nature. The person recruited must be of the highest standard of ability, efficiency and integrity. On all the evidence before the Court it seems to me that both men satisfied that test and could have filled the post satisfactorily.

It is not just a question of counting points in the competition. Mr Constantinopoulos did not fail to be a person of the highest standard merely because the applicant got higher marks. In any event, it is to be noted, as counsel for the Council pointed out this

morning, that Mr Kotsonis was only 21 points ahead of Mr Constantinopoulos, which is, if my arithmetic is right, only about 5% of the total marks involved. The Council had to take a decision between the two men and at the end of the day, as part of its appreciation of the situation, it was in my view entitled to balance the candidates' 'track records' with the Council against the results of the competition and previous experience.

I, for my part, do not accept that a breach of Article 27 of the Staff Regulations has been shown. If the difference in the competition had been considerably greater, then different considerations might have arisen.

The applicant is right when he says that he did not have the same opportunity as Mr Constantinopoulos to prove himself for the job and this, to my mind, is clearly a factor which ought to be borne in mind by an appointing authority. On the other hand, the Council were entitled to appoint somebody *ad interim* and they were not, as seems to be suggested in the written pleadings, required to rotate the post so that potential candidates would have a chance to prove themselves. Such an obligation would clearly cause administrative chaos.

I do not consider here that it has been shown that there was any breach of the principle of equal treatment in that only Mr Constantinopoulos had a continuing and full-time experience as head of the division. Nor does such a fact indicate or constitute bias, as is alleged by the applicant. It has to be borne in mind that the applicant had had some chance in the 22-week period referred to to prove his abilities and he does not in that time seem to have dislodged the impression formed that, from the organizational point of view, Mr Constantinopoulos was the better candidate.

As to the third point which is taken, there is obviously a risk that when someone is appointed *ad interim* after the competition reasons will be sought to justify retaining the person in the post. That desire, however natural, cannot be allowed to render the results of the competition nugatory. The applicant says that that was done in this case and that there was accordingly a misuse of power.

For my own part, I am not satisfied that this allegation has been made out. Even though there is a reference in one of the opinions given after the competition to the fact that it would be hard on Mr Constantinopoulos if he was not appointed, that comment has to be seen in the light of the opinion formed that it would be hard on him because he had done the job so well. That would not be conclusive if the applicant in the competition and on his record had proved himself outstandingly the better candidate. In this case, although Mr Kotsonis was obviously good at his job and got higher marks, it seems to me that there is no real challenge to Mr Constantinopoulos' abilities, and the latter's performance in the competition was not so very far behind. I am not satisfied that there was here a misuse of powers in the exercise of the discretion to appoint.

It is, however, suggested this morning that Mr Constantinopoulos would never have been on the list of suitable candidates if the marks in the oral test had not been so high.

The suggestion, as I understand it, frankly put is that since the written marks were not so good it was necessary for the result of the oral tests to be increased in order to make sure that he got into the list.

I well understand the applicant's feeling of surprise that Mr Constantinopoulos just scraped home with 276 points, but there are plainly other explanations as to why this could happen which do not involve suggestions that this was what popularly would be described as a 'fix' and that the Selection Board in some way behaved improperly. It seems to me on the evidence quite impossible either to say that that is made out or to draw that inference. Mr Constantinopoulos may have been lucky but I reject the suggestion that the oral marks were improperly upgraded to enable Mr Constantinopoulos to qualify.

Accordingly, on these four grounds, it seems to me that it is not possible to say that the Council destroyed the very concept of the competition. In my view, although there are perhaps some curious features about the case which do raise queries, it has been established by the Council that there were serious reasons for choosing the second candidate in the test rather than the first.

Finally, and this is the most difficult point in the case, it is said that Mr Constantinopoulos was not in any event qualified to enter the competition. This claim is based on a comparison of his application form for a post as a reviser in competition LA/198, the first competition, and the form he completed in the later competition.

In the first form, he stated in 1980 that he had worked with a company called Exantas in Athens for the period from 1976 to 1978 and that he had worked for another organization called Gerhardt Verlag, Berlin from 1976 to 1979. He also stated that he was a university student between 1968 and 1975, first at Bonn until 1971 and then in Berlin from 1972. That form thus showed in 1980 only three years' relevant experience.

When he applied for the present job, which required at least 10 years' experience, he claimed that he had been employed by Exantas from 1972 to 1978 as well as from 1976 to 1979 with Gerhardt Verlag. Adding that period of eight years to his three years with the Council, that gave him more than the minimum 10 years' experience. His studies in the second form were said to be from 1968 to 1973, although the Court has been told this morning that that was a mistake: it should have read 1975.

This discrepancy in the two periods is obviously something which had to be investigated and the Court has this morning heard Mr Constantinopoulos and Mr Banoussis, who is the representative of Exantas in Athens. Mr Constantinopoulos' explanation of the discrepancy is that in 1980 he merely filled in the minimum number of years which was required to satisfy the competition. For my part, I find that a strange answer since the competition required 'at least' three years' experience and one would expect a candidate to put forward the best account he could of his relevant experience. But that is his explanation; he now admits that it was probably very naive to give only the minimum period of experience.

What he has said this morning, which confirms a written declaration which he put in, is that from 1972 he was working in Berlin to assist Exantas in Athens with the publications which they were undertaking. It was his job to make proposals for publishing books in Greek and in other languages, to read books to see whether they should be recommended for publication by the publishers, and to translate material for the publishers. In addition, he was engaged in revising translations done by others. There seems to be some doubt as to the amount of time he spent in Berlin and in Athens, but it seems to me quite plain from what the Court has been told that it was perfectly possible for him to do this kind of work in Berlin for a publisher in Athens. He did not need to be in Athens the whole time.

I would accept what he has told us on a solemn declaration that his university studies during the period from 1972 to 1975 involved no more than seminars of two or perhaps three hours a week and that by no stretch of the imagination could he have been said to have been during those three years a full-time student.

It is not very clear as to precisely how much time he spent working and what material he actually produced. Nor is it very clear precisely how much he was paid during the period except that an estimate has been given of what is called a permanent salary, but what seems to be more in the nature of a retainer, of approximately DR 15 000 a month during the early years which was increased by further payments for work actually done.

Counsel for Mr Kotsonis has criticized the evidence given saying it is inadequate and is contradictory. For my part, although I confess to having initially had doubts as to whether Mr Constantinopoulos really had been engaged full-time or for a very substantial part of the time during the period from 1972 to 1980, I would accept the evidence of Mr Constantinopoulos and Mr Banoussis, which has not been successfully challenged, that he was engaged full-time during that period on relevant work and that the retainer he was paid, together with commission on the publications which he either read or translated or wrote himself, was sufficient to constitute a sufficiently full-time paid activity.

Accordingly, it does not seem to me that the applicant has made out the claim that Mr Constantinopoulos was not qualified for this competition. He was quite right to investigate it — it plainly called for investigation — but at the end of the day it does not seem to me that the allegation is made out.

It is not surprising that Mr Kotsonis feels considerable disappointment that he was not appointed. In my view, however, he has not made out a case that the Council's decision has violated any rule of law or that Mr Constantinopoulos was not qualified.

I consider accordingly, and despite the difficulties in the case, that the application should be dismissed and that each side should pay its own costs.