In Case 22/75

BERTHOLD KUSTER, an official of the European Parliament, residing at Bertrange (Luxembourg), represented by Victor Biel, Advocate of the Cour Supérieure de Justice of the Grand Duchy of Luxembourg, with an address for service in Luxembourg at the Chambers of his Counsel, 18a rue des Glacis,

applicant,

v

EUROPEAN PARLIAMENT, Luxembourg, represented by its Secretary-General, Hans Nord, acting as Agent, assisted by Alex Bonn, Advocate of the Luxembourg Bar, with an address for service in Luxembourg at the Chambers of its Counsel, 22 Côte d'Eich,

defendant,

Application for the annulment of Internal Competition A/50, for a post of Head of Division with the Directorate-General for Committees and Interparliamentary Delegations,

THE COURT (First Chamber)

composed of: R. Monaco, President of Chamber, A. Donner and A. O'Keeffe, Judges,

Advocate-General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts and the arguments advanced by the parties in the course of the written procedure may be summarized as follows:

I — Facts and written procedure

1. By Vacancy Notice No A/50 of 30 September 1974, the European

Parliament opened an internal competition for the purpose of filling a post of Head of Division (Grade A 3) with the Directorate-General for Committees and Interparliamentary Delegations. The post in question had previously been the subject of Vacancy Notice No 1509 of 12 March 1974, against which the applicant had brought Case No 79/74, dismissed by judgment of the Court dated 19 June 1975.

Vacancy Notice No A/50, published in the official languages of the Community, laid down — as did Vacancy Notice No 1509 — amongst the qualifications and abilities required, 'for practical reasons, a thorough knowledge of English'.

By a letter of 18 October 1974, Mr Küster submitted a complaint in respect of the opening of this competition, for which he had applied.

Since he did not receive a reply to this complaint, the applicant lodged the present application on 19 February 1975.

In a document attached to the application, the applicant further asked for the competition procedure in question to be suspended until the Court had ruled on the main issue. This application was dismissed by order of the President of the First Chamber dated 25 February 1975.

2. On hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court (First Chamber) decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The *applicant* claims that the Court should:

'— Rule that this application is admissible as to form and that it has been made within the prescribed period;
— Take note of the applicant's offer of proof set out in his submissions;
On the substance of the case:
— Rule that the application is well founded and consequently annul Internal Competition A/50;
— Rule that such annulment shall include the annulment of any procedure attaching thereto, where appropriate, and that such procedure cannot adversely affect the applicant;
— Order the Parliament to pay the costs.'

The *defendant* contends that the Court should:

'— Take note that it leaves the question of the admissibility of the application to the discretion of the Court;
On the substance of the case:
— Rule that the application is unfounded and dismiss it;
— Make a ruling as to costs in conformity with the provisions applicable.'

III — Submissions and arguments of the parties

The *applicant* maintains that in holding Internal Competition A/50, the appointing authority had not exhausted the possibilities of promotion which in fact existed since the applicant fulfilled — even in the opinion of his superiors — the conditions required for promotion. In fact the competition was held because of the appointing authority's concern to reserve the vacant post for a British national, contrary to Articles 7, 29 (1) (a) and 45 of the Staff Regulations, as well as to the third paragraph of Article 27, according to which 'No posts shall be reserved for nationals of any specific Member State'.

For this reason the competition procedure in question is vitiated by a misuse of powers, as is shown by the statement of the Secretary-General, that

the post to be filled had been reserved for a British national (offer of proof by a witness) and by the system of marking adopted in the Notice of Competition, especially as regards qualifications, the oral tests on the 'type of duties' and the 'knowledge of languages'. The application of this system of selection results in candidates of English mother tongue being favoured.

The *defendant,* after having pleaded the inadmissibility of the application, withdraws this plea in its rejoinder, in view of the judgment meanwhile given by the Court on 19 June 1975 in Case 79/74 *(Küster* v *European Parliament).*

On the substance of the case, having emphasized that no candidate can claim an absolute right to promotion, the defendant points out that the vacancy notice, whilst requiring a thorough knowledge of the English language, does not contains a condition that the candidate be of English mother tongue or that his knowledge of that language should be equal to that of his mother tongue. Moreover, the condition laid down is motivated by a functional criterion due to the requirements of the work of the parliamentary committees. Far from amounting to a 'disguised means' of favouring a particular nationality, this condition is solely based on the interests of the service.

Furthermore, the defendant opposes the acceptance of the offer of proof put forward by the applicant. It argues that the Secretary-General did not make the statement attributed to him and that the objectives pursued by the institution can be discerned only in decided and completed acts and not in statements made by officials.

In his reply the applicant states that whilst officials have no absolute right to promotion, it can nevertheless not be denied that they are 'eligible' for promotion. Respect for this eligibility requires that, in applying Article 29 (1) of the Staff Regulations, the consideration which it requires be undertaken with the greatest possible care, respecting all the interests of applicants for promotion. Moreover, one might justifiably wonder whether candidates entitled to promotion should not benefit, in the case of an internal competition, if not from preferential treatment in relation to other candidates, at least from an appropriate differential in marking.

Furthermore, the factual situation envisaged by Case 79/74 is not the same as that in the present case. Whilst the first case was concerned with the creation of a 'pool' of Heads of Division, in the case of Competition A/50 the recruitment procedure related to an isolated post.

Finally, the applicant points out that in the opinion of highly placed officials in the institution there is in the present state of the detailed list of posts no post of Head of Division still available for allocation to a German national. It is therefore clear that the consideration of the comparative merits of officials, required by Article 45 of the Staff Regulations, did not take place, contrary to the conditions laid down in that provision.

In its rejoinder, the *defendant* points out that in his final pleading the applicant by implication withdrew the submission based on a thorough knowledge of the English language. Since this withdrawal, prompted by the principles enunciated by the Court in its judgment of 19 June 1975 in Case 79/74, was nevertheless not a formal withdrawal, the defendant considers itself obliged to maintain its conclusion on this submission.

Moreover, as regards the submission based on the alleged infringement of Article 29 (1) (a) of the Staff Regulations, this was also rejected by the Court, in its judgment of 12 March 1975 in Case 23/74. The factual situation considered by the Court on that occasion was the same as that in the present case. The

difference emphasized by the applicant, that is to say, the fact that the competition which was the subject matter of Case 23/74 was held for the purpose of recruiting five Heads of Division, whilst the competition involved in the present case was held for that of selecting a single applicant, is without importance, since the conditions of recruitment contained in the Staff Regulations have to be respected in all circumstances.

Finally, as regards the submission relating to misuse of powers, the defendant recalls that the applicant appears on the list of suitable candidates for competition A/50 and emphasizes that the chosen candidate is not a British national.

IV — Oral procedure

The oral observations of the parties were heard at the hearing on 9 October 1975.

The Advocate-General delivered his opinion on 19 June 1975.

Law

1 By application submitted on 19 February 1975 under Article 91 of the Staff Regulations, the applicant asks the Court to annul the implied rejection by the European Parliament of his complaint of 18 October 1974 and consequently to annul Internal Competition A/50 of 30 September 1974, relating to a post of Head of Division (Grade A 3) with the Directorate-General for 'Committees and Interparliamentary Delegations'.

2 In support of his conclusions he submits that the competition procedure was irregular, in particular by reason of the appointing authority's decision to hold it without providing proof of compliance with the formalities laid down by Article 29 (1) (a) of the Staff Regulations.

3 In fact, according to that article, the appointing authority can only organize a competition internal to the institution such as provided for under subparagraph (b) of the paragraph in question where it appears impossible to fill the vacant post by way of transfer or promotion.

4 Since — even in the opinion of his superiors — the applicant fulfilled the conditions required for promotion to the vacant post and had submitted his application, it is alleged that such proof cannot be adduced, so that the decision to hold an internal competition was accordingly illegal.

5 The existence of several persons eligible for promotion or transfer may lead the appointing authority to the conclusion that the interests of the service and the impartiality of recruitment render an internal competition desirable.

6 The applicant's argument amounts to attributing to the assistant of an official whose post becomes vacant the right to succeed him wherever it appears from his file that he has the qualifications necessary to fill that post.

7 Both the interest of the service and the rights of other officials militate against the acceptance of such a claim.

8 The fact that the recruitment procedure in question had the purpose of filling a single post and not a number of individual posts is of no importance.

9 The submission must therefore be rejected.

10 The applicant also argues that the condition contained in the vacancy notice, laying down that 'for practical reasons, a thorough knowledge of English is required', is not justified by reasons based on the interests of the service but amounts to a disguised method of reserving the post in question for a particular nationality.

11 In support of this submission the applicant argues *inter alia* that the system of marking which the vacancy notice in question lays down for the oral test bearing on the 'knowledge of languages' shows the decisive importance attached to a thorough knowledge of English, which appears amongst the qualifications required in respect of a possible appointment.

12 For these reasons the notice in question is alleged to infringe the final paragraph of Article 27 of the Staff Regulations, according to which 'No posts shall be reserved for nationals of any specific Member State'.

13 Whilst the Staff Regulations prohibit the reserving of posts for nationals of any specific Member State, the appointing authority may nevertheless make its selection, when recruiting an official, dependent upon specific linguistic abilities required in the interests of the service.

14 In the present case the special nature of the tasks devolving on the secretariats of the parliamentary committees which have the task of assisting the members of these committees in their work, may justify a recruitment

based *inter alia* on a thorough knowledge of one of the national languages used by such members, who come from the national parliaments of the Member States.

15 More specifically, the recruitment of an official having a thorough knowledge of English may correspond to the requirements of the service resulting from the accession to the Community of the new Member States.

16 The information appearing in the written pleadings and that furnished in the course of the oral procedure do not make it possible to arrive at the conclusion in the present case that the recruitment of an official having a thorough knowledge of the English language is unjustified having regard to the nature and characteristics of the vacant post or the requirements of the service.

17 Besides, in laying down the condition in question the vacancy notice in dispute does not intend to refer to so thorough a knowledge that only officials whose mother tongue is English can possess it but allows it to be clearly understood, by specific reference to 'practical reasons' which justify such a condition's being imposed, that the level of linguistic knowledge required is one appropriate to the actual requirements of the service.

18 Moreover it is shown by the other 'qualifications and abilities' specified that the thorough knowledge of English does not constitute the only criterion determining the choice of the candidate to be appointed.

19 On the contrary, the notice of competition in question allows it to be understood that since such a choice can only result from the taking into consideration of several factors which are themselves justified in the interest of the services, the appointing authority must take all these factors into account.

20 This submission is therefore unfounded.

21 The application must therefore be dismissed.

Costs

22 Under the terms of Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs.

23 The applicant has failed in his action.

24 However, under the terms of Article 70 of the Rules of Procedure, the costs incurred by institutions in actions brought by servants of the Communities are to be borne by such institutions.

On those grounds,

THE COURT (First Chamber)

hereby

1. Dismisses the application;

2. Orders the parties to bear their own costs.

Monaco Donner O'Keeffe

Delivered in open court in Luxembourg on 29 October 1975.

A. Van Houtte
Registrar

R. Monaco
President of the First Chamber