OPINION OF MR ADVOCATE GENERAL LENZ DELIVERED ON 21 JUNE 1984 [1]

Mr President,
Members of the Court,

The staff case to be dealt with today deals essentially with the question of whether the seniority of an official who was previously a member of the temporary staff is to be calculated according to the rules laid down in the Staff Regulations on *promotion* or according to the provisions on *recruitment.*

A — The applicant, Angel Angelidis, is a Greek national born in 1946. His occupational background may be summarized as follows:

He obtained a degree from the School of Higher Agricultural Studies, Athens, in January 1970 and then did two years' military service. From October 1972 to June 1974 he attended the Technical High School for Advanced Agricultural Studies, Madrid, and was awarded a doctorate in agriculture there. From October 1974 to June 1975 he was enrolled at the University of Montpellier I and obtained the degree of Doctor of Economics there. According to the information supplied by him, he worked both during that period and later as an adviser to several private agricultural undertakings. From 1975 he also worked for several Greek administrative authorities which dealt, among other things, with questions affecting Greece's accession. In February 1979 he was appointed head of the agriculture division in the Greek Ministry for Coordination.

By a contract of 11 June 1979, Mr Angelidis entered the service of the Commission as a member of the temporary staff in the capacity of a translator in Grade L/A 7, Step 3. On 11 August 1980, a new contract was concluded whereby Mr Angelidis was appointed, with effect from 1 January 1980, as an administrator in Grade A 7, Step 3, in the Directorate General for Agriculture.

Having been successful in an open competition held for the purpose of recruiting principal administrators of Greek nationality, Mr Angelidis, by a Commission decision of 4 May 1982, effective from 1 April 1982, was appointed as a probationary official in Grade A 5, Step 1, and assigned to the post which he already occupied.

On 5 July 1982 he submitted a complaint against this classification pursuant to Article 90 (2), claiming that by virtue of his having 12 years' experience, he should have been classified, pursuant to the second paragraph of Article 32 of the Staff Regulations, in the third step of his grade.

As no decision was given on that complaint within the prescribed time and as the applicant was appointed as an established official in Grade A 5, Step 1, by a Commission decision of 14 December 1982, he brought an action on 1 February 1983 claiming essentially that the Court should,

(a) annul the implied rejection of his complaint and the decision relating to his step classification,

1 — Translated from the German.

(b) declare that he should be classified in Step 3 of Grade A 5;

(c) order the defendant to pay the costs.

B — My view on those claims is as follows.

1. The first claim

(a) In the applicant's view, his classification pursuant to Article 46 of the Staff Regulations in the first step of Grade A 5 is incorrect. In his opinion, the classification made when he was appointed as a probationary official and later as an established official should not have been made according to the rules governing promotion but rather, in accordance with the legal provisions referred to in the instrument of appointment of 4 May 1982, according to the rules governing recruitment. He states that, in view of the fact that he has had 12 years' experience since obtaining his first University degree, he should have been granted, pursuant to the second paragraph of Article 32 of the Staff Regulations, additional seniority of 48 months, which is equal to an additional two steps. This contention is based in particular on Article 5 (1) of the Commission decision of 1973 on the Criteria applicable to Grade and Step Classification on Recruitment (hereinafter referred to as the "Classification Criteria") and on the table annexed to that decision, which shows that even 11 years' experience would have entitled him to classification in the third step of his grade. The classification which was made is also contrary to Article 5 (3) of the Staff Regulations which provides that identical conditions of recruitment and service career are to apply to all officials belonging to the same category or the same service. However, he has been placed at a disadvantage compared to other, external, candidates who took part in the same open competition because their experience was fully taken into account for the purposes of their original classification in accordance with the second paragraph of Article 32. In the applicant's view, his classification also infringes general principles of law, and in particular breaches the principles of equality, objectivity and distributive justice and the principle *patere legem quam ipse fecisti.*

In the defendant's view, on the other hand, Article 32 of the Staff Regulations can only apply, in accordance with Article 15 of the Conditions of Employment of Other Servants of the European Communities (hereinafter referred to as "the Conditions of Employment"), to the initial classification of a member of the temporary staff, but not to the appointment of such a person as an official. That provision can also not be used in such a case, in the defendant's opinion, if the principle of career continuity is to be respected. The principles of continuity and equal treatment, which are the basis of the Community's civil service law, can best be respected by applying by analogy the rules governing promotion. Finally, Article 8 of the Classification Criteria, which provides that, in the normal case, a member of the temporary staff appointed as a probationary official is entitled to the same grade and step as he had before that appointment, is also the expression of a general principle according to which the appointing authority, in such a case, has no grounds for making a new classification.

(b) For a whole series of reasons, that argument of the defendant is unconvincing. It may be objected first that the Classification Criteria which, as the Court has declared *inter alia* in the *Blomefield*, *Michael* and *Buick* judgments [1], are an internal directive; as such, they are not capable of derogating from the mandatory rules of the Staff Regulations. They are accordingly also not capable of filling an alleged lacuna in the Staff Regulations, but may only be construed in the light of those superior rules.

(c) The fact that Article 46 is to be found in Chapter 3 of the Staff Regulations which, as the heading shows, deals with reports, advancement to a higher step and *promotion* of officials, also militates against its application by analogy in this case. It is clear from Article 4 of the Staff Regulations that there are two methods of filling posts, appointment and promotion, the latter being, according to the definition in Article 45, appointment to the next higher grade. Whilst the concept of "appointment", as Mr Advocate General Reischl in particular correctly emphasized in his Opinion in the *Van Belle* case [2], covers all possible forms of appointment to vacancies, including recruitment as an official, the terms and the position of Article 45 presuppose that the person to be promoted is already an official within the meaning of Article 1 of the Staff Regulations. Accordingly, Article 45 (1) provides that promotion is to be exclusively by *selection from among officials* who have completed a minimum period in their grade. Article 45 further provides that the selection is to be made after consideration of the merits of the *officials* eligible for promotion and of the reports on those *officials*.

The only persons who may be appointed as officials are those who, in accordance with the provisions of Article 28 of the Staff Regulations, meet, *inter alia*, the conditions of a competition as provided for in Annex III or those who have been recruited as officials in accordance with the prerequisites laid down in Article 29 (2) of the Staff Regulations.

Since the applicant, until his recruitment as a probationary official, was in the service of the Community not as an official but only as a member of the temporary staff on a contractual basis, it is not the rules governing promotion but rather those governing recruitment which must be applied to his case. The fact that the applicant is obliged, pursuant to Article 34 of the Staff Regulations, to serve a probationary period before being appointed as an established official also supports this conclusion.

(d) Even if it is accepted, contrary to that general view, that the appointment of a member of the temporary staff, whose legal position is governed by the Conditions of Employment, to be an official, who is subject to the Staff Regulations, is essentially governed by Article 45 and the following articles, this case cannot in my view be regarded, for a series of other reasons, as a *promotion* within the meaning of those provisions.

1 — Judgment of 1 December 1983, Case 190/82 *Adam Blomefield* v *Commission of the European Communities* [1983] ECR 3981;

Judgment of 1 December 1983, Case 343/82 *Christos Michael* v *Commission of the European Communities* [1983] ECR 4023;

Judgment of 29 March 1984, Case 25/83 *Adam Buick* v *Commission of the European Communities* [1984] ECR 1773;

2 — Judgment of 5 December 1974, Case 175/73 *Claudette Van Belle* v *Council of the European Communities* [1974] ECR 1361.

According to the definition in Article 45 (1) a promotion is affected essentially by appointment of the official to the *next higher grade* in his category.

Application of Article 46 by analogy makes no sense when an official is classified in the *next grade but one*, which cannot therefore be assessed either in accordance with Article 45 (1) or Article 45 (2).

Finally, it was established in the *Williams* judgment [1] that Article 46 is applicable only where the career is organized in a consistent manner from the outset. The applicant in that case was first of all appointed as an official of the Audit Board in Grade A 7 and was transferred to the Court of Auditors when it was being set up. He was first appointed to Grade A 7, Step 3, and later promoted to Grade A 6, Step 1. During that period the Court of Auditors recruited officials and other employees not already in the service of the Communities, who were classified on the basis of the criteria for the appointment and classification of staff which had been laid down in the meantime. In the applicant's view the classification criteria thus established led to discrimination, in so far as the classification of new officials and other staff was more favourable than that of the existing officials transferred from the Audit Board. The Court of Auditors argued that its decision was justified since the applicant had been transferred and promoted in accordance with the Staff Regulations and especially Article 46 thereof.

1 — Judgment of 6 October 1982, Case 9/81 *Calvin Williams* v *Court of Auditors of the European Communities* [1982] ECR 3301.

The Court of Justice had therefore to decide whether the applicant's qualifications and experience entitled him, in the light of the new criteria for the classification of staff, to a higher step, notwithstanding the provisions of Article 46. He explained that the provisions of the Staff Regulations and especially Article 46 thereof were based on the principle of equality of treatment as between officials of the same category which is embodied in Article 5 (3) of the Staff Regulations and is of central importance to the legal provisions governing employees of the European Communities. Since the career of the official concerned was not organized in a consistent manner from the outset, the Court of Justice finally declared that the Court of Auditors was not entitled to rely, in the applicant's case, upon Article 46 and ordered it to classify the applicant in the appropriate step, taking account of his experience and possibly of his qualifications in conformity with the criteria for classification.

No less can be done in this case, in which the application by analogy of Article 46 would lead to the applicant's being put at a disadvantage compared to other candidates, not hitherto in the employment of the Community, who took part in the same competition and whose qualifications and experience were or would be taken into account on the basis of Article 32.

(e) Contrary to the defendant's view, the application of Article 32 of the Staff Regulations to the present case does not breach the principle of career continuity in the legal provisions governing employees of the European Communities and does not lead to unequal treatment of those officials who were recruited under the same conditions and whose step classification upon promotion must be carried out according to the

provisions of Article 46. One could only speak of such a breach if all periods spent in the employment of the European Communities could be regarded as part of a career organized in a consistent manner. The very existence of the Staff Regulations of Officials of the European Communities and the differently drafted Conditions of Employment of Other Servants shows that there can be no question of that. It is certainly true that, under Article 15 of the Conditions of Employment, initial grading of members of the temporary staff takes place in accordance with Article 32 of the Staff Regulations, and that members of the temporary staff are in many respects placed on the same footing as officials as regards their rights and obligations. A distinct difference exists however between the two categories *inter alia* inasmuch as Title III of the Staff Regulations provides for a *career* for officials based on the principle of equal treatment, whilst corresponding provisions for members of the temporary staff are not to be found in the Conditions of Employment. According to the third paragraph of Article 10 of those conditions, temporary staff may be assigned to a post carrying a higher grade than that at which they were engaged only by means of an agreement supplementary to their contract of service. It is only in that situation that Article 15 of the Conditions of Employment refers to Article 46 of the Staff Regulations in connection with step classification. What is noteworthy is that, whilst the first paragraph of Article 10 of the Conditions of Employment provides that the provisions of the Staff Regulations concerning the classification of posts in categories, services and grades and the assignment of officials to posts is to apply by analogy, it specifically excludes Article 5 (3) of the Staff Regulations which, *inter alia*, contains the principle of equal treatment as regards the service career of officials. The *Plug* judgment [1], in which the Court recognized that even though a series of temporary contracts have been concluded with a temporary employee, a further contract may be concluded with him providing for a lower grade than the previous ones, also shows that the rules of the Staff Regulations concerning careers cannot be applied by analogy to temporary servants.

It is also incompatible with the theory of career continuity advanced by the defendant that Article 29 of the Staff Regulations provides that before a vacant post in an institution is filled, the possibility of filling it by the promotion or transfer of *officials* within the institutions must first be considered and only then is the possibility of holding a competition within the institution, in which temporary exployees may also take part, to be considered. This procedure makes clear that temporary employees are in a different position from officials under the Staff Regulations and also justifies their being classified in step according to Article 32 and not, as in the case of officials, according to Article 46.

(f) Finally, that fact also makes it impossible to regard Article 8 of the Classification Criteria as the expression of a general principle to the effect that where a temporary employee is appointed as an official by the application more or less by analogy of Article 46 of the Staff Regulations, there is no justification for carrying out a new step classification under Article 32 of the Staff Regulations. That interpretation is also contradicted by the fact that this provision is contained in the Commission

1 — Judgment of 9 December 1982, Case 191/81 *Onno Plug* v *Commission of the European Communities* [1982] ECR 4229.

Decision on Criteria applicable to Grade and Step Classification upon Recruitment which *inter alia* is expressly based on Article 29 and the following articles of the Staff Regulations and which is intended to ensure that all candidates enjoy equal treatment with regard to the *initial classification* which is carried out at the time of appointment as a probationary official. Furthermore, it is not logical to seek to extract from that provision, which is based on the normal case of the appointment of a temporary employee as an official *in the same grade*, a general principle which also applies to classification in a *higher* grade.

Correctly understood, that provision can only be interpreted in the light of the second paragraph of Article 32 of the Staff Regulations as meaning that when a temporary employee is appointed as an official in the same grade, the appointing authority must also take into account, in the application of the second paragraph of Article 32 of the Staff Regulations and Article 5 of the Classification Criteria, the experience acquired by the candidate in question whilst a member of the temporary staff of the Communities. It must be granted in favour of the defendant that such an interpretation might theoretically lead, because of the limitation to the third step contained in the second paragraph of Article 32 of the Staff Regulations, to a candidate who as a temporary employee was already classified in a high step and who was appointed as an official in the same grade, being placed at a disadvantage. Such a disadvantage may however be overcome by making use of the possibility offered by Articles 2 and 3 of the Classification Criteria which allow such candidates, on account of long experience which would cause them to be classified in a high step, to be classified in a higher grade.

(g) It must therefore be stated that the classification of the applicant contained in the defendant's decisions of 4 May and 14 December 1982 ought not to have been effected by the application by analogy of Article 46 of the Staff Regulations dealing with promotion and that it is therefore incorrect. Instead of making a mathematical calculation of the step in accordance with that provision, which is based on the idea of officials having a certain seniority, the defendant should have taken into account and reassessed, in accordance with the second paragraph of Article 32 of the Staff Regulations read together with Article 5 of the Classification Criteria, all the applicant's experience from the time of his first university degree. Contrary to that legal basis referred to in the instrument of appointment of 4 May 1982, the defendant admits that it did not make use of its *discretionary power* and, in particular, it did not consult the Grading Committee provided for in Article 6 of the Classification Criteria. Consequently, the decision to classify the applicant in Step 1 of Grade A 5, taken in connection with his appointment as an official, must, in my opinion, be annulled on the grounds that it infringes the binding provisions of the Staff Regulations. The fact that the defendant considers that the Grading Committee would not have come to a different decision cannot change that result in any way. The sole decisive factor is that the appointing authority unquestionably did not exercise the discretion granted to it and the Grading Committee, which ensures that staff representatives participate in the decision, was not involved in the assessment.

2. The remaining claims

(a) The applicant claims further that the Court should declare that, on

account of his 12 years'experience, he ought to have been classified in Step 3 of Grade A 5. In his view, the entire period between the time when he was awarded his first university degree in January 1970 and his appointment as an official in April 1982 must be recognized as relevant experience.

In the defendant's opinion, on the other hand, at most the period following the applicant's appointment as an adviser to the Greek Ministry for Co-ordination in October 1975 may be regarded as relevant experience within the meaning of Article 32 of the Staff Regulations and the Classification Criteria. In the period before that, the applicant was engaged in academic work and doing his military service.

(b) It must briefly be commented with regard to this argument that, under Article 32 of the Staff Regulations, the appointing authority has a wide *discretion* as to whether or not to grant additional seniority in the light of the training and special experience of a candidate. The defendant, in Article 5 of the Classification Criteria, has limited its discretion to do this in such a way that where a candidate has experience of a certain length, he is to be granted additional seniority.

It is true that according to the Staff Regulations only "special experience" may be taken into account. The experience which can be taken into account is defined as follows in Article 2 of the Classification Criteria:

"Professional experience with regard to the post to be filled shall be assessed on the basis of all the activities in which the candidate has engaged before recruitment."

Since the appointing authority has therefore a wide discretion as to what part of a candidate's experience it will regard as relevant, the Court cannot substitute itself for that authority and declare that the applicant must be classified in a given step. It can at most order the defendant to make a fresh assessment of the applicant's seniority in the light of the Classification Criteria.

(c) In view of the solution here proposed, it is not necessary to arrive at a decision on the further claim that the defendant be ordered to bring the applicant's legal situation into harmony with the provisions of the Staff Regulations and the Classification Criteria. The defendant is required automatically to take the necessary measures to comply with the judgment of the Court.

(d) If the case is to be so decided, the defendant must be regarded as having essentially failed its submissions. It must thus be ordered to pay the costs of the proceedings as applied for in the applicant's pleadings.

C — In conclusion, I propose therefore that the classification of the applicant in Step 1 of Grade A 5 effected by the Commission's decisions of 4 May and 14 December 1982 be annulled and that the defendant be ordered to define afresh the applicant's step classification in the light of the second paragraph of Article 32 of the Staff Regulations and the Commission Decision of 1973 on the Criteria applicable to Grade and Step Classification upon Recruitment. The defendant should in addition be ordered to pay the costs.