On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Staff Regulations of Officials, especially Article 7;
Having regard to the Protocols on the Statute of the Court of Justice;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application both as regards the principal and the alternative claim.**

2. **Orders the parties to bear their own costs.**

Trabucchi Pescatore Kutscher

Delivered in open court in Luxembourg on 16 December 1970

A. Van Houtte — A. Trabucchi

Registrar — President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL DUTHEILLET DE LAMOTHE DELIVERED ON 19 NOVEMBER 1970[1]

Mr President,
Members of the Court,

In spite of nearly 25 years' experience in litigation in public office there is always a certain sadness for me when I give an opinion in a case between a senior official and the administration which he serves.
This is all the more so where the official is one of the legal advisers of that administration.
Indeed the very existence of such cases shows that something is wrong or has gone wrong in the relations between the administration and its principal servants, where relations should be ones of mutual confidence.
Mr Prelle is an official in Grade A4 who

1 — Translated from the French.

carries out the duties of a legal adviser in the legal department of the Commission.

In April 1969 one of his colleagues, Mr Marchini-Camia, obtained leave on personal grounds and from then on it was Mr Prelle who carried out the duties formerly performed by his colleague and, it seems, still carries them out today.

On 3 October 1969 Mr Prelle asked the President of the Commission to grant him the differential allowance provided for by Article 7 (2) of the Staff Regulations of Officials of the Community.

That article provides as follows—I quote:

> 'An official may be called upon to occupy temporarily a post in a career bracket in his category or service which is higher than his substantive career bracket. From the beginning of the fourth month of such temporary posting, he shall receive a differential allowance equal to the difference between the remuneration carried by his substantive grade and step and the remuneration he would receive in respect of the step at which he would be classified in the starting grade if he were appointed to the career bracket of his temporary posting.'

Mr Prelle thought that this article was applicable to him.

He maintained, and continues to maintain, that 'when Mr Marchini-Camia went on leave he held Grade A3. His post therefore is connected with a career bracket higher than mine as I only hold Grade A4 and thus belong to the career bracket A4–A5'.

However, the departments of the Commission did not find this argument convincing. Therefore Mr Prelle brought this action before the Court for, on the one hand, the annulment, with all its legal consequences, of the implied or express decisions rejecting the requests made by him and, on the other hand, and in the alternative, for reparation for the damage caused to him by the behaviour of the Commission towards him.

First, as to the conclusions in the application for annulment, it is my view that these conclusions should be rejected for two reasons, either of which would be sufficient on its own.

The first reason is that in this case the applicant can show no express decision of the administration giving him the temporary posting which he held.

In its judgment of 9 July 1970 in Case 35/69, *Herta Grosz (nee Lampe)* v *Commission of the European Communities*, the Court held that in order to be able to claim the allowance under Article 7 an official must have been called upon to occupy temporarily a higher post by an *express decision* or with the *express agreement* of the appointing authority.

As Mr Advocate-General Roemer emphasized in his opinion for that case, *actual* performance of the duties of another post even on the instruction of an immediate superior cannot be sufficient.

For, as Mr Roemer said, a contrary decision would to a certain extent mean that, to use his very apt expression, 'the power of organization of the appointing authority is ... undermined'—and the appointing authority is not necessarily, and indeed is only rarely the immediate superior of the person concerned.

It may be noted in addition that this requirement of an express decision does not create the risk, as one might fear at first sight, that the competent authorities might escape the obligations imposed on them by the Staff Regulations.

An official who has been given a task by his immediate superior and who considers that that task is in fact a temporary posting to a higher post may at any time, even before the expiry of the time from which an allowance would be payable to him, request the appointing authority for an express decision granting him the temporary posting. If his request is rejected or unanswered he may refer the express or implied rejection to the Court.

In this case Mr Prelle neither asked for nor obtained a decision by the appointing authority granting him a temporary posting; therefore, for this reason alone he cannot claim the allowance provided for by Article 7 even if in fact, as is not denied, he assumed the duties of Mr Marchini-Camia during the latter's absence.

Equally, however, there is another reason, which in my opinion must lead to the rejection of Mr Prelle's application for annulment.

The conditions for the application of Article 7 are not fulfilled in this case.

In fact that article does not provide for the payment of a temporary allowance for every case in which there is a temporary posting.

For the provisions to be applicable the post held by the temporary replacement must be a 'post in a career bracket which is higher than his substantive career bracket'.

The applicant maintains that this condition is fulfilled in this case because the official for whom he was deputizing was in Grade A3 before he went on leave and thus was in a higher career bracket than the A4–A5 career bracket to which the applicant belongs.

However, this reasoning would only be correct if posts corresponding exactly to career brackets and if therefore to each grade or rather to each career bracket there were necessarily a corresponding post or group of posts.

In fact this is not the case.

It must be said that the Staff Regulations are very unclear on this point and I am very pleased to hear from the representative of the Commission that they are being revised.

It appears that, according to the wording as it stands, there is a sort of compromise between two main types of organization in the public service:

— the type which is chiefly, and often solely, based on the '*post*' which generally has unfavourable consequences for the careers of officials (consequences which have generally led trade unions to fight against the adoption of this system);

— on the other hand, the type of organization which is one of the foundations of the French system where there is almost no connexion between the '*grade*', the personnel attribute of an official, and the '*post*', that is to say, the duties which are entrusted to him.

In the present Staff Regulations it appears that an attempt was made to mix the two and to add a third element, that of a career bracket.

It is true that Article 5 (4) of the Staff Regulations does provide for the establishment of tables of basic posts and corresponding career brackets, which sometimes cover several grades and sometimes consist of a single grade, and that article further refers to an annexed table determining basic posts and corresponding career brackets.

This provision does not however deal with the problem with which you are faced, namely the interpretation of the phrase in Article 7, 'post in a career bracket ... which is higher than his substantive career bracket'.

Should it be interpreted, as the applicant asks, as meaning 'a post occupied by a person in a career bracket higher than that of the temporary replacement'?

I prefer the latter interpretation for two reasons:

The first is that each time that the Court has had to rule on the application of Article 7 it has decided that the provision was to be interpreted strictly.

This is quite understandable as the article gives officials of the Community a substantial advantage which is not given by most national legislations.

The second and, for me, more important reason is that I feel that by introducing the idea of 'career bracket' between the ideas of 'post' and 'grade' and by leaving it up to each institution to fix in the form of a table the correspondence between 'post', 'grade' and 'career bracket', the authors of the regulations, while retaining a preference for a system based on 'grade' nevertheless wanted to keep the system flexible and in certain cases to allow a distinction to be made, particularly at the higher levels, between 'grade' or 'career bracket' on the one hand and 'post' on the other.

The result appears to be that for Article 7 to be applicable a post may only be held to be attached to a career bracket higher than that of the party concerned in two cases:

1. Where in law the post may only be occupied by someone in a higher career bracket than that of the temporary replacement;

2. Where in fact responsibilities involved in the post could, in view of the definitions in the table of basic posts in an annex to the Staff Regulations, only be entrusted

to an official in a career bracket higher than that of the temporary replacement.

The first point is clear and need not be discussed.

I agree that the second point is more open to doubt, but after due consideration I feel it should be accepted for the following reason:

As has been said, I do in fact believe that the regulations leave the competent authority some freedom to organize its service either on a strict basis of seniority where each post is restricted to one career bracket, or else on a more flexible basis where there may be some distinction between the career bracket and the post.

This is in fact how the practice developed. As you have heard in the course of the proceedings, there is a strict correspondence between posts and career brackets in most of the departments of the Community; in others this correspondence does exist but express provision is made for officials who, because of their age, their seniority or their experience, belong to different career brackets to assume identical or very similar duties nevertheless. Finally, in other departments such as the legal department or the spokesman's department of the Commission there is no corresponding table.

I do not think that this system, which is flexible and has certain advantages, is illegal.

However it is also necessary that the freedom thus granted to the responsible authorities, to organize their departments as best they can in the general interests of the Community should never result in depriving officials of the guarantees which they have been given.

The price of the freedom which in my opinion can and must be left to the responsible authorities in this respect is review by the Court of the use which they make of it.

It is not only a review of a possible misuse of powers or rather, in the modern, better suited terminology, a possible misuse of procedure, which would be highly unlikely in this case, but also a review to ensure that the imprecise but real rights, which officials undeniably derive from the combined provisions of Article 5 (1) and (4) of the Staff Regulations and from the annexed table of basic posts, have been observed.

In other words, if we reject the applicant's view and hold that the administration does not have to reclassify all the posts in terms of career brackets, we decide that, if it is not done, the Court may review whether, because of the nature of the responsibilities involved in the post, it is in fact, by virtue of Article 5 and the annexed table, one of those which can only be held by an official in a career bracket higher than that of the temporary replacement.

If you accept this, there should be no difficulty in the present case in finding that the post occupied by Mr Marchine-Camia, in which Mr Prelle acted as his replacement, was neither in law nor in fact one which could only be occupied by officials of A3 career bracket.

There can be no possible doubt in law.

In fact, it is equally certain and two circumstances appear to show this perfectly.

The first is that Mr Marchini-Cambia held the same post when he was only in the career bracket A4–A5 and that he did not change his duties when he was promoted to grade and career bracket A3.

The second is that, when we examine the responsibilities corresponding to this post, it becomes clear that they were of the same sort as those of Mr Prelle, as there were a number of problems for which the two officials were jointly competent.

I believe therefore that the conditions necessary for Article 7 to be applicable were not fulfilled in this case. This is the second reason for deciding that Mr Prelle's conclusions in his application for annulment should be rejected.

There remain the conclusions in the application for compensation.

The applicant alternatively requests, in the event of your not recognizing his right to the allowance under Article 7 of the Staff Regulation that the Community be ordered to pay him compensation for the wrongful act or omission on its part in not giving him Mr Marchini-Camia's post on a temporary basis by an express decision under Article 7 of the Staff Regulations.

However, there are two factors which lead me to recommend the rejection to these conclusions:

1. For the reasons given above Article 7 of the Staff Regulations was not, in my opinion, applicable. Therefore the appointing authority was not under an obligation to take a decision to entrust to Mr Prelle the post of Mr Marchini-Camia on a temporary basis under the conditions set out in Article 7.

2. It does not appear that Mr Prelle can show such damage as to give him a right to compensation.

If my opinion is followed, all the conclusions, both principal and alternative, submitted by Mr Prelle will be rejected.

As to the costs, it is my opinion that in view of all the circumstances of the case, half the costs which would normally be paid by Mr Prelle should be borne by the Commission. In fact in view of the evidence recently heard by the Court, I feel that even if Mr Prelle's application is dismissed it has perhaps helped to make certain imperfections in the Staff Regulations clearer and to encourage the responsible authorities to eradicate them.

I am therefore of the opinion that:

1. the application should be dismissed;

2. one half of the costs incurred by Mr Prelle should be paid by him, the other half to be paid by the Commission of the European Communities.