# OPINION OF MR ADVOCATE GENERAL DA CRUZ VILAÇA
delivered on 1 April 1987 *

*Mr President,*
*Members of the Court,*

1. This application seeks the annulment of a decision adopted by the Secretary-General of the European Parliament on 25 February 1985 and based on a recommendation made by the Advisory Committee on Promotion in December 1984, promoting to Grade A 6 four A 7 officials from a list of 24 candidates, and failing to promote in particular the applicant and four other officials who, like him, had been recruited by open competition and had greater seniority in Grade A 7.

2. By contrast, the four officials promoted on the recommendation of the Advisory Committee on Promotion had attained Grade A 7 by passing internal competitions and had greater seniority in the service but less seniority in grade and category.

3. At the same time, no periodic report had been drawn up on the applicant or on the four officials who were in the same position as he was, whereas reports had been drawn up on the officials who were actually promoted.

4. By letter of 19 February 1985, the applicant and his four colleagues unsuccessfully tried to prevent the recommendation of the Advisory Committee on Promotion from being followed.

5. When he became aware of the decision taken by the Secretary-General of the Parliament, John Vincent submitted to him on 18 June 1985 a complaint claiming that the promotion procedure was defective and requesting that he should be promoted to Grade A 6 with effect from 1 October 1984.

6. On 16 December 1985 the President of the European Parliament replied to that complaint, informing the applicant that all the necessary steps had been taken to draw up his periodic report without delay, so as to enable his case to be reconsidered.

7. However, considering that his complaint had already been rejected by implied decision, within the meaning of Article 90 (1) of the Staff Regulations, the applicant brought the present action on 14 January 1986.

8. Subsequently, the periodic report on the applicant was drawn up and submitted to the Advisory Committee on Promotion which, after fresh deliberation, maintained its previous position, on the basis of which, on 16 July 1986, the Secretary-General of the Parliament confirmed his decision of 25 February 1985.

## I — The admissibility of the application

9. The Parliament claims firstly that the application is inadmissible on the ground that it has no purpose or is, at least, premature.

10. The defendant does not deny that the period of four months prescribed in the

* Translated from the Portuguese.

Staff Regulations for the reply to the complaint submitted by the applicant on 18 June 1985 had elapsed.

11. However, it maintains that the letter written by the President of the Parliament on 16 December constituted an express decision by which the administration had acceded to the applicant's request, in so far as it stated that his periodic report would be drawn up and his case reconsidered.

12. Since the period prescribed for bringing an action was still running at that time, the Parliament maintains that the applicant should not have brought an action or at least should not have proceeded with it.

13. In my view that objection is unfounded.

14. The Court has already stated that the periods laid down in Articles 90 and 91 of the Staff Regulations are mandatory and are intended to ensure clarity and certainty in legal situations and it is therefore not up to the parties most directly concerned to extend them at their convenience,[1] regardless of the party which will benefit therefrom.

15. Once the four-month period within which the Parliament should have replied to the complaint submitted by the applicant in this case had expired, the three-month period prescribed for an appeal started to run in accordance with the last sentence of Article 90 (2) and the second indent of Article 91 (3) of the Staff Regulations.

16. Since there was no express decision rejecting the complaint after its rejection by implied decision but before the period for lodging an appeal had expired, the period for lodging the appeal did not start to run afresh, as provided for by the last sentence of Article 91 (3).

17. On the other hand, contrary to what the defendant maintains, it does not seem to me that the letter of 16 December from the President of the European Parliament may be considered a wholly favourable reply to the applicant's complaint, capable of rendering his application devoid of purpose.

18. In his complaint, the applicant expressly requests that he be promoted to Grade A 6 with effect from 1 October 1984, and the reply merely states that his periodic report will be drawn up and his case will be reconsidered.

19. It is true that, since the applicant's periodic report had not yet been properly drawn up or the opinion of the Advisory Committee on Promotion obtained, the appointing authority was not in a position to adopt the requested decision before those documents were prepared.

20. However, since it is equally plain that the original promotions were not annulled or even suspended, the appointing authority's decision contained in the letter of 16 December 1985 represents only an intermediate step and cannot change the legal or factual circumstances of the applicant as at the time of the implied rejection of his complaint, nor can it change the legal position by extending the period for bringing an action.

21. Under those circumstances, if the applicant had not applied to the Court within the three-month period but had awaited a fresh decision unfavourable to him before doing so,[2] he would have run the risk that his application might be dismissed as being out of time.

1 — Judgments of 12 December 1967 in Case 4/67 *Collignon* v *Commission* [1967] ECR 365 at p. 372; of 14 April 1970 in Case 24/69 *Nebe* v *Commission* [1970] ECR 145 at pp. 151 and 152; of 7 July 1971 in Case 79/70 *Müllers* v *Economic and Social Committee* [1971] ECR 689 at p. 698; and of 17 February 1972 in Case 40/71 *Richez-Parise* v *Commission* [1972] ECR 73 at p. 79.

2 — See the judgments cited under footnote 1.

22. I therefore consider that the application must be held to be admissible.

## II — The substance of the applicant's claims

23. In his application the applicant claims that the Court should:

(1) Annul the decision of the appointing authority of 25 February 1985 and the promotions of the four officials to which it relates;

(2) Annul the implied decision rejecting the applicant's complaint contained in the letter of 18 June 1985;

(3) Order the European Parliament to reopen the promotion procedure on the basis of the list of officials eligible for promotion and to fill the four available A 6 posts with effect from 1 October 1984 with due regard for Article 45 of the Staff Regulations and the principle of non-discrimination, as customarily observed by the institution;

(4) Order the defendant to pay the costs.

24. In support of his application, the applicant makes the following submissions:

(1) The contested decision is contrary to Article 45 of the Staff Regulations;

(2) It disregards the institution's previous practice;

(3) It is in breach of the principles of equality and non-discrimination between officials.

25. I shall examine those submissions one by one.

A — 26. Let me start with the argument based on Article 45 of the Staff Regulations.

27. According to that provision, promotion is to be exclusively by selection from among officials who have completed a minimum period in their grade, after consideration of the comparative merits of the officials eligible for promotion and of the reports on them.

28. Article 43 provides that 'the ability, efficiency and conduct in the service of each official . . . shall be the subject of a periodic report made at least once every two years as provided for by each institution'.

29. The importance of the periodic report has been stressed by the Court of Justice in the following terms: 'This document must compulsorily be drawn up for the good administration and the rationalization of the services of the Community and in order to safeguard the interests of officials. It constitutes an indispensable criterion of assessment each time the official's career is taken into consideration by the administration'.

30. 'One of the bounden duties of the administration is therefore to ensure that that report is drawn up periodically on the dates laid down by the Staff Regulations and that it is drawn up in proper form'.[3]

31. The Court has concluded that 'consideration of the merits of candidates whose periodic reports had already been drawn up under Article 43 and of others in whose case this had not yet been done fails

3 — Judgment of 14 July 1977 in Case 61/76 *Geist* v *Commission* [1977] ECR 1419 at p. 1435, paragraphs 44 and 45. See also judgment of 5 June 1980 in Case 24/79 *Oberthür* v *Commission* [1980] ECR 1743 at p. 1758; judgment of 18 December 1980 in Joined Cases 156/79 and 51/80 *Gratreau* v *Commission* [1980] ECR 3943 at pp. 3953 and 3954; judgment of 27 January 1983 in Case 263/81 *List* v *Commission* [1983] ECR 103 at p. 117.

to meet the requirements of Article 45 with regard to consideration of the comparative merits of officials'.[4]

32. In the present case, the applicant entered the service of the Parliament on 1 May 1982 and was established on 1 February 1983, but his first periodic report was not drawn up until 25 March 1986.

33. By contrast, the periodic reports on a number of officials whose names appeared on the list for promotion — including those who were promoted — had been drawn up within the prescribed period.

34. The combination of those facts amounts to an infringement of Articles 43 and 45 of the Staff Regulations, rendering the promotion procedure in question defective.

35. The reference made to the applicant's probationary report by counsel for the defendant — though not until the hearing — cannot alter that conclusion, since the purpose of that report is different; in any event, the promotion decision was adoped on 25 February 1985, more than two years after the probationary report on the applicant was drawn up, and it does not seem fair to substitute oral or written information supplied by the applicant's superiors, on which he was given no opportunity of commenting, for the periodic report covering such a long period.

36. It is none the less clear that, following the applicant's complaint and after this action was brought, the periodic report on the applicant was prepared and completed on 25 March 1986. The report was given to the Advisory Committee on Promotion, which on 10 April 1986 undertook a fresh assessment, on this occasion comparing him with the other candidates, and decided to confirm its previous conclusions 'having regard to the limited possibilities for promotion and the limited seniority of the person concerned'. On the basis of that finding the Secretary-General of the European Parliament in his capacity as the appointing authority confirmed, by decision of 16 July 1986, the decision of 25 February 1985 contested by the applicant.

37. In these circumstances, two solutions are theoretically available.

38. Firstly, the promotions originally decided upon could be annulled, on the ground that they were vitiated by an irreparable defect by reason of the infringement of an essential procedural requirement. Even if it were considered that such annulment would not affect the conclusions of the Advisory Committee on Promotion of 10 April 1986 or the appointing authority's decision of 16 July 1986, the latter could not then be regarded as a confirmatory decision but would take effect only *ex nunc*, so that the seniority of the officials promoted would be calculated only from the date on which the decision was adopted with all the consequences which that would entail.

39. Support for that solution could possibly be found in the earliest judgments of the Court[5] on this subject and it would be consistent with a view which might be prompted by the rules of administrative law applicable in some Member States.

40. However, in the present circumstances, another solution seems preferable and also

4 — Judgment of 23 January 1975 in Case 29/74 *De Dapper* v *Parliament* [1975] ECR 35 at pp. 41 and 42.

5 — For example, judgment in *De Dapper*, cited above; see also the judgment cited by Mr Advocate General Mayras in his Opinion in *Gratreau* [1980] ECR 3961.

more consistent with recent judgments of the Court, such as *Gratreau*, *List* and even *Oberthür*.

41. Thus — even more clearly than in *List*,[6] since the applicant in the present case has not apparently challenged the periodic report on which the reconsideration of his case was based — the appointing authority may be considered to have already taken the measures incumbent upon it as a result of the defect vitiating the original decision, so that it is unnecessary for the Court to annul that decision.

42. Furthermore, in view of the confirmation by the Advisory Committee on Promotion and by the appointing authority of their original decisions it cannot be concluded that the original absence of the periodic report had a decisive effect on the contested promotion procedure, in which there were 25 candidates for four posts.[7]

43. Under those circumstances, the annulment of the four promotions decided upon by the appointing authority on 25 February 1985 would constitute an excessive penalty with regard to the defect vitiating that decision and would cause unnecessary damage to the officials concerned, without conferring any corresponding benefit upon the applicant.

**B** — 44. The applicant also alleges that the contested decision disregarded the practice previously adopted by the institution with regard to promotions, which is formalized in an 'internal directive concerning the membership and procedures of the Advisory Committee on Promotion'. According to Article 4 of that directive, the following criteria are to be taken into account, in descending order of importance, with regard to promotions within career brackets: seniority in grade; seniority in career bracket; seniority in the service; age; periodic reports; any other element contained in the personal file.

45. The applicant maintains that owing to the absence of any periodic report in his case he was compared with the other officials solely on the basis of seniority. In making the comparison, the Advisory Committee on Promotion gave preference to seniority in the service, at the expense of seniority in grade and career bracket, in disregard of its previous practice and to the detriment of the applicant.

46. The directive in question cannot, however, go against Article 45 of the Staff Regulations, which provides that promotion shall be *by selection* from among officials who have completed a *minimum period* (as defined in the second subparagraph of Article 45 (1)) *in their grade*, after *consideration of the comparative merits* of the officials eligible for promotion and of the *reports* on them.

47. In adopting the decision provided for in Article 45 of the Staff Regulations, the appointing authority has, as the Court has already stressed,[8] 'a wide discretion', and the Court must 'confine itself to the question whether the administration kept within proper bounds and did not exercise its power in a manifestly erroneous manner'.

6 — [1983] ECR 117 and 118.

7 — See in this regard paragraphs 24 to 26 of the judgment in *Gratreau*, *supra*, and paragraph 28 of the judgment in *List*, *supra*.

8 — See judgment of 25 November 1976 in Case 123/75 *Küster* v *Parliament* [1976] ECR 1685 at p. 1709; judgment of 14 July 1983 in Case 9/82 *Øhrgaard and Delvaux* v *Commission* [1983] ECR 2379 at p. 2390.

48. In that connection, seniority is merely 'one of a number of criteria of assessment', which cannot take precedence over the merits of the candidates.[9] Seniority is taken into account automatically only with regard to advancement in the next step in the same grade under Article 44.

49. Consequently it cannot be inferred from the said directive or from the alleged practice of the institution or any internal note referring thereto that the criteria of seniority in grade and seniority in career bracket should necessarily enjoy priority, since that would be no more immune from criticism than the systematic adoption of seniority in the service as the prevailing criterion.

50. Otherwise, consideration of the comparative merits of the candidates and, in particular, the periodic reports would be denied the overriding importance attributed to them by the Court, in conformity with the Staff Regulations, and in any event that argument appears to contradict the applicant's previous submission.

51. The explanations furnished by the representatives of the Parliament at the hearing as to the reasons for the alleged 'practice' of the institution also seriously undermine that argument.

52. In adopting his decision of 16 July 1986 on the basis of a fresh consideration of the comparative merits of the candidates for promotion, the appointing authority made use of the discretionary power conferred upon him.

53. That decision has not been contested by the applicant who, in any event, had only one month's seniority over the officials who were promoted.

9 — *Øhrgaard, supra*, p. 2390, paragraph 19.

C — 54. The foregoing considerations in my view show that the third submission relied upon by the applicant should be rejected, since he has not proved 'sustained discrimination against officials recruited by external competition'.

55. Moreover, it was the applicant himself who informed the Court that in a subsequent decision the Advisory Committee on Promotion recommended for promotion two officials with greater seniority in grade and in category, to the detriment of other officials with greater seniority in the service.

D — 56. On the basis of the foregoing examination of the applicant's submissions, I therefore propose that the Court should dismiss the applicant's first two heads of claim on identical grounds.

57. It therefore naturally follows that the third head of claim is unfounded; and in any event it also fails to take account of the principles governing the division of powers between the Court and the administrative authorities of the Community, a fact which might even result in its being adjudged inadmissible.[10]

**III — The new claims contained in the reply**

58. In his reply the applicant made new claims, asking that the Court should:

(1) Order the European Parliament to adopt a fresh decision on the applicant's complaint, promoting him to Grade A 6

10 — See judgment of 14 December 1965 in Case 11/65 *Morina* v *European Parliament* [1965] ECR 1017 at p. 1027; judgment of 15 December 1966 in Case 62/65 *Serio* v *Commission* [1966] ECR 561 at p. 571; judgment of 27 October 1977 in Case 121/76 *Moli* v *Commission* [1977] ECR 1971 at p. 1979.

with effect from 1 October 1984, taking into consideration the decision of the Court;

(2) In the alternative, if the Court should consider that it should not annul the decision, order the European Parliament to pay the applicant, in respect of the damage suffered owing to the defects in the promotion procedure, a sum to be fixed by the Court, taking into account the increase in net salary of BFR 7 000 per month which the applicant would have received from October 1984 if he had been promoted and the loss of seniority in Grade A 6 which will permanently affect his future career;

(3) Order the European Parliament to pay to the applicant a sum to be fixed by the Court *ex aequo et bono* in respect of the damage which he has suffered owing to the Parliament's delay in complying with its obligations under the Staff Regulations.

59. Those claims must be held to be inadmissible, since, by virtue of Article 38 (1) (c) of the Rules of Procedure, the applicant may not alter his claim in the course of the proceedings or formulate new claims in the reply.[11] The Court has only very rarely permitted an applicant to extend the subject-matter of an application and raise new issues, when in the course of the written procedure new elements of law or of fact have come to light[12] (Article 42 (2) of the Rules of Procedure).

60. I therefore propose that the Court should dismiss those claims as inadmissible and, as a result of such inadmissibility, it is unnecessary for me to examine the substance of them.

61. I did, however, consider whether I ought to suggest that the Court should of its own motion award the applicant compensation, as it did in the *Oberthür* case[13] and in other earlier judgments,[14] for the damage which he suffered as a result of the absence of his periodic report, owing to negligence on the part of the administration.

62. Nevertheless, I am of the opinion that the conditions which would justify that course of action are not satisfied here, since it has not been established that that omission in fact caused the applicant any damage and no reference has been made to any specific information whose absence might have had a decisive effect on the decision adopted.

## IV — Conclusion

63. On the other hand, I consider that it is wholly justified to order the Parliament to pay the costs in their entirety pursuant to Article 69 (3) of the Rules of Procedure, even though the applicant has failed in several of his submissions, in so far as the action was brought solely because of an omission on the part of the institution, and, moreover, the latter did not adopt its confirmatory decision until after the applicant had lodged his reply.

11 — Judgments of 8 July 1965 in Case 83/63 *Krawczynski* v *Commission* [1965] ECR 623 at p. 640, and of 16 March 1971 in Case 48/70 *Bernardi* v *Parliament* [1971] ECR 175 at p. 183.

12 — Judgment of 3 March 1982 in Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749 at p. 763.

13 — Judgment of 5 June 1980, *supra*, at p. 1759.

14 — Judgment of 16 December 1960 in Case 44/59 *Fiddelaar* v *Commission* [1960] ECR 535 at p. 548; and of 9 July 1970 in Case 23/69 *Fiehn* v *Commission* [1970] ECR 547 at p. 560.

64. In those circumstances I propose that the Court should:

1. Declare the application unfounded as regards the heads of claim contained in the application;

2. Declare the heads of claim formulated in the reply inadmissible;

3. Order the defendant to pay the costs in their entirety.