OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 12 DECEMBER 1974

My Lords,

On 20 December 1972, the Secretariat-General of the Parliament published Notice of Vacancy No 707 relating to three posts of revisers in the career bracket L/A 5-4 (Annex 1 to the Application). These posts were to become available, as from 1 January 1973, in the Dutch-language Division of the Translation Service of the Parliament. The Notice stated that the President of the Parliament (who was the appointing authority) had decided to consider in the first instance the possibility of filling the posts by way of promotion or transfer; and applications were invited, from members of the staff of the Secretariat-General, on that footing. Such applications were to be made by letter, in duplicate.

Ten applications were received and on 17 January 1973 the Director-General of Administration, Personnel and Finance forwarded the list of them to Mr Bruch, the relevant Director, with a note to the effect that none of the candidates qualified for transfer, but that eight of them, including Mr de Dapper, the Applicant in the present case, could be considered for promotion. These eight were all translators of Grade L/A 5 in the career bracket L/A 6-5.

On 25 January 1973, Mr Bruch reported to the Director-General (Annex 2 to the Application) that the relevant applications had been very carefully examined by the Director of the Translation Service and the Head of the Dutch-language Division together with the revisers of that Division and that they had concluded that it could not be said, from a mere perusal of the candidates' personal files, that any of them possessed such obvious qualifications that three could 'without hesitation' be recommended for promotion. Mr Bruch, in agreement with the Director of the Translation Service and the Head of the Dutch-language Division suggested that the appointing authority should accordingly be advised to hold an internal competition on the basis of tests.

The appointing authority, however, was against holding such a competition and asked that an effort should be made to choose between the candidates so that, if possible, the posts could be filled by way of promotion.

So the Head of the Dutch-language Division and his three senior revisers met and considered afresh the comparative merits of the candidates. In the result they decided unanimously to recommend three for promotion. The Applicant was not one of the three.

A note signed by the Head of the Dutch-language Division and his senior revisers containing their recommendations (Annex 4 to the Application) was forwarded to the Director-General by Mr Bruch under cover of a note dated 9 May 1973 (Annex 3 to the Application). In this note Mr Bruch said that those recommendations were approved by the Director of the Translation Service. He added that seniority in the grade, seniority in the service and the candidates' biennial reports had also been taken into account in arriving at the recommendations.

On 21 May 1973, the appointing authority decided to promote the three candidates who had been recommended to be revisers in the career bracket L/A 5-4, in grade L/A 5. That decision was published on 9 August 1973.

On 5 November 1973, the Applicant submitted to the appointing authority a complaint against the decision under Article 90 (2) of the Staff Regulations (Annex 5 to the Application). This complaint was rejected by the appointing authority by letter dated 14 February

1974 (Annex 6 to the Application). It is against the rejection of that complaint that the Applicant now appeals to this Court.

The Applicant's challenge to the validity of the decision is based on a number of grounds.

My Lords, there is, in my opinion, among those grounds, one on which the Applicant is entitled to succeed.

Your Lordships remember that Article 43 of the Staff Regulations provides:

'The ability, efficiency and counduct in the service of each official, with the exception of those in Grades A 1 and A 2, shall be the subject of a periodicial report made at least once every two years as provided by each institution in accordance with Article 110.

The report shall be communicated to the official. He shall be entitled to make any comments thereon which he considers relevant.'

The provisions adopted by the Parliament under Article 110, so far as material, prescribe a period of two years between reports and provide that the first report on an official shall be made within two years of his establishment (Annex 1 to the Reply).

Article 45 of the Staff Regulations provides among other things:

'Promotion shall 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.'

The Court was left in some doubt at the end of the hearing as to precisely what documents the officials who made the relevant recommendations in May 1973 had before them at the time. It was asserted on behalf of the Defendant and not, in the end, contested on behalf of the Applicant that those officials had before them the personal files of the candidates. It is not certain whether they had before them copies of the candidates' letters of application, or whether those letters contained relevant information not otherwise apparent from the files. But I will not take up Your Lordships' time with a discussion of the evidence bearing on these points, because there is one thing of which there is no doubt and that is that the officials in question did not have before them up-to-date biennial reports on the Applicant and on some of the other candidates. So much was conceded at the hearing by Counsel for the Defendant, although he asserted that, at the time, the relevant reports were in a sufficiently advanced state of preparation for them to have been capable of being taken into consideration, an assertion that I found startling in view of the law as laid down by this Court.

The Applicant's own latest report is before the Court (Annex 2 to the Reply). It was signed on 21 December 1973. It appears from his Personal file, which is also before the Court, that he was established in January 1967, so that the report was some 11 months late. According to the Defendant the delay was due to difficulties arising from the enlargement of the Communities and the consequent recruitment of extra staff.

My Lords, that there were such difficulties I do not doubt, and they may explain why the Applicant's report was not ready in January as it should have been, though I observe, again from the Applicant's personal file, that his earlier biennial reports (dated in 1969 and 1971) had also, in each case, been late, albeit not quite so late. In my view the difficulties, assuming that they constituted a valid excuse in law, should have been overcome by May. Indeed, no argument was addressed to us as to why they should not have been.

The Court has laid it down quite clearly that Article 45 requires a scrupulous examination of the personal files of the candidates and in particular of their biennial reports, so as to ensure that the wide discretión thereby conferred is exercised in full knowledge of the facts — see Case 27/63 *Raponi v*

Commission (Rec. 1964 at p. 265 et seq.), Cases 94 & 96/63 *Bernusset v Commission* (ibid. at p. 608 et seq.) and Case 97/63 *De Pascale v Commission* (ibid. at p. 1036). More recently the Court has emphasized that the right conferred on an official by Article 43 to comment on the contents of his biennial reports before they are used for any purpose, and in particular in connection with promotions, must be respected — see the Judgment in Case 21/70 *Rittweger v Commission* (Rec. 1971 at p. 18) and the Opinion of Mr Advocate-General Dutheillet de Lamothe in that case (ibid. at pp. 21-22). So it would have been improper for the Applicant's biennial report for 1973 to have been taken into consideration before it was even signed.

It was submitted on behalf of the Defendant that Article 45 does not require account to be taken of biennial reports covering any particular period and that accordingly it was immaterial that, in this case, the last available report on the Applicant was dated in 1971. It seems to me, my Lords, that that submission has only to be stated to be rejected. Article 43 requires the reports to be 'made at least every two years' and Article 45 requires the reports so made to be taken into consideration.

I am therefore of the opinion that the promotions in question in the present case must be declared void.

That being so, I propose to deal only very shortly with the other grounds of complaint put forward on behalf of the Applicant.

First it was pointed out on his behalf that Article 45 provides that promotion 'shall be effected by appointment of the official to the next higher grade in the category or service to which he belongs' but that, nonetheless, the three officials who were promoted in this case remained in the same grade as before.

The Defendant objects, quite properly in my view, that this cannot be a legitimate ground of complaint on the part of the Applicant: even if Article 45 is, in this respect, to be interpreted strictly, no right of his was infringed. But, in any event, I do not think that Article 45 can be interpreted without reference to Annex I to the Staff Regulations, which sets out the basic posts and corresponding career brackets in each category and service. An analysis of this Annex discloses the existence of a number of cases where career brackets overlap. Thus the career brackets with which this case is concerned, those of 'Reviser' and 'Translator', overlap at grade L/A 5. It seems that similarly the career brackets of 'Head of Translation Division' and 'Reviser' overlap at grade L/A 4; and there are several instances of such overlaps in the career brackets of Euratom design office staff and manufacturing workshop staff. There can be no doubt that for an official to be moved into a higher career bracket, e.g. for a translator to be appointed reviser, constitutes 'promotion' in the ordinary sense of the word. Is it to be held that, in the case of a translator in grade L/A 5, it does not constitute 'promotion' in the sense of Article 45 unless he is appointed to grade L/A 4? I think not, for so to hold would mean that, in the case of such a translator, the appointing authority would be faced with the choice of either not promoting him at all or promoting him over the heads of existing revisers in grade L/A 5. I cannot believe that the authors of the Staff Regulations intended such an absurdity. In my opinion this is a case for the application of the principle illustrated by the decision of the House of Lords in *Luke v C.I.R.* [1963] A.C. 557 that the words of an enactment are not to be applied literally where so to apply them would be 'to defeat the obvious intention of the legislation and to produce a wholly unreasonable result' (per Lord Reid at p. 577).

It was suggested on behalf of the Applicant that the three officials in question here were 'transferred' rather than 'promoted', but that cannot, in my opinion, be right. It seems to me that 'transfer' in the Staff Regulations must

connote transfer to another post in the same career bracket, for no process of selection is prescribed for it.

Another complaint put forward on behalf of the Applicant was that the officials who made the relevant recommendations to the appointing authority confined themselves to picking the three most senior candidates whom they had no particular reason to rule out. The Court is invited to draw the inference that this was so from the contents of Mr Bruch's note of 9 May 1973 coupled with the doubts as to whether those officials had before them copies of the candidates' letters of application. As regards Mr Bruch's note, I simply cannot draw that inference from it. The inference I draw from it is that seniority was, very properly, taken into account as one of the relevant factors. The absence of the candidates' letters, assuming in favour of the Applicant that it were proved, would not, it seems to me, carry this point any furhter.

Lastly the Applicant submits that the appointing authority was guilty of a misuse or abuse of power when it declined the advice tendered to it in the first instance to hold an internal competition and asked that a further attempt should be made to select candidates for promotion. My Lords, I would reject this submission which is tantamount to a submission that the appointing authority, with whom in law the decision lay, was bound by the views of its own officials.

There remains the question of costs. If Your Lordships share my views on the questions of substance, the Applicant will have succeeded in his appeal and will prima facie be entitled to costs. He will have failed on all his grounds of appeal but one, but I do not think that the grounds on which he will have failed are of such a nature that he should be mulcted of costs for relying on them. I am therefore of the opinion that the Defendant should be ordered to pay the costs of the proceedings.