JUDGMENT OF THE COURT (THIRD CHAMBER)
9 FEBRUARY 1984 [1]

Cornelis Henrick Fabius
v Commission of the European Communities

(Official — Non-admission to oral tests in an open competition)

Case 39/83

Officials — Recruitment — Competition — Organization — Rules and conditions — Determination — Discretion of the administration

The appointing authority enjoys a wide discretion in deciding upon the criteria of ability required for the posts to be filled and in determining the rules and conditions under which a competition is organized in the light of those criteria and in the interests of the service.

In Case 39/83

CORNELIS HENRICK FABIUS, residing in The Hague, represented and assisted by Eric Grabandt of The Hague Bar, with an address for service in Luxembourg at the Chambers of E. Arendt, Centre Louvigny, 34 B/IV Rue Philippe-II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Hendrik van Lier, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

1 — Language of the Case: Dutch.

APPLICATION for the annulment of the Commission's decision dated 22 December 1982 confirming that the applicant was not eligible to take the oral test for Open Competition No COM/A/325,

THE COURT (Third Chamber)

composed of: Y. Galmot, President of Chamber, U. Everling and C. Kakouris, Judges,

Advocate General: Sir Gordon Slynn
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure, the conclusions and the submissions and arguments of the parties may be summarized as follows:

I — Facts

1. In a Notice of Open Competition (No COM/A/325, Official Journal of the European Communities, C 233 of 12 September 1981, p. 21), the Commission of the European Communities (the defendant) announced an open competition, based on qualifications and tests, to constitute a reserve of administrators in the career bracket covering Grades 7 and 6 of Category A.

The purpose of the competition, as stated in the notice, was to constitute a reserve which would be drawn upon to fill vacant or newly-created posts in that career bracket with the Commission. The posts would involve administrative, advisory and supervisory duties relating to the political, administrative and financial activities of the Communities. The following options were to be available:

1. External relations;
2. Press and information;
3. Public finance, accounting and auditing;
4. General administration.

2. The relevant provisions of Section V of the notice of competition entitled "Written Tests — Admission to Oral Tests" are worded as follows:

"1. Nature of written tests

(a) Comprehension and reasoning test to assess the candidate's aptitude for administrative, advisory and supervisory duties; this test will not require any specific academic knowledge (time allowed: 2 hours).

(b) Test to assess the candidate's general aptitude for work in an international organization. This test may take the form of a case-study (time allowed: 3 hours).

2. Marking of written tests

Test 1 (a) out of 40.

Test 1 (b) out of 60.

Candidates who obtain less than 20 marks for Test 1 (a) or less than 30 marks for Test 1 (b) will not be considered.

3. Admission to oral test

Candidates obtaining the highest marks in the written tests will be admitted to the oral test, provided their marks are above the minima mentioned at V 2."

3. The applicant, Cornelis Fabius, who was born on 5 June 1950, applied to take part in Competition No COM/A/325, selecting "External relations" as his option, and was invited to take the written tests.

The written tests took place in The Hague on 28 June 1982.

In a letter dated 10 November 1982, the Commission informed the applicant that the selection board considered that his marks did not meet the standard required to make him eligible for the next stage of the competition.

In fact he had obtained 13.82 out of 40 marks in the first test ("Comprehension and reasoning"), whereas the pass mark was 20.

By contrast, Mr Fabius had obtained 46 marks out of 60 in the second test.

In a letter dated 18 November 1982, the applicant requested the Commission to reconsider his case, arguing, in particular, that he thought it unreasonable to attach so much importance to the test of "comprehension and reasoning" for success in the examination.

That request was rejected, in a decision dated 22 December 1982, by the Head of the Commission's Recruitment Division, who pointed out to the applicant that his complaints were directed not so much against the selection board's decision as against the general provisions relating to the competition, which had been accepted by both the candidate and the selection board.

That decision is the subject of this application to the Court.

The applicant wrote again in a letter dated 20 February 1983 to request that the selection board's findings be reviewed by the Commission. On 16 March 1983 the Commission replied that selection boards were entirely independent in arriving at their opinions and in the conclusions which they drew therefrom and that in this case the board had observed the rules governing the tests as stated in the notice of competition.

II — Written procedure and conclusions of the parties

By application registered on 15 March 1983, the applicant brought proceedings against the Commission of the European Communities. He claims that the Court should:

(a) annul the Commission's decision confirming that the applicant was ineligible to take the oral test for Open Competition No COM/A/325, which was notified to him by the Head of the Recruitment Division in a letter dated 22 December 1982;

(b) order the Commission, within a period of three months from the date of the Court's judgment, to undertake a thorough inquiry into the applicant's suitability or at least give the applicant an opportunity to take part in a subsequent open competition for the recruitment of administrators in Grades 7 and 6 of Category A, regardless of the age-limit to be fixed in the notice of competition, subject always to the principles laid down by the Court;

(c) order the defendant to pay the costs.

The Commission contends that the Court should:

(a) declare the application unfounded and consequently dismiss it;

(b) order the applicant to pay the costs.

In an additional document lodged at the Court Registry on 21 April 1983, the applicant claimed that the Court should:

1. Annul the Commission's decision notified in the letter of 16 March 1983 or declare that the Commission had failed to take a decision as requested in the applicant's letter of 20 February 1983;

2. Order the Commission to reconsider the applicant's suitability to take part in the competition.

After considering the Commission's defence, from which it appears to the applicant that the Commission regards its letter dated 16 March 1983 purely as a confirmation of the decision of 22 December 1982, the applicant expressly declares, in his reply registered on 19 May 1983, that he withdraws his supplementary application for the sake of the efficient use of legal procedure.

Finally, in an application for the adoption of an interim measure lodged at the Court Registry on 20 April 1983, the applicant claimed that the President of the Court should:

"Order the Commission, as an interim measure, to authorize the applicant to take part in the remainder of Open Competition No COM/A/325 until judgment has been given on the substance of the case, or, at least, to order the Commission, as an interim measure, to instruct the Selection Board for Open Competition No COM/A/325 to authorize the applicant to take part in the remainder of Open Competition No COM/A/325 until judgment has been given on the substance of the case, subject to the proviso that if the applicant is successful in the oral test, his name is to be included in the reserve list

which is to be drawn up or which has already been drawn up until judgment has been given on the substance of the case;

Order the Commission to pay the costs."

That application was dismissed by order dated 30 June 1983.

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

III — Submissions and arguments of the parties

1. The applicant

The applicant makes a single submission against the decision at issue, relating to a breach of the principles of equity and "due care".

Mr Fabius presents three arguments in support of this submission. He complains that the Commission has attached decisive importance to a single criterion of assessment, that it has given decisive importance to an evaluative test which is not sufficiently reliable and, lastly, that it has refused to arrange a fresh test for him.

(a) The allegation that the Commission has attached decisive importance to a single criterion of assessment

The applicant submits that he has not been permitted to take part in the next stage of the competition solely on the ground that the marks which he obtained in the test of comprehension and reasoning were insufficient, whereas his marks in the second test were amply sufficient.

He claims that the minimum marks required for both tests added up to 50, whilst the sum of the marks which he obtained amounted to 59.82, so that it may be inferred that his elimination was determined solely upon the basis of the test of comprehension and reasoning, in which he did not obtain the minimum required.

In this connection the applicant refers to his letter of 28 November 1982 in which he presented the Commission with his objections to a unilateral mode of evaluation of candidates, and he requests the Court to treat that letter as an integral part of his application.

In that letter, Mr Fabius laid particular stress on the fact that in order to have taken the second written test and obtained the sort of mark that was awarded to him, he must necessarily have been adept at "comprehension and reasoning", and that that could not be determined by an intelligence test alone.

The applicant submits in conclusion that the decision at issue is contrary to equity and the principle of "due care", because decisive importance was automatically attached to the only criterion of assessment provided, without any allowance being made for the possibility of a more thorough test on special grounds.

(b) The allegation that the Commission attached decisive importance to an insufficiently reliable test

The applicant maintains that the disputed decision is contrary to the principle of "due care" inasmuch as decisive importance has been given to a test

which is not sufficiently reliable to govern the admission of candidates.

In support of this point he submits a letter dated 26 November 1982 from the Rijks Psychologische Dienst [National Psychology Department] of the Netherlands, which shows, on the one hand, that intelligence tests cannot be considered a sufficiently reliable criterion of assessment, in particular because an individual's performance in examination conditions may be considerably worse than it would be in other conditions, and, on the other hand, that the National Psychology Department once came to an unfavourable opinion regarding the recruitment of the applicant in its national administration, and in spite of that his work has been found wholly satisfactory.

The applicant also submits letters from the Ministry of Foreign Affairs and from the Ministry of the Interior of the Kingdom of the Netherlands, which show that the assessments of psychologists have no conclusive importance and that selection procedures based on them are considered with a certain amount of disquiet.

The applicant adds that in the Netherlands intelligence tests have not in the last few years been generally accorded such absolute value in recruitment for government service.

Finally, he argues that in the assessment of intelligence tests the findings of the Commission differ from results recorded in the Netherlands, which has therefore insisted that the procedure for recruitment and selection should be changed.

In these respects the applicant maintains that he has correctly interpreted the documents which he has annexed to his application.

(c) The allegation that the Commission wrongly refused to arrange a new test for the applicant

Mr Fabius maintains that the contested decision is contrary to the principle of "due care" inasmuch as the Commission refused to undertake a more thorough inquiry into his capacities when it was informed of the fully-documented complaints which he submitted in his letter of 28 November 1982.

The Commission never expressed a view on the validity of the applicant's reasoning, either in the exchange of correspondence mentioned above, or in its defence.

(d) In addition, the candidate offers evidence:

that his present employer (Ministry of Transport, Water Control and Construction) is satisfied with his work, as was his previous employer (Ministry of Foreign Affairs);

that there are differences of opinion between the Commission and the Netherlands authorities with regard to the selection criteria for recruitment applied by the Commission.

(e) Finally, the applicant argues that he has a special concern in bringing proceedings.

Since he is now 32 years of age, he can no longer comply with the age-limit laid down for candidates wishing to take part in subsequent competitions.

For this reason he considers that in accordance with a judgment of the Court allowing his application, the Commission

should, within a period of three months following the judgment, undertake a more thorough inquiry into his suitability and that it should at least give him a fresh opportunity to take part in a subsequent open competition, subject always to the principles laid down by the Court.

2. *The Commission*

(a) The argument relating to the decisive importance attached to a single criterion of assessment

The Commission recalls that, according to the case-law of the Court, it has wide discretionary powers in laying down all the rules governing competition (Case 90/74) *Deboeck* v *Commission* [1975] ECR 1123; Case 178/78 *Szemerey* v *Commission* [1979] ECR 2855).

Since the disputed provision in the notice of competition was clearly laid down in the interests of the service, the defendant did not exceed the limits of its discretion.

The Commission observes that the selection board complied with the rules laid down for the organization of the competition, so that no complaint can be levelled against it.

The Commission takes the view that the argument has no bearing on the case, in view of the fact that it appears from the notice of competition that the test of comprehension and reasoning was not the only eliminatory test and that by giving an eliminative effect to certain tests in the competition the Commission was within the limits of its discretion.

(b) The argument that decisive importance was attached to an evaluative test which was not sufficiently reliable

The Commission points out that the test entitled "Comprehension and reasoning" itself contained a number of questions (it consisted partly of a multi-choice test and partly of a constructive interpolation test), that the pass mark for that test was not very high and that the Commission has long relied on the "battery of tests" used in Competition No COM/A/325.

The Commission also considers that the documents submitted by the applicant in this connection have no relevance for this case, since the individuals or organizations which produced them could not have had enough information on the subject of the comprehension and reasoning test in Competition No COM/A/325, which moreover must not be assumed to be a psychological/technical test as the writers of the documents produced seem to suppose.

The Commission adds, in the alternative, that the documents produced by the applicant do not bear the construction that he places on them.

Finally, the Commission considers that in any event it enjoys a discretion as regards the choice of tests and the way in which the answers are to be marked.

(c) The argument relating to the refusal to arrange a fresh test for the applicant

The Commission points out that the selection board complied with the rules governing the competition and that it

cannot be accused of not treating the applicant's case with the care required.

The selection board was not called upon to interpret the provision at issue in the notice of competition because that provision did not require any interpretation in view of the fact that its terms were clear.

Finally, the position adopted by the selection board was consistent with the principle of equality as between the various candidates in the competition.

(d) In conclusion, the Commission submits that the evidence produced by the applicant should be rejected.

IV — Oral procedure

At the sitting on 12 January 1984, the parties did not appear.

The Advocate General delivered his opinion at the same sitting.

Decision

1 By application lodged at the Court Registry on 15 March 1983, Cornelis Fabius brought an action against the Commission of the European Communities, in the first place, for the annulment of the decision confirming that he was ineligible to take the oral tests for Competition No COM/A/325, and, in the second place, for an order that the Commission should arrange a fresh test in order to assess his suitability or permit him to take part in a subsequent open competition at the same level, regardless of any age-limit.

2 The competition at issue was an open competition based on qualifications and tests to constitute a reserve of administrators in the career bracket covering Grades 7 and 6 of Category A.

3 The notice of competition, published in the Official Journal of the European Communities dated 12 September 1981, provided as follows in Section V, entitled "Written Tests — Admission to Oral Tests":

"1. Nature of written tests

(a) Comprehension and reasoning test to assess the candidate's aptitude for administrative, advisory and supervisory duties; this test will not require any specific academic knowledge (time allowed: 2 hours).

(b) Test to assess the candidate's general aptitude for work in an international organization. This test may take the form of a case-study (time allowed: 3 hours).

2. Marking of written tests

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Test 1 (b) out of 60.

Candidates who obtain less than 20 marks for Test 1 (a) or less than 30 marks for Test 1 (b) will not be considered.

3. Admission to oral test

Candidates obtaining the highest marks in the written tests will be admitted to the oral test, provided their marks are above the minima mentioned at V 2."

4 The applicant was invited to take part in the competition and took the written tests on 28 June 1982. In a letter dated 10 November 1982, the Commission informed him that the selection board considered the marks he had obtained in the written tests to be insufficient to make him eligible for the oral tests in the competition. For the first test, entitled "Comprehension and reasoning", he had obtained only 13.82 out of 40 marks against a pass mark of 20.

5 In a letter dated 28 November 1982, the applicant requested the Commission to reconsider his case, arguing, in particular, that he thought it unreasonable to attach so much importance to a test of "comprehension and reasoning" for the outcome of the examination. That request was rejected, in a decision dated 22 December 1982, by the Head of the Commission's Recruitment Division.

6 That decision is the subject of this application to the Court, in support of which Mr Fabius puts forward a single submission relating to a breach by the Commission of the principles of equity and "due care". More specifically, the applicant complains that the Commission attached decisive importance to a single criterion of assessment, that it has given too much weight to an

evaluative test which was not sufficiently reliable, and finally, that it has refused to arrange a fresh test for him.

7 It should be recalled that as the Court has already decided in a number of cases (Case 90/74 *F. Deboeck* v *Commission* [1975] ECR 1123; Case 67/81 *M. H. Ruske* v *Commission* [1982] ECR 661), the appointing authority enjoys a wide discretion in deciding upon the criteria of ability required for the posts to be filled and in determining the rules and conditions under which the competitions are organized in the light of those criteria and in the interests of the service.

8 In this case it appears that the Commission, by providing, in a notice of competition for the recruitment of officials in Category A for administrative, advisory and supervisory duties, that there should be a test for comprehension and reasoning to assess the suitability of candidates for those different kinds of work, and by allotting a pass mark of 20 out of 40 for that test, did not exceed the discretion conferred upon it and did not infringe any general principle of law

9 In those circumstances, the applicant's arguments based on the good marks which he obtained in the second written test, on the general satisfaction with his work in his country of origin and on the limited value attached to such tests by certain authorities there, do not affect the legality of the contested decision.

10 Accordingly, the selection board, and subsequently the appointing authority, were justified in refusing to admit the applicant to the oral tests for the competition and later to arrange a fresh test for him.

11 The application must therefore be dismissed and there are no grounds for admitting the evidence offered by the applicant.

Costs

12 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is required to bear the costs.

13 However, under Article 70 of those rules, in proceedings brought by servants of the Communities, institutions are to bear their own costs.

On those grounds

THE COURT (Third Chamber)

hereby:

1. **Dismisses the application;**

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

Galmot Everling Kakouris

Delivered in open court in Luxembourg on 9 February 1984.

P. Heim
Registrar

Y. Galmot
President of the Third Chamber