On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application;**

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

Pescatore Sørensen Mackenzie Stuart

Delivered in open court in Luxembourg on 14 June 1977.

A. Van Houtte
Registrar

P. Pescatore
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 26 MAY 1977 [1]

Mr President,
Members of the Court,

The present case is the sequel to Case 31/75 which resulted in a judgment of the Court (First Chamber) dated 4 December 1975 ([1975] 2 ECR 1563).

I do not think that there is any point therefore in examining the facts which gave rise to Mr Costacurta's previous application and in retracing the course of his career, for all relevant information is amply set out in that judgment as also, moreover, in the opinion delivered on 20 November 1975 by Mr Advocate-General Warner.

It will be enough to recall that in that case the applicant claimed that the Court should annul the decision of the Selection Board for the internal competition on the basis of qualifications and tests which was instituted under notice COM/A/15/73 in order to constitute a reserve for future recruitment of administrators in the career bracket A 7/A 6 in the field of printing and publishing. He also claimed that the Commission's decision of 13 January 1975 rejecting his complaint made through official channels should be annulled.

The application was based in particular on infringement of Article 25 of the Staff Regulations, in that insufficient reasons were given for the decision, and on the misuse of powers allegedly committed by the Selection Board and at a later stage

1 — Translated from the French.

by the Commission in rejecting the proposition that the applicant's experience was equivalent to possession of a university degree.

Mr Advocate-General Warner was of the opinion not only that the decision of the Selection Board and subsequently the Commission's decision rejecting his complaint should be annulled, but also that any appointments made on the basis of the report of the Selection Board should also be annulled.

However, in the abovementioned judgment, the Court confined itself to annulling only, on grounds of inadequate reasons, the decision of the Selection Board not to admit the applicant to the list of candidates, together with the decision adopted by the Administration rejecting Mr Costacurta's complaint.

The First Chamber took the view that the competition in question was intended to constitute a reserve for future recruitment and that therefore the exclusion of the applicant from the list of candidates admitted to take part in the competition did not affect the admission to the list of the persons selected by the Selection Board as fulfilling the conditions listed in the notice of competition. The Court stated (paragraph 17) that 'the rights of the applicant will be sufficiently protected if the Selection Board reconsiders the question of the applicant's suitability for being included in the list of candidates and if such be the case it admits him to the competition without the selection already made by the Selection Board being affected'.

I — The conclusions in the present application are exclusively directed against the decision, dated 25 May 1976, notified by letter of 26 May, whereby the Selection Board reiterated its refusal to admit the applicant to take part in Competition COM/A/15/73.

Thus it is necessary to examine whether the Selection Board complied with the duty imposed on it by the earlier judgment of the Court in proceedings to a fresh examination of the applicant's suitability, and whether, in doing so, it made a lawful application of the conditions set out in the notice of competition, having regard to the relevant provisions of the Staff Regulations.

Before doing so, however, perhaps I ought to go into the question whether the task of the Selection Board could properly be confined to that re-examination. For in answer to a specific question put by the President of this Chamber during the hearing, the applicant's lawyer said that the Commission had made two appointments to posts as administrators in Grade A 7 in the light of the competition at issue. The representative of the Commission was not able to give a precise answer to the question. He confined himself to saying that so far as he knew nobody had been appointed. The question arises whether, supposing appointments of that nature were made, that is to say supposing the appointing authority in fact drew upon the reserve recruitment list constituted subsequent to the former activities of the Selection Board, the latter was not required, in order to render the judgment of 4 December 1975 fully effective, to re-examine the question of the admissibility of all the candidates — of whom there were 22, including Mr Costacurta — or whether it was entitled to limit itself to re-examining the suitability of the applicant alone.

Upon reading the reasons which clarify the operative words of that judgment, I am of the opinion that the Court clearly suggested that the Selection Board should adopt none other than the second solution so as to avoid calling in question the selection already made amongst the candidates other than the applicant.

It seems to me indisputable that such was indeed how the Selection Board, to

which the text of the judgment delivered in Case 31/75 had been communicated, understood its task.

The Board met again, first on 17 May 1976, composed as before except that the member appointed by the Staff Committee was not the same as the person who had taken part in the correction of the tests in July 1974.

Without going over the whole of the steps in the competition again *ab ovo,* the Selection Board confined itself, as directed by the judgment of the Court, to re-examining whether the applicant could be admitted as a candidate, having regard to his qualifications and to his experience, on the basis of the provisions of the notice of competition and of all the facts appearing on the personal file of the person concerned.

It appears that at that first meeting the Selection Board took a decision of principle against admitting the applicant, because it met a second time on 25 May 1976 in order to 'approve the result of its proceedings'. Then, after an examination in depth it decided, for reasons to which I shall return, not to admit Mr Costacurta to the competition.

II — Between those two dates of 17 and 25 May there occurred an incident which, according to the applicant, shows that the provisions of Article 6 of Annex III to the Staff Regulations, which provides that 'the proceedings of the Selection Board shall be secret' were infringed. For on the morning of 19 May, Mr Costacurta was informed by one of his colleagues that at a private party held on the previous evening a member of the Selection Board had revealed the unfavourable decision already taken with regard to the applicant at the meeting on 17 May. The latter immediately sent a memorandum of protest to the Director of Personnel and Administration.

The actual fact of the revelation thus brought to his notice is not substantially contradicted by the Commission. On this point, the latter has confined itself to replying that before the full value of the applicant's allegation can be assessed, it will be essential 'to name the person who allegedly disregarded the duty of secrecy' imposed by Article 6 of Annex III to the Staff Regulations.

The applicant adds, for his part, that the disclosure of the information concerning the rejection of his application occurred when the members of the Selection Board had not yet either signed the minutes of their proceedings or drawn up their statement of the reasons finally given for the rejection of his application.

A distinction must be made between two features of those allegations.

First of all the applicant's allegation, to the effect that he learned from a colleague, whose name has been given, of the disclosure of the rejection of his application by a person who had taken part in the meeting of the Selection Board of 17 May 1976, may be taken as very convincing if not actually proven. On this point, moreover, the Commission has left it to the Court to consider the applicant's offer of proof by witnesses.

On the other hand, even supposing that at that meeting the Selection Board had not yet drawn up the reasons for its decision in their definitive form, it does not seem to me that this contradicts the fact that as early as 17 May it had adopted a decision of principle as regards Mr Costacurta's entry for the competition. It appears from the very words of the minutes of the meeting held on 25 May that the Selection Board met on that date in order to 'approve the *result* of its proceedings'. Those words imply that deliberations took place during the preceding meeting. That fact is confirmed, moreover, by the applicant himself for he complains of the *disclosure of a decision* of the Selection Board rejecting his entry. If his protest is

well founded, it means that the Selection Board had not only deliberated on his case at its initial meeting, but that it had decided not to accept him as a candidate. On 25 May there was nothing more for it to do, after confirming the result of its proceedings, than to put its decision into writing.

Therefore, in view of that decision, prior to any disclosure, I am of the opinion that the breach of the secrecy of the proceedings cannot have any effect on the legality of the decision itself.

In this respect, I believe I find support in a judgment of the Conseil d'État of France, dated 19 December 1973 *(Ministre de l'Éducation Nationale* v *Sieur Chambe)*, mentioned by the Commission in its rejoinder. That decision rejected the submission based on breach of the secrecy of the proceedings of a Selection Board for a competition, on the ground that the said breach, however regrettable it may have been, did not affect the legality of the tests and the determination of the results thereof, since it occurred before the official announcement of the results, but after the correction of the papers and after the meeting during which the Selection Board had awarded the candidates their marks.

Those facts seem to me to be comparable to the situation in the present case, in so far as the decision to reject the applicant's entry for the competition had been drawn up, as to the principle if not as to the reasons, before the breach of the secrecy of the proceedings occurred.

At its meeting on 25 May, the Selection Board simply confirmed that decision. Therefore the submission raised cannot be accepted.

III — However, it appears that there is a flagrant contradiction between the factual assessments to be found in the applicant's periodic reports for the period immediately preceding the re-examination of his application to enter for the competition at issue, and the reasons stated by the Selection Board. Mr Costacurta claims to see proof of a misuse of powers in that contradiction.

Presented thus, this submission is, I would say, put forward clumsily but I think it can be transposed into the legal concept of manifest error in the assessment of facts. The reasons given for the exclusion of the applicant are that his experience was acquired from 1956 to 31 May 1972 in *clerical duties* either of a technical or of an administrative nature, whereas from 1 June 1972 that experience has been acquired in duties which were primarily *executive* duties (correcting of proofs and preparing of manuscripts for printing).

To judge by the reasons given by the Selection Board, the applicant's duties even remained clerical duties or manual or service duties, which would throw doubt on whether he was properly graded in Category B, although that occurred as a result of a competition.

The most recent periodic report on the applicant, which covers the period from 1 July 1973 to 30 June 1975, describes his efficiency as above average and above all, here, states, as does the previous report for the period 1 July 1971 to 30 June 1973, that he is an official carrying out *advisory* duties and this, at least according to the French version of Article 5 of the Staff Regulations, qualifies the official concerned for Category A.

I would add, for my part, despite the fact that this submission has not been put forward by the applicant, that it appears that the Selection Board was not able to take into account this most recent periodic report on the applicant for the period 1 July 1973 to 30 June 1975. That is to be explained by the fact that the said report was only signed by the first reporting officer, the Head of the Publishing Division, who was, moreover,

the chairman of the Selection Board, and by the latter's superior, the Director of Administration, on 14 June 1976, whilst the applicant himself signed on 18 June 1976.

As regards the assessing of qualifications or *experience* equivalent to the qualifications required and *experience* relative to the duties, nothing can replace the periodic reports whose very purpose is to describe accurately the duties which each official is required to perform and to assess his ability, efficiency and conduct in the service.

Finally, the Selection Board has not, in 1976, any more than in 1975, as was pointed out by Mr Advocate-General Warner in his opinion ([1975] 2 ECR 1578), defined in an objective manner the criteria for assessing the equivalence of the experience of the candidates to the level of education required, as is required by the Court's case-law *(Alvino* [1965] 2 ECR 789). As the Commission has admitted, in answer to a question put at the hearing by the President of the Chamber: 'It does not seem that it is entirely clear that the reasons stated meet the requirements of the Court, as they can be discerned in the previous judgment'.

The second statement of reasons applied by the Selection Board, which certainly goes a little further than the previous one, seems to me to remain insufficient and to display the same 'lack of any attempt to make a more precise analysis' and the same 'lack of any additional criterion of selection'.

For this reasons, I am of the opinion that this application should be declared well founded and that accordingly the decision of the Selection Board for Competition COM/A/15/73 should be annulled, and finally that the costs should be borne by the Commission.