JUDGMENT OF THE COURT (First Chamber)
19 November 1998 *

In Case C-252/96 P,

European Parliament, represented by Manfred Peter and José Luis Rufas Quintana, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the Secretariat of the European Parliament, Kirchberg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Second Chamber) of 22 May 1996 in Case T-140/94 *Gutiérrez de Quijano y Lloréns* v *Parliament* [1996] ECR-SC II-689, seeking to have that judgment set aside,

the other party to the proceedings being:

Enrique Gutiérrez de Quijano y Lloréns, official of the Court of Justice of the European Communities, residing in Luxembourg at 53 Rue de Beggen, represented by Sonia Sequero Marcos, of the Málaga Bar, with an address for service in Luxembourg at the office of Enrique Gutiérrez de Quijano,

THE COURT (First Chamber),

composed of: D. A. O. Edward, acting as President of the First Chamber, L. Sevón (Rapporteur) and M. Wathelet, Judges,

* Language of the case: Spanish.

Advocate General: P. Léger,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 2 April 1998,

gives the following

Judgment

1 By application lodged at the Court Registry on 22 July 1996, the European Parliament appealed under Article 49 of the EC Statute of the Court of Justice and the corresponding provisions of the ECSC and EAEC Statutes against the judgment delivered on 22 May 1996 in Case T-140/94 *Gutiérrez de Quijano y Lloréns* v *Parliament* [1996] ECR-SC II-689 (hereinafter 'the judgment appealed against'), by which the Court of First Instance annulled the decision of the European Parliament of 10 January 1994 rejecting Mr Gutiérrez de Quijano's complaint against the rejection of his candidature for the vacant post advertised in Notice of Transfer PE/LA/91 (hereinafter 'the contested decision').

The facts

2 As stated in the judgment appealed against, Mr Gutiérrez de Quijano entered the service of the Parliament on 6 January 1986 as a Spanish-language interpreter and was transferred to the Court of Justice on 1 January 1990.

3 On 4 July 1991, he sent a letter to the Director of the Parliament's Interpreting Service expressing the wish to be reappointed to the post he occupied at the Parliament before his transfer to the Court of Justice. Since he received no reply, he sent a letter on 5 February 1992 to his former immediate superior at the Parliament requesting a written reply to his application for a transfer. By a letter of 19 March 1992, the latter informed him that his application had been forwarded to the competent department of the administration of the Parliament. By letter of 24 May 1992 to the Parliament's Personnel Department, Mr Gutiérrez de Quijano again requested a written reply to his application for a transfer. Since he received no response, he visited the abovementioned department himself, which informed him that his application had never arrived.

4 By letter of 30 July 1992, the Directorate-General for the Administration of the Parliament informed Mr Gutiérrez de Quijano that the posts for interpreters in that institution were filled according to the combination of languages offered and that it was not expected to recruit staff possessing a range of languages such as his.

5 Notice of Competition No PE/161/LA for the recruitment of Spanish-language interpreters was published on 26 November 1992. By letter of 11 January 1993, Mr Gutiérrez de Quijano pointed out to the Head of the Personnel Division of the Parliament that, in accordance with Article 29 of the Staff Regulations of Officials of the European Communities (hereinafter the 'Staff Regulations'), transfer procedures take precedence over competition procedures, and formally repeated his request to be reinstated in that institution.

6 On 15 March 1993, the Parliament published Notice of Vacancy No 7281 concerning post No VI/LA/2759 for one Spanish-language interpreter, to be filled by way of transfer within the institution. On the same date, the Parliament also published Notice of Vacancy No PE/LA/91 concerning the same post No VI/LA/2759, to be filled by way of transfer from other Community institutions. The two notices were identical as regards the duties and the qualifications and knowledge required of the candidates. These included the 'ability to take charge of certain coordination

duties' and 'specific knowledge of problems relating to the powers of the Communities', conditions which were not laid down in Notice of Competition No PE/161/LA.

7 On 22 March 1993, Mr Gutiérrez de Quijano applied for the post advertised in Notice of Transfer No PE/LA/91. By letter of 16 August 1993, the Parliament informed him that it was not possible to grant his application for a transfer. On 30 September 1993, Mr Gutiérrez de Quijano lodged a complaint against the decision rejecting his application for a transfer. That complaint was rejected by decision of 10 January 1994.

8 On 8 April 1994 Mr Gutiérrez de Quijano brought an application seeking both the annulment of the contested decision and compensation for the non-material damage he claims to have suffered by reason of the refusal of that transfer.

The judgment appealed against

9 By the judgment appealed against the Court of First Instance granted the claim for annulment and dismissed the remainder of the application.

10 Before the Court Mr Gutiérrez de Quijano argued that the Parliament had breached the order of priority established by Article 29 of the Staff Regulations, which requires the appointing authority to consider first applications for transfer from officials of other institutions before opening the procedure for an open competition, as well as the principles of good administration, sound management, good faith and the protection of legitimate expectations. In his view, the Parliament had breached Article 29 of the Staff Regulations and the abovementioned principles by first publishing, on 26 November 1992, Notice of Open Competition No PE/161/LA for the recruitment of interpreters with the same range of languages as the applicant and later publishing, on 15 March 1993, Notice of Vacancy No PE/LA/91, then

rejecting the candidature he submitted in response to that notice although he fully met the conditions set out in it and was the only candidate, and proceeding in the end to make its selection from the successful candidates in the open competition whose qualifications were inferior to his.

11 In paragraph 41 of the judgment appealed against the Court of First Instance pointed out, first, that Article 29(1) of the Staff Regulations required the appointing authority to consider as a priority the possibilities of promotion and transfer within the institution before proceeding to one of the subsequent stages laid down by that article, that is to say, in order, consideration of the possibility of organising an internal competition, reviewing requests for inter-institutional transfer and, if necessary, organising an open competition (Case T-52/90 *Volger* v *Parliament* [1992] ECR II-121, paragraph 19), and, secondly, that the simultaneous publication of the notices corresponding to the various successive stages provided for in Article 29(1) of the Staff Regulations, such as an internal vacancy notice and a notice of inter-institutional transfer, even where those notices did not expressly set out the order of priority laid down in Article 29(1) of the Staff Regulations, did not prevent consideration being given first to internal candidates before a review of any requests for inter-institutional transfer (*Volger* v *Parliament*, cited above, paragraph 20).

12 It concluded, in paragraph 42, that the fact that the publication on 26 November 1992 of Notice of Open Competition No PE/161/LA preceded the publication, on 15 March 1993, of Notice of Transfer No PE/LA/91 did not automatically constitute a breach of Article 29(1) of the Staff Regulations, since the candidatures submitted under the open competition procedure were not considered until the consideration of the candidatures put forward under the notice of transfer procedure was completed.

13 The Court of First Instance then pointed out, in paragraph 43, that where, in the exercise of its power of assessment, the appointing authority decided, as in this case, to extend its choice in the interest of the service, and thus to pass from one stage of the recruitment procedure to another, which followed it according to the order of priority set out in Article 29(1) of the Staff Regulations, it had to exercise such power within the legal framework which it laid down for itself by means of the

vacancy notice and ensure that the conditions set out in the aforementioned notice corresponded to those set out in the notices relating to subsequent stages and, in particular, as in the present case, in the notice of competition, since if it were open to the institutions to change the conditions of participation from one stage of the procedure to the next, in particular by making them less strict, they would be at liberty to organise external recruitment procedures without having to consider internal candidates or, as in this case, candidates applying at the inter-institutional transfer stage (Joined Cases 341/85, 251/86, 258/86, 259/86, 262/86, 266/86, 222/87 and 232/87 *Van der Stijl and Cullington* v *Commission* [1989] ECR 511, paragraph 52; Case T-586/93 *Kotzonis* v *Economic and Social Committee* [1995] ECR-SC II-203, paragraph 45).

14 Having compared the notices in issue, the Court of First Instance found, in paragraph 44 of the judgment appealed against, that Notice of Transfer No PE/LA/91 required candidates to have the 'ability to take charge of certain coordination duties', whereas Notice of Vacancy No PE/161/LA did not contain that condition. In the light of the case-law requiring that the notices be exactly equivalent, it took the view that the Parliament was not entitled to argue that this condition, which was included in its standard notice of vacancy for posts in Grade LA 5/LA 4 only, had no effect in practice and that no candidate for a post in Grade LA 7/LA 6 was selected or rejected on the basis of that criterion.

15 It also found, in paragraph 45, that Notice of Transfer No PE/LA/91 contained a condition concerning 'specific knowledge of problems relating to the powers of the Communities', unlike Notice of Competition No PE/161/LA which, in the description of the compulsory tests (point B), only included a condition relating to 'knowledge of the major areas of Community activity'. The Court considered that, in requiring a 'specific' knowledge of problems relating to the 'powers' of the European Communities, the Notice of Transfer laid down a stricter requirement than that contained in the Notice of Open Competition: 'specific' knowledge implied the possession of thorough and clearly defined knowledge of a subject, namely the 'powers' of the European Communities, which covered all the areas in which the European Communities had a clearly delineated power, whereas the 'knowledge of the major areas of Community activity' required by Notice of

Competition No PE/161/LA merely implied the possession of general knowledge in the major areas of Community activity, which did not necessarily cover all the areas in which the Community had powers.

16 The Court of First Instance concluded, in paragraph 46, that Notice of Transfer No PE/LA/91, published as Internal Notice of Vacancy No 7281 on 15 March 1993, placed stricter conditions on participation than those set out in Notice of Competition No PE/161/LA published on 26 November 1992 (*Van der Stijl and Cullington* v *Commission*, cited above, paragraph 50). In the circumstances, the appointing authority could no longer observe either the framework which it had initially decided to adopt by publishing, despite the order provided for in Article 29(1) of the Staff Regulations, Notice of Competition No PE/161/LA before publishing Internal Notice of Vacancy No 7281 and Notice of Transfer No PE/LA/91, or the framework it subsequently chose by publishing the two latter notices. The appointing authority made it impossible for those notices, in so far as they referred to the same post, to play their essential part, pursuant to Article 29(1) of the Staff Regulations, in the recruitment procedure, namely that of informing the persons concerned, as accurately as possible, of the conditions to be fulfilled in order to be recruited to the post in issue (Case T-58/91 *Booss and Fischer* v *Commission* [1993] ECR II-147, paragraph 67; *Kotzonis* v *Economic and Social Committee*, cited above, paragraph 67; Case T-562/93 *Obst* v *Commission* [1995] ECR-SC II-737, paragraph 46). If in this case the appointing authority had found that the conditions required by the internal vacancy notice, the transfer notice and the general competition notice were either more or less exacting than the needs of the service demanded, it was entitled to reopen the recruitment procedure after withdrawing the original vacancy notice and putting a suitably amended one in its place (Case T-45/91 *McAvoy* v *Parliament* [1993] ECR II-83, paragraph 48) in order to be able duly to continue, on the basis of that notice, the subsequent stages of recruitment as provided for in Article 29(1) of the Staff Regulations.

17 However, the Court of First Instance found, in paragraph 47, that the Parliament did not withdraw the notices but continued with the recruitment procedure on the basis of the two notices with different contents. It concluded, in paragraph 49, that the rejection of Mr Gutiérrez de Quijano's candidature was irregular and in breach of the provisions of Article 29(1) of the Staff Regulations.

18 In paragraph 50, the Court of First Instance pointed out that, having definitively rejected the applicant's candidature on the grounds that the appointing authority was not obliged to fill a vacant post and that it wished to have a broader basis for comparison and selection, the Parliament did not in fact examine the candidature of Mr Gutiérrez de Quijano in relation to the conditions laid down in Notice of Transfer No PE/LA/91, nor in relation to those laid down in Notice of Competition No PE/161/LA, since, when candidatures submitted on the basis of the latter notice were examined, his candidature had already been rejected. The Parliament therefore did not proceed to consider the comparative merits of Mr Gutiérrez de Quijano and of the candidates who had been accepted on the basis of Notice No PE/161/LA, in order to ensure that, in the present case, recruitment had been carried out in accordance with Article 29 of the Staff Regulations, although such an examination was expressly given as a reason for the appointing authority's decision to move on to the open competition stage by means of the publication of Notice No PE/161/LA, which was intended to provide a wider basis for selection and comparison, and although such an examination was possible since the Parliament had in its possession the candidatures for the external competition and that of Mr Gutiérrez de Quijano at the same time.

19 The Court of First Instance therefore decided, in paragraph 51, to annul the contested decision without considering the other pleas put forward by Mr Gutiérrez de Quijano.

The appeal

20 In its appeal the Parliament claims that the Court should uphold the contentions it put forward at first instance and declare the initial application unfounded. It is based on a single plea alleging breach of Article 48(2) of the Rules of Procedure of the Court of First Instance, under which no new plea in law may be introduced in the course of proceedings, in that the Court of First Instance annulled the contested decision on the ground that the wording of the notice of transfer and that of the notice of competition were not identical, when that plea had never been put forward by Mr Gutiérrez de Quijano, either at the stage of the complaint or at the stage of the written procedure before the Court of First Instance. The Court of First Instance itself raised the issue of its own motion after putting a number of questions to the Parliament in preparation for the oral stage of the procedure. The

Parliament considers that what the parties are not allowed to do cannot *a fortiori* be permissible for the Court itself.

21 The Parliament argues further that, even if the plea alleging that the notices were not identical was not inadmissible as a new plea introduced in the course of proceedings, it was so because there was no act adversely affecting the official in question and because he had no interest in bringing proceedings: since Mr Gutiérrez de Quijano did not apply for Competition No PE/161/LA, the wording of the Notice of Competition cannot be considered to have affected him adversely. Moreover, the fact that he did not apply for the competition also means that he has no interest in bringing proceedings.

22 In the event that the Court should none the less consider that the plea in support of annulment raised by the Court of First Instance is admissible and that there is no problem of admissibility in the absence of any act adversely affecting the official concerned, the Parliament, by reference to an annex to the appeal, reiterates the arguments put forward before the Court of First Instance according to which the differences in the wording of the notices played no role when Mr Gutiérrez de Quijano's candidature was considered.

23 In his response, Mr Gutiérrez de Quijano first disputes that Article 48(2) applies to the Court of First Instance. The assertion that it does apply to the Court is a misconception of the powers of inquiry which the Court of First Instance has and of a court's function in exercising its jurisdiction. In particular, the *iura novit curia* principle allows a civil court to apply the rules of law it considers appropriate without altering the legal basis of the application or changing the substance of the issue raised. Moreover, the position taken by the Parliament requires the court to confine its reasoning to the arguments put forward by the parties, even where they are incorrect.

24 Mr Gutiérrez de Quijano submits, second, that the point about the disparities between the notices is not, strictly speaking, a plea but rather an argument necessarily included in the pleas put forward in the application. The respondent invokes *inter alia* breach of Article 29 of the Staff Regulations and failure of the Parliament to observe the legal framework it set during the successive stages of the selection procedure, and breach of the principle of sound administration. He points out that

he also referred, at the hearing and in his earlier pleadings, to the judgment in *Van der Stijl and Cullington* v *Commission* cited by the Court of First Instance. The fact, raised by the Court of First Instance, that the conditions in the notice of vacancy were more stringent than those in the notice of competition was yet another instance of the same irregular procedure followed by the Parliament.

25 Thirdly, Mr Gutiérrez de Quijano considers that the finding of disparities between the notices is a finding of fact, made in the course of consideration of the plea alleging breach of Article 29 of the Staff Regulations. Since an appeal may lie only on points of law, the appeal brought by the Parliament is inadmissible.

26 Next, Mr Gutiérrez de Quijano points out that the judgment of the Court of First Instance is not based solely on the disparities in the wording of the notices but also on the breach of Article 29 of the Staff Regulations inasmuch as it is considered to be a separate plea. This latter ground of the judgment, set out in paragraphs 49 and 50 of the judgment appealed against, is, he argues, sufficient to justify that Court's decision to annul (Case C-30/91 P *Lestelle* v *Commission* [1992] ECR I-3755, paragraph 28).

27 In response to the Parliament's argument that the point concerning disparities in the wording of the notices is in any event inadmissible in the absence of any act adversely affecting Mr Gutiérrez de Quijano or of any interest on his part in bringing proceedings in that he did not sit the competition, the respondent points out that the procedure laid down by the Staff Regulations for the case where an official wishes to change institution is inter-institutional transfer and not participation in a competition. He therefore committed no error in not sitting the competition.

28 In its reply, the Parliament argues *inter alia* that the differences in the notices were merely differences of wording and had no impact on the consideration of Mr Gutiérrez de Quijano's candidature and that to annul a decision on the basis of such differences is to display excessive regard for formalities. It also submits that in the cases cited by the Court of First Instance (*Van der Stijl and Cullington* v

Commission and *Kotzonis* v *Economic and Social Committee*), the facts were different, particularly in that the applicants expressly raised the issue of the disparities in the notices as a distinct and specific plea in support of annulment.

Findings of the Court

29 The first paragraph of Article 48(2) of the Rules of Procedure of the Court of First Instance provides: 'No new plea in law may be introduced in the course of proceedings unless it is based on matters of law or fact which come to light in the course of the procedure.'

30 From a straightforward reading of that rule in the context of Article 48 of the Rules of Procedure of the Court of First Instance and in the wider context of Title 2, Chapter 1, of those Rules, which is entitled 'Written Procedure', it is clear that this is a rule which applies to the parties and not to the Court of First Instance.

31 Accordingly, since the plea is to the effect that the Court of First Instance has not respected a rule which does not apply to it, it is unfounded.

32 Nor would the plea be founded if it had to be understood as implying that the Court of First Instance had ruled *ultra petita*.

33 It is clear from paragraph 49 of the judgment appealed against that the Court of First Instance annulled the contested decision for breach of Article 29(1) of the Staff Regulations on the ground that the rejection of Mr Gutiérrez de Quijano's candidature was irregular as the candidature was considered on the basis of a notice of transfer containing more stringent conditions than the notice of competition for recruitment to the same post.

34 It follows that the disparities in the notices were not a separate issue but an extension of the Court's argument establishing that the plea alleging breach of Article 29(1) of the Staff Regulations was well founded.

35 As regards the Parliament's alternative plea that the notice of competition does not constitute an act adversely affecting the official concerned and that he has no interest in bringing proceedings, on the ground that Mr Gutiérrez de Quijano did not sit the competition, it should be borne in mind that it follows from Article 51 of the EC Statute of the Court of Justice in conjunction with Article 112(1)(c) of the Rules of Procedure that an appeal must indicate precisely the contested parts of the judgment whose annulment is sought and also the legal arguments which specifically support that claim (Case C-26/94 P *X* v *Commission* [1994] ECR I-4379, paragraphs 11 and 12).

36 In this case the appellant does not indicate precisely at what stage in its reasoning the Court of First Instance identified the act adversely affecting Mr Gutiérrez de Quijano within the meaning of Article 91(1) of the Staff Regulations and in the light of which his interest in bringing proceedings had to be assessed, that is to say the act whose annulment Mr Gutiérrez de Quijano had requested, as being the notice of competition.

37 Rather, a straightforward reading of the judgment appealed against shows that the only act adversely affecting Mr Gutiérrez de Quijano whose annulment he had requested pursuant to Article 91(1) of the Staff Regulations was the decision of the Parliament of 10 January 1994 refusing to accept his complaint against the rejection of his candidature for the vacant post advertised in Notice of Transfer No PE/LA/91.

38 It follows that the alternative plea of absence of any act adversely affecting the official concerned and of no interest in bringing proceedings must be declared inadmissible.

39 As regards the Parliament's reference to the arguments raised before the Court of First Instance to the effect that the differences in the wording of the notices played no role, suffice it to note that, according to consistent case-law, an appeal which amounts to no more than a request for a re-examination of the pleas put before the Court of First Instance falls outside the jurisdiction of the Court of Justice (Case C-354/92 P *Eppe* v *Commission* [1993] ECR I-7027, paragraph 8, and the order in *X* v *Commission*, cited above, paragraph 13).

40 It follows from the foregoing that the appeal is in part unfounded and in part inadmissible.

Costs

41 Under Article 69(2) of the Rules of Procedure, which is applicable to the appeal procedure by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the respondent has applied for an order that the Parliament pay the costs and the Parliament has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (First Chamber)

hereby:

1. Dismisses the appeal;

2. Orders the European Parliament to pay the costs.

Edward Sevón Wathelet

Delivered in open court in Luxembourg on 19 November 1998.

R. Grass

Registrar

P. Jann

President of the First Chamber