OPINION OF ADVOCATE GENERAL LÉGER

delivered on 17 January 1995 *

1. In order to draw up a reserve list of C5/C4 secretaries of English mother tongue the Commission held Open Competition No COM/C/741, notice of which was published on 24 December 1991. [1]

2. Point II. B. 2 of the notice excluded candidates possessing a qualification entitling them to participate in A or LA competitions.

3. The Selection Board informed the respondent in the appeal by letter of 9 June 1992 that it had decided to reject her application on the grounds that she had completed a university course and obtained an honours degree in French and Italian Literature from University College, Dublin.

4. The respondent brought an action challenging that decision before the Court of First Instance on 21 August 1992, claiming that the exclusion of graduates from C competitions was incompatible with the Staff Regulations of Officials of the European Communities ('the Staff Regulations'), the general principle of equal treatment and the freedom to pursue an occupation.

5. Before submitting a defence to the action the Commission raised an objection as to admissibility on the ground that the alleged unlawfulness of the competition notice could not be relied upon in order to challenge a selection board's decision if the provisions in the notice which were considered to affect the applicant adversely had not been challenged in due time. It relied primarily on the judgment of the Court of Justice in *Adams* v *Commission*, [2] and on that of the

1 — OJ 1991 C 333 A, p. 11 (English edition).

2 — Case 294/84 [1986] ECR 977.

Court of First Instance in *Gallone* v *Council*. [3]

6. The Court of First Instance dismissed the objection and declared the action admissible by a judgment of 16 September 1993 [4] on the grounds that, first, it emerged from the case-law of the Court of Justice that 'pleas based on the unlawfulness of a competition notice which was not challenged in due time' were admissible 'when those pleas concerned the statement of the reasons for the implementing decision which was being challenged'. [5]

7. Secondly, the Court noted that the decision in *Adams* did not conflict with that case-law because '... in that case, the pleas based on the unlawfulness of the competition notice, which were dismissed as inadmissible, were not argued by the applicants in relation to the statement of reasons for the decisions not to admit them to the tests, which were at issue in the application.' [6]

8. Lastly, the Court noted that in this case the pleas based on the unlawfulness of the conditions for admission laid down in the competition notice, that is to say, the requirement of the absence of a degree, concerned the grounds for the contested decision (the reason for which was given as the fact that the respondent held a university degree), [7] and ruled on 16 September 1993 that the application was admissible.

9. It is that judgment which the Commission asks the Court of Justice to set aside.

10. The appeal is based on three pleas in law:

— the judgment is not compatible with the case-law of the Court of Justice and does not 'emerge' from it: it would therefore give rise to legal uncertainty;

— the judgment would give rise to 'administrative uncertainty';

— the time-limit for bringing actions laid down by the Staff Regulations would be unduly extended.

11. I shall examine each of those pleas in turn.

3 — Case T-132/89 [1990] ECR II-549, para. 20.

4 — *Noonan* v *Commission* (Case T-60/92 [1993] ECR II-911).

5 — Paragraph 24 of the contested judgment.

6 — Paragraph 25.

7 — Paragraph 29.

1. *Does the case-law of the Court of Justice and the Court of First Instance permit an action for the annulment of an individual decision excluding a candidate from a competition to be based on the unlawfulness of the conditions laid down in the competition notice?*

12. The Commission's argument may be summarized as follows:

the competition notice is a decision by the appointing authority capable of adversely affecting an individual and of being the subject-matter of an action for annulment under the conditions referred to in Articles 90 and 91 of the Staff Regulations;

the notice of competition ceases to be challengeable 3 months after it has been published;

a candidate to whom an individual decision refusing to admit him to a competition has been addressed may not seek the annulment of that decision on the ground that the competition notice was unlawful unless the abovementioned three month time-limit can be made to run anew, which would run counter to the principle of legal certainty;

since the *Adams* judgment, [8] which departed from the previous case-law, 'the time-limits for challenging the alleged illegality of a competition notice cannot be reopened except where the origin of any irregularities which occur in the course of the conduct of the competition can be found in the wording of the competition notice;' [9]

irregularities which occur in the course of the conduct of the competition cannot result from a provision in a competition notice which is clear and not open to any interpretation whatsoever. [10]

13. I have to say at the outset that I cannot discern in the case-law of the Court of Justice and the Court of First Instance the two trends distinguished by the Commission. On the contrary, I see a progressive refinement of the views of the Community judicature, which I propose to set out here.

14. A crucial distinction runs through the case-law.

8 — Cited above.
9 — Appeal, p. 8.
10 — Ibid.

15. On the one hand, the competition notice is a general, impersonal act emanating from a Community institution which is addressed to all potential candidates. It may be the subject of an action for annulment by an individual within three months of its publication (Article 90(2) of the Staff Regulations). The applicant must show, as required by the fourth paragraph of Article 173 of the EC Treaty, that the act adversely affects him and concerns him directly and individually.

16. A decision not to admit a candidate to a competition, on the other hand, is an individual decision based on the competition notice, and applying the provisions thereof. The person to whom such a decision is addressed will have no difficulty in showing that it adversely affects him. Such decisions refer to the conditions laid down in the competition notice.

17. May a candidate seek to have a decision refusing to admit him to a competition annulled on the grounds that the competition notice is unlawful? In other words, may he raise a *plea of illegality*, so to speak, in response to the selection board's decision not to admit him to the competition?

18. The Court has defined such a plea, for which provision is made in Article 184 of the EC Treaty, as one that 'gives expression to a general principle conferring upon any party to proceedings the right to challenge, for the purpose of obtaining the annulment of a decision of direct and individual concern to that party, the validity of previous acts of the institutions which form the legal basis of the decision which is being attacked, if that party was not entitled under Article 173 of the Treaty to bring a direct action challenging those acts, by which it was thus affected without having been in a position to ask that they be declared void.' [11]

19. Since the judgment in *Simmenthal* v *Commission*, [12] the Court has held that a plea of illegality may be relied on as against any act of general scope which produces effects analogous to those of a regulation. [13]

20. There must be a '*direct legal connection*' between the individual decision which is contested and the general measure the legality of which is challenged. [14]

21. Pleas of illegality have been allowed in the context of actions between the Community and its servants brought under Article 179 of the EC Treaty and Article 91 of the Staff Regulations. In *Acton* v *Commission*, [15] where the annulment of individual decisions making deductions from salary for strike

11 — Case 92/78 [1979] ECR 777, para. 39.
12 — Cited in footnote 11.
13 — Paragraph 40.
14 — Case 21/64 *Macchiorlati* v *High Authority* [1965] ECR 175, at p. 187 *in fine*.
15 — Joined Cases 44/74, 46/74 and 49/74 [1975] ECR 383.

action was sought, and those decisions were adopted in order to implement a general decision of the Commission, the Court laid down the following principle: '... in the context of the right of action made available by Article 91 of the Staff Regulations and in the case of a measure of a general nature designed to be implemented by means of a series of individual decisions affecting all or a large proportion of the officials of an institution, an official taken individually cannot be deprived of his right to invoke the illegality of that measure in order to attack the individual decision which alone allows him certain knowledge of the manner in which and the extent to which his individual interests are affected.' [16]

22. In my view, between the Court's judgment of 31 March 1965 in *Ley* v *Commission* [17] and that in *Gallone* (cited above) the decisions cited by the parties have applied precisely that principle, defining progressively the conditions for implementing it in the particular field with which we are concerned here:

(1) The general and impersonal act must be one not open to direct challenge by individuals, or only exceptionally so. As the Court stated in *Simmenthal*, '[the] wide interpretation of Article 184 derives from the need to provide those persons who are precluded by the second paragraph of Article 173 from instituting proceedings directly in respect of general acts with the benefit of a judicial review of them at the time when they are affected by implementing decisions which are of direct and individual concern to them.' [18] The Court held accordingly in *TWD Textilwerke Deggendorf* v *Germany* [19] that a recipient of State aid who brings an action challenging the administrative act whereby the national authority revokes the certificates which formed the legal basis for granting the aid could not rely indirectly on the unlawfulness of the Commission's decision declaring the aid incompatible with Community law. The Court noted that 'the applicant in the main proceedings ... could without any doubt have challenged it under Article 173 of the Treaty.' [20]

As regards competitions, it should be noted that the competition notice is a measure of general scope (which the respondent has compared to a notice of invitation to tender [21]) which may only in exceptional circumstances be the subject-matter of an action for annulment brought by an individual. *Küster* v *Parliament* [22] is unusual in that regard. The notice of internal competition in that case laid down certain language requirements as a condition for access to the post,

16 — Paragraph 7.
17 — Joined Cases 12/64 and 29/64 [1965] ECR 107.
18 — Paragraph 41.
19 — Case C-188/92 [1994] ECR I-833.
20 — Paragraph 24.
21 — Paragraph 3.8 of the Reply.
22 — Case 79/74 [1975] ECR 725.

the result of which was to exclude Mr Küster and to damage his chances of promotion.

I should add that in practice competition notices are not challenged before the applications to take part have been submitted; it is the individual decision excluding the candidate which brings the challenge. It is therefore exceptional, but not impossible, for an action to challenge directly the notice of competition. [23]

(2) The action is directed against the individual decision not to admit the candidate and it *relies on* the unlawfulness of the competition notice. [24] The applicant must establish that there is a direct connection [25] between the alleged irregularity in the competition notice and the selection board's decision not to admit him.

That principle was resumed in *Simonella* v *Commission*: [26]

'... whilst (the) submission (that the notice of competition is incompatible with the Staff Regulations) must be rejected in so far as it concerns the (failure to indicate) in the competition notice ... the marks to be carried by certain tests, it must still be considered in so far as it concerns the reasons on which the contested decision is based', [27]

and, even more clearly, in *Agazzi Léonard* v *Commission*: [28]

'... whilst those submissions must be rejected in so far as they relate to the irregularity of the competition notice as such, they must be considered in relation to the substance of the case in so far as they relate to irregularities vitiating the conduct of the competition itself.' [29]

23. The purpose is thus to ensure that competition notices themselves are not placed at issue in proceedings challenging an individual decision when in fact the alleged defect in the notice did not affect the individual decision.

24. The *Adams* decision accords with that reasoning. The action seeking the annulment of the selection board's decision not to admit a candidate to the tests in the competition

23 — The same is true of actions by individuals for the annulment of a regulation. See Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853.

24 — See Case 11/65 *Morina* v *Parliament* [1965] ECR 1017, at p. 1023: '... the conclusions concerning the competition are admissible only in so far as they support the application directed against the abovementioned decision'.

25 — See for example Case 78/71 *Costacurta* v *Commission* [1972] ECR 163, para. 12.

26 — Case 164/87 [1988] 3807.

27 — Paragraph 19.

28 — Case 181/87 [1988] ECR 3823.

29 — Paragraph 24.

was based primarily on the following two complaints.

25. In the first case, the competition notice violated Article 1(d) of Annex III of the Staff Regulations by failing to specify the diplomas and other evidence of former qualifications or the degree of experience required for the posts to be filled. The information supplied by letter subsequently was given too late.

26. Secondly, the nature of the tests indicated in the notice of competition was in breach of Article 1(e) of Annex III to the Staff Regulations, which requires the notice to specify, 'where the competition is on the basis of tests, what kind they will be and how they will be marked'. The applicant claimed that the tests were not specified.

27. As regards the first point, it is clear that had the notice been more specific as regards the requirements of experience that would not in any way have influenced the individual decisions refusing to admit candidates. As regards the second, it could not have affected the applicants because they did not take part in the tests.

28. It was because the defects in the notice relied on in those complaints had no connection with the reasons for the decisions not to admit (inadequate qualifications and experience) that the Court rejected them as inadmissible, pointing out that the challenges to the individual decisions were in fact being used as a means of challenging the lawfulness of the competition notice. [30]

29. Consequently, the Court confined its consideration of the substance to the submissions alleging that certain actions of the selection board during the procedure were unlawful. [31]

30. Examination of the judgment in *Adams* reveals that the decisions refusing to admit the candidates were in fact annulled on grounds other than the unlawfulness of the competition notice. A significant factor was undoubtedly the length of time taken by the competition procedure, which was no less than two and a half years.

31. In an action directed against an individual decision refusing to admit a candidate it is therefore not possible to rely on a defect in the competition notice which has no bear-

30 — See paragraph 17 of *Adams*.
31 — Ibid., paragraph 18.

ing on the decision refusing to admit the candidate. The Court of First Instance therefore rightly argued from *Adams* that:

'... in that case, the pleas based on the unlawfulness of the competition notice, which were dismissed as inadmissible, were not argued by the applicants in relation to the statement of reasons for the decisions not to admit them to the tests, which were at issue in the application.' [32]

32. If, on the contrary, the contested provisions in the notice are those on which the decision not to admit the candidates is based, is the plea of illegality then admissible? Is there the 'direct legal connection' referred to in the decisions of the Court concerning the plea of illegality provided for in Article 184 of the Treaty?

33. Adams does not supply the answer to that question.

34. Subsequent decisions refer to the principle laid down in that decision to the effect that:

'... any official who takes the view that the illegal character of a notice of competition has an adverse affect on him must challenge that notice in good time. Were it otherwise, it would be possible to challenge a competition notice long after it had been published and after most, or all, of the operations carried out in connection with the competition had already taken place, which would be contrary to the principles of legal certainty, legitimate expectation and sound administration.' [33]

35. They add:

'Failure to challenge a notice of competition within the time-limit ... does not prevent an applicant from relying on irregularities occurring in the course of the competition, even if the origin of those irregularities may be found in the wording of the notice of competition'. [34]

32 — Paragraph 25 of the judgment appealed against.

33 — Joined Cases 64/86, 71/86, 72/86, 73/86 and 78/86 *Sergio* v *Commission* [1988] ECR 1399, para. 13. See also paragraph 15 of *Simonella* and paragraph 22 of *Agazzi Léonard*, both cited above.

34 — *Sergio*, para. 15. See also paragraph 16 of *Simonella*, paragraph 23 of *Agazzi Léonard*, and paragraph 20 of the judgment of the Court of First Instance in *Gallone*, cited above.

36. The defect must have affected the actual conduct of the competition.

37. The Court of First Instance rightly pointed out that '... where a plea based on the alleged unlawfulness of the competition notice which was not challenged in due time concerns the statement of reasons for the contested individual decision, the Court has held that such a plea is admissible'. [35]

38. In my view the same must be true where the selection board has no discretion to exercise in applying the conditions laid down in the competition notice. In that case, it has no margin of discretion to enable it to avoid the conditions stipulated in the notice.

39. How does that affect the respondent? The refusal to admit her to the competition is directly attributable to the condition regarding the absence of a university qualification which appears in the competition notice. The plea challenging that condition is directly linked to the reasons for the contested decision, as the Court of First Instance found in paragraph 29 of the judgment.

35 — Paragraph 27 of the judgment appealed against.

40. The Court of First Instance was thus following the case-law of the Court of Justice, on which it expressly based its decision, and which it interpreted entirely correctly. I cannot therefore discern any breach of the principle of legal certainty in the judgment.

2. Does the decision of the Court of First Instance lead to 'administrative uncertainty'?

41. The Commission maintains that the decision of the Court of First Instance has the effect of enabling the conditions laid down in the competition notice to be challenged without limit in time, even if they are clear and not open to interpretation.

42. That plea requires only a brief comment.

43. There is no indefinite extension of the time-limit for bringing an action for annulment for the simple reason that in this case the action is not an action for annulment.

44. The plea of illegality must not be confused with such an action, which produces

different effects. 'The regulation will not be annulled *erga omnes*. It will be declared inapplicable in so far as it has been applied in the individual decision. The ruling will be effective only as between the parties and does not place the existence of the regulation itself at issue'. [36] A plea of illegality therefore constitutes a challenge to such a measure only in a very narrow sense.

45. Furthermore, the clear provisions of the competition notice fall to be debated only in so far as they are directly linked to the grounds for the individual decision not to admit the candidate.

3. *Has the time-limit laid down by the Staff Regulations been 'unduly extended'?*

46. I have already dealt with this third plea, [37] which does not call for further discussion.

47. I conclude, therefore, that the judgment appealed against should be affirmed.

48. The judgment of the Court of Justice does not close the proceedings as provided for in Article 69 of the Rules of Procedure; there is therefore no need to rule on costs, which must be reserved.

36 — R. Joliet, *Le droit institutionnel des Communautés européennes — Le contentieux*, 1981 p. 137.

37 — See paragraph 43 of this Opinion.