OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 5 February 1987 *

Mr President,
Members of the Court,

A — Facts

1. The applicant in these proceedings was first employed by the European Parliament in 1973 as a temporary employee in Grade B 4. From 1977 onwards she worked for five years in the Information Office in London and since March 1982 she has been employed in the Library Department of the Directorate-General for Research and Documentation. At present she is classified in Grade B 1.

2. The applicant seeks the annulment of a decision for filling a B 1 post in the Human Rights Department of the Directorate-General for Research and Documentation, a post for which she herself was a candidate.

3. Mr Fumagalli, who was appointed to the post in question by way of promotion, has been employed by the Parliament since October 1971. Initially an auxiliary employee, he became an official in May 1973 and was subsequently, after a promotion, classified in Grade B 2. From October 1980 onwards he was seconded pursuant to Article 37 of the Staff Regulations to a political group (as Joint Secretary-General). Upon the termination of his period of secondment (in October 1984) he was reinstated in the General Secretariat of the Parliament where he occupied the post referred to above.

4. In June 1985 staff were informed by Vacancy Notice No 4615 that that post was to be filled by promotion or transfer. Eleven persons, among them the applicant, applied for the post; eight were candidates for promotion, including Mr Fumagalli, who had been on the list of officials eligible for promotion since 1984. On 20 June 1985 the list of candidates was sent to the Director-General for Research and Documentation (Mr Palmer has occupied this post since 1 January 1985) and he was asked to state his views. It was expressly noted that 'you may consult the personal files of the candidates at the Career Management Division, Personal Files Office'. On 4 July 1985 that Director-General proposed that Mr Fumagalli should be promoted to fill the post declared vacant, and a decision to that effect was made by the Director-General for Administration and Personnel of the European Parliament on 17 July 1985, with effect from 1 July 1985. A note was sent to the applicant on 23 August 1985 informing her that her application for the post had not been successful.

5. Even before that date, however, on 14 August 1985, the applicant knew the outcome of the appointment procedure and submitted a complaint to the appointing authority. In challenging the decision she argued that she herself fulfilled the conditions laid down in the vacancy notice and that it had not been shown that the official appointed to the post was clearly better qualified than she was. She had heard, moreover, that the post had in fact been reserved for the purpose of 'regularizing' the position of Mr Fumagalli.

* Translated from the German.

6. That complaint was rejected by a decision of 4 December 1985 of the Director-General for Administration, Personnel and Finance, and on 21 February 1986 the applicant therefore brought proceedings before the Court. She claims that the Court should:

Amend or annul

(a) the decision of 17 July 1985 of the Director-General for Administration, Personnel and Finance appointing Mr Fumagalli to the post advertised in Vacancy Notice No 4615;

(b) the decision rejecting the applicant's candidature for that post.

In so far as the application for the amendment of that decision is declared admissible and well founded, order that the applicant should be appointed to the post in question.

7. The European Parliament argues in the first place that the application is inadmissible. It further submits that in any event it should be dismissed as unfounded.

B — The following remarks are in my view appropriate

I — *Admissibility*

8. On the issue of admissibility the Parliament expressed the view that the decision appointing another official to the vacant B 1 post (and thus rejecting the applicant's candidature) cannot be regarded *as an act adversely affecting the applicant* since she is already classified in Grade B 1. Furthermore, it submits that the applicant has no *interest* in bringing proceedings. In the light of her present classification she has no material interest (not even in the form of any career prospects associated with the post in question); in so far as the applicant relies on a non-material interest (that is to say, puts forward personal grounds for a transfer, such as those which may be inferred from the documents attached to her reply), it is clear that such an interest cannot be taken into account for the purposes of Article 91 of the Staff Regulations.

9. The applicant disputes that view of the matter. She argues first of all that the existence of an act adversely affecting her cannot be denied, since in her submission the act in question constitutes a misuse of the appointment procedure and involved an abuse of discretion. Secondly, she relies on the right to apply for transfer laid down in Article 7 of the Staff Regulations (in respect of which it must be sufficient that she finds her present working conditions unpleasant and would prefer the duties of the vacant post because of their specialized nature), and she points out that the Court has frequently held that decisions transferring officials constituted acts adversely affecting them.

10. With regard to this issue it can be said right away that the applicant's first submission is certainly irrelevant. It is not possible to decide the question whether there is an act adversely affecting the applicant on the basis of the submissions contesting the decision in question. It certainly cannot be said that whenever it is asserted that there has been an abuse of discretion in a particular procedure it must be concluded that there is an act adversely affecting the applicant for the purposes of Article 91 of the Staff Regulations.

11. It must also be acknowledged that the case-law relied on by the applicant has no direct bearing on this case, since those cases all concern the possibility of bringing an

action in the event of a transfer *against the will* of the person concerned (see the judgments in Joined Cases 18 and 35/65,[1] Case 35/72[2] and Case 33/79[3]). Some importance may however be ascribed to the fact that according to the judgment in Case 35/72 reference must be made not only to material interests but also, having regard to the nature of the duties in question and the attendant circumstances, to the non-material interests and future prospects of the official concerned (see paragraph 4) and that in Case 33/79 the Court considered it relevant that the modification of the duties assigned to an official may have an effect on his future prospects (paragraph 13). Reference may also be made to the judgment in Case 46/69,[4] where the Court held that an official may have a legitimate interest in preferring one post to another and that the Staff Regulations therefore make it possible for an official to be transferred at his own request.

12. In my view, therefore, an action such as the one now before us may be considered admissible on two grounds.

13. Let me advert first of all to the principle that every unsuccessful candidate in a procedure for filling a post has a right of action without there being any need to consider the nature of his interest. Reference in that regard may be made to the judgment in Case 257/83,[5] in which the Court held admissible the action of a candidate in a competition contesting a decision appointing another candidate, and thus recognized that he had an interest protected by law.

14. Secondly, it may be considered significant that Article 7 of the Staff Regulations provides for transfer at the request of the official, from which it may be inferred that persons entitled to apply for transfer have a legitimate interest. In that regard it is difficult to hold, however, that only material interests are relevant (for example, the interest in obtaining a post which directly ensures access to a specific career bracket). An official may also apply for a transfer because his working conditions are unfavourable (strained relations within a department may make advancement difficult) or because new duties might improve the possibility of promotion to a higher category. Such circumstances can certainly constitute a relevant interest, and it may therefore legitimately be argued that in principle an official whose application for a transfer is rejected should have a right of action against a decision appointing another official to the post applied for.

15. I cannot therefore accept the Parliament's argument that the action is inadmissible, and I shall thus in any event go on to deal also with the question whether the action is well founded.

II — *Substance of the case*

16. The applicant seeks to support the claim as delineated in the conclusions cited above by stating that the contested promotion was not made 'in the interest of the service' (as

1 — Judgment of 5 May 1966 in Joined Cases 18 and 35/65 *Gutmann* v *Commission of the EAEC* [1966] ECR 103.

2 — Judgment of 27 June 1973 in Case 35/72 *Kley* v *Commission* [1973] ECR 679.

3 — Judgment of 28 May 1980 in Case 33/79 *Kuhner* v *Commission* [1980] ECR 1677.

4 — Judgment of 13 May 1970 in Case 46/69 *Reinarz* v *Commission* [1970] ECR 275, at paragraphs 5 and 6.

5 — Judgment of 16 October 1984 in Case 257/83 *Williams* v *Court of Auditors* [1984] ECR 3537.

required by Article 7 of the Staff Regulations), that is to say, to ensure that the post was filled by an official of the highest standard of ability, efficiency and integrity (as required by Article 27 of the Staff Regulations). In fact, she says, it was made in order to 'regularize' the position of an official who had been seconded to a political group, since upon the termination of his secondment that official could not be reinstated under Article 38 (g) of the Staff Regulations in the post he had previously held in the Directorate-General for Administration, Personnel and Finance (that post having in the meantime been transferred to the Human Rights Department).

17. The applicant argues that if the procedure for filling the post had been correctly conducted — that is to say, with an examination of the comparative merits of the candidates, of which there is no mention — she herself would certainly have been appointed to the post since she was the best qualified candidate from the point of view of experience, knowledge and ability.

18. The Parliament replied that the procedure for filling the post was conducted correctly, since the personal files of all the candidates and their periodic reports were carefully examined before the proposal for promotion was made by the Director-General for Research and Documentation. The Parliament further stated that under the Staff Regulations applicants for transfer have no priority over candidates for promotion, and emphasized that in assessing the abilities of candidates the appointing authority enjoys wide discretion; consequently, the only ground on which its decision can be challenged is that a manifest error was made. Finally, in so far as the applicant speaks of an abuse of procedure or discretion, she has put forward no evidence of abuse and in any event the elements on which she relies do not provide a sufficient basis for such a conclusion.

19. On this issue it is my impression that the Parliament clearly has the sounder arguments and that the application cannot therefore be considered well founded.

20. (a) The serious allegation of abuse of discretion may be taken first.

The Parliament has correctly emphasized that the burden of proof lies on the applicant, and it is equally clear that there is no ground for concluding 'on the basis of objective, relevant and consistent facts' that the Parliament used its powers for purposes other than those intended (judgment in Joined Cases 18 and 35/65 [1966] ECR at page 117). It is not sufficient in that regard that the vacancy notice was not published until eight months after Mr Fumagalli, following the termination of his secondment, was assigned to the post in question. That delay need not necessarily be ascribed to a desire to allow Mr Fumagalli to obtain relevant experience (which is indeed referred to in the decision appointing him); it may equally well be ascribed to mere 'administrative delays' of the kind referred to by the Parliament's representative at the hearing, which are quite familiar to the Court, whose knowledge of administrative practices has been gleaned from a series of cases brought before it.

21. Nor is the applicant helped by a statement by the former Director-General for Research and Documentation, on which

she particularly relied, to the effect that the post in question was allocated to the Directorate-General for Research and Documentation only in order to 'regularize' the position of Mr Fumagalli. In a letter of 8 July 1985 (submitted to the Court at the hearing) that statement was significantly qualified, and the assurance was also given 'that the appointing authority will consider carefully all the applications for the post and decide in accordance with the normal rules how the post should be filled'. It must also be recalled that from 1 January 1985 onwards the author of that letter and of the statement in question was no longer Director-General for Research and Documentation and had nothing whatsoever to do with the conduct of the procedure for filling the post (neither as the person making the proposal nor as the person appointing the successful candidate).

22. (b) The Parliament also correctly pointed out that under Article 29 of the Staff Regulations candidates for promotion and applicants for transfer stand on the same footing. Applicants for transfer are entitled to no priority in the filling of posts. As was made clear in the judgment in Case 21/70,[6] therefore, a candidate for promotion is to be preferred when he is more suitable than other candidates.

23. The Parliament also emphasized that it had carried out a thorough examination of the comparative merits of all candidates on the basis of their personal files and periodic reports, in order to find the best candidate. Mere mention of the fact that there is no reference to such examination in the contested decision itself (as the Court has held, grounds need not be stated for a positive decision) is obviously not sufficient in order to cast doubt on that official assurance.

24. Finally, with regard to the applicant's view that she was the better qualified candidate and that in any event it was for the appointing authority to show that that was not so and that in fact the successful candidate was better qualified, it must be stated first of all that a simple assertion of that nature in no way obliges the appointing authority to provide the evidence referred to; it is instead for the person challenging a decision to show that it is defective. Secondly, it must be recalled in this regard that as a matter of principle the Court of Justice may only review the assessment of the abilities of candidates where manifest error is shown. No substantial evidence of such error has been put forward.

C — Conclusion

25. It is unnecessary, therefore, to hear the witnesses which the applicant has offered to call, and I can only propose that the Court should dismiss the application (rightly to be considered admissible) as unfounded and make an order for costs in accordance with Article 70 of the Rules of Procedure.

6 — Judgment of 3 February 1971 in Case 21/70 *Rittweger* v *Commission* [1971] ECR 7.