administration in making its assessment, the latter has remained within reasonable limits and has not used its power in a manifestly incorrect way. Neither the fact of having occupied the post in an acting capacity nor length of service in a lower grade constitute decisive grounds overriding the interests of the service, which is the decisive criterion determining the choice of candidates to be promoted.

REPORT FOR THE HEARING
delivered in Case 306/85 *

I — Facts and procedure

1. The applicant, André Huybrechts, an official of the Commission since 1958, has since that date occupied the post of Principal Administrator with a classification in Grade A 4 (and step 8 for the past 10 years).

Since 15 September 1982 he has been employed in Division A-3 (Energy, Mining and Industry) of Directorate-General VIII. After the retirement of the former Head of Division the applicant performed the duties of Head of Division from 1 September 1983 to 31 December 1984 first as a deputy (from 1 September 1983 to 31 March 1984) and then as an acting Head (from 1 April to 31 December 1984).

2. On 26 October 1984 the Commission published Vacancy Notice No COM/1422/84 (drawn up in November 1983) relating to the post of Head of Division VIII-A-3. On the subject of requisite qualifications the notice read as follows:

'Requisite qualifications:

(1) ...

(2) Thorough knowledge of development and cooperation policy and of energy, mining and industrial sectors of developing countries, their perspectives and impact on the economic and social environment.

(3) Experience appropriate to the duties.

(4) Ability to run an administrative unit comprising various social and economic sectors.'

3. The applicant applied for the post. By a decision of 19 December 1984 the Commission appointed J. Delorme, chef de cabinet of Mr Pisani, at the time Commissioner responsible for development. The applicant was informed in a memorandum dated 5 February 1985 that 'his application had been unsuccessful'.

* Language of the Case: French.

4. On 19 March 1985 the applicant submitted to the appointing authority a complaint in accordance with Article 90 (2) of the Staff Regulations seeking the annulment of the aforementioned appointment and the subsequent decision rejecting his application.

By letter dated 17 April 1985 the applicant suggested to the department responsible for inquiring into his complaint that it should arrange to have forwarded to it *inter alia*:

'(a) The memoranda concerning the transmission of the files (of officials who had applied for the post . . .) to the Advisory Committee on Appointments or Promotions to posts in Grades A 1, A 2 and A 3 . . .'.

5. The applicant's complaint was expressly rejected by letter dated 2 August 1985. Subsequently the applicant made the present application, which was received at the Court Registry on 11 October 1985.

6. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court (Second Chamber) decided to open the oral procedure without any preparatory inquiry. It nevertheless requested the Commission to produce copies of Opinion No 48/84 of the Advisory Committee on Appointments to Grades A 2 and A 3 and the particular minutes of the meeting of the Commission at which it was decided to appoint another candidate to the post at issue.

II — Conclusions of the parties

The *applicant* claims that the Court should:

1. Declare the application admissible and well founded;

2. In consequence, annul:

(i) The appointing authority's decision of 19 December 1984 appointing J. Delorme to the post of Head of Division VIII-A-3 (Energy, Mining and Industry);

(ii) The subsequent decision of the appointing authority rejecting his application for the post;

(iii) The appointing authority's decision rejecting his complaint;

3. Order the Commission to pay the costs.

The *Commission* contends that the Court should:

(i) Dismiss the action as unfounded;

(ii) Make an appropriate order as to costs.

III — Submissions and arguments of the parties

The applicant makes the following three submissions:

(i) Infringement of the Staff Regulations and in particular Articles 25 (2) and 45 (1) and disregard of essential procedural requirements;

(ii) Infringement of the Staff Regulations and in particular Articles 5 (3), 7 (1), 27 and 45 (1); disregard of general principles of law, in particular the

principle that legally acceptable reasons (that is to say relevant and not vitiated by mistake of law or fact) must be given for every administrative measure, and disregard of the duty to have regard to the interests of staff;

(iii) Infringement of the Staff Regulations, in particular Articles 7 (1) and 45 (1), and misuse of powers.

(i) *The first submission*

1. The *applicant* claims that prior to the appointment decision and the decision rejecting his application for the post at issue there was no comparison of the merits of the officials who had applied for the post and no comparison of their staff reports.

To the applicant's knowledge neither the Advisory Committee on Appointments to Grades A 2 and A 3 nor the Commission, as appointing authority, was in possession of the candidates' personal files. Although it is true that at a meeting on 7 May 1985 with the Head of the Staff Regulations Division the applicant was able to see copies of the opinion of the said Committee and the minutes of the Commission on the appointment in question, they were purely formal documents. Further, the memoranda concerning the transmission of the personal files to the Committee were not shown to him although he had requested them by letter dated 17 April 1985. It is for the Commission to prove to the Court that the comparative merits of the applicants were considered in accordance with the requirements of Article 45 (1) of the Staff Regulations.

2. The *Commission* contends that that submission is based on mistakes of fact. Evidence that the Advisory Committee on Appointments to Grades A 2 and A 3 and the Commission considered the comparative merits of the candidates and their staff reports is to be found in the respective minutes, which were shown to the applicant at the meeting on 7 May 1985. The Commission has no memoranda concerning the transmission of the files of the candidates to the Committee and to the Commissioners.

(ii) *Second submission*

1. The *applicant* claims that the contested decisions are unsupported by any statement of reasons or at least by legally acceptable reasons.

In the applicant's view everything indicated that he should be appointed to the post in issue. He is the oldest (57) of all the applicants, the most senior in the department (26 years) and in Grade A 4 (26 years); he has the longest experience in the relevant area (31 years) and in the specific sector of Division VIII-A-3. Of all the candidates the applicant best satisfies the requisite qualifications and does so perfectly; he was first deputy and then acting Head of Division for 16 months and his last staff report was full of praise. Moreover, this post is his last opportunity of completing a normal career. The Director responsible for the division in question thought that he was by far the best candidate. In those circumstances the appointing authority, in appointing another applicant, did not keep within the

reasonable confines of its discretion or at least it has not been proven to the standard required by law that it did so.

Since it is common ground that the applicant was perfectly capable of performing the duties at issue (he did so for 16 months to everyone's satisfaction), the duty to have regard to his interests required that his main interest, namely promotion finally to Grade A 3, should be respected.

2. The *Commission* states that according to the case-law of the Court the appointing authority does not have to give reasons for promotion to applicants who are not promoted.

It contends that consideration of the applicant's position and in particular the facts which he has set out shows that the appointing authority has not exceeded the limits of its discretion as recognized by the Court. Mr Delorme was 50 when the contested decision was adopted and had some 9 years seniority in the Commission and in the grade as well as some 22 years experience in the relevant sector. Comparison of the staff reports of Mr Delorme, which are eulogistic in every way, and those of the applicant favours Mr Delorme. As for the applicant's argument based on the fact he had been deputy and acting Head of the Division at issue, the Commission observes that the fact of having performed duties above one's grade gives no entitlement to promotion. Moreover, according to information from the Director-General of the department at issue, when the applicant was acting Head of Division VIII-A-3 he did not reveal the managerial qualities which the Director-General considered indispensable for running the division.

As regards the Commission's alleged failure to have regard to the applicant's interests, there is no obligation to promote an official when the interests of the service require the promotion of another.

(iii) *Third submission*

1. The *applicant* considers that the power of appointment was not exercised in the present case for its lawful purpose.

Misuse of powers may already be inferred from the failure to state legally acceptable reasons for the choice made by the appointing authority, as explained in the second submission.

In addition the appointment was one of the group of appointments made at the end of the term of office of the Commission (commonly known as 'parachuting'), as is evidenced by the circular of 7 November 1984 from the syndicat des fonctionnaires internationaux et européens, which mentions the vacancy notice at issue by way of example of a measure preparing the 'parachuting' in the present case of a member of Mr Pisani's cabinet.

As the third piece of evidence of misuse of powers the applicant refers to the background to the appointment. He says that the notice of vacancy for the post was drawn up

in November 1983 but was not published until October 1984, just before the end of the term of office of the previous Commission on 31 December 1984. It is clear that the post was expressly reserved for Commissioner Pisani's chef de cabinet.

2. The *Commission* contends that the submission of misuse of powers has no factual basis.

In so far as the applicant infers a misuse of powers from the alleged failure to state legally acceptable reasons for the appointing authority's choice, the Commission refers to the arguments put forward in respect of the second submission.

The applicant's allegations are unsupported by any evidence. There is nothing to prevent the Commission from promoting, as Head of Division, an official seconded to a cabinet if it considers him to be the most suitable for the relevant duties.

With regard to the background to the appointment the Commission explains that until 1 April 1984 the notice of vacancy could not be published because the post left vacant by the departure of the former Head of Division VIII-A-3 had been assigned to another division following the transfer of an official. Division VIII-A-3 did not regain the post until another A 3 post was released on 1 April 1984. The Commission did not then consider the publication of the notice of vacancy to be a matter of urgency. There were other posts to be published before the post of this particular Head of Division.

O. Due
Judge-Rapporteur