THE COURT (Second Chamber)

hereby :

1. **Rejects Application No 23/64 as unfounded;**

2. **Orders the applicant to pay the costs, including those concerning the application for legal aid, with the exception of the costs of the defendant.**

Donner Strauß Monaco

Delivered in open court in Luxembourg on 31 March 1965.

A. Van Houtte
Registrar

A. M. Donner
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 10 FEBRUARY 1965[1]

Mr President,
Members of the Court,

On 2 December 1963, the Official Journal of the European Communities published a notice of a general competition based on qualifications and tests for recruitment by the European Parliament of an assistant in the Directorate-General of Parliamentary Documentation and Information, Library Service (Grades B 3-B 2).

Miss Vandevyvere, a Belgian national, who until then had had no connexion with the Parliament or any other Community institution, submitted her candidature. She was informed on 27 February 1964, in terms of whose meaning I shall have occasion to return, that the Selection Board did not consider that it should put her name on the list of candidates allowed to participate in the tests. Following her request which was made with a view to finding whether this letter was not based on an error, the Chairman of the Selection Board replied that the latter had, after discussion, confirmed on 5 March 1964 the selection of candidates made on the previous 25 February.

These are the decisions which Miss Vandevyvere disputes before you. But before discussing her conclusions and the submissions by which she supports them in more detail, it is appropriate to decide upon the most delicate question involved in her application, that is to say its admissibility.

I — Admissibility

While accepting that this is a matter for the Court, the defendant institution argues in favour of a negative reply to this question. The defendant relies first on the fact that your jurisdiction is specific and is exercised under Article 179 of the EEC Treaty (or 152 of the

1 – Translated from the French.

EAEC Treaty), for 'any dispute between the Community and its *servants* within the limits and under the conditions laid down in the Staff Regulations or the Conditions of Employment'. The Regulations, as their title and their whole wording testify, apply only to officials. The system of appeals provided for in Title VII is thus open to the latter. This result, which is clear in respect of Article 90, is equally so as concerns Article 91. The latter allows to be submitted to you 'any dispute between one of the Communities and any person *to whom these Staff Regulations apply* regarding the legality of an act *adversely affecting such person*'; but that only means, apart from officials actually in service, those who have been retired or former officials, and not persons outside the Community. The Regulations do not confer any right on these persons and the acts of the institution cannot give them cause for complaint.

On the other hand it would be useless for the applicant to claim to be able to rely upon the wording of the preamble and of Article 27 of the Regulations which lay down the conditions of recruitment by the Communities, in order to support the proposition that the rights and guarantees established by Title III and by Annex III extend equally to persons who have not yet acquired the status of official or of servant. The detailed rules laid down—particularly the requirement of a competition—are laid down in the interests of the service and not of candidates; they may also be laid down for the benefit of officials already in the service to the extent that they are given 'internal preference'; they are never laid down for the benefit of persons outside the institution, who cannot avail themselves of them.

This last argument is not decisive. If one leaves aside internal preference which is not in issue here, the fact that the principle of competition was laid down in the interest of the service by no means implies that the violation of this rule or the manner of its application may not be raised by candidates; quite the contrary. This rule, introduced because it is regarded as necessarily ensuring the best method of recruiting staff, is binding on the institutions required to carry on the administration and they are not entitled to disregard it.

The whole question is whether persons who are 'outside the Communities' may, should the occasion arise, commence an appeal before you, and in what circumstances they may be assimilated to the 'servants' mentioned in the Treaties. It appears undeniable to me in fact that a possible appeal may be based only on Article 179 of the Treaty, and in consequence on Article 91 of the Staff Regulations.

It is quite evident that primarily these Regulations govern the relationships between the institutions and their officials, that they govern the position of the latter within the service once they have been recruited by means of a competition. Only from this moment do they have in principle obligations towards the Communities under the Regulations—and only then can they take advantage of the financial or non-material rights guaranteed by the Regulations, and in particular the right to institute appeals. This is an obvious and common-sense rule. But just as the Regulations include provisions concerning withdrawal from the service, and even concerning the position of the servant after he has left the service, the Regulations include provisions relating to recruitment which apply to persons who have not yet been appointed to any post under the Community and compliance with which these persons have nevertheless an interest in requiring before the Court.

Article 91 on appeals speaks of 'any person to whom these Staff Regulations apply' and by this formula which is wider than that of 'officials' it means, says the Parliament, those who have retired or former officials. But a servant dismissed with loss of pension rights

loses *ipso facto* all links with the service; he keeps however the right to appeal against this step; he is a person to whom the Staff Regulations apply. It is equally legitimate to put into the same category a person who has applied to enter an institution and have the benefit of the Regulations and has had his candidature rejected. In its statement of defence, the Parliament considered that Article 91 envisaged proceedings based 'on certain pre-existing relationships' between the Communities and the applications; the fact of becoming a candidate in an open competition appears to me to constitute just such a pre-existing relationship—a sufficient condition for the admissibility of the application. But there is a further necessary condition to be fulfilled, because it is quite clear that fulfilling the general conditions for eligibility for employment as set out in Article 28 of the Regulations would not in itself suffice to enable proceedings to be taken; in addition the positive act of becoming a candidate is required. This makes it possible to reject the objection raised by the Parliament in its oral observations to the effect that tens of thousands of persons *capable* of becoming candidates could even contest the notice of a general competition.

However that may be, the danger of vexatious appeals does not seem to me to constitute any greater danger than the consequences which would follow from the proposition maintained in the last analysis by the defendant institution. For the latter an appeal under Article 91 is open only to a person entitled to the benefit of the Regulations because he is already an official. It would follow that if after a general competition the appointing authority appointed to a permanent position a candidate not appearing on the list of suitable candidates drawn up by the Selection Board—a hypothesis which I adopt for the sake of argument—its decision could not be contested, at least by those who were included on that list.

You have the duty of securing respect for the law in the application of the Treaties and of the Regulations supplementing them. In this particularly sensitive area of the Staff Regulations, it is proper more than in any other that the possibility of appeal should be quite open to all those having an interest, so that your supervision may be exercised over the legality of the decisions and procedures. In the last resort that is of importance not only to the servants but equally to the Communities themselves, which never have anything to gain by shielding their actions from external supervision, and particularly from the Court. Whatever may be the somewhat ambiguous terms of Article 91 of the Staff Regulations, I suggest that you should agree that the decisions disputed by Miss Vandevyvere affect her adversely and that it is admissible for her to contest them.

II — Merits

1. Here however we must specify what these decisions are; the applicant has confused them to some extent so I should like to recall briefly the rather complex machinery provided by Annex III for dealing, as in the present case, with a competition based on qualifications and tests.

It is first of all for the appointing authority under the wording of Article 4 of Annex III to draw up a list of candidates who satisfy the conditions laid down in Article 28 (a), (b) and (c) of the Staff Regulations, that is to say the general conditions required for entry into the employment of the Community. Then, the Selection Board, to whom this list is sent, prepares a second one, that of the candidates who meet the special requirements set out in the Notice of Competition, for example age limit (first paragraph of Article 5 of Annex III). Next, in the case of a competition on

the basis of qualifications and tests, it states which of the candidates on that list shall be admitted to the tests (fourth paragraph of Article 5). Lastly at the end of its work, it draws up the list of suitable candidates from which the appointing authority makes its choice (fifth paragraph of Article 5).

On receiving the notification from the Secretary of the Selection Board on 27 February 1964, Miss Vandevyvere clearly believed that it referred to the decision mentioned in the first paragraph of Article 5, that is to say concerning the requirements set out in the Notice of Competition. This was an error on her part since the correct translation of the Dutch wording of this letter was: 'is not admitted to take part *in the tests*', a later stage referred to in the fourth paragraph of Article 5. Following her protest, the Chairman of the Selection Board informed her that the latter was entitled to make a first choice of candidates who clearly had the highest qualifications and that it had decided on 5 March 1964 to confirm the choice of candidates *selected* for admission to the *tests*. This was still the fourth paragraph of Article 5.

Miss Vandevyvere is asking you none the less to declare null and void the decision to remove her from the list of candidates who meet the requirements provided for in the first paragraph of Article 5 of Annex III—and on this point her application is purposeless—but also the decision taken, either at this meeting of the Selection Board, or at a later meeting, not to allow her to be placed on the list of candidates permitted to take part in the tests. It is in connexion with this decision, which she has a legal interest in contesting, that it is appropriate to consider the submissions which she makes.

2. The first submission—a standard one—is based on the fact that the Notice of Competition was published and the competition organized without detailed rules for the implementation of the relevant provisions having been previously adopted as laid down in Article 110 of the EEC and EAEC Staff Regulations and Article 107 of the ECSC Staff Regulations. I will not dwell upon the objection of inadmissibility pleaded by the European Parliament in response to this submission, on the basis that these provisions do not affect persons who are not within the Communities, and that in any case the applicant ought to prove that the failure to adopt these general provisions affects her adversely. If you agree, as I have suggested, that Miss Vandevyvere has a right to contest the decision which concerns her, she can in doing so, cite any flaws in the preliminary procedure, without the necessity of establishing that the irregularity adversely affects her in particular.

It is not correct moreover that the institution alone is competent, as it maintains, to decide upon the necessity or the expediency of such implementing provisions and that it would not be bound to do unless the Regulations expressly provided for this. But in accordance with your case-law these implementing provisions are not obligatory unless their absence would make the proper application of the Staff Regulations impossible. Such does not appear to be the case, particularly as concerns the European Parliament which, because of the relatively small number of its servants, has no particular difficulties in applying Annex III relating to the competition procedure. What I have asked you to say concerning the Commission of the EEC applies even more strongly to the Parliament, and I suggest that you set aside this first submission.

3. Miss Vandevyvere maintains in the second place that the decision of the Selection Board not to place her on the admission list provided for in the first paragraph of Article 5 of the Annex—but we know that there was no such list—like that not to allow her to take part in the tests affected her adversely and should have stated the reasons on

which it was based in accordance both with Article 25 of the Regulations and of the general principles of law such as those set forth in your judgments in the cases of von Lachmüller and de Bruyn (Rec. 1960, p. 933 and 1962, p. 39).

In any case, the submission is incorrect in fact, since the letter of 6 March 1964 informing the applicant of the confirmation of the previous decision informed her that as the competition was based on qualifications and tests, the Selection Board not only had to eliminate those candidates whose qualifications did not correspond to the Notice of Competition, but also to make a first choice, a selection of candidates whose qualifications were clearly superior. That implied necessarily that her qualifications, although corresponding to the minimum requirements of the Notice of Competition, were surpassed by those of other candidates, and that this was the reason for the disputed decision.

But one may hesitate as regards the law on the question whether Article 25 is itself applicable to decisions of this type; as to the case-law cited, it appears not so much to be a formal requirement to state reasons as a device intended to allow the Court to check whether the measure which is criticized is based upon reasons which are valid in law. Where they are not enumerated in this measure, the reasons may be capable of deduction from the statements of the competent authority. That is what appears to follow in particular from your judgment in the de Bruyn case.

Is such case-law valid in respect of decisions taken by the Selection Board? The defendant institution relies upon its unfettered power of discretion and Miss Vandevyvere replies by quoting your judgment in the Mirossevitch case (Rec. 1955-1956, p. 365) which, in respect of the probationary period, although leaving the administrative authority the task of evaluating in its discretion the capacity of the candidates to carry out given tasks, reserves the right of the Court where appropriate to review 'the ways and means which may have led to this evaluation'. The solution appears to her to be the same as regards competitions and to be supported by the case-law of the French Conseil d'État which allows the Court to review the proceedings of a Selection Board in order to decide whether there has been any illegality.

It is certain that the freedom of the Selection Board is limited by its duty to conform to the legal provisions governing the competition: general provisions, rules of all kinds for the competition, which may for example lay down the exact character of the tests and the weighting to be given to each of these. On the other hand, its independence is complete when, within the limits indicated above, it evaluates the respective qualities of the various candidates and gives them marks or a grading. On the last point, the very nature of its task is such that it is not subject to any control, even that of the Court.

4. And here we encounter the third submission put forward by the applicant, according to which the decisions of the competition Selection Board are vitiated by error or were taken on the basis of fact or incorrectly evaluated facts.

The position is the same, she claims, as regards the decision not to place her on the admission list though she had the required qualifications and experience and even knowledge of languages superior to those required by the Notice of Competition. But the submission cannot be accepted because, once again, the Selection Board never refused to put Miss Vandevyvere on the list of candidates provided for in the first paragraph of Article 5 of the Annex, and never disputed that she met the requirements set out in the Notice of Competition.

The applicant consequently cannot maintain that 'for the same reasons' the decision not to place her on the list of candidates to be admitted to the tests

(fourth paragraph of Article 5) should be regarded as vitiated by error. In fact, in order to take this decision the Selection Board had to make a *selective* choice between the candidates who fulfilled the *legal* conditions, and, this having been done, it went on to an evaluation which is outside any form of review, as also would be the marks which it later gave to the candidates allowed to take the tests.

5. There remains a last point. During the written procedure the applicant's Advocate insistently asked the defendant institution and yourselves for the production of a certain number of documents; the personal file of his client—which does not exist apart from the documents put in by the two parties—the minutes of the proceedings of the Selection Board, which the Parliament refused because of its secret character and which, taking into account the disputed decision, is of no interest in the case; lastly the proof that, in accordance with Article 1 (1) of Annex III, the Notice of Competition was indeed drawn up after consultation with the Joint Committee. The defendant institution also refused this document because, as this formality is required in the interests of staff, its performance cannot be reviewed by persons outside the Committees. I have some doubt about the relevance of this reply, since these persons are entitled to dispute the running of the competition. However that may be, although you did not order the production of this document, the Advocate of the Parliament has asserted in the clearest manner during the oral procedure that this consultation did take place and that the Joint Committee was heard. It is for you to decide whether, as I think, this statement should be regarded as sufficient or whether, on the contrary, it should be supplemented by the production of the document which the applicant persists in asking for.

Subject to this last remark I am of the opinion that the Court should:

— reject the application of Miss Vandevyvere as unfounded;
— order each party to bear its own costs in accordance with Article 70 of the Rules of Procedure.