OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 15 MARCH 1979 [1]

Mr President,
Members of the Court,

The applicants in the proceedings now before the Court were — with the exception of Angelo Gemelli and Bruno Palombi, who had been employed by the Joint Nuclear Research Centre, Ispra, as so-called "appaltati" [contract staff] since 1964 and 1967 respectively — engaged at the aforementioned Joint Nuclear Research Centre between 1970 and 1974 as local staff within the meaning of Article 4 of the Conditions of Employment of Other Servants, with contracts for an indefinite period and paid from research appropriations, but one of the applicants, Angelo Del Grande, was engaged as a member of the establishment staff. It appears that with the exception of Mr Del Grande the applicants have a technical training with appropriate qualifications and hold commensurate appointments. For further details I refer to the description of their duties contained in the reports concerning the applicants and to certain statements made by their superiors in answer to an express request by the head of administration at Ispra in 1975. Those statements were intended for use by a working party whose task was to deal with the problems raised by the "so-called local staff", who as a result of a lack of sufficient posts in the budget could not be appointed as members of the establishment staff.

That working party, which was set up on a joint basis at the beginning of 1976, was required to consider which members of the local staff might be given preference for appointment as members of the establishment staff within the meaning of the third paragraph of Article 4 of the Conditions of Employment of Other Servants, which was still applicable at that time. The names of four of the applicants in the present case were among those to be found in ninth and thirteenth place on the list drawn up by that working party. Furthermore, the minutes of that working party for August 1976 contain a list of the employees "dont les fonctions et/ou les diplômes paraissent, suite à un premier examen, les situer à un niveau supérieur à la classe 1 (Réf. agents d'établissement)". That list includes all the applicants except Mr Del Grande who, as already stated, apparently has no technical qualification. He maintains, however, with reference to the reports for the years 1969 to 1973, that he is also a technician or at any rate — on the strength of the report covering the years 1973 to 1975 — that his position is almost equivalent to that of such employees. On the basis of the report drawn up by that working party six other members of the local staff who performed duties of a technical nature were given contracts as members of the establishment staff in the course of 1976 and thereafter were apparently also appointed officials in Category B. One further member of the local staff was directly appointed as an official in Category B on the basis of a competition.

Another event which took place in 1976 was the amendment of Regulation No 259/68 by Council Regulation No 2615/76 of 21 October 1976 (Official Journal No L 299 of 29 October 1976, p. 1), as a result of which the group known as "establishment staff" in the Conditions of Employment was abolished (last indent of Article 1 and

1 — Translated from the German.

last paragraph of Article 4) and Article 2, which begins:

"For the purposes of these Conditions of Employment, 'temporary staff' means:"

was supplemented by a subparagraph (d), as follows:

"(d) Staff engaged to fill temporarily a permanent post paid from research and investment appropriations and included in the list of posts appended to the budget relating to the institution concerned".

Furthermore, Article 8 of the Conditions of Employment was supplemented by a paragraph worded as follows:

"Temporary staff to whom Article 2 (d) applies shall be engaged on the following conditions:

Temporary staff in Category A or B required to perform duties necessitating scientific or technical qualifications shall be engaged for not more than five years; their contracts may be renewed;

Staff in Category A or B required to perform administrative duties shall be engaged for an indefinite period;

Staff in Category C or D shall be engaged for an indefinite or definite period."

Finally, it was also provided that Articles 84 to 98 of the Conditions of Employment of Other Servants were to be repealed.

In addition, Article 2 of the aforementioned regulation contains transitional provisions which — in so far as they are of interest here — provide as follows:

"(1) A member of the establishment or local staff paid from the research and investment appropriations who is in service on the date on which this regulation comes into force shall be offered a contract by the authority referred to in the first paragraph of Article 6 of the Conditions of Employment of Other Servants of the European Communities in accordance with Title II of these Conditions of Employment.

The contract shall take effect on the said date.

(2) The person concerned shall be assigned to a post in accordance with Article 10 of the Conditions of Employment.

...

(5) The contract of any member of establishment or local staff who does not accept the offer made under paragraph (1) within six months shall be terminated. . . ."

Those provisions were also applied to the applicants. In that connexion it is to be observed that as a result of problems of classification existing at the Joint Research Centre, Ispra, a special committee was set up, also on a joint basis. As a result of deliberations which took place in June and July 1977 that committee stated, on the one hand, that seven of the applicants possessed qualifications "donnant vocation à un classement en Catégorie B". On the one hand it was unanimously agreed that the classification *of all* the applicants in Category C must be regarded as correct. Accordingly contracts of employment dated 25 January 1977, which were intended to take effect on the entry into

force of Regulation No 2615/76, were submitted to the applicants for signature in July 1977. They provided for employment as members of the temporary staff in Category C for an indefinite period. By the end of July 1977 the contracts were signed by all the applicants, including one who had abandoned an attempt to introduce a reservation.

The applicants are nevertheless of the opinion that the introduction of the new rules is disadvantageous for them and, furthermore, that their contracts are not in the correct form. They therefore submitted a formal complaint to the appointing authority on 25 October 1977 in which they maintained that their classification had been incorrect since their entry into service and that in any event the classification in Category C provided for by the new contracts was unlawful. They claimed that in this way they were discriminated against, in particular in relation to those members of the local staff performing duties of a technical nature, who had entered Category B for an indefinite period just before Regulation No 2615/76 entered into force. The applicants' contracts of employment should similarly have provided for classification in Category B for the same period. Furthermore, Regulation No 2615/76 should not have been applied to staff who were already in service. They allege that the regulation must also be regarded as unlawful, since it makes no provision for contracts for an indefinite period for Categories A and B, with the result that staff in Category C must relinquish the possibility of employment for an unlimited period if they are promoted to Category B.

That complaint was unsuccessful. In a decision in reply dated 20 March 1978 and signed by a member of the Commission it was emphasized that Regulation No 2615/76 unquestionably applied not only to new appointments but also to local staff already in service. Furthermore, in the light of the situation of the complaints on the entry into force of the regulation and having regard to the transitional provisions of that regulation, the allocation of a post in Category C in a contract for an unlimited period was unexceptionable.

As a result the applicants lodged an application before the Court of Justice on 17 May 1978, in which they asked the Court to:

1. Declare that the contracts offered to the applicants are illegal and must be annulled on the ground that they do not provide for classification in Category B (for an indefinite period);

2. Annul the rejection of the applicants' complaint;

3. In the alternative, declare that Regulation No 2615/76 is unlawful in so far as it applies to employees who were already in the service of the Community on its entry into force.

My opinion on those conclusions is as follows:

1. The applicants' view that the new rules introduced by Regulation No 2615/76 could not be applied to persons who were already in the service of the Community is quite obviously untenable. To appreciate that it is sufficient to refer to the wording of Article 2 (1) of the regulation, which quite clearly provides that a member of the establishment or local staff paid from the research and investment appropriations who is in service on the date on which the regulation comes into force shall be offered a contract by the authority referred to in the first paragraph of Article 6 of the Conditions of Employment of Other Servants of the European Communities in accordance with Title II of those

Conditions of Employment. In addition, paragraph (5) of that article provides for termination of the contract of employment of any member of the establishment or local staff who does not accept the offer made under paragraph (1) within six months. The only conclusion to be drawn from that is that Regulation No 2615/76 naturally also applied to staff who were already in the service of the Community on its entry into force.

2. The applicants also maintain that they were wrongly engaged as local staff and that their classification was open to challenge even at that time. They point out that according to Article 4 of the Conditions of Employment local staff are engaged "for manual or service duties". As is shown by the corresponding wording in the fifth subparagraph of Article 5 (1) of the Staff Regulations performance of such duties involves classification corresponding to Category D, whereas having regard to their actual duties the applicants should have been awarded classification in Category B.

Further consideration cannot be given to that submission in these proceedings. For that purpose the applicants should have brought legal proceedings earlier. Such proceedings would not have been precluded by Article 81 of the Conditions of Employment, since it has been clearly established by case-law (judgment of 11 March 1975 in Case 65/74, *Porrini and Others* v *The European Atomic Energy Community and Comont S.p.A. and Bellintani and Others* v *The European Atomic Energy Community and Cemi S.p.A.* [1975] ECR 319) that the right to bring proceedings under Article 152 of the EAEC Treaty applies not only to officials and other servants but also to persons, such as the applicants, who are claiming such status.

Two observations therefore seem to me to be appropriate in the present case.

First, it is indisputable that on their entry into service the applicants received contracts as members of the local staff only because the list of posts did not provide for a sufficient number of posts for establishment staff, which they would otherwise have received. It was precisely in order to remedy that unsatisfactory situation, however, that Regulation No 2615/76 was drawn up, which now provides for temporary contracts for such staff.

Secondly, the applicants cannot rely on the conclusions of a working party which was set up at the Joint Research Centre, Ispra, in 1964 in support of their view that they should already have been classified in Category B on their entry into service. That working party was only required to examine the equivalence of the qualifications of employees from the various Member States employed in the technical services. If, in addition, it also expressed the view in its report that it was essential for all technicians engaged in the future to be classified in Category B, that was merely a suggestion without binding force. It in no way constituted a directive binding on the administration on which claims relating to classification could be based, since that, as the Commission has explained to us, would have required an amendment to Annex I B to the Staff Regulations.

3. In a third argument the applicants refer in particular to Regulation No 2615/76. They consider that because

Article 2 of that regulation provided for different types of contractual relationships in respect of local staff it concerned nothing less than "integration" as dealt with in Article 102 of the Staff Regulations. For that reason they claim that the rules developed in that connexion — classification in accordance with the duties performed — should have been applied to the applicants. They point out, however, that it must in any event be remembered that Article 2 provides that the persons concerned shall be assigned to posts in accordance with Article 10 of the Conditions of Employment of Other Servants. Since the fourth paragraph of Article 10 provides that Annex I B shall apply by analogy, it follows that it is the terms of Annex I B which must be respected. However, in the light of those terms and having regard to the descriptions of the duties performed by the applicants contained in the reports and information which their superiors gave to the Working Party on "Falsi Agenti Locali" classification in Category C must appear to be incorrect.

As regards those arguments the Commission is certainly right when it points out that proceedings in accordance with Article 2 of Regulation No 2615/76 cannot be equated with integration under Article 102 of the Staff Regulations, that is to say, with the transfer to the status of officials of persons who, before the entry into force of the Staff Regulations, had been employed only on a contractual basis. In fact, Article 2 contains no corresponding rule providing for the setting up of an establishment board consisting of servants of the institution employed in a supervisory capacity, to give a binding opinion on the suitability of the employees under consideration for the duties assigned to them. The so-called Tugendhat Committee set up from Brussels in 1976 cannot be compared to such an establishment board, since it was set up on a joint basis and its sole task was to give opinions on complaints concerning classification. For that reason the case-law which evolved previously for the application of Article 102 of the Staff Regulations cannot be relied on in the present proceedings.

Furthermore, a right to classification in Category B cannot be positively inferred from Article 10 of the Conditions of Employment combined with Annex I B to the Staff Regulations, since technicians are in fact to be found in that annex in both Categories B and C.

Moreover, if we consider whether other compelling considerations have emerged in favour of the classification of the applicants in Category B, the answer can once again only be in the negative.

In that respect, there is certainly no relevance in the applicants' reference to a letter from the head of administration at Ispra of 20 July 1977, in which it is accepted that their qualifications give them the "idoneità" for classification in Category B. That letter merely states what was also contained in the decisions in reply to the applicants' complaints: that having regard to their abilities they satisfy the conditions for entry, on an appropriate occasion, into Category B by way of promotion, that is, therefore, that they are eligible for promotion.

The same applies to the fact that, with the exception of Mr Del Grande, the applicants' names are listed in the report of the Working Party on Falsi Agenti Locali in August 1976 amongst those of the employees "dont les fonctions et/ou les diplômes paraissent, suite à un premier examen, les situer à un niveau supérieur à la classe 1 (Réf. agents d'établissement)". In that respect it is of significance that it cannot be inferred

from the aforementioned document that having regard to the *duties* assigned to them the applicants deserve a higher classification, since the mere possession of suitable qualifications is naturally not sufficient for a claim to classification.

However, in so far as the applicants seek to base a claim relating to classification on the reports and "fiches de renseignement", to which several references have already been made and which were prepared for use by the Working Party on Falsi Agenti Locali, reference may be made to the relevant case-law relating to officials, according to which the performance of duties attaching to a post at a higher level gives no right to reclassification but is at the most a factor to be borne in mind in connexion with promotion (judgment of 16 June 1971 in Case 77/70, *Maurice Prelle* v *Commission* [1971] ECR 561, and judgment of 12 July 1973 in Case 28/72, *Leandro Tontodonati* v *Commission* [1973] ECR 779). Moreover, it is important that as regards this delicate question of evaluation (such difficult technical areas undoubtedly give rise to problems of overlapping and delimination) there exists an expert opinion by the Tugendhat Committee, already referred to, which was set up on a joint basis and which, as already stated, was required to examine complaints concerning classification following the entry into force of Regulation No 2615/76. So long as the Tugendhat Committee was unanimous (in other cases such unanimity was lacking) in holding that classification in Category C was appropriate for all the applicants, there is no reason to doubt its correctness particularly since the applicants have not provided any specific and substantiated information which might cast doubt on those assessments.

4. The applicants also maintain that they suffered discrimination as a result of the modification of their administrative status. In that connexion they refer to the fact that six other members of the local staff who were in a comparable situation before the entry into force of Regulation No 2615/76 became members of the establishment staff and a short time later were promoted to the status of officials in Category B. Those employees therefore obtained not only a higher classification but also a stable administrative status, whereas, if the classification of the applicants had been raised to Category B in accordance with Article 8 of the Conditions of Employment in the version contained in Regulation No 2615/76, they could have obtained at the most contracts whose duration was limited to five years. In the opinion of the applicants that is clearly inconsistent with the principle of equal treatment which, even though Article 10 of the Conditions of Employment omits to refer to Article 5 (3), is clearly also applicable to temporary staff belonging to the same category.

We have heard in the course of the proceedings that the Working Party on Falsi Agenti Locali set up in 1976 had the task of examining the position of members of the local staff and of drawing up a list of those employees who — having regard to their qualifications, duties and seniority — were to be given preference in appointments to the establishment staff, who according to the previous version of Article 4 of the Conditions of Employment belonged to Categories C and D. On the basis of that list, towards the bottom of which the names of four of the present applicants were to be found, six members of the local staff were appointed to the establishment staff in Category C. They were subsequently promoted to the status of *officials* in Category B obviously on the basis of the normal procedure for promotion referred to in Article 92 of the Conditions of

Employment and without the involvement of the working party.

As I understand it, the applicants are not claiming that those developments were objectionable. In any event, in so far as they have expressed certain criticisms on that subject — for example, as regards the fact that an employee whose name appeared in thirteenth place on the list in question was given an appointment before certain other employees or that the promotion procedures were carried out after Regulation No 2615/76 was issued even though before it entered into force, the applicants must accept that those events can no longer be subject to review but should have been challenged at the time and within the prescribed period.

On the contrary, the applicants are in essence claiming comparable treatment for themselves.

In that connexion it must be observed, first, that comparable treatment was imposible in 1976 since a sufficient number of posts was not available. As is shown by Annex 2 to the reply and, in particular, by Footnote 3 to Annex 2 to the rejoinder, Category B posts authorized but not filled, to which the applicants have referred, had to be set off against the number by which the Category C posts authorized had been exceeded. Moreover, it must be said that the applicants should have asserted a claim for equal treatment on that basis at the time the events referred to above took place, although in that connexion it must admittedly not be forgotten that there is in principle no right to promotion.

On the other hand, in so far as the applicants speak of discrimination after the entry into force of Regulation No 2615/76 it is relevant that their situation was not comparable to that of the seven other employees previously referred to whose status at that time was already that of officials. There was, therefore, naturally no possibility of providing in accordance with the terms of the new regulation for the administrative status of the seven to be regulated by contractual means, as was unavoidable in the case of the applicants, having regard to their position after the entry into force of the aforementioned regulation.

There can therefore be no question of discrimination against the applicants.

5. The applicants also maintain that the Commission failed in its duty to provide assistance laid down in Article 24 of the Staff Regulations and that, when it fixed their administrative status, it disregarded the principle that acquired rights must not be encroached upon. They point out that reference was also made to that principle in a Resolution of the European Parliament (Official Journal No C 100 of 3 May 1976, p. 38).

As regards the first point it must be observed that there can clearly be no question of an infringement of the provisions of Article 24 — even if they are understood to mean that the appointing authority must ensure that the careers of its servants develop in a satisfactory manner — in a situation in which the administrative status of certain local officials is regularized by means of a proper application of *inter alia* provisions which were drawn up for the very purpose of regulating that status.

On the other hand, as regards the alleged disregard of acquired rights it must be remembered that before the entry into force of Regulation No 2615/76 the applicants were local staff with contracts for an indefinite period and that they had at best a claim to enter the establishment staff, who were classified in Categories C and D. If under those circumstances, following the

entry into force of Regulation No 2615/76, a contract for an indefinite period with classification in Category C was offered to them in accordance with Article 8 of the Conditions of Employment I do not see how it could be said that there has been a disregard of acquired rights. Furthermore, as regards the fact that under the new legal position laboratory technicians in Category B may only receive contracts for five years — even though, of course, such contracts are renewable — whereas no such limitation existed under the previous regulations, that is simply because under the old rules the applicants were possibly eligible for classification in Category B but that they had no right to it. Such a situation is certainly not sufficient to support the finding that the applicants have been deprived of acquired rights.

6. Finally, I still have to consider the applicants' alternative conclusions, in which they ask the Court to declare Regulation No 2615/76 unlawful. In that connexion the applicants make the following criticisms in particular:

(a) The Commission omitted to point out and, when it adopted the regulation at issue, the Council failed to take into account the fact that when the status of the local staff performing duties of a technical nature was regularized in 1976 the applicants were not included and that it would therefore have been appropriate to adopt special provisions relating to them in order to avoid discrimination.

(b) Under the new regulation the applicants can no longer be give a contract for an indefinite period if they are promoted to Category B, even though they are not involved in the carrying out of research programmes but are employed in connexion with the infrastructure, which is rather to be regarded as falling within the field of administration. As a result they are compelled to abandon a normal career.

(c) In any event — and this represents a change for the worse as regards the former legal position — the new regulation makes no provision for any career with possibilities of promotion.

Article 92 of the Conditions of Employment, which in practice also applied to local staff and under which Articles 43 and 45 of the Staff Regulations relating to reports and promotion had applied by analogy to establishment staff, has been repealed. Now in the case of assignment of duties attaching to a post carrying a higher grade the only provision applicable is the third paragraph of Article 10, which provides that in such a case an agreement supplementary to the contract of service is to be drawn up.

In my opinion the following remarks may in particular be made on those points.

(a) I do not consider that special provisions to deal with the applicants' case should have been included in Regulation No 2615/76. Under the old rules the applicants were, as we have seen, at best able to lay claim to contract as establishment staff with classification in Category C. That corresponds to the treatment which they receive under the new rules. However, as regards appointment as officials and, in particular, promotion to Category B, as was still mentioned in 1976 in relation to several other members of the local staff, it must be said that as regards the applicants nothing more than a possibility existed, whose disappearance naturally did not make it necessary to include special compensatory measures in the new regulation.

(b) Moreover, I have been convinced by the explanation given by the Commission to the effect that the new rules — according to which employees in Category B who perform duties of a technical nature may only be given contracts for five years, which it is true are renewable — are based upon reasonable considerations. Unlike either staff in Categories C and D, whose level allows them to be assigned to various research programmes, or staff performing administrative duties, laboratory technicians in Category B, even if they are to be regarded as dealing with the so-called infrastructure (maintenance of scientific equipment), may be assumed to be so closely connected with the research programmes, which according to Article 7 of the Treaty establishing the EAEC are to be drawn up for five years, that a corresponding limitation on their contracts of employment appears necessary in the interests of a flexible organization of the research work based on the particular qualifications of the staff involved.

In that connexion it must be remembered as regards the position of the applicants that at present they still belong — and, as we have seen, rightly — to Category C, which means that they are not in any way covered by the terms of the provisions just referred to. If, however, they should one day obtain contracts in Category B it would be necessary to consider whether having regard to their duties — which in such a case would have to be re-defined — they are in fact so closely involved in the carrying out of research programmes that a time-limit on their contracts is justified or whether, being employed in relation to the infrastructure, they are rather required to perform duties which are administrative in nature.

(c) As regards this point it must of course be admitted that in accordance with the Conditions of Employment of Other Servants assignment to a post carrying a higher grade required the conclusion of a supplementary agreement (third paragraph of Article 10). In fact, however, the application of that provision in conjunction with the repeal of Articles 84 to 98 of the Conditions of Employment does not result, as regards careers, in any relevant worsening in the legal position since, as the Commission has shown, the general provisions concerning promotion applicable with effect from 1 January 1977 also apply to temporary staff in accordance with Article 2 (d) of the Conditions of Employment. For them too, therefore, a procedure carried out each year in accordance with precise rules determines who shall be given preference as regards the conclusion of an agreement involving classification in a higher grade and at the same time guarantees, as far as possible, that their careers may progress in accordance with objective criteria.

Having regard to all of the foregoing it can only be stated that the conclusions put forward in the alternative are also unfounded and that there is therefore no reason to declare that Regulation No 2615/76 is unlawful and the applicants' contracts based on it are invalid.

7. Accordingly it only remains for me to deal with the question of the costs of the proceedings. The applicants consider that even if the Commission is successful it should be ordered to pay the costs in accordance with Article 69 (3) of the Rules of Procedure, which states that the Court may order a successful party to pay costs which it considers "that party to have unreasonably or vexatiously caused the opposite party to incur".

Once again I can see no reasonable ground for accepting the applicants' view. They rely essentially on the fact that the provisions just referred to concerning the procedure to be observed in the case of promotion were only brought to the attention of the staff at the end of April 1978. On that point, however, it must be observed that it is

clear from all the pleadings of the applicants in this case that an earlier publication of the provisions in question would scarcely have prevented them from bringing proceedings. In addition it must be remembered that publication took place even before the institution of proceedings and that as early as in the replies to the complaints made by the applicants it was expressly stated that entry into a higher category is effected along the lines of the procedure laid down for promotion. Furthermore, since no other "exceptional circumstances" within the meaning of the first subparagraph of Article 69 (3) of the Rules of Procedure are to be found in the present case — the fact that the applicants were for a considerable time wrongly employed as local staff may be disregarded — any decision on costs must remain in accordance with Article 70 of the Rules of Procedure.

8. I am therefore of the opinion that the application must be dismissed as unfounded and that all the parties must be ordered to pay their own costs.