OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 24 February 1987

My Lords,

On 15 February 1985 the Commission published in the Official Journal notice of an open competition COM/B/416 to constitute a reserve of administrative assistants in Category B Grades 5 and 4, whose duties would in particular include the 'preparation of manuscripts as regards language and typography — proof-reading'.

The special conditions included an age-limit. Candidates must have been born after 15 February 1949 and before 16 February 1967. The age-limit, however, was not to apply to candidates who 'on any date between publication of this *Official Journal of the European Communities* and 29 March 1985, will have been serving continuously as an official or other servant of the European Communities for at least one year'. It also provided that the age-limit would be raised for candidates (a) who had looked after young children, (b) who had performed military service, or (c) who suffered from a physical handicap.

Mrs Souna, who was born on 1 November 1948, i. e. three-and-a-half months before the earlier qualifying date, applied to enter the competition. On 6 August 1985 she was told that her application could not be accepted since she did not fulfil the age-limit condition. Nor did she qualify for one of the exceptions (a), (b) or (c) referred to above.

By letter of 24 August, her lawyer asked that the Selection Board should reconsider the matter since she was not relying on the exceptions (a), (b) or (c) but on the paragraph quoted above relating to continuous service with the Communities.

By letter of 29 August she was told that her letter had been submitted to the Selection Board but they would not be able to re-examine the matter before mid-September. On 26 September a telegram was sent saying that the Selection Board maintained its decision not to admit her to the tests because she was above the age-limit.

On 23 December 1985, she began these proceedings in which she asks that the rejection of her candidature be annulled and that she be awarded damages.

The Commission objects that she is out of time. The rejection of her application was on 6 August; the proceedings began more that three months from that date. For that reason her action is inadmissible. The telegram of 26 September was 'a pure and simple' confirmation of the decision notified on 6 August 1985.

This I do not accept. She plainly asked for a re-examination, in particular on the basis that she had been engaged in continuous service as a servant of the European Communities, a point not dealt with in the

letter of 6 August. The telegram in reply did not expressly refer to the specific point raised by her lawyer but merely maintained that she was ineligible for the competition. It is, however, in my view a decision which can be challenged. In the first place, I assume that there was a genuine re-examination of her position, as it was said that there would be, and I regard the result as a new decision rather than a mere confirmation. In the second place, the telegram is to be read as an implicit rejection of the point made in her letter (i. e. that she was a servant who had served continuously) which had not been dealt with in the first decision. To that extent at the least it was a new decision. These proceedings were commenced within three months of the date of the telegram and are in time. On the ground relied on by the Commission these proceedings are not inadmissible.

The Commission's case on the substance is that Mrs Souna is not 'an official or other servant of the European Communities'. It does not, however, rely on this to say that the proceedings were inadmissible in that Article 179 of the Treaty, Article 91 of the Staff Regulations and Articles 46, 73 and 83 of the Conditions of Employment of Other Servants only give a right of application to the Court to an official or to the servants therein mentioned. It seems to me that on the practice of the Court the Commission was right not to take this point on admissibility. In a number of cases the Court has accepted that someone who is for the first time seeking to enter Community employment and who wishes to challenge a rejection during the competition procedure may do so and may benefit from the provisions of Article 70 of the Court's Rules of Procedure as to costs, even though *ex hypothesi* not an official or a servant. It would be quite wrong if such a person had no means of redress before the Court. (For example Cases 30/75 *Prais* v *Council* [1976] ECR 1589; Joined Cases 4, 19 and 28/78 *Salerno* v *Commission* [1978] ECR 2403; Case 12/84 *Kypreos* v *Council*, [1985] ECR 1005. See Case 43/84 *Maag* v *Commission*, judgment of 11 July 1985 ECR 2581, where the applicant was held not to be a servant for the purpose of bringing proceedings under Article 179 but it was held that he could be given the benefit of Article 70 of the Court's Rules of Procedure on costs in proceedings under Article 95 (3) 'commenced by an official or other servant of an institution' since he was seeking to establish that he had the status of a servant.)

The applicant criticizes the decision in question as being a breach of duty of good faith towards its staff, as not observing the rules the Commission had itself laid down and as being discriminatory. She also says that the decision fails to give any or any adequate reasons.

The essential first question is whether she had been 'serving continuously as an official or other servant of the European Communities for at least one year' — a question involving both the amount and regularity of work done and the capacity in which it was done.

At the hearing the parties were not agreed as to the amount and regularity of the work done, though the applicant had produced a certificate from the Office for Official Publications that she had worked from 13 October 1980 to 4 January 1981 for 402 hours and from 7 January 1981 to 30 April 1984 had totalled 822 working days. They were accordingly asked to reply in writing to certain questions, their replies and comments being received finally on 4 February 1987.

The documents produced by the applicant show that from October 1980 until 4 January 1981 she was paid on an hourly basis for work done in Athens, those hours averaging about 40 a week except for the first week. By telex of 19 December 1980 the Athens office said that she would be available to start work at the office in Luxembourg on 7 January 1981 and asked Luxembourg to 'confirm appointment'. On 29 January 1981 she received a letter asking whether she would be prepared to 'work as a free-lance proof-reader' for the Office for the following calendar months 'on the terms laid down in the Regulations concerning free-lance proof-readers' attached to the insurance policy, a copy of which had been sent to her when she 'worked for the office previously'. She apparently received a similar letter each month save that for certain months a few days were excluded (e. g. August 1981, September and October 1982) and save that new 'conditions générales regissant les prestations des correcteurs indépendants' with three annexes were substituted for the earlier Regulations with effect from 1 January 1984. For certain months the letters are not available (e. g. August to November 1985) but the figures supplied by the Commission show that, except in certain months, she had days of work averaging approximately 20 a month. Her total days were 1981, 259; 1982, 240.5; 1983, 238.5; 1984, 258.5; 1985 to July, 158.5. In the months when she did less than 20 days (e. g. August 1981, 13 days; August 1982, 10 days) the difference seems explicable by the fact that she took holidays. The months she did more than 20 days may be due to the fact that she worked overtime or weekends, the extra hours being amalgamated as working days, perhaps for payment purposes.

The pattern is thus clear. She worked regularly and continuously throughout the period and for more than one year ending February or March 1985. Her work on any view can be described as 'full-time'.

The competition notice required, however, that she should have not merely worked but 'been serving' 'as an official or other servant of the European Communities'.

The Commission contends that the words 'official' and 'other servant' must be given the same meaning as is found respectively in the Staff Regulations and the Conditions of Employment of Other Servants of the European Communities, and she satisfies neither test. Even if the words 'other servant' can be more widely construed, she was not a servant at all (by which I understand the Commission to mean someone employed under a contract of service) but a 'free-lance' (i.e. an independent contractor).

It seems to me that 'official' in the notice must be given the same meaning as in Article 1 of the Staff Regulations and it is agreed that she was not an official since she had not been appointed to an established post. If the phrase 'other servant' is read in isolation it is perfectly possible, and in my view it would be right, to ask simply whether she was employed under a contract of service. The phrase does not, however, stand alone. It is the phrase used in the Conditions of Employment, the provisions parallel to the Staff Regulations, and has in my view acquired a technical meaning — i.e. those servants to whom the Conditions apply. That is the sense in practice in which the phrase is used and I believe that it was the Commission's intention to use it in that way. Accordingly, I do not think it possible to construe the phrase 'other servants' in the competition notice in a way different from that employed in the Conditions of Employment.

Those Conditions are expressed in Article 1 to apply to 'servants engaged under a contract of service'. If the article had stopped there it would again be enough to show that there was a contract of service, as the applicant argues. The article goes on, however, 'such servants shall be:

temporary staff,

auxiliary staff,

local staff,

special advisers.'

Each such category is dealt with under a separate title and there is no residual group of provisions which would apply to other persons engaged under a contract of service who do not fit into one of the four categories. The intention seems to have been that persons employed under a contract of service must be put into one of those categories.

Mrs Souna was not engaged to fill a post classified by the budgetary authorities as temporary, nor engaged temporarily to fill a permanent post. No post existed for her. She was, thus, Article 2 (c) and (d) not being relevant, not included in 'temporary staff'. She was not engaged to replace another official temporarily absent. Even if she was engaged for the performance of full-time or part-time duties within the meaning of Article 3 of the Conditions of Employment, her actual period of 'employment' (if such it was) exceeded one year contrary to Article 52 so that on the basis of the Court's decision in *Maag* she cannot strictly be classified as 'auxiliary staff'. It is not suggested that she could be 'local staff' or 'a special adviser' within the meaning of Articles 4 and 5 of the Conditions. Accordingly, on this basis she was not an 'other servant' within the meaning of the Conditions or of the competition notice.

The Commission contends that the definition of servant in the Conditions is, in any event, exclusive. No one can be a servant unless he falls squarely within one of the four categories dealt with in the Conditions of Employment. On the arguments advanced in this case, I am not satisfied that this is right. Other contracts of employment as a servant may be possible which do not fit easily into the four categories defined. A

person who begins as a member of the auxiliary staff but who serves and is paid beyond the limit of one year imposed by Article 52 of the Conditions continues to be a servant even if no longer strictly 'auxiliary staff'. The result may be that such persons cannot rely on the Conditions except by analogy; it does not follow that they are not 'servants'.

It is to be noticed that under Article 179 of the Treaty the Court has jurisdiction in any dispute between the Community and 'its servants within the limits and under the conditions laid down in the Staff Regulations and the Conditions of Employment'. 'Servants' here clearly include officials and the limits and conditions which may be laid down in the Regulations and Conditions go to jurisdiction rather than to the exclusive definition of what is a servant. Moreover, Annex III to the Staff Regulations, dealing with competitions, itself in Article 1(g) requires that where appropriate a notice must specify 'the age-limit and any extension of the age-limit in the case of servants of the Communities who have completed not less than one year's service'. The technical expression 'other servants' is not used.

Accordingly, if it were possible to construe the phrase in the competition notice more widely (which I think it is not) the question would arise as to whether she was 'a servant' or whether she had a different contractual relationship with the Commission.

The latter stresses the word 'free-lance'. I do not consider that the label is conclusive. The true nature of the relationship must be regarded. It is usually easier to recognize than to define the difference and many tests have been suggested. At the end of the day, a broad-brush approach may be as helpful as any. 'One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it' (Denning, L. J. in *Stevenson, Jordan and Harrison Ltd* v *Macdonald* [1952] 1 TLR 101, 111).

Mrs Souna can point to the continuity and regularity of her service, to the fact that she did work also done by officials and 'other servants' in the same way and was subject to the same supervision.

On the other side, it is said that she was not engaged for more than a month at a time and she might not be renewed. This latter argument I do not regard as conclusive since auxiliary staff can be appointed for short periods which are renewable. Then reference is made by the Commission to the provisions in the 'conditions générales' that 'son activité en qualité de correcteur free-lance ne lui donne en aucune façon vocation à être nommé fonctionnaire ou autre agent des Communautés européennes'. That again is not conclusive if the proper categorization of her engagement is as a servant.

Reading the 'conditions générales' as a whole, and having regard to the method of

payment, the provisions as to tax (which fell to be paid to national authorities rather than to the Community), her exclusion from the ordinary insurance provisions applicable to servants, the fact that she had a right to work only when asked to do so in the light of the needs of the office and could refuse any monthly assignment offered to her, it seems to me (debatable though some of these factors may be and despite the fact that she was willing to transfer from Athens to Luxembourg to continue her work) that the intention of both parties was that she should retain her independent status and that her contract was not that of a servant.

Accordingly and despite the fact that there are substantial differences between Mrs Souna's position and that of the free-lance interpreter in *Maag* (e. g. the length and regularity of the periods worked, the *ad hoc* nature of the task and the fact that Mr Maag could be asked to work in different places for limited conferences or meetings) I have come to the conclusion that she has not shown that she was a 'servant' of the European Communities.

That, however, does not dispose of what is perhaps her major contention — i.e. that, even if not a servant, she was, in relation to the exemption from the age-limit, in a position which is so similar to that of a servant that she should have been given the same exemption. My initial reaction was that this argument could only be relevant to a challenge to the validity of the competition notice itself and she did not raise that challenge in due time. On reflection, I consider that this is too strict a view. She could not reasonably have been expected to challenge the notice at the outset, particularly as she contended that she was a servant. It was only when she was refused admission to the competition on the basis that she was not an 'other servant' (as is now made clear) that her real grievance arose. I would, therefore, accept as admissible her argument that she was being discriminated against when she was refused the benefit of the age exemption.

The question to be decided is thus whether her position was, in a relevant way, similar to that of the 'other servants' who benefited from the exemption. That involves asking what is the real basis or justification for granting the exemption, the *ratio legis* — a question which I do not think has been answered in argument.

One possible reason for giving officials and other servants the benefit of the exemption might be that they should not have counted against them years they worked for the Commission. That cannot be the sole reason since the exemption does not provide that only those years actually worked for the Commission should be deducted from the actual age. Anyone who has worked for one year at whatever age escapes the age-limit. It is only for those in the special categories (a), (b) and (c) that there is a limit of five years on the raising of the age-limit. If this were the justification, it can be said in any event that Mrs Souna worked for far longer than the three-and-a-half months by which she failed to satisfy the earlier age-limit.

Another reason might be familiarity with the working of the Commission, so that it would be of benefit to the Commission to keep on a candidate with prior Community experience. Here again, Mrs Souna had such experience for five years on a virtually full-time basis, and in the course of it transferred from Athens to Luxembourg. (Why she moved the Court is not told but it seems likely that she must have hoped for a long-term appointment; for all the Court knows this is the first competition for proof-readers since she moved and it may be indicative that 23 out of 48 free-lance proof-readers applied for the competition.) She plainly had the necessary familiarity with the working of the Commission.

At the hearing in answer to questions it was suggested by the Commission that the reason for allowing other servants and officials to apply was that they had 'been subject to Community discipline for a year, it is known that they are capable of working whereas a free-lance is entirely independent'. I can see that, in a case where a person works at home for an occasional month or week and is doing work which is not effectively supervised, this may be a justification for not applying the same rules as those which are applied to a servant. That explanation does not, however, rule out a case where, month by month, the Commission had the opportunity not to invite Mrs Souna back, if not satisfied with her work, but doggedly did invite her back. The power not to invite her after each month seems to me in practice a potentially greater sanction than those which 'the discipline' referred to makes available for officials. Moreover, she was required by the 'conditions générales' to produce a guarantee of good character, to pass an aptitude test, to do her work with all diligence in accordance with instructions and to respect the confidentiality of what she learned. By Clause VII (wrongly numbered in the original) she could be sent away without reasons even during the month, for serious professional fault or for failing to observe her instructions. Yet for five years she was kept on.

Another reason may be suggested by Case 106/80 *Fournier* v *Commission* [1981] ECR 2759 where it was said that the outstanding characteristic of a contract for the employment of auxiliary staff was its 'precariousness in time' since it can be used only to effect a temporary replacement or to allow the performance of administrative duties which are of a transitory nature, which fulfil an urgent need or which are not clearly defined. In the present context that can be no reason for distinguishing unfavourably someone like Mrs Souna from auxiliary staff since her engagement was also precarious. On the contrary, the fact that for long periods, albeit precariously, she was fulfilling a need of the office for which no post was available indicates that, if anything, she deserves more rather than less favourable treatment compared with someone whose actual employment should not exceed one year.

The other cases cited in argument do not, it seems to me, resolve the problem directly. In Case 16/81 *Alaimo* v *Commission* [1982] ECR 1559 the applicant was accepted to be an employee. The sole question was whether she was an employee of the European

Communities when employed by the European Centre for the Development of Vocational Training. It was held that she was since the Centre was part of the European Communities.

Reliance is placed on a sentence in Case 16/64 *Rauch* v *Commission* [1965] ECR 135: 'The expression "competition internal to the institution", taken as it stands, means any person employed by the institution in whatever capacity'. That must be seen in the context of the issue — namely, whether a member of the auxiliary staff could enter for such a competition. 'Whatever capacity' means, as I read it, whatever capacity as a servant and does not include engagement as an independent contractor.

In Case 78/71 *Costacurta* v *Commission* [1972] ECR 163, the sole point decided by the Court was that an internal competition must either state an age-limit or state that it is not considered necessary to fix one.

On the other hand, even if they do not decide the point directly, the cases do indicate that the Court looks to the substance rather than to the legal form. Thus in Case 17/78 *Deshormes* v *Commission* [1979] ECR 189 the Court accepted that as from the date of her first appointment as a member of the auxiliary staff the applicant's agreement 'should have taken on the form of a contract of employment of a member of the temporary staff because the applicant had been assigned to a permanent post appearing in the list of posts appended to the budget'. She was *de facto* a temporary official and so her contracts were to be treated as having been entered into with a member of the temporary staff. Moreover, Mr Advocate General Reischl took the view that the earlier contracts, although described as for an expert, were those revealing a regular relationship of employment to the Communities. Had there been no post available he would have regarded her as being a member of the auxiliary staff for the purposes of deciding pension entitlement.

In *Costacurta* Mr Advocate General Roemer dealt with a contention not considered by the Court that free-lance 'employees' of the Office for Official Publications were wrongly admitted to the competition in question. He cited the passage from *Rauch* to which I have referred and he considered that the free-lance candidates had worked for many years and that it appeared that it was only for budgetary reasons 'that they were not put on a normal footing earlier'. He went on: 'It may thus be considered that as free-lance employees these candidates already stood in such a close relationship with the Office for Official Publications that they may be compared at least to auxiliary staff, that is to say the persons directly entitled to take part in the competitions'. Although that was an *obiter dictum*, since the free-lance candidates were temporary staff when applications for the competition had to be made, it does indicate a willingness to look at the reality of the situation.

Again in Joined Cases 225 and 241/81 *Toledano Laredo* v *Commission* [1983] ECR 347 the Court ruled that a member of the auxiliary staff who had performed well-

defined Community public-service duties for which posts were generally available, was for the purposes of the Community pension scheme entitled to count the period of such service as completed in the capacity of a member of the temporary staff.

It is also to be noted that in *Deshormes* the Court at page 201 said that in view of the precariousness of the duties performed 'it is clear that the said conditions of employment cannot be wrongfully used to assign such staff to permanent duties for long periods, and thus employ them abnormally at the cost of prolonged uncertainty'. I doubt whether, but for budgetary reasons, the scheme of employment adopted by the Communities really intended that people should be employed 'free-lance' full-time, continuously and over a long period. If people are employed in this way, they should not in my view be prejudiced when it comes to the age conditions relating to eligibility for a competition.

In the light of the approach adopted in these cases it does not seem to me in the present case to be sufficient merely to say, as the Commission in reality does, that the legal nature of Mrs Souna's contract is different, therefore she is in a different position and can be treated differently in regard to the age exemption. The substance must be looked at. I accept that a person who works infrequently or irregularly or on special assignments is in a different position from a servant who works regularly. On the other hand, one who provides services full-time for five years is, in my opinion, in a comparable position to temporary staff or auxiliary staff when it comes to granting an exemption from the age-limit. This may well be an exceptional case but in my view the decision to exclude Mrs Souna because she was three-and-a-half months too old was discriminatory and unfair when regard is had to the benefit accorded to temporary agents and auxiliary staff. The fact that in a competition organized by the Parliament she was accorded the exemption (as the Commission accepts the Parliament was entitled to do) albeit the notice of competition was limited to 'officials and other servants', only goes to underline the unhappy result in the present case.

As a separate matter I would in any event accept the applicant's argument that the decision gave no or no adequate reasons and is in that regard defective.

It seems to me, however, that the refusal to admit her to the competition should be set aside on the ground that the exemption from the age-limit should have been granted to her and that she should have her costs of these proceedings. This seems to me to be a sufficient remedy since no specific financial loss is put forward and I would reject her claim for damages.