# OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 12 JANUARY 1984

*My Lords,*

Mr Fabius was a candidate in Competition No COM/A/325 arranged by the Commission in 1981 to recruit a reserve pool of administrative officers in grades A 7/6. One of the terms of the competition was that candidates should take two written tests, the first directed to assessing comprehension and reasoning, the second to general aptitude for work in an international organization. Only those candidates who obtained a 50% pass mark in each of the written papers were to be allowed to proceed to the next stage of the competition, the oral test. Mr Fabius took the written examination, obtaining 13.82 out of 40 marks on the first paper, 46 out of 60 on the second. He thus did not pass the first test and was told by letter from the Commission on the 10 November 1982 that he could accordingly not proceed to the interview.

He complained about this by letter of 28 November 1982, asking for his case to be reconsidered. His complaint was rejected on 22 December 1982 and after further correspondence, that rejection was further explained by a letter of 16 March 1983 from the Commission.

Meanwhile on 15 March 1983, within the prescribed limitation period, he brought these proceedings before the Court. He asks two things: first, that the Commission's decision of 22 December 1982 refusing to admit him to the oral test, on the basis of the selection board's decision, should be annulled, and secondly, that the Court should declare that the Commission must arrange a new test for him or permit him to participate in the next competition for officials of these grades, even if he were then over the age-limit laid down for such competition. Since issuing the proceedings, he unsuccessfully sought interim relief to enable him to continue in the initial competition.

He attacks not so much what the selection board did as the basis upon which the competition was organized. This is said to have violated principles of equity and "due care". His primary contention is that the Commission erred in attaching so much importance to the general test, which had the object of assessing powers of "reasoning". He insists that general intelligence tests of this kind do not necessarily select the right candidates: as in his case, an official may be successful in practice,

even if he cannot or does not do well in this kind of test. He refers to the fact that in the Netherlands it is now recognized that tests of this kind are not necessarily reliable or determinative, and accordingly they should not be determinative in the Community. That this test in the present case was not reliable is shown, he contends, by the fact that in the second test, where "reasoning" must be applied, he scored high marks. It is, moreover, inequitable that, since he scored in total 59.82 marks for the two papers (when 50 would have been enough so long as be obtained 50% on each paper) he should still fail. Accordingly, both in the way the competition was arranged, and in refusing to reconsider his case on the basis of all the facts and all his arguments, the Commission was in breach of duty to him.

The Court has recognized that the Commission must have a discretion in the way it organizes its competitions and the criteria it adopts. It is for the appointing authority rather than the Court in the first place, to assess these (see Case 90/74 *Deboeck* v *Commission* [1975] ECR 1125; Case 143/82 *David Lipman* v *Commission* [1983] ECR 1301. If the Commission adopted criteria of no possible relevance to the posts advertised, or which no reasonable appointing authority could insist upon (e.g. that only candidates with red hair would be admitted) then the Court could no doubt interfere. In the present case, even assuming that there may be two views about the absolute value of general intelligence tests, and that some able people do not make good examination candidates, whatever the tests adopted, it does not seem to me that it can possibly be said that the Commission went beyond the discretion vested in it. The object of the test of "comprehension and reasoning" was directed to enabling the candidate's aptitude for administrative, advisory and supervisory duties to be assessed. To check that a candidate had a general ability to reason, think and express himself clearly and sensibly as a quite separate test, was perfectly open to the Commission and the Commission in no way erred in law in requiring a candidate to pass both the general and the specific test, even if in the circumstances it is surprising that the candidate did so well on the latter and not well on the former. Moreover, it has not been shown that the specific tests used were defective, let alone so defective as to be unreliable.

In my view nothing has been shown in this case to justify the relief sought, the application should be refused and each party should bear its own costs.