OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 22 OCTOBER 1981 [1]

Mr President,
Members of the Court,

1. Introduction

Mrs d'Aloya's application raises the rather exceptional problem as to what criteria the Council may or must apply in making a decision on the promotion of a typist (career bracket C 5/C 4) of Norwegian nationality, to the career bracket of secretary/shorthand typist (career bracket C 3/C 2). Although this particular case is in itself exceptional, it will nevertheless become apparent that it also displays features which may be important for the policy on promotion in a number of other cases. The actual dispute is concentrated on the question, in which language and by what criteria as to speed the applicant's shorthand skill ought to be judged.

2. Principal facts

The relevant facts and the arguments which the parties have raised in the written procedure are summarized fully and well in the report for the hearing. I can therefore refer to it in the main. So that my argument may be properly understood, however, I consider it useful to recall some important facts. Moreover, some other facts which deserve mentioning emerged at the oral hearing as a result of questions from the Judge-Rapporteur and myself.

Mrs d'Aloya was appointed as a member of the auxiliary staff in the Norwegian section of the typing pool of the Council in 1972, during the negotiations which were then being conducted concerning the accession of Norway, amongst others. Norway ultimately did not accede to the Treaty and she was then appointed as a temporary official in the English section of the typing pool. On the basis of an open competition for the recruitment of English-language typists, she was appointed a probationary official with effect from 1 August 1973 and established on 1 February 1974. Both appointments were made to grade C 4.

Before her appointment as an official, a derogation from Article 28 (a) of the Staff Regulations was necessary. This derogation was granted to her by the Council.

According to Staff Note No 184/79 of 26 September 1979, evidence may be provided of suitability for promotion to secretary/shorthand typist, so far as shorthand skill is concerned, *inter alia* by passing an optional shorthand test in one language or by production of a certificate. In either case, proof must be given of a speed of 150 syllables per minute over a period of three minutes. The applicant produced such a certificate relating to her shorthand skill in Norwegian. At the same time the certificate attested a shorthand speed of 60

1 — Translated from the Dutch.

words per minute in English (maintained over at least six minutes, according to the further information provided at the oral hearing).

One of the main questions which arise in this application is the question whether proved shorthand skill in Norwegian is or is not sufficient to satisfy the requirements laid down with regard to shorthand skill for purposes of promotion. First, however, there is the question whether the Council may lay down such strict requirements with regard to shorthand skill. Before going into detail on that and other relevant questions, however, I should like to mention a few more particulars which were provided during the hearing.

First, there seems to be a difference of opinion as to whether the Norwegian certificate did or did not appear in the applicant's personal file during the 1978 and 1979 sessions of the Advisory Committee on Promotion. Secondly, the Council disputes, in the rejoinder but above all at the hearing, whether the applicant has proved by means of the certificate that she satisfies in English the rules relating to speed (in shorthand) for a second language. Under those rules, 66 words per minute have to be recorded for at least three minutes. The speed of 60 words per minute which, according to the Norwegian certificate, was maintained for more than six minutes would therefore not be sufficient to satisfy the rules laid down for a second language.

However, I consider three other matters concerning the practice of the General Secretariat of the Council, which emerged during the oral procedure, to be more important for determining this dispute.

First, the parties agree that it is only exceptionally that candidates with a different mother tongue take part in an open competition for English-language typists. Thus to this extent the applicant's career from the beginning constituted an exception to the general pattern of recruitment. That early part of her career also confirms, as moreover appears from the file as well, that she was recognized as having a thorough knowledge of one of the languages and a satisfactory knowledge of another language of the Communities at the time of her appointment. That finding is of importance in connection with the condition contained in Article 28 (f) of the Staff Regulations.

Secondly, it was acknowledged by the Council during the oral procedure that a considerable part of shorthand work is taken in a language other than the mother tongue and that, particularly in the directorates-general, French and English predominate so far as shorthand is concerned. That finding is of importance in connection with the lesser shorthand speed which is required according to Staff Note No 114/79 of 29 May 1979 for a language other than the mother tongue.

Thirdly, it is confirmed by both parties that for purposes of promotion officials who normally take shorthand in French or English are nevertheless in general judged on the basis of their shorthand speed in their mother tongue.

In my arguments on the main issue, I shall come back (so far as is necessary) to other facts which may be of importance to the Court in reaching a decision.

3. The grounds for the application

The applicant's name was not included in the list drawn up by the Advisory Committee on Promotion, and she thereupon sent a memorandum on 15 February 1980 to the appointing authority with a request for a review. The applicant received a negative reply to her letter, which was regarded by the Council as a request within the meaning of Article 90 (1) of the Staff Regulations, and she then submitted a complaint on 29 May 1980, registered on 12 June 1980, under Article 90 (2) of the Staff Regulations. The applicant received no reply to that complaint. Her subsequent application to the Court of 30 December 1980 must be regarded as admissible under Articles 90 and 91 of the Staff Regulations. The admissibility of the application is in any event not disputed by the Council.

4. Summary of the submissions put forward and their scope and the connection between them

In her application the applicant claims:

(a) that the memorandum of the Council of 27 March 1980 rejecting the applicant's request of 15 February 1980 should be annulled, together with the Council's implied decision rejecting her complaint of 29 May 1980;

(b) that the Council should be ordered to reopen with respect to the applicant the procedure for promotion to grade C 3 for 1978 or at least for 1979;

(c) that the Council should be ordered to pay the costs.

For a complete account of the applicant's three submissions, I refer once again to the excellent report for the hearing. I consider that here also a short summary of the submissions is sufficient for the understanding of my further argument. The general foundation for the application is the infringement of the Staff Regulations, particularly Articles 5 (3) and 45 (1), *ultra vires* acts and breach of general principles of law as set out in the application. The submissions made are the following:

In her first submission the applicant complains that (a) the Council is not prepared to take account of her shorthand skill in Norwegian and (b) it assesses her on the standard of her second language, English, but does so according to the standards required for the first language (or mother tongue). In fact this first submission thus divides into two parts, which I have referred to as (a) and (b).

The second submission, which is subsidiary to the first, is in fact a more detailed elaboration of part (a) of the first submission. In this second submission the applicant complains that the Council is not prepared to take account of shorthand skill in the mother tongue, when the mother tongue is not an official language of the Community institutions. The second submission may best be dealt with in direct connection with part (a) of the first submission.

The third submission, which is subsidiary to the other two, complains that the Council judges the applicant's shorthand skill in English in accordance not with the standard for a second language, but with the standard for the first language (or mother tongue). In fact that submission is therefore a more detailed

elaboration of part (b) of the first submission. It may therefore be examined best in connection therewith.

For the sake of clarity, I would add to the above summary of the submissions that in the summary of the first and third submissions after the words "first language" I have added "(or mother tongue)" in brackets. That explanation first of all corresponds to the tenor of the said submissions. On the other hand, it is apparently also used in the Council's Staff Note No 114/79 of 29 May 1979.

5. Review of the submissions put forward

In my argument on the main issue, I shall first look briefly, for the sake of logic, at part of the applicant's argument regarding her second submission. The applicant questions whether it is acceptable for the Council to lay down requirements relating to shorthand skill for promotion to secretary/shorthand typist. In practice shorthand is alleged to be neglected in the Danish and Dutch sections. It should be credited with only marginal importance in the German and Italian sections as well. With regard to this preliminary matter, I do not, in these proceedings at least, wish to challenge the Council's power for considerations based on the interest of the service to lay down shorthand skill as a requirement for promotion to secretary/shorthand typist. I do not need here to consider whether that requirement is also reasonable — in view of the principle of proportionality, for example — as a *sine qua non* for promotion, in cases where it is established that the duties concerned never involve work in shorthand. It is common ground that such a case does not arise here. In particular, it is established that the applicant is in fact asked to take shorthand in English and French in addition to her remaining and probably more important secretarial duties of other kinds.

I should like to deal further with the applicant's three submissions in relation to one another. As has been noted earlier, her second submission constitutes a more detailed elaboration of the first part of her first submission and the third submission a more detailed elaboration of the second part of that first submission. As stated first of all, the applicant complains that the Council is not prepared to take account of her shorthand skill in Norwegian. As a subsidiary second submission, she complains, in that connection, that the Council is not prepared to take account of shorthand skill in the mother tongue if that mother tongue is not an official language or a working language of the Community institutions. In her third submission, to be regarded as subsidiary to the first two submissions, the applicant complains that the Council in her case judged her shorthand skill in English according to the standards laid down for a first language and not according to the standards laid down for a second language. Although this submission in fact overlaps with the second part of the first submission (referred to as (b) in my summary), I shall deal with that part only in relation to the third submission.

In dealing with the three submissions raised, I should first like to state that the balancing of the principle contained in Article 5 (3) of the Staff Regulations that there should be equal opportunities for

promotion for all officials belonging to the same category or service, on the one hand, and the interest of the service on the other, raises particular difficulties in a case such as this. In particular the question arises here, who is to be compared with whom and which qualities are to be compared with one another so that we may speak of equal opportunities for promotion. The concept of "the interest of the service" will naturally have to be interpreted in the light of Article 45 of the Staff Regulations which relates to promotion.

The fundamental importance of the principle of equality in the career of officials is laid down by the Court *inter alia* in its judgment of 4 March 1964 in Case 15/63, (*Lassalle* v *European Parliament* [1964] ECR 31), of 7 July 1964 in Case 97/63, (*de Pascale* v *Commission* [1964] ECR 515), and of 13 July 1972 in Joined Cases 55 to 76, 86, 87 and 95/71 (*Besnard and Others* v *Commission* [1972] ECR 543). Thus as early as Case 97/63, the Court stated, at page 527, that the relevant authority, wide as its discretionary powers may be, must, in accordance with the first subparagraph of Article 45 (1) of the Staff Regulations, take into consideration the comparative merits of each candidate, using comparable sources of information. It appears from the subsequent paragraphs of that decision that, in so doing, the administration ought to base its assessment in particular on "the personal files of the candidates in which must appear in particular the opinions of their immediate superiors". The latter requirement is also of particular importance in the present case. The opinion of the applicant's immediate superiors is in fact outstandingly favourable, as appears from the file, precisely with regard to her shorthand in English and French.

The Council's chief objection with regard to the possibility of taking account of the applicant's shorthand skills in Norwegian is of a strictly legal nature. In the Council's view, a criterion for assessment of that kind would conflict with Article 28 of the Staff Regulations which makes possible an exception to the requirement that the official should be a national of one of the Member States only in the case of appointment. No exception may, on the other hand, be made to the requirement contained in Article 28 (f) that the official concerned must produce evidence of a thorough knowledge of one of the languages of the Communities and of a satisfactory knowledge of another language of the Communities.

I consider that that argument, which is taken virtually word for word from the oral submissions of the Council's representative, is in itself correct. On the other hand, for the sake of clarity I should like to add that I consider that that argument is not relevant to the solution of the present dispute. Article 28 refers exclusively, as appears from its clear terms, to the requirements which must be met before an appointment may be made. In this case it is not disputed that the applicant complied with those requirements at the time of her appointment by producing evidence of thorough knowledge of English and satisfactory knowledge of French. It is not Article 28 but rather Article 45 of the Staff Regulations which is relevant with regard to the requirements which may be imposed concerning promotion.

We therefore return to the general question of the balancing of the interests of the service, on the one hand, and the requirement of equal opportunity for promotion of officials who are comparable for this purpose, on the other.

So far as the interests of the service are concerned, for cases such as the present one, specific expression was given to them in Staff Note No 184/79 of 26

September 1979. The French version of this staff note is attached to the application as Annex 9. With regard to that communication, I should first like to point out that its wording by no means rules out the possibility that the shorthand speed required therein may be proved in Norwegian. As has already been noted, in this regard the Council's earlier Staff Note No 114/79 itself expressly refers to shorthand skill in the mother tongue. Moreover, I have already noted that such exclusion of shorthand skill in Norwegian as a relevant criterion for promotion cannot be inferred by implication from Article 28 of the Staff Regulations either. To this I would add here that Article 45 of the Staff Regulations does not provide a clear foundation for rendering more stringent the requirement of shorthand skills by requiring such evidence in a language of the Communities.

In order to decide the dispute it must therefore be determined in particular whether other considerations relating to the interests of the service may perhaps rule out the possibility of proving shorthand skills in Norwegian, without thereby breaching the principle of equal opportunities for promotion for all officials who are comparable in any given case and have completed the minimum period of service required in their grade.

Article 45 provides that for this purpose the comparative merits of the officials eligible for promotion and the reports on them are to be considered. It is not disputed that Mrs d'Aloya's reports constitute no obstacle in this respect. She is obviously a very good secretary ("une secrétaire particulièrement douée, dont les connaissances et les aptitudes sont remarquables") [a particularly gifted secretary, whose knowledge and abilities are outstanding]. Her thorough knowledge of English and French, including her ability to do shorthand and other written work also in those languages, is also confirmed by the above-mentioned periodic report. Even if Article 28 (f) were also applicable to promotion, it would therefore not be necessary to grant an exception to that rule. Furthermore, the applicant is apparently able to work in Danish, German and Italian as well. Therefore, as a secretary/shorthand typist, she appears from the above-mentioned report to possess very good qualities, even outstanding qualities with regard to her ability to express herself orally and in writing. That favourable opinion is also not challenged by the Council.

The problem therefore comes to a head with the interpretation of the concept of "merits" in Article 45. In the course of an exhaustive examination of case-law I have been unable to find any relevant pronouncement of the Court relating to that concept. It already follows from my previous remarks that I should not wish to dispute the Council's power to define that concept more precisely in the interests of the service in that institution. The exercise of that power should in my opinion, however, satisfy the requirement that in exercising the discretion which I recognize that it has in that regard, the Council *could* reasonably reach the conclusion that the standards to be applied in the comparison of merits are required by the interests of the service. Thus there should in particular be a functional connection between the requirements laid down and the duties to be performed.

As I do not require this question for the sake of my own arguments, I mention only *pro memoria* the question which was not expressly dealt with in the proceedings, whether Article 45 permits absolutely decisive significance to be attributed, as was done here by the Council, to interests of the service other than qualities assessed, in this case favourably, in the periodical reports. It is precisely in the framework of this kind of question that the principle of proportionality to which the applicant has referred may be of importance.

As has already been noted, during the oral procedure the Council itself admitted that in general a considerable part of shorthand work, and indeed outside the typing pool the greater part, is required to be done in French and English. In balancing the interest of the service and the principle of equal opportunity for promotion, account must therefore be taken of the fact that shorthand work in French and English is frequently undertaken by shorthand typists whose mother tongue is not French or English. Here we may think of Danish, Dutch, German and Italian and now of Greek shorthand typists as well.

On the basis of the principle that the standards laid down must display a reasonably functional connection with the duties to be performed, it seems to me that the Council may not reasonably impose on the applicant another requirement with regard to the mother tongue, in addition to the criteria relating to speed contained in Staff Note No 114/79, to the effect that the mother tongue must be one of the languages of the Community. The mother tongue displays, not only for the applicant but also for other officials who have a mother tongue other than English or French, no direct functional connection with the duties to be performed in most cases. It is thus a sort of academic criterion, from which the likelihood of satisfactory shorthand speed in a second language which is in fact functional, may be derived only indirectly. In view of the fact that the proved shorthand speed is of such an academic nature, I cannot see any acceptable reasons not to take proved shorthand speed in Norwegian into account. Precisely because such a requirement is academic or theoretical in nature and is not of direct importance for the work in most cases, the principle of equal opportunity requires that nationals of non-member countries who have succeeded in passing the barrier with regard to appointment should be treated in the same way as nationals of Member States whose mother tongue is neither French nor English. That is certainly valid for a case such as the present, where the official concerned is employed not in the typing pool but in one of the directorates-general. As has already been noted, French and English play a predominant part there, as the Council itself has also stated.

Apart from that, it might be suitable for all staff who in practice work in a language other than their mother tongue to assess their merits at least in the alternative on the basis of the language other than their mother tongue. So far as I know, that is also the normal pratice in the promotion policy for officials in grades A and B. Critical significance is not then ascribed to a command of the second language which is not as perfect

as in the case of officials who have that language as their mother tongue. It is not clear why that cannot apply also to promotion to secretary/shorthand typist on grounds of the interest of the service.

I should like to go further and expressly state that the Council cannot reasonably refuse to base its assessment as to shorthand skill as secretary/shorthand typist in the alternative on the shorthand skill in the actual working language if that is a different language from the mother tongue of the official concerned.

Proper command of the second language may naturally then be required. The Council's Staff Note No 114/79 contains criteria for that, to which the applicant also refers in the alternative both in the second part of her first submission and, in more detail, in her third submission.

It is indeed an established fact that shorthand skill deteriorates if it is not maintained by practice. Under the given circumstances, an alternative criterion for assessment with regard to shorthand skill, such as that laid down in Staff Note No 114/79 and not opposed by the Council during the proceedings, would therefore be very useful for Danish, Dutch, German, Greek and Italian shorthand typists as well. It seems then to be contrary to the principle of equality to refuse to apply the alternative criterion contained in Staff Note No 114/79 to an official with a mother tongue other than one of the languages of the Community. Both the wording of Staff Note No 114/79 and general considerations in connection with the objectives of Articles 5 and 45 of the Staff Regulations require that, for the application of the principle of equal treatment, all cases in which assessment takes place in a language other than the mother tongue must be assessed in the same way.

After these more general observations, I now return to the particular case.

From the above remarks it may be apparent that I consider both the first and the alternative second submission of the applicant to be well founded. The Council's refusal to take account of a certificate of shorthand skill in Norwegian in particular finds no support in Article 28 of the Staff Regulations which was primarily invoked by the Council for that purpose. Precisely because of the importance which the Council obviously attributes to that argument, the applicant's claim should be accepted. The refusal to take account of shorthand skill in Norwegian finds no support in any other provision of the Staff Regualtions either, or in the case-law of the Court. The refusal to take account of shorthand skill in Norwegian further contrasts with the fact that account is actually taken by the Council of shorthand skill in Community languages which in practice are not used either in the performance of duties. That difference in treatment on the grounds of nationality seems to me to conflict with the principle of equal opportunity for promotion after the application, before her *appointment* as an established official years previously, had already obtained a derogation from the rule contained in Article 28 (a) concerning nationality of one of the Member States, while she was at that time considered to comply with the requirements of Article 28 (f). Convincing reasons based on the interest of the service or convincing general principles of law, which would in this case be capable of justifying such a

breach of the principle that there should be equal opportunity for promotion, have not been put forward.

The third submission advanced by the applicant in the alternative also seems to be well founded on the basis of my earlier argument. The Council's refusal to assess the applicant in the alternative on the basis of the criteria which are laid down for a second language also seems to conflict with the principle of equal opportunity. Certainly if the second language is a customary working language, the principle of equality requires that in the application of that alternative criterion at least *all* officials whose working language is not their mother tongue should be assessed according to the rules for the second language. Moreover, to equate the applicant with officials whose mother tongue is English in the application of the principle of equality in the case of that subsidiary criterion seems contrary to the wording of the Council's Staff Note No 114/79. If that were done an additional requirement would be added to the staff note in relation to the applicant, which is incompatible with the principle of equality.

My argument up to now naturally does not mean that the Court would be obliged or even merely entitled to impose on the Council a given solution to problems such as the present one. The Council's discretion must be respected in this regard as well. In this connection I refer to a remark to that effect in the opinion of Mr Advocate General Mayras in Case 24/79 (*Oberthür* v *Commission* [1980] ECR 1761). The point is rather that the arguments relied on by the Council in its defence do not stand up to careful scrutiny, while the applicant's main arguments appear to be correct.

The question whether the Norwegian certificate was or was not in the file seems to me on balance to be of very minor importance to the Court's decision. It seems to me to be of no importance to the 1978 session because the relevant criterion relating to certificates was not introduced until 1979. It seems to me to be of secondary importance with regard to the 1979 session, because the applicant's requests in this case ought anyway to be granted on other grounds. The question what typing speed the applicant has ultimately attained in English also seems to me to be of secondary importance. The Court's decision on this dispute as to the facts is not requested and it may be accepted that the Council, after the annulment of its earlier decisions, will find a reasonable solution to that practical question, whereby, in the event of continuing doubt, the favourable assessment of the command of languages in the periodical report may also play a part.

6. Conclusion

My opinion is therefore as follows:

1. The application is admissible and well founded.

2. The memorandum of the Council of 27 March 1980 and the applicant's request of 15 February 1980 and the implied decision of the Council

rejecting her complaint of 29 May 1980, registered at the office of the General Secretariat of the Council on 12 June 1980, should therefore be annulled.

3. The Council should be ordered to reopen the procedure for promotion to grade C 3, the post of secretary/shorthand typist, for the 1979 session.

4. The Council should be ordered to pay the costs of the proceedings, including the costs incurred by the applicant in this application.