OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 17 October 1989 *

My Lords,

1. In this case seven language teachers complain at being engaged under contracts with the Commission which expressly exclude the possibility of their being regarded as servants or other agents of the Communities, and claim that they should be employed under the Staff Regulations of Officials of the European Communities ('the Staff Regulations') or the Conditions of Employment of other Servants of the European Communities ('the Conditions of Employment').

2. All the applicants have, for a number of years, been teaching languages for the Commission to members of its staff. The arrangements have changed over the years. It appears that, at least at the beginning of the 1980s, individual contracts were entered into for each language course to be given, but that from about 1983, following discussions between the Commission and the staff associations, more general contracts of indefinite duration were entered into so that teachers were engaged to carry out such teaching tasks as might be allocated to them, usually 33 weeks a year at 15 hours per week. The reason for this change appeared largely to be in order to bring the teachers within the Belgian social security system. The contracts were stated to be subject to Belgian law, but were not consistent on which courts would have jurisdiction over any dispute, some specifying this Court and others the Belgian courts. In 1986, the Commission presented the teachers with a new standard-form contract of indefinite duration providing for 15 hours work per week for 33 weeks per academic year, for Belgian law to apply and for the Belgian courts to have jurisdiction, but this time specifically stating in Article 5(2) that:

'In the light of the nature of the duties to which this contract relates, the contracting party may not be regarded as a servant of the Commission.'

The Commission states that there are currently 23 language teachers engaged under contracts of this kind.

3. The applicants protested at the inclusion of the clause cited above but the Commission insisted that the new contracts be signed without reservations and all the applicants did so on or about 6 November 1986, while writing separately to maintain their protests. On 6 February 1987 the applicants lodged a complaint against the

* Original language: English.

contracts under Article 90(2) of the Staff Regulations but, despite a reminder sent by the applicants on 19 May, no response was forthcoming from the Commission within the prescribed period of four months from the date of the complaint. The application in the case was lodged at the Court on 19 August 1987, seeking *inter alia* the annulment of the implied rejection of the complaint. In the meantime, the Commission expressly rejected the complaint by letter dated 31 July, but it was apparently not received by the applicants until after they had lodged their application.

4. The applicants ask the Court, first, to annul the decision of the Commission to impose on the applicants the standard-form contract of November 1986 and the implicit rejection of the applicants' complaint and, secondly, to order the Commission to replace the contested contract by an arrangement covered by either the Staff Regulations or the Conditions of Employment.

5. Three points may be mentioned on the admissibility of the application. First, as regards the second head of the applicants' claim, it is plain that the Court has no jurisdiction to make an order such as the one sought by the applicants. Therefore that head of the claim is strictly speaking inadmissible. However, if the Court were to uphold the claim for annulment, the Commission would be required to take the necessary measures to comply with the judgment in accordance with the principle stated in Article 176 of the EEC Treaty.

6. Secondly, while the terms of Articles 90 and 91 of the Staff Regulations, relating to the jurisdiction of the Court in staff cases, refer to 'any person to whom these Staff Regulations apply', and so do not explicitly cover the present applicants, nevertheless there is no doubt about their standing to bring proceedings. Those words have been widely interpreted in many cases, and in Case 123/84 *Klein* v *Commission* [1985] ECR 1907, to which I shall refer further in considering the substance of the case, the Court stated that, according to a consistent line of cases, provisions of the Staff Regulations may be relied upon before the Court, not only by officials or other servants of the Communities, but also by persons claiming to be such. Although in Case 43/84 *Maag* v *Commission* [1985] ECR 2581, also considered below, the Court held the application inadmissible, it did so only after considering the substantive issue whether the applicant could claim to be considered as a Community servant. That issue is one which must, in my view, be within the jurisdiction of the Court.

7. Thirdly, one of the applicants, Mr Penella-Rom, has now commenced full-time employment with the Commission, having been successful in an open competition. However, no question arises as to the continued admissibility of his application: he clearly still has an interest in proceeding since his future rights, in particular his pension rights, may depend on whether or not he could be regarded as an official or temporary servant prior to his present employment.

8. On the substance, the applicants rely on four submissions, which I shall consider in

the following order: first, infringement of Article 212 of the EEC Treaty and/or Title I of the Conditions of Employment; second, misuse of procedure; third, infringement of the principle of the protection of legitimate expectations; and fourth, failure by the administration to fulfil its duty to have regard to the interest of its officials and other servants. Because they are interrelated, it is in my view necessary to take the first two submissions together.

9. Article 212 of the EEC Treaty was in fact repealed by Article 24(2) of the Merger Treaty, and it appears that the applicants intend to refer to Article 24(1) of the latter, which provides:

'The officials and other servants of the European Coal and Steel Community, the European Economic Community and the European Atomic Energy Community shall, at the date of entry into force of this Treaty, become officials and other servants of the European Communities and form part of the single administration of those Communities.

The Council shall, acting by a qualified majority on a proposal from the Commission and after consulting the other institutions concerned, lay down the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of those Communities.'

10. Title I of the Staff Regulations comprises Articles 1 to 10a thereof, under the heading 'General Provisions'. The first paragraph of Article 1 provides:

'For the purposes of these Staff Regulations "official of the Communities" means any person who has been appointed, as provided for in these Staff Regulations, to an established post on the staff of one of the institutions of the Communities by an instrument issued by the appointing authority of that institution.'

11. Title I of the Conditions of Employment comprises Articles 1 to 7a thereof, again under the heading 'General Provisions'. Article 1 in particular provides:

'The Conditions of Employment shall apply to servants engaged under contract by the Communities. Such servants shall be: temporary staff, auxiliary staff, local staff, special advisers.'

12. By their first submission the applicants contend that the above provisions provide only for officials and other servants and that there can be no other category of staff such as individuals employed under private law contracts of indefinite duration. They argue that therefore any persons providing services to the Communities under such contracts must be doing so either under the terms of the Staff Regulations or, under the terms of the Conditions of Employment.

13. In my opinion it is necessary, first, to consider whether there is an absolute prohibition on the Commission's entering into a contractual relationship of the kind at issue in this case otherwise than under the Staff Regulations or the Conditions of Employment. The answer in my view is clearly in the negative. The Commission has the capacity to enter into contracts (EEC Treaty, Article 211) and to agree that such contracts be governed by national law,

whether public or private (EEC Treaty, Article 181; and see paragraph 11 of the judgment in Case 109/81 *Pace, née Porta* v *Commission* [1982] ECR 2469, at p. 2480). That capacity extends to contracts for the provision of services outside the Staff Regulations and the Conditions of Employment: see paragraphs 20 and 23 of the judgment in Case 43/84 *Maag* v *Commission* [1985] ECR 2581, at pp. 2601 and 2602; see also paragraphs 9 and 13 of the judgment in Case 111/84 *Institut national d'assurances sociales pour travailleurs indépendants* v *Cantisani* [1985] ECR 2671, at pp. 2677 and 2678, paragraphs 12 to 26 of the judgment in *Klein* v *Commission*, already cited, at pp. 1916 to 1918, and paragraphs 13 and 14 of the judgment in Case 432/85 *Souna* v *Commission* [1987] ECR 2229, at p. 2247.

14. However, there are limits on the Commission's power to enter into contracts for the provision of services outside the Staff Regulations and the Conditions of Employment, and the next question is where those limits fall in relation to the present case. In this connection, it should be made clear that the relationship arising between an official and an institution under the Staff Regulations is not contractual but statutory, whereas the legal relations under the Conditions of Employment are contractual.

15. The *Klein* case concerned a contract for the engagement of a doctor to attend on the Commission's premises for 16 hours a week at an hourly fee. The Court upheld the lawfulness of that contract in the following terms (paragraphs 24 and 25 of the judgment):

'Accordingly, the recruitment of Dr Klein by means of a contract which expressly refers to Belgian law could not be regarded as contrary to Article 1 of the Conditions of Employment of Other Servants unless the Commission had determined Dr Klein's terms of employment, not in the light of the needs of the service, but with a view to avoiding the application of the said Conditions of Employment and so had been responsible for a misuse of procedure.

Neither the documents on file nor the oral proceedings have established that that was in fact the case.'

16. It follows that the Commission may enter into a contract of this kind outside the Conditions of Employment if that corresponds to the needs of the service. It was not proved that the contract in issue in the *Klein* case did not so correspond. Another example is found in the *Maag* case in relation to free-lance interpreters. The needs of the service in question in that case were described (at paragraph 16) as 'occasional needs which vary greatly according to the frequency of Community meetings and of negotiations with non-member countries, where it is necessary to call on a large number of supplementary assistants whose qualifications enable pressing needs to be met and who may be engaged time after time for very brief periods.' The contractual arrangements made to meet those needs outside the Conditions of Employment were also held to be lawful: see paragraph 20 of the judgment, loc. cit.

17. On the other hand, if the relationship properly comes under one of the categories

defined in the Conditions of Employment, it would be a misuse of procedure to deal with it under another of those categories or by a contract altogether outside the Conditions of Employment, if that were not required by the needs of the service but were a way of avoiding the proper application of the Conditions: see *Klein* loc. cit.; and see Case 17/78 *Deshormes* v *Commission* [1979] ECR 189. This aspect of the question forms the subject-matter of the second submission (misuse of procedure).

18. It is necessary to apply the above criteria to the facts of the present case and to consider whether the arrangements between the applicants and the Commission properly fall, having regard to the nature of the services provided, under the Staff Regulations or under one of the categories defined in the Conditions of Employment; and whether those arrangements correspond to the needs of the institution or whether, on the contrary, they are designed to exclude the application of the Staff Regulations and the Conditions of Employment.

19. It is plain at the outset that, under the arrangements by which they work at present, the applicants do not fit into any of the existing categories of staff falling within the Staff Regulations or Conditions of Employment. They cannot be regarded as 'officials' within the meaning of Article 1 of the Staff Regulations since they cannot claim any 'established post' under that article. Moreover it is clear that in principle officials are those who occupy permanent full-time posts. As I shall seek to show, the applicants working on the basis of 15 hours per week for 33 weeks in the year (or even if, as they claim, they work longer hours from time to time) cannot be regarded as working full-time within the meaning of the Staff Regulations. Nor do the applicants fall within the half-time provisions contained in Article 55a of and Annex IVa to the Staff Regulations. Those provisions are clearly envisaged as being for temporary periods and are expressly described as exceptional; the applicants do not fall within the hours there described; and the relevant formalities have not been fulfilled. Those provisions would also deprive the applicants of the right to engage in any other paid activity, which they remain free to do under the contracts in question.

20. By Article 1 of the Conditions of Employment, cited above, those Conditions apply to four categories of servants: 'temporary staff, auxiliary staff, local staff, special advisers.' Articles 2 to 5 lay down the precise meanings of each of those categories, and it is clear that the applicants' contracts do not come within any of them. They do not qualify as 'temporary staff', because they are plainly not assisting an office-holder under Article 2(c) and, since their contracts are for an indefinite period, they are not filling a post on a temporary basis under Article 2(a), (b) or (d); see also *Maag*, paragraph 17. They do not qualify as 'auxiliary staff' under the terms of Articles 3 and 52 because, on the one hand, they are not engaged to replace an official or member of the temporary staff and, on the other, the actual period of their employment exceeds one year. They do not qualify as 'local staff' as defined in Article 4, because they are not engaged for 'manual or service duties' but for intellectual

tasks. Finally, they do not qualify as 'special advisers' under Article 5 because they have not been engaged to assist the institution concerned by reason of their 'special qualifications'. It should be noted that the French version of Article 5 speaks of 'qualifications exceptionnelles', and in the *Maag* case the Court recognized (at paragraph 8) that the position of special adviser was appropriate only in exceptional cases.

21. The fact that the applicants do not fall within any of the existing categories of officials or other servants does not, however, dispose of their submission. They can properly contend that the Commission was bound, if it was appropriate to do so, to alter the arrangements so as to bring them within those categories — for example by offering, if appropriate, full-time employment — or even that the Commission ought to have proposed amendments to the Staff Regulations or Conditions of Employment so as to make provision for language teachers to be brought within them. The essential question remains whether the applicants could claim, by reason of the nature of the services they provide, to be treated as officials or other servants of the Communities.

22. In dealing with that question it is necessary, in my view, to examine to what extent the tasks carried out by the applicants are ancillary to the main functions of the institution, to what extent they can be carried out on a full-time basis and to what extent they respond to a permanent need of the institution. Even services which respond to a permanent need of the institution can in my view properly be secured by contractual arrangements outside the Staff Regulations or Conditions of Employment, when the services in question — while undeniably of importance — are none the less ancillary to the central tasks performed by Community officials.

23. In a multilingual Community, it is obviously desirable that the staff of the Community institutions should have a knowledge of more than one of the languages of the Community. Indeed, the minimum requirements regarding knowledge of languages, laid down by Article 28(f) of the Staff Regulations and, in respect of temporary staff, by Article 12(2)(e) of the Conditions of Employment, are:

'a thorough knowledge of one of the languages of the Communities and . . . a satisfactory knowledge of another language of the Communities to the extent necessary for the performance of [the] duties'.

Those are the minimum requirements, but greater linguistic attainments are plainly desirable, or even necessary.

24. The applicants seek to rely upon the absolute necessity for Community officials to learn other languages in order to be able to fulfil their tasks. As was graphically pointed out at the hearing, failure to communicate between officials would result in the Commission's Berlaymont Building becoming a tower of Babel. But the fact remains that the primary tasks of officials of the Commission are the formulation and implementation of Community policy. Of course, it is necessary for them to be able to communicate with each other but it is also necessary for them to eat, to be provided with an office, to remain healthy and so forth. The Commission may properly

contract out provision for staff restaurants and office cleaning and, as has been seen in the *Klein* case, medical care. There seems to be no reason why the Commission should not do the same in respect of language teaching for its officials: it could choose to send its officials to a privately run language school or alternatively contract out the arrangements to a private firm.

25. The fact that language teaching may be regarded as ancillary to the official's normal tasks is further illustrated by the fact that language teaching is carried out for about half the time outside normal working hours: in the morning, at lunchtime or in the evening. In general, half the time spent in attending language classes is attributed to working hours and the other half to the officials' own time. For that reason, the hours of classes tend to be from 8.30 to 10.30 a. m., from 11.30 a. m. to 1.30 p. m. and from 4.30 to 6.30 p. m.; the classes are thus fitted in around the start of the working day, the lunchtime break and the end of the working day. An official will normally attend at one of those times once a week, or more often for the more intensive courses. Further, the periods during which classes are given to some extent follow school terms with breaks at Christmas, Easter and in the summer. Therefore, language teaching within the Communities is unlikely to be anything but a part-time and ancillary occupation.

26. According to the Commission, most of the applicants teach for 12 hours per week, with an additional three hours of educational duties. The applicants argue that they are, in effect, carrying out full-time duties. They suggest that, in addition to teaching for the period set out in their contracts, they may undertake further individual teaching assignments, sometimes under specific additional contracts, and also spend a considerable amount of time on such activities as preparing courses, marking scripts, evaluating courses and materials and coordinating their activities among themselves. They suggested at the hearing that they worked for at least 22 to 27 hours per week (which it was said would make them the equivalent of full-time under Belgian law). However, this figure does not approach the maximum of 42 hours per normal working week laid down by Article 55 of the Staff Regulations, nor the 37 space/1/2 hours per week which, following agreement with the staff associations, officials normally work. Further, even though there may be tasks which certain teachers at present undertake outside the period for which they are under contract, they are basically only engaged for 33 weeks in the year.

27. The Commission argues that the needs for language teaching vary greatly from one period to another, and that must be so. Plainly, some language teaching will always be required but the demand for particular languages will vary according to the prevalent circumstances. Demand for a particular language may vary considerably according to circumstances such as the accession of new Member States, the amount of new recruitment or mobility and the desire of individual officials to learn or improve their knowledge of another language. It may well be right to say that there is an element of permanence as regards the need, for example, to teach

drafting in the working language or languages of a particular institution (although, in time, even those may change), but it appears from the specimen contracts submitted and from what was said by the Commission at the hearing that such courses are very few in comparison to the general language courses. The applicants do not claim that they are individually proficient in teaching all Community languages, and it must therefore be recognized that, as the need for different languages arises, so does the need for different teachers. It must therefore be doubtful whether the services of a full-time teacher of one language will always be required. In that sense, therefore, the task of an individual teacher may not be regarded as permanent even if there is a permanent need for teaching in various different languages.

28. I therefore conclude that, in view of the ancillary, part-time and impermanent nature of the tasks in question, there was no requirement on the Commission to bring the arrangements within the Staff Regulations or the Conditions of Employment and that for the same reasons the arrangements can be regarded as corresponding to the needs of the institution.

29. Nor is there, in my view, sufficient evidence to suggest that the true aim of the current arrangements is to avoid the application of the Staff Regulations or the Conditions of Employment. In this regard, the applicants cite an internal document of the Commission which in their view tends to suggest that the aim of the Commission is to avoid the possibility that the applicants should ever become servants or agents of the Communities. The Commission, while not denying the existence of this document, says that it is unable to find it and suggests that even if the document does exist it does not reflect the true policy of the Commission. In my view, reliance on that document, which was not produced to the Court, is not sufficient to contradict the conclusion that the arrangements were made in the interests of the service. I would therefore reject the first two submissions in this case.

30. In their third submission, the applicants argue that they had a legitimate expectation that the various meetings of the staff associations with the Commission would lead to their being accepted as officials or other servants. That submission can be disposed of shortly. As the Commission, in my view rightly, says, the fact of entering into negotiations does not of itself guarantee a satisfactory outcome and at no stage does it appear that the Commission held out the specific prospect that the language teachers would be given a specific status or contractual position as officials or other servants. Indeed, the staff associations themselves were, at least until 1986, apparently content to accept that Belgian law should govern the contracts and their main concern until that stage was simply to ensure that the language teachers were appropriately covered for social security and other benefits. In those circumstances, it does not seem to me that any question of legitimate expectation arises.

31. Finally, in their fourth submission, the applicants suggest that the Commission is in breach of its duty to have regard to the interests of its staff. The applicants appear to rely mainly on an alleged breach of the Commission's duty to provide adequate teaching for its staff, to the detriment of the

staff. The Commission rightly objects that only the staff allegedly prejudiced can rely on that alleged breach: see, for example, Case 85/82 *Schloh* v *Council* [1983] ECR 2105. In any event, there is nothing to suggest that the staff of the Commission who are taught by the applicants are prejudiced by the fact that the applicants are not officials or other servants of the Communities, or by the fact that the teaching is provided under the contracts in issue in this case.

32. In so far as the applicants seek to invoke a duty towards the applicants themselves, I consider that any such duty is owed only to staff in the strict sense and does not extend to persons providing services under contracts outside the Staff Regulations and Conditions of Employment, still less to bringing such persons within the category of 'staff'. In relation to such persons the most that in my opinion could be expected of the Commission is to ensure that, where they work a substantial number of hours per week, the contractual arrangements should allow them to come within the national social security scheme. If, as it appears, the contracts in dispute here enable the applicants to benefit from the Belgian social security system that in my view meets the substance of the applicants' complaint. The Commission stated, in reply to a question from the Court, that it pays by way of social security contributions an amount equal to 35% of the teachers' remuneration. The applicants have not specified any further respects on which they consider that the Commission has failed to have regard to their interests. Consequently the final submission of the applicants must also be rejected.

33. Accordingly in my opinion the application should be dismissed as unfounded. In accordance with Article 70 of the Rules of Procedure, each side should be ordered to bear its own costs.