OPINION OF ADVOCATE GENERAL MISCHO

delivered on 16 March 2000 *

1. On 10 May 1999, the European Parliament brought an appeal against the judgment of the Court of First Instance of 9 March 1999 [1] in an action brought against the Parliament by Mr Richard, an official of that institution.

2. The facts of the case were established by the Court of First Instance as follows.

3. Following publication of a vacancy notice for a Grade A 3 post as Head of Division 'Equipment and internal service' in Directorate A 'Infrastructures and internal service' of the Directorate-General 'Administration' ('DG VI') published in 1996 by the Parliament in accordance with the recruitment procedure provided for in Article 29(1) of the Staff Regulations of Officials of the European Communities ('the Staff Regulations'), the Director-General of DG VI considered that, of the twelve candidates eligible for promotion or transfer, two had the necessary qualifications and satisfied the requirements for the post. The Director-General proposed that the appointing authority (the Bureau of the European Parliament) appoint Mr Richard to the post.

4. However, the appointing authority decided to extend the range of potential candidates and consulted the reserve lists established following the open competitions for Grade A 3 posts reserved for nationals of the new Member States pursuant to Council Regulation (EC) No 626/95 of 20 March 1995 introducing special and temporary measures applicable to the recruitment of officials of the European Communities as a result of the accession of Austria, Finland and Sweden. [2]

5. The Head of the Personnel Division, on learning of the decision of the Director-General of DG VI, sent the latter a memorandum on 23 September 1996, in the following terms:

'Following publication of the abovementioned vacancy notice, you concluded, by memorandum of 25 July 1996, that of the twelve applications eligible for appoint-

* Original language: French.

1 — T-273/97 *Richard* v *Parliament* [1999] ECR-SC II-235 ('the contested judgment').

2 — OJ 1995 L 66, p. 1.

ment to the post by way of promotion or transfer, only two candidates had the necessary qualifications and satisfied the basic conditions set out in the vacancy notice in question, and proposed that Mr Richard be promoted.

In order to extend the range of potential candidates for this vacancy, and, in accordance with the instructions of the President of the Parliament, will you please consult the reserve lists established following the open competitions for Grade A 3 posts reserved for nationals of the new Member States, before taking a final decision'.

6. By memorandum of 26 September 1996, the Director-General of DG VI replied to the memorandum of the Head of the Personnel Division, stating that it was for the appointing authority to take a decision on the proposal that Mr Richard be appointed and that, as things stood, he was not required to consult the other reserve lists.

7. In a further memorandum of 11 October 1996, the Director-General of DG VI set out the operational criteria which had led him to propose that Mr Richard be appointed, and continued:

'Should [the appointing authority] consider that those practical qualifications were less important than more geographical criteria, I have formed the view after examining the reserve lists of candidates from the Swedish competition (EP/79/A), the Finnish competition (EP/78/A) and the Austrian competition (EP/77/A) that two candidates, after what would no doubt be a long and arduous period of adaptation, might be suitable for the vacant post, in the following order of preference: (1) Mrs S. (Swedish), (2) Mr P. (Finnish).'

8. On 9 January 1997, the appointing authority appointed Mrs S., a Swedish national, to the post.

9. On 6 May 1997, Mr Richard lodged a complaint, seeking annulment of the appointing authority's decision. That complaint was rejected and the President of the Parliament wrote to Mr Richard stating, *inter alia*:

'The Bureau, in its capacity as [appointing authority], has considered your complaint and has asked me to inform you of its decision and of the reasons on which it is based.

I should first point out that, where a vacant post is to be filled, the appointing authority is not bound absolutely to fill it by promotion or transfer, even if suitable candidates for promotion or transfer are available, but that it must simply consider in turn whether each of the procedures laid down in Article 29(1) of the Staff Regulations can result in the appointment of a

person of the highest standard of ability, efficiency and integrity.

The appointing authority considered the applications for transfer and promotion and concluded that the small number of suitable candidates did not provide sufficient choice from which to fill the post. It therefore decided, in order to widen its choice, to consider successful candidates on the lists of suitable candidates established following the open competitions instead of appointing one of the suitable candidates for promotion. In taking this decision, the appointing authority, which enjoys a wide discretion in that regard, did not infringe your rights under the Staff Regulations as a candidate for this post.

...

As the appointing authority considered that both the candidates proposed [3] were of almost equal merit and that both satisfied the conditions and possessed the requisite qualifications — and that the requirements relating to the interests of the service and consideration of the personal merit of candidates were therefore satisfied —, it decided to take other criteria into consideration, namely the need to ensure sufficient representation of nationals of the new Member States with a view to fulfilling the objective laid down in Article 27 of the Staff Regulations of maintaining or restoring geographical balance in its staff'.

3 — That is to say, the two candidates chosen by the Director-General.

10. Following that reply, Mr Richard brought an action before the Court of First Instance. By the contested judgment, the Court of First Instance annulled both the decision to appoint Mrs S. and the associated recruitment procedure.

11. By the present appeal, the Parliament seeks to have that judgment set aside on the ground that it infringes Community law.

12. Reference is made to the contested judgment for an account of the reasoning followed by the Court of First Instance.

Admissibility of the appeal

13. Mr Richard claims that the appeal is inadmissible, for two separate reasons.

14. He relies on the fact that the appeal is not accompanied by a decision of the appointing authority that an appeal should be lodged.

15. This first plea of inadmissibility cannot be upheld. Under Article 2(1) of the Staff Regulations, each institution is to determine who within it is to exercise the powers conferred by the Staff Regulations on the appointing authority.

16. The appointing authority is therefore a manifestation of the institution which established it and is required only to exercise the powers conferred on it.

17. Article 91a of the Staff Regulations provides that actions by officials are to be brought 'against the institution to which the appointing authority is answerable'. Mr Richard was therefore correct to bring his action against the Parliament.

18. Pursuant to Article 49(2) of the EC Statute of the Court of Justice, an appeal against a judgment of the Court of First Instance 'may be brought by any party which has been unsuccessful, in whole or in part, in its submissions'. As the decision of the Parliament contested by Mr Richard was annulled by the Court of First Instance, the Parliament was entitled to bring this appeal, without there being any need for a decision or for authorisation on the part of the appointing authority. It has not been alleged that, within the internal structure of the Parliament, the Parliament's right to bring an appeal was dependent on a decision of the appointing authority.

19. At the hearing on 27 January 2000, Mr Richard raised a second objection of inadmissibility, alleging that the Parliament had no interest in lodging the appeal.

20. Mr Richard claimed, without being contradicted by the Parliament, that, by decision of the Parliament of 4 October 1999, the vacancy notice on the basis of which Mrs S. had been appointed had been cancelled by the Parliament. Mrs S. was appointed to another post and the post as Head of Division 'Equipment and internal service' of Directorate A of DG VI, for which Mr Richard had applied and to which Mrs S. had been appointed, had been removed from the Parliament's organisation plan. Therefore, according to Mr Richard, a judgment of the Court of Justice setting aside the judgment of the Court of First Instance, and thus confirming the appointment of Mrs S. to the post in question, would be devoid of purpose. The appeal is therefore otiose.

21. Mr Richard also submitted that, under Article 42(2) of the Rules of Procedure of the Court of Justice, he was entitled to introduce that new plea at the hearing, since it was based on a fact which came to light in the course of the procedure.

22. That is indeed the case: the Parliament's appeal was lodged on 10 May 1999, the response was lodged on 15 July 1999 and the vacancy notice was withdrawn on 4 October 1999. Mr Richard was therefore entitled to introduce this new plea at the hearing.

23. The Parliament, however, contended that it still had an interest in lodging the appeal. In that regard, it referred, without more, to the judgment of the Court of First Instance in *Antillean Rice Mills and Others* v *Commission*. [4]

24. The relevant paragraphs of the judgment read as follows:

'59 It is settled law that a claim for annulment is not admissible unless the applicant has an interest in seeing the contested measure annulled... Such an interest can be present only if the annulment of the measure is of itself capable of having legal consequences (see Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965, paragraph 21).

60 In that regard, it must be borne in mind that, under Article 176 of the Treaty, an institution whose act has been declared void is required to take the necessary measures to comply with the judgment. Those measures do not concern the elimination of the act as such from the Community legal order, since that is the very essence of its annulment by the Court. They involve, rather, the removal of the effects of the illegalities found in the judgment annulling the act. The annulment of an act which has already been implemented or which has in the meantime been repealed from a certain date is thus still capable of having legal consequences. Such annulment places a duty on the institution concerned to take the necessary measures to comply with the judgment. The institution may thus be required to take adequate steps to restore the applicant to its original situation or *to avoid the adoption of an identical measure* [5] (see Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777, paragraph 32; *AKZO Chemie*, cited above, paragraph 21; and Case 207/86 *Apesco* v *Commission* [1988] ECR 2151, paragraph 16).'

25. In the judgments of the Court of Justice cited by the Court of First Instance, the Court of Justice emphasised the importance of clarifying the applicable rules for the

4 — Joined Cases T-480/93 and T-483/93 [1995] ECR II-2305, paragraph 59 et seq.

5 — Emphasis added.

future. The relevant passages read as follows:

In *Simmenthal* v *Commission*:

'Even though the contested decision has already been fully implemented for the benefit of the other tenderers participating in the same invitation to tender the applicant retains an interest in the annulment of this decision; such interest consists either in its being restored sufficiently by the Commission to its original position or in inducing the Commission to make suitable amendments in the future to the system of invitations to tender if the latter is found to be incompatible with certain legal requirements' (paragraph 32).

In *AKZO Chemie* v *Commission*:

'AKZO's interest in contesting the decision in question cannot be denied on the ground that in this case the decision had already been implemented at the time when the action was brought. The annulment of such a decision is of itself capable of having legal consequences, in particular by preventing a repetition by the Commission of the practice complained of and by rendering unlawful the use by ECS of any documents improperly communicated to it' (paragraph 21).

In *Apesco* v *Commission*:

'It must be emphasised that the action was brought within the time-limit prescribed in the third paragraph of Article 173 of the Treaty. Moreover, Apesco has an interest in challenging the list for July 1986, even though it is no longer applicable, in order to prevent a repetition of the alleged illegality in future lists' (paragraph 16).

26. In the present case, however, the situation is somewhat different. On the one hand, the Parliament is seeking not to have a measure annulled but to have a judgment side aside. Should the judgment be set aside, the consequence would be not the annulment but the confirmation of a decision adopted by the Parliament itself (the decision to appoint Mrs S.), which it has withdrawn in the meantime.

27. On the other hand, still on the assumption that the judgment of the Court of First Instance were to be set aside and Mrs S.'s appointment confirmed in principle, the Parliament would not be required to restore the person concerned to his original position, nor would it be prevented from adopting an identical measure in the future.

28. On the contrary, such a judgment would confirm that the method followed to fill the post in question was not open to criticism and that it could therefore be used again in the future. In paragraph 2 of its

application, the Parliament states that the contested judgment and the reasoning therein are inconsistent with previous decisions of both the Court of Justice and the Court of First Instance on the procedure for filling vacant posts laid down in Article 29 of the Staff Regulations. The Parliament maintains that this raises serious doubts from the legal point of view and leads to pernicious uncertainty in relation to the proper administration of the posts in the organisation plans of the institutions. Therefore, the interpretation of Article 29 of the Staff Regulations is clearly of interest not only to the Parliament, but also to all the other institutions.

29. Thus the Parliament's appeal takes on the aspect of an appeal 'in the interest of the law'. Such a right of appeal, however, has not been conferred on the Parliament, either by the Treaty or by the Staff Regulations.

30. The Court of Justice dealt with the question of an interest in bringing an appeal in *Rendo and Others* v *Commission*, [6] where it held, in paragraph 13, that:

'The Court may of its own motion raise the objection that a party has no interest in bringing or in maintaining an appeal on the ground that an event subsequent to the judgment of the Court of First Instance removes the prejudicial effect thereof as regards the appellant, and declare the appeal inadmissible or devoid of purpose for that reason. For an applicant to have an interest in bringing proceedings the appeal must be likely, *if successful*, to procure *an advantage* [7] to the party bringing it.'

31. The present case does not concern an event subsequent to the judgment of the Court of First Instance that removes the prejudicial effect thereof as regards the appellant. Furthermore, it is the appellant itself that was responsible for the event in question.

32. Could it be said, in fact, that a judgment of the Court of Justice setting aside the judgment of the Court of First Instance would be likely to procure *an advantage* to the Parliament?

33. Any retroactive validation of Mrs S.'s appointment would certainly not give the Parliament the 'advantage' of being able to keep her in her post, as the post has been abolished.

34. However, I can see one point on which a judgment of the Court of Justice setting aside the judgment of the Court of First Instance would confer a definite advantage on the Parliament. Such a judgment could provide the Parliament with a complete

6 — Case C-19/93 P [1995] ECR I-3319.

7 — Emphasis added.

defence to any claim by Mr Richard for damages in respect of the harm sustained as a result of what the Court of First Instance held to be the unlawful appointment of Mrs S.

35. That, to my mind, is sufficient reason not to dismiss the appeal as inadmissible.

Substance

36. The Parliament's appeal concerns the interpretation of Article 29(1) of the Staff Regulations. That provision is worded as follows:

'Before filling a vacant post in an institution, the appointing authority shall first consider:

(a) whether the post can be filled by promotion or transfer within the institutions;

(b) whether to hold competitions internal to the institution;

(c) what applications for transfer have been made by officials of other institutions of the three European Communities;

and then follow the procedure for competitions on the basis either of qualifications or of tests, or of both qualifications and tests. Annex III lays down the competition procedure.

The procedure may likewise be followed for the purpose of constituting a reserve for future recruitment.'

37. In paragraph 3 of its application, the Parliament submits that the contested judgment is consistent with earlier case-law:

'— on the scope of the appointing authority's discretion and the fact that it is unable to extend its range of choices if a worthy candidate has applied in the previous stage;

— where it establishes the requirement that each stage [of the recruitment procedure] be formally closed and the candidatures received rejected before it is possible to proceed to a subsequent stage, so that it is impossible to compare the merits of candidatures received in the different stages provided for in Article 29;

— on the conditions under which recruitment can be effected on the basis of lists of suitable candidates established following open competitions.'

38. It is those three points of contention, therefore, that I shall consider. However, I should first point out that consideration of those points will play only a minor role in determining the outcome of the appeal.

39. In raising those three points, the Parliament (without claiming otherwise) criticises in their entirety the grounds on which the Court of First Instance annulled the appointment of Mrs S.

40. In paragraph 6 of its pleadings, the Parliament expressly accepts that Mr Richard's argument before the Court of First Instance that the appointing authority was not entitled, after considering the applications for transfer and promotion, to proceed directly to a consideration of the reserve lists established following open competitions without considering the possibilities offered by Article 29(1)(b) and (c) of the Staff Regulations, namely the possibility of organising an internal competition or the possibility of an official being transferred from another institution, was well founded.

41. That is tantamount to recognising that the Court of First Instance had at least one unassailable ground on which to annul the contested appointment. As we know, the Court of Justice cannot set aside a judgment of the Court of First Instance when the operative part is well founded. For that reason, I believe that the Parliament's appeal must be dismissed in any event.

The prohibition on the appointing authority extending its field of choice where a worthy candidate has applied in one of the stages of the procedure

42. It is an established fact that where the appointing authority concludes that none of the applications submitted at a specific stage of the procedure provided for in Article 29 of the Staff Regulations can be accepted, it duly records that fact and goes on to the next stage.

43. But what is the position where, on the other hand, the appointing authority concludes that one or more of the candidates have the necessary qualifications to fill the vacant post?

44. Is it required, in such a case, to appoint one of those candidates? That is the position adopted by the Court of First Instance in the contested judgment.

45. The Parliament criticises the Court of First Instance for having stated, in paragraph 41 of the contested judgment, that '[a]s the applicant's candidature satisfied the requirements of the post to be filled, the appointing authority could not legitimately consider, in spite of its broad discretion, that its choice was not sufficiently wide to ensure that an appointment is made in accordance with the vacancy notice'.

46. The Parliament claims that, on the contrary, the appointing authority's discretion allows it, even where there are a number of candidates with all the required qualifications (candidates 'worthy' of promotion), not only to decide not to promote one of the candidates to the vacant post, in accordance with *Küster* v *Parliament*, [8] but, if it considers that it has insufficient choice to ensure that an appointment is made in accordance with the vacancy notice, to extend its choice in order to find the best candidate for the vacant post, as was held in *Anacoreta Correia* v *Commission* and *Kotsonis* v *Council*. [9]

47. The Parliament argues that the contested judgment considerably reduces the appointing authority's discretion and that it confers overriding supremacy on the official's 'right to reasonable career prospects', to the detriment of the principle that appointments are to made solely in the interests of the service. That principle implies that the appointing authority is under an obligation to choose the person of the highest standard of ability, efficiency and integrity and therefore that it is entitled to extend its margin of choice.

48. Mr Richard claims that Article 29(1) of the Staff Regulations establishes an order of priority between the different stages of filling a vacant post. It should be read together with the third paragraph of Article 4 of the Staff Regulations, which provide that the appointing authority is to notify the vacancy to the staff of the three Communities only where it cannot fill the post by promotion, transfer or internal competition. He maintains that under those two provisions officials are entitled to have their candidatures examined and accepted in priority to candidatures submitted in the subsequent stages. The preference thus given to internal candidates is intended to ensure that officials have reasonable career prospects. Mr Richard also claims that it is for the appointing authority to determine, in the exercise of its discretion, whether or not it has found a 'worthy' candidate. If a satisfactory candidature has been submitted, the appointing authority is required to choose that candidature and cannot consider candidatures submitted in the subsequent stages. If there is no worthy candidate, the appointing authority may only proceed to the subsequent stages after rejecting all the candidatures received in the current stage.

8 — Case 23/74 [1975] ECR 353 ('*Küster I*') and Case 123/75 [1976] ECR 1701 ('*Küster II*').

9 — Case T-118/95 [1996] ECR-SC I-A-283 and II-835 and Case 246/84 [1986] ECR 3989.

Assessment

49. In *Van Belle* v *Council*, [10] the Court of Justice held that Article 29(1) of the Staff Regulations requires the appointing authority to examine, in order of preference, the possibilities of filling the post by promotion or transfer within the institution where the vacancy has occurred, next the possibility of holding competitions internal to that institution and, finally, applications for transfer made by officials of other institutions, and that it is only if those procedures are seen to be inadequate that the procedure for competitions on the basis of either qualifications or of tests or of both qualifications and tests may be followed; the competitions in question may be either inter-institutional competitions or open competitions. [11]

50. It cannot be disputed, therefore, that the appointing authority must first carefully examine the applications for promotion or transfer.

51. The order of preference established by Article 29(1) of the Staff Regulations must be understood to be 'the expression of the principle that all officials are entitled to reasonable career prospects within their institution'. [12]

52. However, there is no personal right as such to promotion (or transfer), as appointments are made solely on the basis of selection and the appointing authority must ensure that each post is occupied by the official with the highest qualifications possible.

53. In *Küster I*, a judgment concerning an official who, because he was eligible for promotion, claimed to have the right to be promoted to the post vacated upon the departure of his immediate superior, the Court of Justice held that '[t]he applicant's argument amounts to granting the deputy of an official whose post has become vacant the right to succeed him as soon as it appears from his personal file that he has the necessary qualifications to fill that post' and that '[b]oth the interests of the service and the rights of other officials militate against acceptance of such a claim'. [13]

54. In *Küster II*, the Court confirmed that the fact of satisfying the necessary conditions for a vacant post does not confer a right to be appointed to that post. The Court held as follows:

'Although Article 29(1)(a) of the Staff Regulations provides that before filling a vacant post in an institution, the appointing authority shall first consider whether the post can be filled by promotion or transfer

10 — Case 176/73 [1974] ECR 1361.

11 — Case C-304/97 P *Carbajo Ferrero* v *Parliament* [1999] ECR I-1749; Case T-140/94 *Gutiérrez de Quijano y Llorens* v *Parliament* [1996] ECR-SC I-A-241 and II-689; Case T-52/90 *Volger* v *Parliament* [1992] ECR II-121; and Case T-3/97 *Campogrande* v *Commission* [1998] ECR-SC I-A-89 and II-215.

12 — *Campogrande* v *Commission*, cited above.

13 — Paragraphs 25 and 26.

within the institutions, it does not give officials who fulfil the conditions for promotion a personal right to promotion, since the filling of each post must in accordance with the first paragraph of Article 27 of the Staff Regulations be based in the first place on the interests of the service.

Moreover, Article 45(1) of the Staff Regulations provides that "Promotion shall be exclusively by selection ... after consideration of the comparative merits of the officials eligible for promotion ...".

It appears from these provisions that the appointing authority has a wide discretion in the matter;

Thus it does not appear that in deciding to hold an internal competition instead of promoting the applicant the appointing authority failed to fulfil its obligations under Articles 29 and 45 of the Staff Regulations and infringed the applicant's rights under those Regulations'. [14]

55. That rule is equally valid where the appointing authority has available only one candidate suitable for promotion (paragraph 17 of *Küster II*) as where several candidates are available.

56. In fact, 'the presence of several persons having the qualifications for promotion or transfer within the institution may lead the appointing authority to conclude that the interests of the service and the impartiality of recruitment render an internal competition desirable'. [15]

57. The Court upheld those principles in *Mogensen and Others* v *Commission*, [16] where it stated that,

'The use of the word "can" [in Article 29(1)(a)] clearly shows that the appointing authority is under no absolute obligation to promote an official but merely has to consider, in each case, whether promotion is capable of leading to the appointment of a person of the highest standard of ability, efficiency and integrity as required by Article 27 of the Staff Regulations.

Although Article 29(1)(a) requires the appointing authority to consider the possibility of promotion with the utmost care before going on to the following stage, it

14 — Paragraphs 10 to 13.

15 — *Küster I*, paragraph 24.

16 — Case 10/82 [1983] ECR 2397, paragraphs 9 and 10.

does not prevent the authority, in the course of such an examination, from also taking account of the possibility of obtaining better candidates by using the other procedures mentioned in that paragraph. Consequently the appointing authority is at liberty to consider the subsequent options.'

58. Thus the appointing authority may proceed to the subsequent stages provided for in Article 29(1) of the Staff Regulations, when the qualifications and merits of candidates who applied in the first stage may be compared with those of other candidates.

59. However, that option for the appointing authority to extend the range of candidates must be used with extreme caution, since, if applied systematically, it would completely eliminate the priority which Article 29(1) of the Staff Regulations undeniably intended to confer on officials employed by the institution concerned. Furthermore, it has led to abuse in the past.

60. In the present case, it is clear from the documents in the file referred to by the Court of First Instance and also referred to above that there was no proper comparison of the qualifications and professional experience of Mr Richard and those of Mrs S. Mrs S. was chosen because, by comparison with that of other successful candidates in the open competitions for nationals of the new Member States, her professional experience was closest to (or least removed from) that required for the post in question. In the final analysis, as the reply to the complaint acknowledges, Mrs S. was recruited 'in order to ensure sufficient representation of nationals of the new Member States'. I shall return to that point when I deal with the third plea.

61. It is still the case that, in principle, the contested judgment misconstrued Article 29(1) of the Staff Regulations when it stated that, because the applicant's candidature satisfied the requirements of the vacant post, the appointing authority, notwithstanding its wide discretion, could not legitimately consider that it did not have a sufficiently wide choice to ensure that an appointment could be made in accordance with the vacancy notice.

62. This criticism by the Parliament is justified.

The requirement that the candidatures received must be rejected before proceeding to the next stage in the recruitment procedure

63. The Parliament also criticises the Court of First Instance for having held, in para-

graph 29 of the contested judgment, that '[t]he rejection of candidatures for promotion or transfer under Article 29(1)(a) of the Staff Regulations is a necessary precondition for passing on to the subsequent stages of the procedure provided for in [that] article ... since that provision establishes an order of priority as between the different stages for which it provides'. The Parliament maintains, therefore, that the Court of First Instance erred in law in holding, in paragraph 45 of the contested judgment, that, '[i]t follows from the foregoing that, by not formally rejecting the applicant's candidature and by proceeding to compare the candidatures of the applicant and Mrs S., the appointing authority infringed Article 29(1) of the Staff Regulations'.

64. In other words, the Parliament does not agree that Article 29(1) of the Staff Regulations requires that the appointing authority formally close each stage of the recruitment procedure by rejecting the candidatures received in that stage, since it would then become impossible to compare the merits of candidates applying in the different stages provided for in Article 29(1).

65. The Parliament maintains that if, after all, the best candidate none the less turns out to be one of those who applied for promotion, 'it must be possible, in the interest of the service, to go back to a previous stage, which is impossible if the previous stage has been closed and the candidatures received in that stage have been rejected'.

66. The judgment in *Coussios* v *Commission*[17] cited by Mr Richard should not be followed, since it was wrongly held in that judgment that the appointing authority must reject candidatures received in one stage of the procedure provided for in Article 29(1) of the Staff Regulations before passing to the subsequent stage.

67. Mr Richard contends that if no candidate internal to the institution possesses the requisite qualifications, the appointing authority must reject the candidatures which have been considered and close the recruitment stages internal to the institution before proceeding to recruit staff employed in the other institutions. He submits that that applies *a fortiori* if the appointing authority wishes to proceed from internal recruitment to recruitment from outside the Community institutions. He accepts that the appointing authority can 'extend its choice' if it does so in the interests of the service taken in a wide sense. However, that concept of extending its choice does not allow the appointing authority to compare candidatures received in different stages, but only to examine candidatures received in addition to those submitted in the priority stage, on condition that the candidatures submitted in the priority stage do not meet the interest of the service and have been rejected.

17 — Joined Cases T-18/92 and T-68/92 [1994] ECR-SC I-A-47 and II-171.

Assessment

68. If follows from what I said in connection with the first plea that the appointing authority is not required to reject candidatures considered for promotion or transfer before organising an internal competition or proceeding to one of the subsequent stages.

69. In the present case, the appointing authority did not find that the candidates for promotion or transfer were unsuitable for the post: it wished to extend its choice in order to ascertain whether there was any candidate whose appointment would better serve the interests of the service.

70. Such an outcome cannot be guaranteed in advance, however, and it would therefore not be prudent to reject definitively candidates who have applied pursuant to Article 29(1)(a) of the Staff Regulations. As the Parliament points out, to reject candidatures from the previous stage or stages 'would again be contrary to the interests of the service if, for example, it turned out, following consideration of the candidatures for inter-institutional transfer, that the best candidate was, after all, one of the candidates for promotion, when the appointing authority had already closed that stage by formally rejecting the respective candidatures' (paragraph 30 of the application).

71. That criticism is justified.

Conditions of recruitment on the basis of the reserve list

72. The Parliament submits that 'the conditions laid down in paragraph 42 of the contested judgment concerning the possibility of consulting, and recruiting on the basis of, the reserve lists established following open competitions also raise significant doubts as to their compliance with the applicable regulations.'

73. In paragraph 42 of the contested judgment, the Court of First Instance held that the fact that the appointing authority 'consulted the reserve list of nationals of the new Member States required that the procedure initiated be annulled and that new conditions for filling the post be established'.

74. The Parliament maintains, first, that it is not clear from that reasoning whether the requirements imposed on the appointing authority by the Court of First Instance must be satisfied only where the appointing authority consults the reserve lists established following the open competitions organised pursuant to Regulation No 626/95 or, alternatively, whenever, in a recruitment procedure, the appointing authority deems it appropriate to consult the reserve lists established following open competitions.

75. The Parliament submits that, if the first of those hypotheses is correct, the Court of First Instance infringed Regulation No 626/95, which, although it provides that vacancy notices may be published exclusively for nationals of the new Member States, does not prevent successful candidates in competitions organised in that context from being appointed following a recruitment pursuant to Article 29 of the Staff Regulations. Were that not so, all lists of suitable candidates drawn up under the derogating regulations would lapse upon the expiry of the period of validity of that regulation.

76. It must be borne in mind, according to the Parliament, that 'open competitions are not designed to fill a specific post but are held for the purpose of establishing recruitment reserves in order to fill posts in the same category and corresponding to a particular career bracket. The successful applicants in these open competitions are then placed on a list of suitable candidates and may be recruited if they possess the necessary qualifications to fill a particular post'.

77. On the assumption that the second hypothesis is correct, the reasoning of the Court of First Instance is still without a valid legal basis. The Parliament claims, with reference to *Carbajo Ferrero* v *Parliament* and *Gutiérrez de Quijano y Llorens* v *Parliament*, cited above, that the only rule that must be observed in this context is the requirement that the conditions and qualifications be the same in the vacancy notices published at the various stages of the procedure, since the framework of legality by which the appointing authority undertakes to be bound and with which it must comply throughout the recruitment procedure depends on the terms of the vacancy notice.

78. Mr Richard contends that the Court of First Instance was correct to hold that consultation of the reserve list of nationals of the new Member States was subordinate to annulment of the procedure initiated and to the establishment of new conditions for filling the post. He argues that the post should be assigned in the context of a recruitment procedure laid down in the Staff Regulations and that it is therefore necessary to refer to the rules governing that procedure in order to determine whether it is possible to take account of a reserve list established following a derogating procedure. Mr Richard states that, under the Staff Regulations, the appointing authority must ensure that the conditions set out in the relevant vacancy notices correspond. That cannot be so in the case of a vacancy notice published in the context of a recruitment procedure laid down in the Staff Regulations and a notice of an open competition organised under Regulation No 626/95, since the latter necessarily stipulates a condition as to nationality.

Assessment

79. To my mind, it is clear from the contested judgment, and the Parliament cannot have been mistaken in that regard, that the Court of First Instance was refer-

ring only to cases in which the appointing authority, after opening a procedure to fill a vacant post pursuant to Article 29(1) of the Staff Regulations, proceeds to consult the reserve lists established under a scheme derogating from the Staff Regulations.

80. The Staff Regulations contain a series of rules which are intended to strike a balance between the need to ensure that deserving officials have career prospects and the need for the efficient organisation of a civil service made up of the nationals of all Member States. To that end, the Staff Regulations lay down a number of mandatory rules, such as the requirement that the appointing authority, acting solely in the interest of the service and without regard to nationality, assign each official to a post in his category or service which corresponds to his grade (Article 7(1)); the prohibition on reserving posts for nationals of any specific Member State (the third paragraph of Article 27); or the requirement that the appointing authority consider whether a post can be filled by internal recruitment before going on to consider external candidatures (Article 29(1)).

81. On a number of occasions, the Council has introduced temporary derogations from this regulation: first in 1982, on the accession of the Hellenic Republic, then in 1985, on the accession of the Kingdom of Spain and the Portuguese Republic, and, finally, in 1995, on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, when it adopted Regulation No 626/95.

82. Article 1(1) of that regulation is worded as follows:

'1. Notwithstanding the second and third paragraphs of Article 4, Article 5(3), Article 7(1), the third paragraph of Article 27, Article 29(1)(a), (b) and (c) and Article 31 of the Staff Regulations of Officials of the European Communities, provision may be made until 31 December 1999 for vacant posts to be filled by Austrian, Finnish and Swedish nationals up to the limits set in the context of budgetary discussions within the institutions responsible.

2. Appointments to grades A 3 ... shall be made after a competition based on qualifications and tests, organised in accordance with Annex III to the Staff Regulations.

3. Vacant posts shall be adequately advertised both inside and outside the Community institutions.'

83. Pursuant to this provision, the Parliament published, on a date not stated in the file, three notices of open competitions for the recruitment, *in one of its Directorates-General*, of Heads of Division (male/female) of Austrian, Finnish and Swedish nationality respectively.

84. The nature of the functions was outlined as follows in the notice of competition:

'Highly qualified official, responsible, under the authority of a Director, for a specific sector of activity within the Secretariat of the European Parliament and in particular for:

— assigning and coordinating the work of his division and ensuring the quality of the work of his colleagues;

— administering the budgetary resources allocated to this sector of the Secretariat General;

— representing the Secretariat General at interinstitutional meetings;

— liaising with Members of the European Parliament in the context of the work of the European Parliament.

The duties associated with these management posts in the European Parliament require a high level of skill in coordinating the available human and financial resources, i.e. in organising the work of the unit, managing the teams and enhancing performance through innovation.'

85. Vacancy Notice No 8011, to which Mr Richard replied, was worded as follows:

'Post: Directorate-General Administration
Infrastructures and internal service Division
Division: Equipment and internal service
1 Head of Division (male/female) (Grade A 3).'

86. The nature of the duties was outlined as follows:

'Highly qualified official to manage and administer the work of the Division,

with responsibility in particular for services:

(a) Human resources: drivers, furniture removers, Travel Office and management of related external contracts;

(b) Equipment:
— Purchase Office: furniture, office machinery, technical equipment, photocopiers, work clothing;
— Insurance and customs formalities;
— Shops and warehouses;

(c) Conferences:
— General running of meetings;
— Conference technicians;
— Management of meetings requested by external organisations;

(d) Inventory, Finances, Postal service:
— Budgetary operations for all posts connected with the services of the Division;
— Office messengers.

These duties require inter-personal communication skills.'

87. It may be seen from a comparison of the two notices that one was addressed to nationals of a specific country and included a very general description of the nature of the duties, which would apply to any post as Head of Division, while the other did not include any condition as to nationality and defined the duties in question much more specifically.

88. Furthermore, in the contested judgment, the Court of First Instance observed that 'the Parliament has accepted that it did not apply ... Regulation [No 629/95] in the appointment procedure in question'. That assertion has not been challenged in the proceedings before the Court of Justice.

89. As regards the application of the procedure provided for in Article 29 of the Staff Regulations, it is settled case-law that the vacancy notice, which is drawn up before the first stage of the procedure provided for in Article 29(1) is opened, establishes the framework of that procedure, in particular by defining the nature of the post to be filled and by stating the qualifications and knowledge required of candidates in the interests of the service. [18]

90. On a number of occasions, the Community judicature has been required to adjudicate on the essential 'correspondence' between the notices initiating the

18 — Case 188/73 *Grassi* v *Council* [1974] ECR 1099, paragraph 39.

various stages provided for in Article 29(1). It has held, in particular, that any change in the conditions of participation between the various stages would deprive Article 29(1) of its effect, since, if an institution were able to change the conditions of participation from one stage to another, for example by making them less strict, such a change would preclude the promotion or transfer of officials of the institution concerned who might have been able to satisfy the less strict conditions set out in the notice of competition or would leave the institutions free to organise external recruitment procedures without having to consider internal candidatures. [19]

91. In the present case, it was as though the appointing authority had changed the terms of the vacancy notice during the procedure.

92. The Court of First Instance was therefore correct to hold, in point 45 of the contested judgment, that 'in comparing the candidatures of the applicant and of Mrs S., the appointing authority infringed Article 29(1) of the Staff Regulations'.

93. The Court of First Instance was also correct to state in paragraph 42 of the contested judgment that 'consulting the reserve list of nationals of new Member States required that the procedure initiated be annulled and that new conditions for filling the post be established'. On that point, the Court of First Instance referred to its judgment in *Rasmussen* v *Commission*, [20] which I wholly approve.

94. In that case, the Commission had first annulled a vacancy notice published pursuant to Article 29 of the Staff Regulations. It had then published in the Official Journal notices of competitions pursuant to Regulation No 626/95 to fill nine posts as Head of Unit of Austrian, Finnish or Swedish nationality. One of those open competitions was specifically intended to fill the same post as had formed the subject-matter of the vacancy notice which had been annulled (paragraphs 2 and 11 of *Rasmussen* v *Commission*, cited above).

95. To my mind, in doing so the Commission followed the only permissible procedure when, at the time of enlargement, posts must be allocated to nationals of the new Member States by virtue of their nationality. [21]

96. I do not agree with the Parliament's argument that the derogating regulation does not require that the successful candi-

19 — Joined Cases 341/85, 251/86, 258/86, 259/86, 262/86, 266/86, 222/87 and 232/87 *Van der Stijl* v *Commission* [1989] ECR 511.

20 — Case T-35/96 [1997] ECR-SC I-A-61 and II-187, paragraph 62.

21 — Apart from these cases, the institutions still have the option of reserving a post for a particular nationality or stipulating a condition of perfect knowledge of a particular language where that is justified by reasons connected with the proper functioning of their departments (see Case 15/63 *Lassalle* v *Parliament* [1964] ECR 31).

dates in competitions organised for nationals of the new Member States 'be appointed by publication procedures organised under the derogating arrangements. If that were so, all the lists of suitable candidates from competitions organised by all the institutions for nationals of the new Member States would lapse on 31 December 1999, the date on which the derogating regulation cases to be valid, which is not provided for in the derogating regulation and does not correspond to the interests of the institutions or to the interests of the successful candidates in those competitions' (paragraph 42 of the application).

97. Since Regulation No 626/95 has as its purpose and effect to ensure, within certain limits, that nationals of a specific Member State are recruited and since that regulation is therefore based wholly on considerations of nationality, it is an inherent characteristic of the system that such treatment, which favours one specific country but discriminates against the others, should be limited in time.

98. Consequently, the reserve lists established in the derogating recruitment procedure must lapse when the quota of posts to be filled by that method is exhausted, and no later than the date of expiry of the derogating regulation under which the lists were drawn up.

99. Therefore, the considerations of the Court of First Instance in paragraphs 42 to 44 of the contested judgment do not to my mind deserve the criticisms put forward by the Parliament. The relevance of those considerations means that the Court of First Instance based its decision to annul the appointment of Mrs S. on legally sound grounds and that, accordingly, irrespective of the grounds for setting aside the appeal set out in paragraphs 9 to 41 above, the contested judgment should not be set aside.

100. In conclusion, in spite of the fact that certain criticisms of the contested judgment are accurate, I can only propose that the Court should dismiss the Parliament's appeal as unfounded.

Costs

101. Under Article 69(2) of the Rules of Procedure of the Court, which applies to the appeal procedure pursuant to Article 118, the unsuccessful party is to be ordered to pay the costs where they have been applied for in the successful party's pleadings. If, as I propose, the Parliament's appeal is dismissed, the form of order sought by Mr Richard should be granted and the Parliament should be ordered to pay the costs of these proceedings.

Conclusion

102. I propose that the Court should

— dismiss the appeal;

— order the European Parliament to pay the costs.