

included on a list drawn up by a joint body required to give its opinion, it discharges that obligation if, in its letter rejecting the complaint, it makes clear that it made its comparative assessment of all the candidates' qualifications, merits and knowledge required for the performance of duties on the basis of the staff reports of all the officials eligible for promotion.

2. The purpose of Article 26 of the Staff Regulations is to safeguard an official's right to a fair hearing by ensuring that decisions taken by the appointing authority and affecting his administrative status and his career are not based on matters concerning his conduct which are not mentioned in his personal file. A decision

based on such matters is contrary to the guarantees contained in the Staff Regulations and must be annulled because it was adopted on the basis of a procedure vitiated by illegality.

That is not the case where the appointing authority makes a decision granting promotion to an official, in preference to others, on the basis both of the staff reports of the candidates and of a comparative assessment of their abilities by their immediate superior, which, as a value judgment likely to be damaging to the unsuccessful candidates, must not be communicated to them or included in their personal file.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

28 September 1993 *

In Case T-84/92,

Finn Nielsen and Pia Møller, officials of the Economic and Social Community of the European Communities, residing respectively in Rixensart (Belgium) and Brussels, represented by Thierry Demaseure and Jean-Noël Louis, of the Brussels Bar, with an address for service in Luxembourg at the offices of Myson SARL, 1 Rue Glesener,

applicants,

* Language of the case: French.

Economic and Social Committee of the European Communities, represented by Moisés Bermejo Garde, Legal Adviser, acting as Agent, assisted by Denis Waelbroeck, of the Brussels Bar, with an address for service at the office of Nicola Anecchino, of its Legal Service of the Commission, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of Decision No 451/91 A of 16 October 1991 of the Chairman of the Economic and Social Committee of the European Communities to promote Mr F. to Grade LA 4, annulment of the decision not to promote the applicants to Grade LA 4 and, so far as may be necessary, annulment of the decision of 1 July 1992 expressly rejecting the complaint submitted by the applicants,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: D. P. M. Barrington, President, R. Schintgen and K. Lenaerts,
Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 22 June 1993,

gives the following

Judgment

Facts

1 The applicants, Mr Nielsen and Mrs Møller, took up their duties as Danish-language translators with the Economic and Social Committee of the European Communities (hereinafter 'the ESC') on 1 July 1973. Mrs Møller was promoted to Grade LA 5, as a Principal Translator, on 1 May 1978, and Mr Nielsen was promoted to Grade LA 5, as a Principal Translator, on 1 July 1982.

2 By Decision No 2117/74, of 29 July 1974, amended by Decisions Nos 1515/81 A, of 15 June 1981, and 2903/81 A, of 13 December 1981, the ESC set up a Joint Committee on Promotions (hereinafter the 'Committee') 'to give its opinion as part of the consultative procedure preceding promotion within a career bracket spanning two grades and, once a year, to draw up a list of officials worthy of promotion to the next career bracket'. Pursuant to the above decision, on 16 May 1991 the Chairman of the ESC appointed the six members of the Committee for the 1991 promotions operation during the course of which two posts at Grade LA 4 were to be filled and a third post at LA 4 would fall vacant as from 1 January 1992 as a result of a retirement on grounds of invalidity.

3 At a meeting held on 2 December 1991, having established that two posts at LA 4 were available for 1991 and that one post at LA 4 would be freed as from 1 January 1992, the Committee voted by a majority for two candidates, while a third candidate received three votes, a fourth two votes and a fifth one vote. The Committee delivered its opinion on the same day, proposing that the two candidates who had obtained the majority of the votes should be promoted to Grade LA 4.

4 On 3 December 1991, the Head of the Danish Translation Division sent the following note to the Head of the Recruitment and Personnel Management Division: 'I hereby confirm the statement I made yesterday to the Committee on Promotions

regarding the merits of the three LA5 officials in the Danish Translation Division eligible for promotion to LA 4, namely Mrs Pia Møller, Mr Finn Nielsen and Mr F. That is to say, having considered the interest of the service and the qualifications and merits of the three candidates, as well as their staff reports, I would recommend the promotion of Mr F. as he seems to me to be the best of the three'.

- 5 On 6 December 1991, the Director of Administration, Personnel and Finance wrote to the Secretary General, attaching the opinions of the Committee, the lists of officials with the required seniority, a table showing average waiting times for promotion, a table showing the proposed dates for each of the promotions and the draft decisions on promotion. He also proposed that Mr F. should be promoted to the LA 4 post freed as a result of the retirement of an official on grounds of invalidity, thus following the proposal of 3 December 1991 by the Head of the Danish Translation Division.

- 6 On 12 December 1991, the Director of Administration, Personnel and Finance sent to the Secretary General a list of officials to be considered for promotion and attached the personal files of those officials, the reports drawn up on them and the opinion of the Committee.

- 7 By decision of 16 December 1991 the appointing authority promoted to Grade LA 4 the two officials chosen by the Committee and Mr F., Principal Translator in the Danish Division, who had been promoted to Grade LA 5 on 1 May 1988.

- 8 The list of officials promoted within a career bracket for 1991 was posted on the notice board on 18 December 1991 and the applicants were notified on the same date.

- 9 On 8 January 1992, the Chairman of the Committee and four of its members tendered their resignation to the Secretary-General complaining that the appointing authority had not followed the opinions of the Committee and at the same time had not appended any explanation for this to its decisions.
- 10 On 17 March 1992 both of the applicants submitted a complaint pursuant to Article 90(2) of the Staff Regulations of Officials of the European Communities (hereinafter 'the Staff Regulations') against Decision No 451/91 A of 16 December 1991 promoting Mr F. to Grade LA 4 and implicitly rejecting their applications for promotion.
- 11 In letters dated 1 July 1992 the Chairman of the Economic and Social Committee rejected those complaints in the following terms:

'Your complaint of 17 March 1992 against Decision No 451/91 A of 16 December 1991 concerning the promotion of Mr F. to Grade LA 4 has been given thorough consideration.

I would make the following comments:

In accordance with the provisions of Article 45(1) of the Staff Regulations the appointing authority made its choice from among those officials with the required seniority in their grade after consideration of the comparative merits of the officials eligible for promotion and of the reports on them.

In this connection I would point out that the appointing authority has a wide discretion in assessing the merits and staff reports to be taken into account for promotion; this discretion has consistently been given express recognition in the decisions of the Court of Justice of the European Communities.

In this case I can assure you that the appointing authority adhered scrupulously to the rules laid down in Article 45 of the Staff Regulations.

The Joint Committee on Promotions was expressly consulted before the decision in issue and the other two decisions on promotion within the LA 5/4 career bracket were adopted.

Although you have the required seniority in your grade, the outcome of the comparison of all the qualifications, merits, knowledge of languages and staff reports of all the officials concerned was clearly in favour of the person promoted. To inform you of the details of the choice made or of the various aspects of the complex appraisal made of the staff reports would be likely to be detrimental to the officials who were not promoted and I cannot, therefore, provide you with such details.

Moreover, the opinion of the Joint Committee on Promotions and the opinion of the Head of the Danish Translation Division, in neither of which your promotion was recommended, confirm the decision of the appointing authority to promote Mr F.'

Procedure

- 12 It was in those circumstances that the applicants lodged the application in this case at the Court Registry on 1 October 1992.
- 13 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure. It asked the parties to comply with the following requests:

'(1) The ESC is requested to produce the staff reports of the applicants, Mrs Pia Møller and Mr Finn Nielsen, and that of Mr F. for the period from 1 September 1988 to 31 August 1990 ...

(2) The parties are requested to confirm that it was Mr F. who received three votes in the vote taken at the meeting of the Joint Committee on Promotions of 2 December 1991.'

14 The parties presented oral argument and replied to the questions put by the Court at the hearing on 22 June 1993.

Forms of order sought

15 The applicants claim that the Court of First Instance should:

(1) annul the Decision No 451/91 of 16 December 1991 promoting Mr F. to Grade LA 4 and the decisions rejecting the applicants' applications for that post;

(2) order the defendant to pay the costs.

16 The ESC contends that the Court of First Instance should:

(1) dismiss the application as unfounded;

(2) make an appropriate order as to costs.

Pleas in law and arguments of the parties

17 The applicants put forward two pleas in support of their application. The first alleges that Article 45 of the Staff Regulations was infringed in that the appointing

authority did not consult the Committee or consider the comparative merits of all the candidates before promoting Mr F.

The second plea alleges that Article 26 of the Staff Regulations was infringed in that the applicants were not informed of certain oral statements on their merits and those statements were not recorded in their personal files.

The first plea alleging infringement of Article 45 of the Staff Regulations

Arguments of the parties

18 The applicants complain, firstly, that the appointing authority did not consult the Committee before deciding to promote Mr F. Pointing out that Article 5 of Decision No 2903/81 A requires the appointing authority to decide on promotions in the light of the list of officials whom the Committee considers most deserving of promotion, they state that, where an institution sets up a consultative committee not provided for by the Staff Regulations in order to obtain an opinion, regarding appointments to certain posts, in relation to the abilities and aptitudes of candidates, having regard to the qualifications required, the Court of First Instance has held that this constitutes a measure designed to ensure that the institution, as appointing authority, has a better basis for the consideration of the comparative merits of the candidates pursuant to Article 45 of the Staff Regulations (Case T-25/90 *Schönherr v ESC* [1992] ECR II-63).

19 In this case, according to the applicants, the Committee was not informed that a third LA 4 post had been freed in the Danish Translation Division and it was accordingly unable to deliver an opinion on the abilities and aptitudes of the candidates in the light of the qualifications required for that post.

20 However, in their reply, the applicants, acknowledging that the documents submitted by the defendant showed that the Committee had considered the possibility of proposing a third official for promotion to Grade LA 4, decided not to rely on this argument.

21 Secondly, the applicants complain that the appointing authority promoted Mr F. without having provided the Committee with the information it needed to give an objective opinion. They maintain that, although the Committee did consider his application, it took the view that it did not have the information necessary to form an objective opinion on the subject.

22 In this connection the applicants submit that it could not have been clear to the appointing authority that Mr F. had the best qualifications, since the Committee, which considered the files of all the candidates and interviewed their immediate superior, was unable to find a majority verdict in his favour.

23 Thirdly, the applicants state that it is clear from the letters of 1 July 1992 rejecting their complaints, which, moreover, do not give sufficient reasons, that the appointing authority based its decision to promote Mr F. solely on a comparison of the staff reports. They stress that the Committee took the view that those reports did not enable an objective choice to be made from among the candidates and that, at the very least, the appointing authority ought to have stated the precise grounds on which it decided to disregard the opinion of the Committee.

24 In this reply, however, the applicants maintain that it is clear from the letter sent by the Director General of Administration, Personnel and Finance to the Secretary General on 6 December 1991 that the administration did not forward those staff reports to the appointing authority with the result that the appointing authority could not undertake the consideration of the comparative merits of the candidates and their staff reports as required by Article 45 of the Staff Regulations.

25 According to the applicants, the appointing authority merely ratified the choice made by the administration which had already drawn up a table showing the proposed date for each of the promotions due and drafts of the various decisions on promotion, as is clear from the letter sent to the Secretary General by the Directorate for Administration, Personnel and Finance on 6 December 1991.

- 26 The applicants take the view that this demonstrates that the appointing authority did not undertake the consideration of comparative merits required by Article 45 of the Staff Regulations or that it took account of factors which it did not disclose to the Committee, thus preventing it from delivering a valid opinion.
- 27 The defendant considers that the applicants' plea alleging infringement of Article 45 of the Staff Regulations has no factual or legal basis. According to the defendant, it is clear from the minutes of the meeting of the Committee of 2 December 1991 that the Committee was informed that an LA 4 post in the Danish Translation Division would be freed as of 1 January 1992 as a result of a retirement on grounds of invalidity.
- 28 In this connection the defendant points out that the Committee was unable to reach a majority in favour of one candidate for the third LA 4 post and that, faced with the Committee's indecision and given that it did not reserve its opinion on appointment to that post, the appointing authority reached its decision chiefly on the basis of the note from the Head of the Danish Translation Division recommending the promotion of Mr F. The defendant concludes that, in accordance with Article 45 of the Staff Regulations, the appointing authority did in fact take the decision to promote Mr F. on the basis of his merits and staff reports after consideration of the comparative merits of the officials with the required seniority.
- 29 Moreover, the defendant contends that the Committee only has the power to give an opinion and that, in the absence of such an opinion, the appointing authority remains competent to choose, on its own authority, which officials to promote.
- 30 In its rejoinder the defendant refutes the applicants' argument in their reply that the fact that staff reports were not mentioned in the document of 6 December 1991 proves that the appointing authority did not have those reports before it when it made the contested decision on promotion.

31 The defendant maintains that, on the contrary, it was clear from the reply to the applicants' complaints, from the note of 12 December 1991 from the Director of Administration, Personnel and Finance to the Secretary-General, from the letter of 3 December 1991 from the Head of the Danish Translation Division to the appointing authority and from the minutes of the meeting of the Committee of 2 December 1991 that the candidates' files contained their staff reports and thus that the appointing authority had them before it when it made its decision.

Findings of the Court

32 It must first be noted that, although at its meeting on 2 December 1991 the Committee was aware that three posts had become available during 1991 for promotions within the LA 5/4 career bracket as from 1 January 1992, it none the less only gave the appointing authority the names of two officials for promotion.

33 Next, it is clear from the minutes of that meeting that the two officials proposed by the Committee each received the absolute majority required by Article 7 of Decision No 2903/81 A to be included on the list of officials considered most deserving of promotion, while three officials did not receive the required majority in that vote, those officials having received respectively three votes, two votes and one vote. It is clear from the letter lodged at the Court Registry by the defendant on 27 May 1993, which is not disputed by the applicants, that it was Mr F. who received three votes in the Committee's vote.

34 It is also clear from the minutes of the meeting of 2 December 1991 that, in accordance with Article 4 of Decision No 2903/81 A, the Committee adopted its opinion and the list of officials considered the most deserving of promotion 'after reading the staff reports' of all the officials with the seniority required for promotion, on whom the Committee voted. Moreover, the minutes make clear that the Committee's discussions took place 'after the heads of the language divisions had been heard'.

- 35 It was only in their reply that the applicants, having maintained in their application that 'the decision to appoint Mr F. was based solely on the comparison of staff reports', claimed that those reports were not in fact available to the appointing authority when it adopted the contested decision on promotion, a claim which, at the hearing, their counsel offered to prove, alleging that their staff reports had not been removed from their personal files.
- 36 In that connection it should be pointed out that Article 48(2) of the Rules of Procedure prohibits the introduction of new pleas in law in the course of proceedings unless such pleas are based on matters of law or of fact which come to light in the course of the written procedure (see the judgments of the Court of First Instance in Case T-53/91 *Mergen v Commission* [1992] ECR II-2041 and in joined Cases T-59/91 and T-79/91 *Eppe v Commission* [1992] ECR II-2061). Article 48(1) provides that the parties may submit evidence in support of their arguments in the reply and the rejoinder if they state the grounds for their delay in submitting such evidence.
- 37 The Court notes that in the letters sent on 1 July 1992 to both of the applicants rejecting their complaints the appointing authority confirmed that it had made its choice from among the officials with the required seniority in their grade 'after consideration of the comparative merits of the officials eligible for promotion and of the reports on them'. The applicants are informed in those letters that 'the outcome of the comparison of all the qualifications, merits and knowledge of languages (emerging) from the staff reports of all the officials concerned is clearly in favour of the person who was promoted'.
- 38 The Court can therefore only find that the applicants, who, as soon as their complaints were rejected, could have disputed that the staff reports were available to the appointing authority when it decided to promote Mr F., have not put forward any matters of fact or law which came to light during the written procedure in order to provide a basis for their argument that those reports were not available. That argument therefore constitutes a new plea within the meaning of Article 48(2) of the Rules of Procedure.

39 Similarly, the submission, at the stage of the oral procedure, of evidence to prove that the appointing authority did not have the staff reports before it must be regarded as out of time as the applicants have not put forward any fact which would have prevented them from submitting such evidence during the written procedure. It must, therefore, also be rejected, pursuant to Article 48(1) of the Rules of Procedure.

40 According to Article 5 of Decision No 2903/81 A, the appointing authority is to decide on promotions in the light of the list drawn up by the Joint Committee on Promotions.

41 It is clear from the decisions of the Court of First Instance (*Schönherr v ESC*, cited above) that the list drawn up by the Committee on Promotions must be one of the factors on which the institution bases its own assessment of the candidates and that the appointing authority is required to take it into account, even if it considers itself obliged not to follow it. The Court also held in that case that if the appointing authority fails to mention the opinion of the Committee on Promotions or to demonstrate that it has complied with its obligation to take account of that opinion, it is in breach of its obligation to state the reasons for a disputed decision on promotion, at the very least at the stage of the decision to reject a complaint against it, since it has seen fit to disregard the recommendations in the opinion of the Committee on Promotions.

42 Similarly, where the appointing authority decides, as in the present case, to promote an official who does not appear on the list drawn up by the Joint Committee on Promotions, it is required under Article 90(2) of the Staff Regulations to give a reasoned decision rejecting any complaint against that promotion so that the Community judicature can review the legality of the decision on promotion and to provide the person concerned with details sufficient to allow him to ascertain whether the decision is well founded or vitiated by an error which will allow its legality to be contested.

- 43 In its letters of 1 July 1992 to the applicants rejecting their complaints, the appointing authority made clear that the comparison it made of all the qualifications, merits and knowledge of languages of the candidates was based on the staff reports of all the officials eligible for promotion.
- 44 Furthermore, an examination of the analytical appraisals contained in the staff reports of the persons concerned, reports which, according to the letter sent to the Secretary General on 12 December 1991, were forwarded to the appointing authority, shows that for the period 1988 to 1990 Mr F. was deemed 'excellent' on eight counts and 'very good' on six, whereas, for the same period, the staff reports of the two applicants show respectively, for the first applicant, 'excellent' on seven counts and 'very good' on seven, and, for the second applicant, 'excellent' on five counts and 'very good' on nine. Moreover, the appraisal of Mr F. was accompanied by a positive eulogy, stating in particular that 'Mr F. has continued to develop his high level of ability and experience', that he 'has made an excellent contribution to in the daily work of the team' and that his 'working relations with his colleagues are excellent'.
- 45 Accordingly, in this case, the appointing authority, which has a wide discretion in assessing the interest of the service and the merits to be taken into account in a decision on promotion under Article 45 of the Staff Regulations (see judgment of the Court of First Instance in Case T-20/89 *Moritz v Commission* [1990] ECR II-769), remained within proper bounds and did not use its authority in a manifestly incorrect manner in adopting the decision to promote Mr F.
- 46 Accordingly, the plea alleging breach of Article 45 of the Staff Regulations must be rejected.

The second plea alleging breach of Article 26 of the Staff Regulations

Arguments of the parties

- 47 In support of their plea alleging infringement of Article 26 of the Staff Regulations, the applicants point out that the Court held in its judgment in Case T-82/89 *Marcato v Commission* [1990] ECR II-735 that ‘oral statements [of the Director General’s representative] made in the context of a promotion procedure before a committee set up for that purpose, are to be regarded as constituting a report within the meaning of Article 26 of the Staff Regulations. They should therefore have been immediately put into writing and recorded in the applicant’s personal file as required by Article 26’.
- 48 The applicants maintain that it is clear from the correspondence between the Chairman of the Committee and the appointing authority that the latter claims to have taken the decisions in issue ‘having considered the opinion of the Committee on Promotion, representatives of the administration, various directors and other persons’. Those opinions on their ability, efficiency and conduct in the service were not brought to their knowledge or placed in their personal files, which prejudices their right to a fair hearing.
- 49 In their reply the applicants acknowledge that, in this case, the note from the Head of the Danish Translation Division represents the only opinion in issue, and claim, firstly, that that note does not accurately reflect what was said by its author to the Committee, given that in the light of the recommendation made by the Committee it seems inconceivable that he told it that Mr F. seemed to him to be the best candidate.
- 50 Secondly, they claim that the note from the Head of the Danish Translation Division itself shows that its author based his opinion on the outcome of the compari-

son of all the qualifications of the candidates and, accordingly, on the merits of the three candidates during periods not yet covered by a staff report. They submit, therefore, that the Head of the Danish Translation Division drew up a report on their merits and abilities which should have been included in their personal file after they had been given the opportunity to record their comments in accordance with Article 26 of the Staff Regulations.

- 51 The defendant states, firstly, that the applicants' interpretation of the judgment in *Marcato v Commission* is mistaken in that it was the particular circumstances of the case, notably the fact that the Committee's decision not to include Mr Marcato on the list of most suitable candidates was based in practice, in the absence of a staff report, solely on oral statements by the representative of the Director General, which led the Court to hold that 'Given the importance which they thus assumed, those oral statements, made in the context of a promotion procedure before a committee set up for that purpose, are to be regarded as constituting a report within the meaning of Article 26 of the Staff Regulations' and that 'They should therefore have been immediately put into writing and recorded in the applicant's personal file as required by Article 26'.
- 52 The defendant states that, in this case, the appointing authority had before it the staff reports of the officials eligible for promotion and the only statement received by the appointing authority was the very brief one contained in the note of 3 December 1991 from the Head of the Danish Translation Division who took the view that Mr F. was clearly the best candidate in the light of the staff reports and the qualifications and merits of the three candidates.
- 53 The defendant, therefore, considers that there was no 'important statement' concerning the conduct of the applicants which affected them personally and should have been included in their personal file. The defendant takes the view that it is clear and in conformity with the decisions of the Court of Justice (Case 188/73 *Grassi v Council* [1974] ECR 1108) that the appraisal made following comparison of the candidates' qualifications should not be included in an official's personal file as the reasons cited in that appraisal might be damaging to him.

54 As regards the note of 3 December 1991, the defendant further contends that the applicants' assertion that it 'does not appear to reflect the statements made by its author to the Committee' is unsupported by any formal evidence. To the contrary, it is stated in the note itself that it simply 'confirms' the statement made to the Committee by its author the previous day.

55 The defendant also rejects the applicants' argument that the note in question should have been included in their personal files because it amounted to a Staff report for the purposes of Article 26 of the Staff Regulations, contending that it is clear from the decisions of the Court of First Instance that only matters relating to an official's conduct must be reported to him and recorded in his file (*Marcato v Commission*, cited above).

56 The note of 3 December 1991, according to the defendant, does not contain any individual appraisal of the conduct and service record of the applicants but constitutes a comparative assessment of the abilities of the various candidates, which is, moreover, confirmed by the reference to staff reports in the note in question. In this connection, the defendant adds that in *Bonino v Commission* Advocate General Darmon took the view that '[t]he appointing authority is clearly not required to communicate the contents and result of the comparative assessment of the suitability of the various candidates which it carried out before arriving at its choice. That value judgment is the very expression of the discretion conferred on it in such matters and the communication thereof to unsuccessful candidates might, as I have pointed out, be damaging to them.' (Opinion preceding judgment in Case 233/85 [1987] ECR 739, at 748).

57 Finally, the defendant contends that, even if the note should have been included in the applicants' personal files, failure to do so did not prejudice their right to a fair hearing, and that a hypothetical infringement of Article 26 of the Staff Regulations is not such as to justify the annulment of the decision in issue in this case.

Findings of the Court

58 According to Article 26 of the Staff Regulations, an official's personal file is to contain all documents concerning his administrative status and all reports relating to his ability, efficiency and conduct together with any comments by the official on such documents.

59 The Court of Justice and the Court of First Instance have held that the purpose of Article 26 is to safeguard an official's right to a fair hearing by ensuring that decisions taken by the appointing authority and affecting his administrative status and his career are not based on matters concerning his conduct which are not mentioned in his personal file. It follows that any decision based on such matters is contrary to the guarantees contained in the Staff Regulations and must be annulled because it was adopted on the basis of a procedure vitiated by illegality (*Bonino v Commission* and *Marcato v Commission*, cited above, and the judgments of the Court of Justice in Case 88/71 *Brasseur v Parliament* [1972] ECR 499 and Case 21/70 *Rittweger v Commission* [1972] ECR 7).

60 As regards, firstly, the applicants' assertion that the note sent to the appointing authority on 3 December 1991 by the Head of the Danish Translation Division did not reflect the statements made by its author to the Committee, the Court of First Instance finds that the applicants have not put forward the slightest evidence to establish that the note in question was not a simple restatement, for the appointing authority, of the reasons which led its author to recommend to the Committee the promotion of Mr F.

61 The Court notes that, in this case, the personal files of the applicants do not contain the note from the Head of the Danish Translation Division.

62 However, the Court finds that the note of 3 December 1991 does not mention any specific facts concerning the applicants' conduct and cannot, therefore, be classified as a report for the purposes of Article 26 of the Staff Regulations. It is, rather, the result of a comparative assessment of the abilities of the various candidates which the Head of the Danish Translation Division undertook before making his choice and, as a value judgment likely to be damaging to the unsuccessful candidates, should not be disclosed to them (*Grassi v Council* and *Bonino v Commission*, cited above; see also the judgments of the Court of Justice in Case 111/86 *Delauche v Commission* [1987] ECR 5345 and in Case 104/88 *Brus v Commission* [1987] ECR 1873).

63 Furthermore, the judgment in *Marcato v Commission*, on which the candidates rely, was delivered on the basis of different facts from those in this case. The list drawn up by the Committee on Promotions and the subsequent decision by the appointing authority not to include Mr Marcato on the list of officials was based, in the absence of a staff report, solely on statements concerning his conduct made by the representative of the Director General to the Committee on Promotions.

64 In this case the appointing authority based its decision on the staff reports of all the officials eligible for promotion and not solely on the note of 3 December 1991, in which the Head of the Danish Translation Division simply restated and confirmed, for the appointing authority, the reasons which led him to recommend Mr F. to the Committee on Promotions and which related in particular to the comparative assessment of the staff reports of the three candidates who did not receive the majority required for inclusion on the list, namely, the two applicants and Mr F.

65 Accordingly, the plea alleging infringement of Article 26 of the Staff Regulations cannot be upheld.

Costs

- 66 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. However, Article 88 of those Rules provides that in proceedings between the Communities and their servants the institutions are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

- 1. Dismisses the application;**
- 2. Orders the parties to bear their own costs.**

Barrington

Schintgen

Lenaerts

Delivered in open court in Luxembourg on 28 September 1993.

H. Jung

D. P. M. Barrington

Registrar

President