

JUDGMENT OF THE COURT (FIRST CHAMBER)
27 OCTOBER 1976 ¹

Vivien Prais
v Council of the European Communities

Case 130/75

Summary

1. *Officials — Recruitment — Competitions on the basis of tests — Organization — Principle of equality — Application — Criteria*
(*Staff Regulations of Officials, Article 29 (1), Annex III, Articles 1 and 5*)
2. *Officials — Recruitment — Competitions on the basis of tests — Organization — Date — Certain dates impossible for a candidate — Religious reasons — Obligations on the part of the administration*
(*Staff Regulations of Officials, Article 29 (1), Annex III, Articles 1 and 5*)

1. When a competition is on the basis of tests, the principle of equality necessitates that the tests shall be on the same conditions for all candidates, and in the case of written tests the practical difficulties of comparison require that the written tests for all candidates should be the same. It is therefore of great importance that the date of the written tests should be the same for all candidates. The interest of participants not to have a date fixed for a test which is unsuitable must be balanced against this necessity.
2. If a candidate informs the appointing authority that religious reasons make certain dates impossible for him the appointing authority should take this into account in fixing the date for written tests, and endeavour to avoid such dates. On the other hand, if the candidate does not inform the appointing authority in good time of his difficulties the appointing authority would be justified in refusing to afford an alternative date, particularly if there are other candidates who have been convoked for the test.

In Case 130/75

VIVIEN PRAIS, residing at 83, West Heath Road, London NW3., represented by Francis Jacobs, Barrister, of the Middle Temple, London, with an address for service in Luxembourg at the home of Mrs Caroline Reid, 21 boulevard Grande-Duchesse Charlotte,

applicant,

¹ — Language of the Case: English.

v

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by Henry Darwin, Director-General of the Legal Department of the General Secretariat of the Council, acting as Agent, assisted by Antonio Sacchetini, Legal Adviser, of the same department, with an address for service in Luxembourg at the offices of J. Nicolaas Van den Houten, Director of the Legal Department of the European Investment Bank, 2 place de Metz,

defendant,

and

DAVID GRANT LAWRENCE, an official of the Council of the European Communities, residing at Résidence 'Les Gaulois', Avenue des Gaulois, Brussels, represented by Roger O. Dalcq, Advocate, of the Brussels Bar, with an address for service in Luxembourg at the office of Jacques Loesch, Advocate, 2 rue Goethe,

intervener,

Application for annulment of the defendant's decision of 29 September 1975 rejecting the applicant's complaint of 14 July 1975 concerning the rejection, on 5 May 1975, of her request of 25 April 1975 to take the tests for competition Council/LA/108 at a date other than that fixed by the defendant; for annulment of the said decision of 5 May 1975; for annulment of the results of the competition in so far as they may have been affected by this refusal; and for damages,

THE COURT (First Chamber)

composed of: A. M. Donner, President of Chamber, J. Mertens de Wilmars and A. O'Keeffe, Judges,

Advocate-General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts and the arguments of the parties put forward in the written procedure may be summarized as follows:

I — Facts and procedure

In Official Journal C 36 of 15 February 1975, page 7, the Secretariat of the Council published a notification of open competition, Council/LA/108, for recruitment of a legal/linguistic expert (translator) of English mother tongue, and to draw up a reserve list.

The applicant, a British national, submitted an application on the prescribed form.

By letter of 23 April 1975 she was informed that her application had been accepted by the Examining Board and that she had been admitted to the written tests due to be held in London on Friday 16 May 1975.

By letter of 25 April, the applicant informed the Council that as she was of the Jewish faith and that, as 16 May was the first day of the Jewish feast of Shavuot (Pentecost), when it is forbidden to travel or write, she would not be able to take part in the examination. She accordingly asked that she should be allowed to take the tests on another date.

By letter of 5 May, the Council replied that it was not possible to offer her an alternative date, since it was essential that all candidates should undergo the examination using the same papers on the same day, and that for that reason arrangements had been made for the examination to take place on 16 May in Brussels and in London.

By letter of 14 July, the applicant submitted a complaint under Article 90

(2) of the Staff Regulations, which the Council rejected on 29 September.

Thereupon the applicant, by an application dated 18 December 1975, lodged at the Registry of the Court of Justice on 23 December 1975, originated the present proceedings.

By an application lodged at the Court Registry on 7 April 1976, Mr David Grant Lawrence made an application to intervene in the case.

By an order of 21 May 1976, the Court (First Chamber) allowed the intervention.

II — Conclusions of the parties

The *applicant* claims that the Court should:

1. annul the decision contained in the letter of 29 September 1975 rejecting the applicant's complaint;
2. annul the decision of 5 May 1975 refusing the applicant's request;
3. annul the results of the competition in so far as they may have been affected by that refusal;
4. award her damages;
5. order the defendant to bear the costs.

The *defendant* contends that the Court should:

1. dismiss:
 - (a) the request for the annulment of the decision contained in the letter of 29 September 1975 rejecting the applicant's complaint;
 - (b) the request for the annulment of the decision of 5 May 1975 refusing the applicant's request;
 - (c) the request for the annulment of the results of the competition in so far as they may have been affected by that refusal;
 - (d) the applicant's claim for damages;
2. order the applicant to bear the costs.

III — Submissions and arguments of the parties put forward in the written procedure

(a) *Submission based on infringement of the second paragraph of Article 27 of the Staff Regulations*

The *applicant* argues that the effect of the refusal of her request was to preclude her from taking part in the competition by reason of her religion, contrary to the second paragraph of Article 27 of the Staff Regulations, which provides that officials shall be selected without reference to race, creed or sex. The effect of the said paragraph is that the Community institutions must make such arrangements for recruitment as will not discriminate against candidates on the ground of their religion.

Even if there were no express provision in the Staff Regulations, religious discrimination is prohibited by Community law as being contrary to the fundamental rights of the individual, respect for which the Court is required to ensure (see Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125 and Case 4/73, *Nold* [1974] ECR 507).

The *Council* replies that, in application of Article 27 and contrary to what the applicant stated in her application, it has never requested candidates to state their religion in its application form; the effect of this is that this information is never used for discriminatory purposes.

Nor did the Council exercise discrimination against the applicant in considering her request for an alternative date. It declined to offer an alternative date as it would have done in the case of any other candidate. The essence of discrimination is to give to one person treatment different from that given to others where no difference of circumstances justifies it. In the present case the applicant was treated in a manner which was in no way different from that given to other candidates.

To allow a candidate to take a written test on a different date from other candidates would create injustice for the latter. It would not be possible for identical papers to be used on the two dates since there would be a risk of disclosure to the candidates who attended on the later date thereby giving them an evident advantage. It would not be possible to suggest different papers on the two dates without making the comparison between the merits of the candidates unfair. Furthermore, candidates competing after others would have more time to prepare for the competition.

If the practice of a second date were adopted, the variety of religious opinions in the Community would make it impossible for the Council to distinguish between them. Apart from the question of the sincerity of the request, it would also have to distinguish between religions the practices of which are to be observed by all members of them and those which leave this to the conscience of their adherents. This would emphasize the question of religion in a manner hardly consistent with the Staff Regulations. Moreover, would not the Council then have to accord an alternative date for the test on other than religious grounds, such as the right to freedom of thought, to respect for private and family life or to freedom of expression...?

The *applicant* accepts that she made a mistake when she alleged, in the application originating the proceedings, that she had declared herself to be Jewish. Nevertheless, the Council would not have considered itself bound to make arrangements to meet her religious convictions even if it had been given advance notice of them.

Discrimination may consist not only in treating like cases differently but also in treating different cases alike (see Case 13/63, *Italy v Commission* [1963] ECR 165 and the Opinion of Mr Advocate-General Lagrange p. 190). In the present

case, to treat the applicant in the same way as other candidates who had no religious convictions precluding them from taking the examination was in substance to discriminate against her.

The injustice which would result from the granting of an alternative date at the request of one candidate has been much exaggerated: in school and university examinations the results of examinations taken under different examining boards using different examination papers are regularly used as a basis of comparison. Additional time for preparation is no advantage either, in the case of an examination where little preparation is possible or where lengthy preparations are possible.

In any case all that is required is to ensure that examinations do not fall on dates on which candidates might be unable, on religious grounds, to sit.

Uncertainty concerning the permissible grounds for granting an alternative date is also much exaggerated. It is true that the practice of the Council has never given rise to proceedings but no Christian denomination is affected by the matter at issue because the main Christian feast-days are already civil public holidays.

As for Muslims, there appear to be no days on which a Muslim would be precluded on grounds of his religion from taking an examination. The religion principally concerned, therefore, is Judaism. With the exception of recent immigrants to France from North Africa, the proportion of practising Jews in the United Kingdom is very substantially higher than that in other Member States, and in the United Kingdom arrangements are made to meet the requirements of Jewish candidates.

It is not necessary to give similar consideration to candidates who invoke other rights, such as those referred to by the Council and which relate to the

special circumstances applying to an individual candidate. In such cases there would not be, as in the present case, any exclusion of a class of candidates.

The *Council* rejoins first that if, in presenting her application, the applicant had indicated that certain dates were objectionable to her for religious reasons, this would have been taken into account when a date was chosen for the competition. Moreover the name of the applicant could have been withheld from the Examining Board.

The applicant should have been aware that the practice of the Community institutions did not in all respects conform to that in the United Kingdom and, moreover, could not be presumed to be identical.

If the applicant had taken this precaution, the interests of the other candidates would have been in no way affected since all the candidates could have been convened on a day which was acceptable.

In inviting the applicant to attend the examination on Friday 16 May, the Council exercised no discrimination against her since it was not aware that she was a person for whom, for reasons of religious convictions, that day created difficulties.

The extent to which a competition can be arranged on successive dates must be left to the discretion of the Examining Board.

Annex II to the Reply shows that in the case of admission to the public service, British practice does not allow for an alternative date to be arranged for separate candidates.

The Court has always been careful to respect and to protect the interests of the other candidates in a competition. Thus, where a particular candidature is open to criticism, this should not affect the

position of other candidates (see Case 31/75, *Costacurta v Commission* [1975] ECR 1563).

Because this may put at risk the rights and interests of the other candidates, the Council would have the delicate task of balancing the rights and interests of the candidate requesting an alternative date and the competing rights and interests of other candidates who might be placed at a disadvantage.

(b) Submission based on the infringement of Articles 9 and 14 of the European Convention on Human Rights

The *applicant* states that, as the European Convention on Human Rights has been ratified by all the Member States, the rights enshrined in that instrument may be regarded as being among the fundamental rights to be protected by Community law. The Community institutions are accordingly bound to respect freedom of religion and such respect must imply a readiness to make the necessary administrative arrangements to enable candidates to take examinations in accordance with their religious convictions.

Article 9 (1) of the Convention proclaims the right to freedom of religion. Paragraph (2) provides as follows: 'Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedom of others'. In the present case, the action of the Council was neither 'prescribed by law' nor 'necessary' for the specified purposes. The only purpose which might be relevant is the 'protection of the rights and freedoms of others'. It could be argued from this that no special arrangements should have been made for the applicant if they involved interference with the religious

freedom of others. But, in the applicant's view, arrangements should be made which respect the religious beliefs of all candidates. That the Council's action was not 'necessary' is shown by the practice adopted in Britain and by the fact that such arrangements are never made by the Council, which, in its letter of 29 September 1975, stated that requests for an alternative date are invariably refused.

The *Council* replies that the European Convention was designed to protect a limited number of rights. It should thus be understood as limited in its scope, as a legal text. There are many rights, including rights which may be recognized as human rights, which are not guaranteed by the Convention. The question of the right of employment in the public service was the subject of special consideration by the Commission of Human Rights in Application No 273/57, when that question was held to remain 'in principle, outside those covered by the first section of the Convention'. The present application cannot, therefore, be put forward on the basis of the Convention. In connexion with Application No 3798/68 the *Church of X v The United Kingdom* the Commission, having ruled that the right claimed for the members of the Church to enter or to remain in residence in the United Kingdom was not a right guaranteed by the Convention, declared the application inadmissible, despite the allegation of discrimination based on religion.

The Convention protects the legal right to exercise certain liberties. It thus precludes legal prohibitions by the State, and physical prevention by the State which would have the effect of hindering the exercise of the rights protected by the Convention. In the present case, there was no legal prohibition binding on the applicant or any physical measures preventing her from carrying out observances which accorded with her religious convictions. The Convention is even less likely to be an adequate text to

regulate in detail the administrative arrangement of competitions held for the specific purpose of recruiting candidates into the public service. As for the argument that restrictions can be laid down only by 'a law', it is not the general practice in the Member States of the Community to lay down in a law the dates on which competitions for recruitment to the public service shall be carried out, which suggests that the administrations of the Member States have taken the view that the subject-matter of the present application falls outside the scope of the Convention.

In conclusion, since the Convention has no application, the matter is regulated in its entirety by Article 27 of the Staff Regulations.

In reply, the *applicant* states that she has never suggested that the Convention guarantees the right of access to the public service. But, even where a right invoked is not included in the Convention, it may be indirectly protected by virtue of a provision of the Convention guaranteeing some other right. For example, although a person cannot invoke the right to enter the State of which he is a national if the State concerned has not ratified the Fourth Protocol, the refusal to admit him could in certain circumstances, if discriminatory, amount to a violation of Article 3 of the Convention (cf. the East African Asians' case, Yearbook of the European Convention on Human Rights, Vol. 13 page 928 at 994). In the present case, although the right to an equal opportunity of access to the public service is not itself included in the Convention, a refusal to allow a candidate to take an examination in accordance with his religious convictions is a breach of the principle of freedom of religion, contrary to Article 9. Accordingly, the suggestion that only legal or physical measures are contrary to the Convention is too narrow an interpretation.

The *Council* rejoins that, in the East African Asians' case, the Commission was not content to examine the matter of Article 14 on its own but did so because the alleged discrimination against the applicants involved also potentially degrading treatment contrary to Article 3. It must therefore be shown that a specific right explicitly protected by the Convention is involved.

Contrary to what was suggested by the applicant, there is no case-law which concerned other than legal prohibitions or physical constraints within the meaning of the Convention. The East African Asians' case, cited by the applicant, concerned the freedom lawfully to enter the United Kingdom. The refusal of that freedom was followed by the measure of imprisonment.

The applicant herself caused the difficulty with which she was faced by failing to notify in good time the dates which she could not accept for religious reasons.

The freedom of manifestation of religious beliefs in the various Member States is not so absolute and overriding a fundamental right. This right is recognized subject, in certain cases, to appropriate prior notification and, in other cases, even to non-recognition where relevant interests of the public and of other individuals are involved.

The legal solution proposed by the applicant appears to be that the institutions of the Community should draw up a list of dates based on a limited number of religions and that it should regard itself as debarred by law from arranging examinations on those dates. The preparation of such a list for the purpose of drawing legal consequences from it would be tantamount to creating a form of discrimination against those adhering to religions not appearing in the said list. Moreover, to draw up such a list would be incompatible with the principles set out in the Staff Regulations

that recruitment must be made without reference to religion.

To ensure that examinations did not fall on dates on which candidates might be unable, on religious grounds, to sit, it would be necessary for the Council to take steps to obtain information from candidates concerning their religious beliefs, which it has no wish to do. Such a solution would, moreover, result in the number of available dates being rather limited.

IV — Oral procedure

The parties were heard at the hearing on 1 July 1976.

The applicant, represented by Francis Jacobs, Barrister, of the Middle Temple,

announced that she renounced her request for the annulment of the results of the competitions in so far as they had led to the recruitment of the intervener, David Grant Lawrence.

The latter, represented by Roger O. Dalcq, Advocate, of the Brussels Bar, maintained that the fact that interventions were not usual in proceedings of this kind and that therefore the applicant did not foresee when she lodged her application that it might have that consequence, should not influence the question of costs. The solution should be that the unsuccessful party should bear the costs of the intervention.

The Advocate-General delivered his opinion at the hearing on 22 September 1976.

Law

- 1 Whereas, by application registered in the Registry of the Court on 23 December 1975, the plaintiff, of British nationality, a candidate in open competition 'Council/LA/108', with a view to recruiting a linguistic expert (translator) of English mother tongue and to create a reserve list, seeks
 - (a) the annulment of the decision, contained in a letter dated 29 September 1975, from the Secretary-General of the defendant, rejecting the plaintiff's complaint lodged on 14 July 1975,
 - (b) the annulment of the defendant's decision of 5 May 1975, refusing the plaintiff's request made by letter of 25 April 1975, for an alternative date for the written test in the said competition,
 - (c) the annulment of the results of the said competition in so far as they may have been affected by that refusal,
 - (d) and the award of damages.
- 2 By letter of 25 April 1975, the plaintiff informed the Council that, being of Jewish religion, and Friday, 16 May 1975 — the date fixed by the defendant

for the written test in the said competition, which should take place simultaneously in Brussels and London — being the first day of the Jewish feast of Shavuot (Pentecost), during which it is not permitted to travel or to write, she would be unable to undergo the test on that day, and asked the Council to fix another day for the test.

- 3 By letter of 5 May 1975, the Council replied to the plaintiff that it could not fix another date, since it was essential that all candidates should be examined on tests passed on the same date.
- 4 By application inscribed on the register of the Court on 7 April 1976, Mr David Grant Lawrence, a person recruited as a result of the said competition, sought to intervene in this case, which was permitted by order of the Court (First Chamber) on 21 May following.
- 5 During the oral hearing, the plaintiff abandoned her complaint concerning the annulment of the results of the competition in question, while maintaining that the costs of the intervention should not be borne by her.
- 6 The plaintiff claims firstly that the refusal of her request had as a result that by reason of her religious convictions she was prevented from taking part in the competition, in contravention of Article 27, second paragraph of the Staff Regulations, which provides that officials shall be selected without reference to race, creed or sex.
- 7 In addition the plaintiff claims that religious discrimination is prohibited by Community law as being contrary to the fundamental rights of the individual, respect for which the Court is bound to ensure.
- 8 The plaintiff also relies on Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, paragraph (2) of which provides as follows: 'Freedom to manifest one's religions or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'. Since the European Convention has been ratified by all the Member States the rights enshrined in it are, according to the plaintiff,

to be regarded as included in the fundamental rights to be protected by Community law.

- 9 The plaintiff claims that Article 27 of the Staff Regulations is to be interpreted in such a manner that the defendant should so arrange the dates of tests for competitions to enter its service as to enable every candidate to take part in the tests, whatever his religious circumstances. Alternatively the right of freedom of religion guaranteed by the European Convention so requires.

- 10 The defendant does not deny that Article 27 of the Staff Regulations requires that officials shall be selected without reference to race, creed or sex, nor does it seek to suggest that the right of freedom of religion as embodied in the European Convention does not form part of the fundamental rights recognized in Community law, but says that neither the Staff Regulations nor the European Convention are to be understood as according to the plaintiff the rights she claims.

- 11 The defendant submits that such an obligation would force it to set up an elaborate administrative machinery. Article 27 does not limit its application to any particular creeds by enumerating them, and it would be necessary to ascertain the details of all religions practised in any Member State in order to avoid fixing for a test a date or a time which might offend against the tenets of any such religion and make it impossible for a candidate of that religious persuasion to take part in the test.

- 12 The Staff Regulations envisage that when a vacant post is being filled, and it is decided not to fill it by promotion or transfer, the selection of the candidate to be appointed shall, in general, be made by following the procedure of competition which may be on the basis of qualifications or of tests or of both qualifications and tests.

- 13 When the competition is on the basis of tests, the principle of equality necessitates that the tests shall be on the same conditions for all candidates, and in the case of written tests the practical difficulties of comparison require that the written tests for all candidates should be the same.

- 14 It is therefore of great importance that the date of the written tests should be the same for all candidates.
- 15 The interest of participants not to have a date fixed for the test which is unsuitable must be balanced against this necessity.
- 16 If a candidate informs the appointing authority that religious reasons make certain dates impossible for him the appointing authority should take this into account in fixing the date for written tests, and endeavour to avoid such dates.
- 17 On the other hand if the candidate does not inform the appointing authority in good time of his difficulties, the appointing authority would be justified in refusing to afford an alternative date, particularly if there are other candidates who have been convoked for the test.
- 18 If it is desirable that an appointing authority informs itself in a general way of dates which might be unsuitable for religious reasons, and seeks to avoid fixing such dates for tests, nevertheless, for the reasons indicated above, neither the Staff Regulations nor the fundamental rights already referred to can be considered as imposing on the appointing authority a duty to avoid a conflict with a religious requirement of which the authority has not been informed.
- 19 In so far as the defendant, if informed of the difficulty in good time, would have been obliged to take reasonable steps to avoid fixing for a test a date which would make it impossible for a person of a particular religious persuasion to undergo the test, it can be said that the defendant in the present case was not informed of the unsuitability of certain days until the date for the test had been fixed, and the defendant was in its discretion entitled to refuse to fix a different date when the other candidates had already been convoked.
- 20 For these reasons the plaintiff's claim should be rejected.

Costs

- 21 Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.
- 22 The plaintiff has failed in her submissions.
- 23 However, under Article 70 of the Rules of Procedure, in proceedings under Article 95 (2) of the Rules, institutions shall bear their own costs.
- 24 In so far as the costs of intervener are concerned, the intervener had a legitimate right to intervene to protect his appointment made as a result of the competition in question, and it is, therefore, not appropriate that, having succeeded in his intervention, he should be made to bear his own costs.
- 25 For this reason the plaintiff should bear the intervener's costs.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Dismisses the application;**
2. **Orders the plaintiff and the Council to bear their own costs;**
3. **Orders the plaintiff to bear the intervener's costs.**

Donner

Mertens de Wilmars

O'Keefe

Delivered in open court in Luxembourg on 27 October 1976.

A. Van Houtte

Registrar

1600

A. M. Donner

President of First Chamber