

JUDGMENT OF THE COURT
26 MAY 1982 ¹

**Commission of the European Communities
v Kingdom of Belgium**

(Free movement of workers)

Case 149/79

*Free movement of persons — Derogations — Employment in the public service —
Concept — Participation in the exercise of powers conferred by public law and in the
safeguarding of the general interests of the State
(EEC Treaty, Art. 48 (4))*

Employment in the public service within the meaning of Article 48 (4) of the EEC Treaty must be connected with the specific activities of the public service in so far as it is entrusted with the exercise

of powers conferred by public law and with responsibility for safeguarding the general interests of the State, to which the specific interests of local authorities such as municipalities must be assimilated.

In Case 149/79

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Jean Amphoux, acting as Agent, assisted by Louis Dubouis, a professor at the Faculty of Law and Political Science of the University of Aix-Marseille III, with an address for service in Luxembourg at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Plateau du Kirchberg,

applicant,

v

KINGDOM OF BELGIUM, represented by the Minister for Foreign Affairs, whose Agent is Robert Hoebaer, Director at the Ministry of Foreign Affairs,

¹ — Language of the Case: French

Foreign Trade and Cooperation with Developing Countries, with an address for service in Luxembourg at the Belgian Embassy, Résidence Champagne, 4 Rue des Girondins,

defendant,

supported by

FEDERAL REPUBLIC OF GERMANY, represented by Martin Seidel and Eberhardt Grabitz, acting as Agents, with an address for service in Luxembourg at the Chancellery of the Embassy of the Federal Republic of Germany, 20 and 22 Avenue Emile Reuter,

FRENCH REPUBLIC, represented by G. Guillaume, acting as Agent, and P. Moreau Defarges, acting as Deputy Agent, with an address for service in Luxembourg at the French Embassy, 2 Rue Bertholet, and

UNITED KINGDOM, represented by W. H. Godwin, Assistant Treasury Solicitor, acting as Agent, with an address for service in Luxembourg at the British Embassy, 28 Boulevard Royal,

interveners,

APPLICATION for a declaration that the Kingdom of Belgium has failed to fulfil its obligations under Article 48 of the EEC Treaty as well as under Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community by making Belgian nationality a condition of entry for posts which do not come under Article 48 (4) of the EEC Treaty,

THE COURT

composed of: J. Mertens de Wilmars, President, G. Bosco, A. Touffait and O. Due, Presidents of Chambers, P. Pescatore, Lord Mackenzie Stuart, A. O'Keefe, T. Koopmans and U. Everling, Judges,

Advocate General: S. Rozès
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

I — Course of the written procedure

1. Having determined the principles by which Article 48 (4) of the EEC Treaty and the concept of employment in the public service to which it refers must be construed, the Court, by an interim judgment of 17 December 1980 ([1980] ECR 3881), ordered the Commission and the Kingdom of Belgium:

“to re-examine the issue between them in the light of the legal considerations contained in this judgment and to report to the Court on the result of that examination before 1 July 1981, after which date the Court will give a final decision”.

2. At the request of the Kingdom of Belgium and the Commission the Court extended the period prescribed to 31 October 1981.

The Commission and the Kingdom of Belgium submitted their reports on 29 and 30 October 1981 respectively.

3. According to the two reports, the representatives of the competent Belgian authorities and of the Commission met on 22 June and 19 October 1981 to inform each other of their views and difficulties.

Although those meetings took place in an atmosphere of mutual understanding the Kingdom of Belgium and the Commission were still not able to agree on a single report to be submitted jointly to the Court. They still disagree on the question whether, in the light of the legal

considerations contained in the judgment of the Court of 17 December 1980, all or some of the posts at issue are of the kind to which the reservations contained in Article 48 (4) of the EEC Treaty applies.

However, on the nature of the duties and responsibilities involved in each of the posts at issue there is no disagreement. Like the Belgian Government, the Commission has based its case on the description which the Belgian authorities concerned, namely the Société Nationale des Chemins de Fer Belges [Belgian National Railways Company], the Société Nationale des Chemins de Fer Vicinaux [National Local Railways Company], the City of Brussels and the Commune of Auderghem, have given of each post in question.

II — Observations of the parties

The posts to which the reports refer are these.

(a) *With the Belgian National Railways:*

Shunters
Loaders
Drivers
Plate-layers
Signalmen

(b) *With the National Local Railways:*

Office cleaners
Painter's assistants
Assistant Furnishers
Battery servicers
Coil-winders
Armature servicers
Night watchmen

Cleaners
Canteen staff
Workshop hands

(c) *With the City of Brussels:*

Joiners
Garden hands
Hospital nurses
Children's nurses
Night watchmen
Head technical office supervisors
Principal supervisors
Works supervisors
Stock controllers
Inspectors
Architects

(d) *With the Commune of Auderghem:*

Architects
Children's nurses
Crèche nurses
Garden hands
Joiners
Electricians
Plumbers

The *Commission* submits that in view of the description of the posts given in the annexes to the said reports none of the posts concerned, except those for architects and supervisors and some of those for night watchmen, whose occupation of watching over buildings or premises needing to be guarded may give them easy access to the secrets of the public authority concerned, are to be considered as constituting employment in the public service involving a power of decision and responsibility inherent in the exercise of powers conferred by public law, and for that reason are not caught by the reservation set out in Article 48 (4) of the Treaty.

The *Belgian Government* argues, however, that:

- (a) the communes are authorities acting under powers conferred by public

law: they are responsible for the public interest within the local community and their employees, who frequently come into contact with the public, must be accepted by them;

- (b) the Belgian National Railways and the National Local Railways look after the public interest in the matter of transport and owing to the importance of this sector only Belgian nationals should be recruited having regard in particular to reasons of security which may arise in certain exceptional circumstances such as war or mobilization;

- (c) access to posts in the public service governed by civil service staff regulations, which confer on their holders genuine security of tenure of post and career must in particular be barred to foreign nationals because as the result of promotion or progress in their career they may come to occupy posts involving a power of decision and responsibility inherent in the exercise of powers conferred by public law.

As regards the posts with the Belgian National Railways and the National Local Railways in particular, the Belgian Government disputes the Commission's argument that those posts have no connection at all with the safeguarding of the general interests of the State. It observes in this regard that it is vital for the State to have available at all times and whatever the circumstances secure means of communication and the availability on the orders of the government of all the means necessary to transport troops and military equipment to any point in the country and at any moment is an essential part of the security of the State. In those circumstances, if the

railways are to be able to play their part to the full in periods of crisis, it is absolutely necessary that all the employees available to both the railway companies and covered by their staff rules should be Belgian nationals.

The security aspect should not be thought of simply in terms of the risk of sabotage or espionage. It is just as important to ensure that the means of communication operate in the most regular and effective manner in any circumstances. The Commission's argument that in times of disturbance the foreign element need only be removed and replaced by Belgian nationals is not a tenable one. Once foreign nationals have acquired the status of employees under the relevant staff rules, involving security of employment, there would be no legal basis for suspending, let alone discontinuing, the employment of those employees, even in times of disturbance. Furthermore, it would be very difficult immediately to fill the posts thus falling vacant because it would not be possible to appoint Belgian nationals until after competitions had been held the duration of which would be incompatible with an emergency situation. Finally, it may be asked what would happen to the foreign employees thus dismissed from their posts after the public danger had passed. In that case one may wonder whether it would be necessary to re-engage them and consequently dismiss the Belgian nationals appointed in the meantime, which would be discriminatory as against the latter, or whether it would be necessary to re-instate the foreign employees while retaining the Belgian nationals as well, which would not be economic.

The Commission replies that the Belgian Government makes the solution of a case falling under Article 48 (4) of the EEC Treaty turn on a situation in which the Member State may invoke Article 48 (3).

Moreover, the security measures hypothetically contemplated would make sense only in the case of certain specific jobs and the occurrence of disturbances or war are highly exceptional circumstances the mere possibility of which is not sufficient to justify the exclusion at the outset of all nationals of other Member States from posts of any kind with the railways.

9. The interveners did not submit any observations at this stage of the proceedings.

III — Oral procedure

At the hearing on 30 March 1982 oral argument was presented by the following: J. Amphoux and L. Dubouis, for the Commission of the European Communities; R. Hoebaer, for the Kingdom of Belgium; W. H. Godwin, for the United Kingdom; E. Grabitz, for the Federal Republic of Germany and M. Museux, for the French Republic.

On 1 April 1982 the Kingdom of Belgium submitted a letter giving information in reply to the question put by the Court during the hearing as to the linguistic abilities required of hospital nurses and children's nurses working in the creches and nurseries of the Commune of Auderghem.

The Advocate General delivered her opinion at the sitting on 12 May 1982.

Decision

- 1 By application lodged at the Court Registry on 28 September 1979 the Commission brought an action under Article 169 of the EEC Treaty for a declaration that by requiring or permitting to be required the possession of Belgian nationality as a condition of recruitment to posts not covered by Article 48 (4) of the Treaty, the Kingdom of Belgium has failed to fulfil its obligations under Article 48 of the Treaty and Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1969 (II), p. 475).
- 2 By an interim judgment of 17 December 1980 ([1980] ECR 3881) the Court defined a number of criteria enabling the scope of the exception contained in Article 48 (4) of the Treaty to be determined with regard to posts such as those at issue which are offered by public authorities.
- 3 However, the information available in the case, which was provided by the parties during the written and oral procedure, did not enable the Court accurately to appraise the actual nature of the duties involved in the posts in question and to determine which of those posts were not within the ambit of Article 48 (4). Consequently it invited the parties to re-examine the issue between them, taking account of the principles of interpretation defined by the Court and having regard to the characteristics of each post.
- The operative part of the aforesaid judgment of 17 December 1980 provides as follows:

"The Court . . . hereby orders the Commission and the Kingdom of Belgium to re-examine the issue between them in the light of the legal considerations contained in this judgment and to report to the Court on the result of that examination before 1 July 1981, after which date the Court will give a final decision."

- 5 The Commission and the Kingdom of Belgium have not been able to agree on a single report to be submitted jointly to the Court and after the period prescribed, originally ending on 1 July 1981, had been extended they submitted two separate reports on 29 and 30 October respectively. Those reports show that the parties still disagree on the question whether, in the light of the legal considerations contained in the judgment of 17 December 1980, some or all of the posts at issue are of the kind to which the reservation contained in Article 48 (4) of the Treaty applies. However, the parties do not disagree on the nature of the duties and responsibilities involved in each of the posts at issue, which both reports describe in basically the same terms.
- 6 The task therefore falls on the Court to settle the dispute by examining whether and to what extent the posts at issue, as described in the two reports aforesaid, must be regarded as posts which fall within the ambit of Article 48 (4), as defined in the judgment of 17 December 1980.
- 7 It follows from that judgment, in particular from paragraphs 12 and 19, that employment within the meaning of Article 48 (4) of the Treaty must be connected with the specific activities of the public service in so far as it is entrusted with the exercise of powers conferred by public law and with responsibility for safeguarding the general interests of the State, to which the specific interests of local authorities such as municipalities must be assimilated.
- 8 The Commission has rightly acknowledged that, regard being had to the duties and responsibilities attached to some of the posts at issue described in the aforesaid reports, they may have characteristics which bring them within the scope of the exception contained in Article 48 (4) of the Treaty in the light of the criteria established in the judgment of the Court of 17 December 1980. The posts are those described as head technical office supervisor, principal supervisor, works supervisor, stock controller and night watchman with the municipality of Brussels and architect with the municipalities of Brussels and Auderghem. Those matters may therefore be regarded as being no longer at issue.

- 9 However, as far as the other posts dealt with in the two reports in question are concerned, it does not appear from the nature of the duties and responsibilities which they involve that they constitute "employment in the public service" within the meaning of Article 48 (4) of the Treaty.
- 10 The arguments put forward by the Kingdom of Belgium with regard to certain posts with the Société Nationale des Chemins de Fer Belges [Belgian National Railway Company] and the Société Nationale des Chemins de Fer Vicinaux [National Local Railway Company] according to which the question of the admission of foreign staff must be considered above all in terms of the possibility that a situation may arise in which the security of the State is jeopardized cannot be accepted in the context of Article 48 (4) of the Treaty. Such a line of argument is based on an hypothesis which has no connection with the legal context of that provision.
- 11 For those reasons it must be declared that by making Belgian nationality or allowing it to be made a condition of entry for the posts referred to in the reports lodged by the parties on 29 and 30 October 1981, other than those of head technical office supervisor, principal supervisor, works supervisor, stock controller and night watchman with the municipality of Brussels and that of architect with the municipalities of Brussels and Auderghem, the Kingdom of Belgium has failed to fulfil its obligations under the EEC Treaty.

Costs

- 12 Under the first subparagraph of Article 69 (3) of the Rules of Procedure the Court may order that the parties bear their own costs in whole or in part where each party succeeds on some and fails on other heads.
- 13 Since the Kingdom of Belgium has failed on a number of heads of its defence it must be ordered to bear half the costs incurred by the Commission. The interveners should be ordered to bear their own costs.

On those grounds,

THE COURT

hereby:

1. Declares that by making Belgian nationality or allowing it to be made a condition of entry for the posts referred to in the reports lodged by the parties on 29 and 30 October 1981, other than those of head technical office supervisor, principal supervisor, works supervisor, stock controller and night watchman with the municipality of Brussels and that of architect with the municipalities of Brussels and Auderghem, the Kingdom of Belgium has failed to fulfil its obligations under the EEC Treaty;
2. Orders the Kingdom of Belgium to bear half the costs incurred by the Commission and the interveners to bear their own costs.

Mertens de Wilmars	Bosco	Touffait	Due
Pescatore	Mackenzie Stuart	O'Keeffe	Koopmans
			Everling

Delivered in open court in Luxembourg on 26 May 1982.

P. Heim
Registrar

J. Mertens de Wilmars
President