JUDGMENT OF THE COURT (Second Chamber)

12 May 2005 *

In Case C-278/03,

Action under Article 226 EC for failure to fulfil obligations, brought on 26 June 2003,

Commission of the European Communities, represented by M.-J. Jonczy, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by I.M. Braguglia, acting as Agent, assisted by G. De Bellis, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans (Rapporteur), President of the Chamber, C. Gulmann, R. Schintgen, G. Arestis and J. Klučka, Judges,

Advocate General: C. Stix-Hackl,
Registrar: R. Grass,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its application, the Commission of the European Communities requests that the Court find that, by failing to take into account professional experience acquired by Community nationals in the civil service of another Member State, for the purposes of the participation of those nationals in competitions for the recruitment of teaching staff in Italian State schools, the Italian Republic has failed to fulfil its obligations under Article 39 EC and Article 3 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

Legal background

Community legislation

2 Article 39(1) EC states that 'freedom of movement for workers shall be secured within the Community'. According to Article 39(2), that implies 'the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment'.

3 Article 3 of Regulation No 1612/68 makes explicit the principles formulated in Article 39 EC with regard, specifically, to access to employment. Thus Article 3(1) provides that under the regulation 'provisions laid down by law, regulation or administrative action or administrative practices of a Member State shall not apply:

— where they limit application for and offers of employment, or the right of foreign nationals to take up and pursue employment or subject these to conditions not applicable in respect of their own nationals; or

— where, though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered'.

National legislation

4 In the version applicable to the facts of the present case, Article 37 of Legislative Decree No 29 rationalising the organisation of public administration and revising the legislation relating to the civil service, in accordance with Article 2 of Law No 421 of 23 October 1992 (Decreto Legislativo n°29, recante razionalizzazione dell'organizzazione delle amministrazioni pubbliche e revisione della disciplina in materia di pubblico impiego, a norma dell'articolo 2 della legge n° 421, 23 ottobre 1992) of 3 February 1993 (ordinary supplement to the *Gazzetta Ufficiale della Repubblica Italiana* No 30 of 6 February 1993) (hereinafter 'Legislative Decree No 29/1993'), provided:

'1. Nationals of Member States of the European Union may have access to employment in the civil service which does not involve the direct or indirect exercise of public powers or which is not connected with the national interest.

2. The jobs and functions requiring possession of Italian citizenship and the mandatory conditions for access for the nationals referred to in paragraph 1 are laid down by Decree of the President of the Council of Ministers in accordance with Article 17 of Law No 400 of 23 August 1988.

3. In the event that no Community legislation has yet been adopted, the equivalence of academic and professional qualifications is recognised by Decree of the President of the Council of Ministers adopted pursuant to a proposal of the competent ministers. The equivalence of university degrees and certificates of service relevant to admission to a competition and appointment is established by way of an identical procedure.'

Pre-litigation procedure and the claim

5 On 24 November 1999, the Commission, having been informed of the difficulties encountered by several Community nationals in their participation in recruitment competitions for teaching staff in Italian State schools, which difficulties arose, in substance, from the failure of the Italian authorities to take account of professional experience previously acquired by those nationals in other Member States, sent a letter to the Italian Republic inviting it to submit its observations regarding that situation and to inform the Commission both of the rules applicable in that area and of how it intended, specifically, to resolve those difficulties.

6 Initially, the Italian authorities denied they were under any obligation to take account of the professional experience acquired by the Community nationals outside Italy. By letter of 28 March 2000, sent by the Ministry for State Education, those authorities pointed out that, having regard to the individual rules and characteristics of each national school system, it was imperative that such experience should be acquired in establishments within the Italian school system. Prior harmonisation of the criteria applicable in each Member State was therefore essential before account could be taken of teaching done by Community nationals in other Member States for the purposes of their participation in recruitment competitions in the Italian civil service.

7 Following the despatch, on 6 April 2001, of a letter of formal notice drawing the attention of the Italian authorities to their obligations under Article 39 EC and Article 3 of Regulation No 1612/68, as interpreted by the Court, inter alia in Case C-419/92 *Scholz* [1994] ECR I-505, the Italian Government accepted that the position adopted in the present case by the Ministry of State Education appeared to be contrary to the provisions of national legislation, which in fact laid down, in Article 37 of Legislative Decree No 29/1993, the obligation to take into account the

qualifications and experience acquired in the civil service of other Member States. The Government added, however, that recognition of the experience and seniority acquired by Community nationals outside Italy continued to cause a certain number of difficulties because of the failure of that Ministry to implement the procedure provided for in Article 37(3) of that Legislative Decree. According to the Italian Government, the failure to transmit to the presidency of the Council of Ministers documents necessary for the adoption of the decree laying down the equivalence of the degrees, certificates and qualifications acquired in other Member States undeniably constitutes a failure to fulfil obligations placed upon the Ministry of State Education, but that failure entails only an infringement of domestic law, as the national legislation itself complies with Community law.

8 In those circumstances, considering that the failure to fulfil obligations continued since all steps had not been taken to give effect to the obligation of the Italian authorities to take account of experience and seniority acquired by Community nationals in teaching outside Italy, on 26 June 2002 the Commission issued a reasoned opinion inviting the Italian Republic to take the measures necessary to comply with it within two months of its notification. Having received no response to that opinion, the Commission decided to bring the present proceedings.

The action

Arguments of the parties

9 In its defence, the Italian Government denies that the alleged failure to fulfil obligations is well founded. Relying, inter alia, on Article 38 of Legislative Decree No 165 laying down the general rules applicable to employment in public administra-

tion (Decreto Legislativo n° 165, recante le norme generali sull'ordinamento del lavoro alle dipendenze delle amministrazioni pubbliche) of 30 March 2001 (ordinary supplement to GURI No 106 of 9 May 2001), which in substance corresponds to Article 37 of Legislative Decree No 29/1993, and the Decree of the President of the Council of Ministers No 174 on the rules of access of nationals of Member States of the European Union to employment in public administration (Decreto del presidente del Consiglio dei ministri n° 174, recante le norme sull'accesso dei cittadini degli Stati membri dell'Unione europea ai posti di lavoro presso le amministrazioni pubbliche) of 7 February 1994 (GURI No 61 of 15 March 1994), that Government claims that both the legislation and the practice of the Italian authorities comply with the requirements of Community law.

10 More particularly, with regard to the teaching sector, that Government points out that recruitment of teachers in Italy is carried out by three distinct methods, namely, for 50% of the posts available per academic year, by way of competitions based on qualifications and tests in accordance with Article 400 of Legislative Decree No 297 approving the single text of the legislative provisions applicable to teaching and relating to schools of all types and levels (Decreto Legislativo n° 297, recante approvazione del testo unico delle disposizioni legislative vigenti in materia di istruzione, relative alle scuole di ogni ordine e grado) of 16 April 1994 (ordinary supplement to GURI No 115 of 19 May 1994, hereinafter 'Legislative Decree No 297/1994'), and, for the remaining 50%, by way of permanent aptitude lists under Article 401 of that legislative decree; special lists of supply teachers, comprising the names of teachers authorised to act as replacements, are used to fill posts temporarily vacant.

11 According to the Italian Government, there is no discrimination between Italian nationals and those of other Member States with regard to the first and third methods of recruitment of teaching staff since, in the first case, namely that of competitions on the basis of qualifications and tests, professional experience is not considered during the recruitment procedure, whilst in the third case, relating to possible replacement or supply teachers, Ministerial Decree No 201 regulating the

norms for the methods of assignment of replacements for teaching and education staff in accordance with Article 4 of Law No 124 of 3 May 1999 (Decreto ministeriale n° 201, relativo al 'regolamento recante le norme sulle modalità di conferimento delle supplenze al personale docente ed educativo ai sensi dell'articolo 4 della legge 3 maggio 1999, n° 124') of 25 May 2000 (GURI No 168 of 20 July 2000, hereinafter 'Ministerial Decree No 201/2000') expressly provides for the award of a certain number of points corresponding to teaching carried out in schools and universities of other Member States. The Italian Government refers more particularly in that regard to Annex A to that decree which, in paragraph E, note 9, assimilates such work to service in the third category, giving the right, in Italy, to the award of a half point per month of teaching carried out in another Member State, with a maximum of three points per year.

12 With regard, however, to the second method for recruiting teachers in Italy, namely recruitment carried out on the basis of permanent aptitude lists, the Italian Government does not deny that there is a difference in treatment according to whether the teaching was carried out in Italy or in other Member States. It submits that such a difference is, however, justified to the extent that teaching carried out abroad would be on the basis of texts, programmes and content different from that in Italy and would not therefore be 'specific' as required by Italian law and giving the right, in accordance with Ministerial Decree No 123 regulating the norms for the application of methods adopted to fill and bring up to date the permanent lists provided for in Articles 1, 2, 6 and 11(9) of Law No 124 of 3 May 1999 (Decreto Ministeriale n° 123, relativo al 'regolamento recante le norme sulle modalità di integrazione e aggiornamento delle graduatorie permanenti previste dagli articoli 1, 2, 6 e 11, comma 9, della legge 3 maggio 1999, n° 124') of 27 March 2000 (GURI No 113 of 17 May 2000, hereinafter 'Ministerial Decree No 123/2000'), to the award of additional points in the recruitment procedure.

Findings of the Court

13 As a preliminary point, from the outset the Italian Government's argument that the Italian Republic has committed no infringement of Community law since its legislation complies with that law and the failure to fulfil obligations in the present case is the result of a mere practice adopted by the competent authorities or of delay on their part in adopting the measures necessary to recognise experience acquired by Community nationals in teaching outside Italy must be rejected. A failure to fulfil obligations may arise due to the existence of an administrative practice which infringes Community law, even if the applicable national legislation itself complies with that law (see to that effect, inter alia, Case C-212/99 *Commission* v *Italy* [2001] ECR I-4923, paragraph 31).

14 Furthermore, with regard to the factual nature of the alleged infringement of Article 39 EC and Article 3 of Regulation No 1612/68, it should be recalled that, according to the first of those two articles as interpreted by the Court, where a public body of a Member State, in recruiting staff for posts which do not fall within the scope of Article 39(4) EC, provides for account to be taken of candidates' previous employment in the public service, that body may not, in relation to Community nationals, make a distinction according to whether such employment was in the public service of that particular State or in the public service of another Member State (see, inter alia, *Scholz*, cited above, paragraph 12).

15 With regard to Article 3 of Regulation No 1612/68, it is important to reiterate that it makes explicit the principles formulated in Article 39 EC with regard, specifically, to access to employment and that it must therefore be interpreted in the same way as that article.

16 In the present case, it cannot be denied that the Italian Republic has failed to have regard to those rights in respect of access of Community nationals to recruitment competitions for teaching staff in the State schools of that Member State.

17 With regard to the recruitment of teaching staff by means of permanent aptitude lists which, as mentioned in paragraph 10 of this judgment, relate to half of the posts available per academic year, the Italian Government, in its defence, has recognised that Community nationals are treated differently according to whether the professional experience taken into account for the purpose of inclusion in those lists was acquired in Italy or in other Member States, a difference justified, according to that Government, by the lack of equivalence between the content and programmes of Italian teaching and those of teaching given outside Italy.

18 It follows from the case-law cited in paragraph 14 of this judgment that an absolute refusal to take into account experience acquired while teaching in other Member States, on the basis of the existence of differences in the teaching programmes of those States, cannot be justified. It cannot be denied that specific experience of teaching as required by Italian legislation, in particular in the teaching of art or teaching handicapped persons, can also be acquired in other Member States.

19 With regard to the third method of recruitment, mentioned in paragraph 10 of this judgment, namely recruitment on the basis of special lists of supply teachers, that does not seem any more suited to guaranteeing fully the equal treatment required by Article 39 EC and Article 3 of Regulation No 1612/68. Examination of the texts submitted by the Italian Government during the present proceedings reveals that professional experience is valued differently depending on whether it was acquired within Italy or in other Member States.

20 As the Commission pointed out in its reply, it is clear from Ministerial Decree No 201/2000 and, more specifically, from paragraph E, note 9 to Annex A, that service in schools and universities of other Member States is still considered to fall within the third category under paragraph E, covering 'other teaching', which gives the right to the award of half a point per month of teaching, with a maximum of three points per academic year. However, a perusal of the same decree also shows that, in Italy, only teaching carried out in boarding schools, nursery, primary or secondary schools or colleges of art — whether State schools or private schools recognised or subsidised by the Italian State — is considered to fall within the first two categories of paragraph E, covering 'specific' and 'non-specific' teaching respectively, which give the right, inter alia, the first to the award of two points per month of teaching, with a maximum of 12 points per academic year and the second to one point per month of teaching, with a maximum of six points per academic year.

21 In those circumstances, even though professional experience acquired by Community nationals outside Italy is indeed taken into account in recruitment of supply teachers from lists, it is not always taken into account in the same manner as similar experience acquired within Italy, without the slightest justification in that regard having been given by the Italian Government.

22 In view of all the foregoing considerations, it must therefore be held that the Italian Republic has failed to fulfil its obligations under Article 39 EC and Article 3(1) of Regulation No 1612/68 inasmuch as for the purposes of participation by Community nationals in competitions to recruit teaching staff in Italian State

schools professional teaching experience acquired by those nationals is not taken into account, or at least not taken into account in the same way, depending on whether the teaching was carried out in Italy or in other Member States.

Costs

23 Article 69(2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Italian Republic has been unsuccessful, the Italian Republic must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Declares that the Italian Republic has failed to fulfil its obligations under Article 39 EC and Article 3(1) of Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community inasmuch as for the purposes of participation by Community nationals in competitions to recruit teaching staff in Italian State schools professional teaching experience acquired by those nationals is not taken into account, or at least not taken into account in the same way, depending on whether the teaching was carried out in Italy or in other Member States;**

2. **Orders the Italian Republic to pay the costs.**

[Signatures]