

JUDGMENT OF THE COURT (Fifth Chamber)  
30 May 1989\*

In Case 33/88

REFERENCE to the Court under Article 177 of the EEC Treaty by the Pretura unificata di Venezia (Magistrate's Court, Venice) for a preliminary ruling in the proceedings pending before that court between

**Pilar Allué and Carmel Mary Coonan**

and

**Università degli studi di Venezia**

on the interpretation of Article 48(2) and (4) of the EEC Treaty and of Article 3 of Regulation (EEC) No 1408/71 of the Council on the application of social security schemes to employed persons, self-employed persons and members of their families moving within the Community (as codified in Official Journal 1983, L 230, p. 8),

THE COURT (Fifth Chamber)

composed of R. Joliet, President of Chamber, Sir Gordon Slynn, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias and M. Zuleeg, Judges,

Advocate General: C. O. Lenz

Registrar: D. Louterman, Principal Administrator

after considering the observations submitted on behalf of

Pilar Allué and Carmel Mary Coonan, the plaintiffs in the main proceedings, by Professor Fausto Capelli, of the Milan Bar, and Maria Virgilio, of the Bologna Bar,

\* Language of the case: Italian.

the Italian Government, at the hearing by Professor Luigi Ferrari Bravo, Head of the Servizio del Contenzioso Diplomatico at the Ministry of Foreign Affairs, acting as Agent, assisted by Pier Giorgio Ferri, avvocato dello Stato,

the Commission of the European Communities, by Enrico Traversa, a member of its Legal Department, acting as Agent,

having regard to the Report for the Hearing and further to the hearing on 14 December 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 14 February 1989,

gives the following

### Judgment

- 1 By an order of 21 December 1987 which was received at the Court on 29 January 1988, the Pretura unificata di Venezia, sezione lavoro, (Employment Section of the Magistrate's Court, Venice) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Article 48(2) and (4) and Article 51 of the EEC Treaty and Article 3 of Regulation (EEC) No 1408/71 of the Council on the application of social security schemes to employed persons, self-employed persons and members of their families moving within the Community, as amended (Official Journal 1983, L 230, p. 8).
- 2 Those questions were raised in proceedings between, on the one hand, Pilar Allué, a Spanish national, and Carmel Mary Coonan, a national of the United Kingdom, and, on the other, the Università degli studi di Venezia (University of Venice), where they worked as foreign-language assistants from 1980 to 1986. At the beginning of the 1986/87 academic year the university informed them that it could not extend their contracts, in view of the provisions of Article 28 of Decree No 382 of the President of the Republic of 11 July 1980 (hereinafter referred to as 'the Presidential Decree'). The third paragraph of Article 28 provides that: 'The contracts referred to in the first paragraph [concerning the employment of foreign-language assistants] may not be extended beyond the academic year for which they are concluded and may be renewed every year for a maximum of five years'.

- 3 The plaintiffs then brought an action claiming essentially that the national court should declare that their employment relationship with the university was governed by private law, order the university to pay them the difference between the salary received by them and the salary which would be payable according to the salary level of a lecturer on a contract for a determinate period, recognize that they were entitled to compulsory social security and insurance cover from the date on which the employment relationship arose, declare that the contract concluded between the parties constituted a contract for an indeterminate period and consequently declare void the date prescribed for its expiry and order the university to pay them the salary owed to them from 1 November 1986. In the alternative, they claimed that the national court should order the university to reinstate them in their posts with effect from 1 November 1986 and find that their objection, that the third paragraph of Article 28 of the Presidential Decree was unconstitutional, relied on in support of their application, was not manifestly without foundation.
- 4 The national court decided to stay the proceedings until the Court had given a preliminary ruling on the following questions:
- ‘(a) The first question concerns the compatibility with Article 48(4) of the EEC Treaty as interpreted by the Court of Justice of the European Communities (see judgment of 17 December 1980) — given that the employment relationship in this case does not involve either the direct or indirect exercise of public authority or functions whose purpose is to safeguard the general interest of the community — of a national law of a Member State which lays down special rules governing the work of foreign-language assistants imposing a limit on the duration of their contracts, whilst other State employees are generally guaranteed security of tenure under Law No 230 of 18 April 1962, although there do not appear to be any particular features of the employment relationship in question justifying derogation from the aforesaid principle.
- (b) The second question is whether or not the national law of a Member State and/or a contract governed by private law which limits the duration of the employment relationship to a predetermined period of five years is compatible with Article 48(2) of the EEC Treaty, inasmuch as the free movement of workers within the Community entails and requires the abolition of any discrimination, and the derogation from the general rule in force in Italy concerning the duration of employment relationships would appear to be discriminatory. A further question is whether the absence of any insurance

cover which is expressly provided for in the contracts on which the employment relationships at issue are based, is compatible with the rights conferred on migrant workers in social security matters, in the light of the manner in which the Court of Justice has interpreted Regulation No 1408/71 in conjunction with Article 51 of the EEC Treaty.’

- 5 Reference is made to the Report for the Hearing for a fuller account of the facts and the legislation applicable in the main proceedings and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

### The first question

- 6 By the first question the national court asks essentially whether employment as a foreign-language assistant at a university must be regarded as employment in the public service, within the meaning of Article 48(4) of the EEC Treaty, to which nationals of other Member States may be refused access.
- 7 In that regard it must be recalled that, as the Court held in the judgment of 3 July 1986 in Case 66/85 *Lawrie-Blum v Land Baden-Württemberg* [1986] ECR 2121, a teaching post does not involve direct or indirect participation in the exercise of powers conferred by public law and in the discharge of functions whose purpose is to safeguard the general interests of the State or of other public authorities and which therefore require a special relationship of allegiance to the State on the part of persons occupying them and reciprocity of rights and duties which form the foundation of the bond of nationality.
- 8 Furthermore, the Court has consistently held (in particular in its judgment of 16 June 1987 in Case 225/85 *Commission v Italy* [1987] ECR 2625) that even if employment in the public service within the meaning of Article 48(4) is involved, that provision cannot justify discriminatory measures with regard to remuneration or other conditions of employment against workers from other Member States once they have been admitted to the public service.

- 9 The answer to the first question must therefore be that employment as a foreign-language assistant at a university is not employment in the public service within the meaning of Article 48(4) of the EEC Treaty.

### The second question

- 10 By the first part of the second question the national court seeks essentially to establish whether Article 48(2) of the EEC Treaty precludes the application of a provision of national law which imposes a limit on the duration of the employment relationship between universities and foreign-language assistants where there is in principle no such limit for other workers.
- 11 In that connection it must be recalled that, according to the judgments of the Court, the principle of equal treatment of which Article 48(2) is one embodiment prohibits not only overt discrimination based on nationality but all covert forms of discrimination which, by applying other distinguishing criteria, in fact achieve the same result (*inter alia*, judgment of 15 January 1986 in Case 41/84 *Pinna v Caisse d'allocations familiales de la Savoie* [1986] ECR 1).
- 12 In this regard it should be noted that, although it applies regardless of the nationality of the worker concerned, the time-limit imposed by the legislation in question on working as a foreign-language assistant in a university essentially concerns workers who are nationals of other Member States. According to the statistics supplied by the Italian Government, only 25% of foreign-language assistants are Italian nationals.
- 13 In order to justify the legislation at issue in the main proceedings, the Italian Government claims that it is the only means of ensuring that universities have foreign-language assistants with an up-to-date knowledge and experience of the mother tongue which they teach.
- 14 In this regard it should be stated that the danger of their losing contact with their mother tongue is slight, in the light of the increase in cultural exchanges and improved communications, and in addition it is open to the universities in any

event to check the level of assistants' knowledge. Furthermore, it should be noted that under the legislation in question an assistant may be engaged by a university after working for six years in another university in the same Member State; the time-limit on the work in question therefore cannot be justified on the ground referred to by the Italian Government.

- 15 The Italian Government claims in addition that the contested provisions are justified by the fact that security of tenure for teaching staff may be guaranteed only where the persons concerned are of recognized ability, attested to by their having passed a competition. That is not so in the case of foreign-language assistants.
  
- 16 In that regard it must be stated that the six-year limit on the work in question is not necessary to enable universities to terminate the contract of members of the teaching staff who prove incompetent. No such limit exists for lecturers engaged under contract, who also perform teaching duties without having passed a competition. In their case, although there is in principle a time-limit of three years, the Minister for Public Education may authorize exceptions (seventh paragraph of Article 25 of the Presidential Decree).
  
- 17 Lastly, the Italian Government claims that the provision in question is also justified by the need to restrict the number of foreign-language assistants according to the needs of the university, which depend upon the number of students wishing to study foreign languages. However, it should be noted that this aim of good management may be achieved by other means and in particular by not renewing the contracts of assistants who are not needed, in accordance with the third paragraph of Article 28 of the Presidential Decree.
  
- 18 It follows from the foregoing that none of the reasons which have been examined can justify limiting the contracts of foreign-language assistants and therefore the application of the principle of equal treatment.

- 19 The answer to the first part of the second question should therefore be that Article 48(2) of the Treaty must be interpreted as precluding the application of a provision of national law imposing a limit on the duration of the employment relationship between universities and foreign-language assistants where there is in principle no such limit with regard to other workers.
- 20 By the second part of the second question the national court seeks essentially to establish whether the provisions of Regulation No 1408/71 must be interpreted as prohibiting stipulations in contracts for the employment of foreign-language assistants by a university of a Member State whereby the person concerned is deprived of the social security cover available to other workers.
- 21 In this regard, it is sufficient to state that social security schemes must respect the principle of equal treatment expressly laid down in Article 3 of Regulation No 1408/71. This principle is not respected where a given category of workers, largely nationals of other Member States, is excluded from the social security scheme of a Member State which is in general available to other workers in that Member State.
- 22 The answer to the second part of the second question must therefore be that Article 3 of Regulation No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community prohibits stipulations in contracts for the employment of foreign-language assistants by a university of a Member State whereby the person concerned is deprived of the social security cover available to other workers.

### Costs

- 23 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Pretura unificata di Venezia, by order of 21 December 1987, hereby rules:

- (1) Employment as a foreign-language assistant at a university is not employment in the public service within the meaning of Article 48(4) of the EEC Treaty.
- (2) Article 48(2) of the EEC Treaty precludes the application of a provision of national law imposing a limit on the duration of the employment relationship between universities and foreign language assistants where there is, in principle, no such limit with regard to other workers.
- (3) Article 3 of Regulation No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community prohibits stipulations in contracts for the employment of foreign-language assistants by a university of a Member State whereby the person concerned is deprived of the social security cover available to other workers.

Joliet

Slynn

Moitinho de Almeida

Rodríguez Iglesias

Zuleeg

Delivered in open court in Luxembourg on 30 May 1989.

J.-G. Giraud

R. Joliet

Registrar

President of the Fifth Chamber