OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 22 October 1991 *

Mr President,
Members of the Court,

A — Introduction

1. The reference for a preliminary ruling submitted by the Tribunal Administratif (Administrative Court), Paris, concerns the classification in Community law of the legal position of qualified secondary school teachers in French public educational establishments. In so far as those teachers are to be regarded as workers within the meaning of Article 48 of the EEC Treaty, the question posed by the abovementioned court is relevant, since it seeks to ascertain whether the employment of such a teacher constitutes 'employment in the public service' within the meaning of Article 48(4) of the EEC Treaty and thus escapes the prohibition on discrimination in Article 48(2).

2. Article 5 of French Law No 83/634 of 13 July 1983 concerning the rights and duties of employees in the public sector [1] provides in its original version:

'No-one may be appointed to the civil service:

(1) — If he does not have French nationality.'

3. Access to posts involving duties intended to be performed by civil servants is thus inevitably denied to the nationals of all other States, including those of the Member States of the European Communities.

4. The plaintiff in the main proceedings is a German national who completed her studies in France. Her application for admission to an external competition leading to a Certificate of Aptitude as a Secondary School Teacher (*Certificat d'Aptitude au Professorat de l'Enseignement Secondaire*) in German was refused on the ground of her nationality. When she brought an action challenging the decision to reject her application, a request for a preliminary ruling was referred to this Court.

5. For a detailed account of the facts of the case, the relevant legal provisions and the submissions and arguments of the parties, I refer to the Report for the Hearing.

B — Analysis

6. Where a post is classified as being in the public service, that has the consequence, given the rules of law applicable to the

* Original language: German.

1 — General Law relating to civil servants, *Journal Officiel de la République Française*, 14 July 1983, p. 2174.

public service in the Member States, that access to that post is restricted as far as the nationals of other Member States are concerned. The Court has therefore already repeatedly held that access to certain posts may not be limited by reason of the fact that in a given Member State persons appointed to such posts have the status of civil servants. [2]

7. While these proceedings were pending, a law was enacted in France which, for certain occupational groups, provides an exception — which, no doubt, must also apply to secondary school teachers — to the nationality requirements in the case of the nationals of other Member States. [3] The French Constitutional Council dismissed an action brought to challenge that law by 73 members of the Senate. [4]

8. However, it is still necessary, in order to apply the law, to adopt implementing measures. Individuals are therefore still unable to rely directly on that law. The plaintiff in the main proceedings, the French Government and the Commission assume, therefore, that from the point of view of both law and fact an interest remains in the decision to be taken in the action.

9. For the application and interpretation of Article 48 of the EEC Treaty and, in particular, of paragraph (4), which is significant for the answer to the question referred, the Court can, meanwhile, rely on established case-law. All the parties to the proceedings, the plaintiff in the main proceedings, the Commission and the French Government, are therefore of the unanimous opinion that the question referred must be answered in the negative, that is to say, employment as a secondary school teacher is not to be regarded as employment in the public service within the meaning of Article 48(4) of the EEC Treaty.

10. When the criteria developed in the case-law are applied, there is no doubt that a foreign-language secondary school teacher is a 'worker'. The definition of a 'worker', which depends on objective criteria, applies where 'for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration'. [5] A secondary school teacher performs services in the form of tuition, in return for which he receives remuneration. The definition is therefore wholly independent of the legal nature of the employment relationship. [6]

11. Further examination is therefore limited to whether the exception laid down in Article 48(4), according to which the guarantees of freedom of movement set out in Article 48 of the EEC Treaty are not to apply to employment in the public service, is

2 — See judgments in Case 307/84 *Commission* v *France* [1986] ECR 1725, paragraph 11; Case 66/85 *Lawrie-Blum* v *Land Baden-Württemberg* [1986] ECR 2121, paragraph 20; and Case 225/85 *Commission* v *Italy* [1987] ECR 2625, paragraph 8.

3 — Law No 91/715 of 26 July 1991, *Journal Officiel de la République Française*, lois et décrets, 27 July 1991, p. 9952.

4 — *Journal Officiel de la République Française*, 25 July 1991, p. 9854.

5 — See Case 66/85 *Lawrie-Blum*, cited above, paragraph 17.

6 — Idem, paragraph 22.

applicable, first in the light of the formal aspects of appointment in the civil service and secondly on material grounds due to the nature of the job itself.

12. The answer to the question has already been outlined in the case-law. Article 48(4) of the EEC Treaty, as a derogation from the 'basic principle of freedom of movement', is to be construed in such a way as to limit its scope to what is strictly necessary for safeguarding the interests protected by that provision.[7] In its judgment in Case 149/79[8] the Court held that Article 48(4) of the EEC Treaty

'removes from the ambit of Article 48(1) to (3) a series of posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities. Such posts in fact presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality.'[9]

13. The scope of Article 48(4) of the EEC Treaty must be determined on the basis of the aims pursued by that article.[10] Furthermore, the concept of public service must be given a uniform interpretation and application throughout the Community.[11] That is because

'the effect of extending the exception contained in Article 48(4) to posts which, while coming under the State or other organizations governed by public law, still do not involve any association with tasks belonging to the public service properly so called, would be to remove a considerable number of posts from the ambit of the principles set out in the Treaty and to create *inequalities between Member States*[12] according to the different ways in which the State and certain sectors of economic life are organized.'[13]

14. As I have already mentioned, the Court has declared in a number of judgments that access to certain posts may not be limited by reason of the fact that persons appointed to such posts have the status of civil servants.[14]

'To make the application of Article 48(4) dependent on the legal nature of the relationship between the employee and the administration would enable the Member State to determine at will the posts covered by the exception laid down by that provision.'[15]

15. For a Member State to make the posts in question available to applicants who are nationals of other Member States, on other hand, in the form of an employment relationship parallel to, and in a legal form different from, the possibilities of access as civil servants given to its own nationals,

7 — Case 66/85, cited above, paragraph 26.

8 — Case 149/79 *Commission* v *Belgium* [1980] ECR 3881.

9 — Paragraph 10.

10 — Ibid., paragraph 11.

11 — Ibid., paragraph 12.

12 — The emphasis is mine.

13 — Ibid., paragraph 11.

14 — See Case 307/84, cited above, paragraph 11; Case 66/85, cited above, paragraph 20; and Case 225/85, cited above, paragraph 8.

15 — Case 225/85, cited above, paragraph 8.

provides a solution only if all the posts offered are open to the nationals of other Member States and if those nationals, once employed, are subject to a rule which provides the same advantages and safeguards as those deriving from the status of members of the established staff. [16]

16. The fact that certain fields of activity are reserved for the civil service, however, is in itself of no significance whatsoever with regard to the application of Article 48(4) of the EEC Treaty.

17. Consequently, it is always necessary to consider

'whether or not the posts in question are typical of the specific activities of the public service in so far as the exercise of powers conferred by public law and responsibility for safeguarding the general interests of the State are vested in it.' [17]

18. As far as the application of Article 48(4) in the case of teachers is concerned, it should be pointed out that that question also is not entirely new for the Court. The *Lawrie-Blum* case [18] concerned the legal position for the purposes of Community law of a Studienreferendar (trainee teacher) in Germany.

19. It had already been stated in the Opinion in that case that not all activities connected in some way with the exercise of powers conferred by public law fell within the scope of the exception in Article 48(4) of the EEC Treaty. In the case of education, the distinction between occupations involving the exercise of powers conferred by public law for safeguarding the general interests of the State and those not to be regarded as employment in the public service within that narrowly definition could be drawn as follows:

20. The basic pedagogical direction of teaching, its general structure and the establishment of the principles for the awarding of marks and certificates might well be established within the sphere of the general interests of the State. The situation is otherwise for the activity of a teacher in daily school life, which is centred on giving lessons, while the maintenance of discipline and the award of individual marks constitute, at most, measures ancillary to teaching which assume only secondary importance compared with the actual pedagogical activity. They cannot therefore determine the nature of teaching, even if they are regarded in national law as the exercise of powers conferred by public law. [19]

21. The Court followed those assessments of the occupation of teacher in the school system developed in the Opinion in Case 66/85. The Court concluded that the post of a Studienreferendar was not one of those

16 — See Case 307/84, cited above, paragraph 16.

17 — See Case 149/79, cited above, paragraph 12; see also Case 307/84, cited above, paragraph 12.

18 — Case 66/85, cited above.

19 — See Opinion in Case 66/85 *Lawrie-Blum* [1986] ECR 2121, 2135.

which, having regard to the tasks and responsibilities involved, displayed the characteristics of the specific activities of the public service within the meaning of the definition [20] established by the Court. [21]

22. In a later judgment [22] the issue concerned the legal position in Community law of foreign-language assistants in Italian universities. Their employment contracts, unlike those of other university employees, were for a fixed term. Referring to the judgment in the *Lawrie-Blum* case, the Court declared, in its judgment in Case 33/88, that

'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.' [23]

23. With regard to the actual employment conditions, the Court held, on the basis of its earlier judgments, that even if employment in the public service within the meaning of Article 48(4) was involved, that provision could not justify discrimination with regard to remuneration or other conditions of employment against workers from other Member States once they had been admitted to the public service. [24]

24. Both *Lawrie-Blum* [25] and *Allué* [26] concerned the *teaching activities of nationals of other Member States in their respective mother tongues.* From that point of view the facts in those judgments correspond to the facts in the case to be decided by the Court.

25. In application of the principles already developed by the Court and set out above, the reply to the question referred should be that employment as a secondary school teacher in French public educational establishments does *not* constitute employment in the public service within the meaning of Article 48(4) of the EEC Treaty.

Costs

26. The decision regarding the costs of these proceedings is a matter for the national court. The costs incurred by the French Government and the Commission are not recoverable.

20 — See Case 149/79, cited above, paragraph 12 and Case 66/85, cited above, paragraph 27; repeated in paragraph 16 of this Opinion.

21 — Case 66/85, cited above, paragraphs 27 and 28.

22 — Case 33/88 *Allué and Another* v *Università degli studi di Venezia* [1989] ECR 1591.

23 — Case 33/88, cited above, paragraph 7.

24 — Case 33/88, cited above, paragraph 8.

25 — Case 66/85, cited above.

26 — Case 33/88, cited above.

Conclusions

27. I suggest that the question referred for a preliminary ruling should be answered as follows:

'Employment as a secondary school teacher in French public educational establishments does not constitute employment in the public service within the meaning of Article 48(4) of the EEC Treaty.'