OPINION OF ADVOCATE GENERAL LENZ

delivered on 20 January 1993 *

Mr President,
Members of the Court,

A — Introduction

1. Joined Cases C-259/91, C-331/91 and C-332/91 are concerned with the same problems as those which arose in Case 33/88, [1] that is to say, whether the third paragraph of Article 28 of Presidential Decree No 382 of 11 July 1980, [2] which regulates the limits on the duration of the employment relationships of foreign-language assistants at Italian universities, is compatible with Community law.

2. The reference in Case C-259/91 has even been made to the Court in the context of the same original proceedings before the Pretore of Venice as in Case 33/88, in order to clarify certain remaining doubts. The two references from the Pretore of Parma in Cases C-331/91 and C-332/91 are prompted by the same doubts.

3. The third paragraph of Article 28 of Decree No 382/1980 is worded as follows:

'The contracts referred to in the first paragraph 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.'

4. That provision thus lays down two conditions. First, such contracts may be concluded for only one academic year and, secondly, a maximum period for which they may be extended is specified. The second condition has already been annulled by judgment of one of the supreme courts of Italy. [3]

5. The Court of Justice ruled as follows in paragraph 2 of the operative part of its judgment in Case 33/88:

'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.'

6. The differently worded questions in the references to the Court all seek a ruling on whether, after the judgment in Case 33/88, the requirement in the third paragraph of Article 28 of Decree No 382/1980 that the duration of such contracts be limited to one

* Original language: German.

1 — *Pilar Allué and Carmel Mary Coonan* v *Università degli Studi di Venezia* [1989] ECR 1591.

2 — GURI No 209, 31 July 1980.

3 — Judgment of the Corte Costituzionale, 9/23 February 1989.

year must be regarded as contrary to Community law.

7. Reference is made to the Report for the Hearing for details of the facts, the legal background of the proceedings, the submissions of the parties and the wording of the questions.

B — Analysis

8. In my Opinion in Case 33/88 I began by examining both the limits laid down in the third paragraph of Article 28 of Decree No 382/1980. This is objectively clear from paragraphs 17 and 18 of my observations, as was rightly understood by the plaintiffs in the main proceedings. Consequently, for the purpose of replying to the questions which have now been put to the Court, I refer to my Opinion in Case 33/88.

9. Neither the operative part nor the reasoning of the judgment are explicit as to whether the judgment relates to one or the other, or both, of the time-limits laid down by the abovementioned provision. The fact that the different elements of Article 28 of Decree No 382/1980 were submitted as a whole for assessment by the Court and that I referred, in my Opinion, to the dual nature of the time-limits in the third paragraph of that article suggests that the Court also proceeded on the basis that both limits were to be examined. In doing so, the Court did not make an express finding that either the one-year duration of the contracts or the maximum duration of extensions was compatible with Community law. However, the wording of paragraph 17 of the judgment gives rise to doubt. It states as follows:

'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 section 28 of the Presidential Decree.'

10. That reasoning could be construed as meaning that the one-year limit on contracts is not contrary to Community law.

11. To come to the point immediately, in my opinion the statutory requirement for contracts for foreign-language assistants to be framed solely on the basis of temporary contracts for one year is contrary to the prohibition of discrimination in Article 48(2) of the EEC Treaty, and paragraph 17 of the judgment in Case 33/88 cannot be taken to mean that a statutory obligation of that kind is compatible with Community law.

12. The present proceedings, particularly the oral procedure, have afforded an opportunity to examine in greater depth the factors which led to that judgment. In Case 33/88 the Court had to proceed on the assumption, from the information submitted to it, that there was no comparable category of workers in the university sector by comparison

with whom the alleged discrimination could be found to exist, so that the Court compared the conditions for the appointment of foreign-language assistants with the provisions applicable to workers in general. [4]

13. A comparison on this basis shows that the condition limiting contracts to one academic year also discriminates against foreign-language assistants because in the Italian legal system employment contracts are normally deemed to be concluded for an indeterminate period. Exceptions to this rule are permitted only in clearly specified cases.

14. It also appears from the parties' submissions that the university reforms of 1980, in the course of which the contested rules in Article 28 of Decree No 382/1980 were adopted, had the object, *inter alia*, of abolishing insecurity of tenure and implementing the principle of job security in the university sector.

15. In the submission of the plaintiffs' representative at the hearing, the discrimination against foreign-language assistants arises first from the fact that their contract of employment takes the form of a private-law contract, although this point has not been made an issue in the present case. Secondly, the obligatory one-year limit on the contract constitutes discrimination in relation to other workers, for whom limited-term contracts are permitted only exceptionally. Finally, in general employment law it is possible, under the legislation, to construe contracts of employment for fixed periods as contracts of employment for an indeterminate period in order to avoid abuses, but that possibility does not apply in the case of foreign-language assistants.

16. In addition, the latter two forms of unfair treatment would have to be regarded as discrimination on grounds of nationality prohibited by Community law if the rules concerning the employment contracts of foreign-language assistants amounted in fact to unfair treatment of migrant workers and no objective grounds to justify such treatment could be shown to exist.

17. As regards the first of those two criteria, in the judgment in Case 33/88 the Court has already stated, on the basis of its settled case-law, as follows:

'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 (...).

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

4 — Paragraph 10 of the judgment.

are nationals of other Member States. According to the statistics supplied by the Italian Government, only 25% of foreign-language assistants are Italian nationals.' [5]

18. Those findings apply in exactly the same manner to the one-year limit for contracts of employment. At the hearing in the present case it was mentioned that 64% of foreign-language assistants were foreign nationals, although it was pointed out that some of them had acquired Italian citizenship, usually as a result of marriage.

19. Even if the amended figures are accepted, it may still be said that the very great majority of foreign-language assistants are workers whose nationality is other than Italian, so that the description 'assistants of foreign mother-tongue' [6] is a description which leads to the same result as overt discrimination.

20. If, therefore, indirect discrimination may be presumed to exist, it must be asked whether there are objective grounds which may justify the unequal treatment.

21. The constantly recurring argument of the Italian Government to justify retaining the rules concerning temporary contracts is that it is necessary to determine actual needs. There is said to be no other means of ensuring that the number of foreign-language assistants engaged meets the changing demand for language courses.

22. From what was said at the hearing concerning the possibilities for terminating contracts under Italian employment law and the rules on protection against unfair dismissal, it must be admitted that the termination of contracts is an unwieldy instrument for adjusting to demand. However, from other statements made at the hearing, it must be accepted that there is a constant increase in the number of foreign-language assistants. Furthermore, in the past their contracts have always been extended, which must be regarded as an objective argument refuting the need to adjust to requirements by dismissing foreign-language assistants. Finally, the number of such assistants in Italian universities is said to be very high by comparison with universities in other Member States. The average ratio is one member of the teaching staff to 10 foreign-language assistants.

23. All these factors make it possible to conclude that there is a constant need for foreign-language assistants in universities and that it is rising rather than falling. Against this background, there are no justifiable grounds to show why the contracts with such assistants should not as a rule be concluded for an indeterminate period.

24. Even accepting that a degree of flexibility is necessary, the compulsory limit of one

5 — See paragraphs 11 and 12 of the judgment, cited above.

6 — First paragraph of Article 28 of Decree No 382/1980.

year on the duration of the contract seems to me inappropriate and disproportionate. It would be quite sufficient to meet any changes in demand by concluding fewer fixed-term contracts. The criteria for the conclusion of such contracts under general employment law would also have to be applied to these contracts. To give the activity of a foreign-language assistant as the reason for the limited duration of the contract is in any case not a sufficient justification for a fixed-term contract of employment.

25. That conclusion is, in my view, supported by the following considerations. According to the information given to the Court at the hearing, in general Italian employment law it is possible to construe a fixed-term contract as a contract of indeterminate duration, but that does not apply to the contracts of foreign-language assistants. According to the case-law both of the highest Italian courts and of the Court of Justice, the six-year maximum duration of contract extensions is unlawful and therefore void. If the one-year limit were not also void, the contracts could be extended without limit, which would result in continuing insecurity in employment, contrary to the principle of job security.

26. In my opinion, it is in principle an abuse to structure the employment relationship in that way, even if the contract could not be construed differently. It therefore seems to me that the annulment of the six-year maximum duration of contracts for foreign-language assistants is not sufficient on its own to remove the discrimination which is contrary to Community law, but may only be so in conjunction with the annulment of the obligatory one-year limit on the duration of contracts.

27. Finally, the Italian Government justifies the one-year limit by referring to the fact that the contracts of employment of foreign-language assistants depend on the funds available. In my view this argument must be rejected because the principle that funds must be available applies basically to all posts in the public service. The fact that, in the specific case of foreign-language assistants, contracts of employment are governed by private law form in no way alters the fact that the university is a public-law employer.

28. On the basis of the comparison of foreign-language assistants with the position of employees in general in Italy, I conclude that the compulsory limit of one year on contracts of employment constitutes discrimination which is prohibited in Community law by Article 48(2) of the EEC Treaty.

29. In the present proceedings the Italian Government has again adduced teaching staff under contract as a comparable group of workers in the university sector. Their contracts of employment are also for a limited period and may be concluded for a maximum term of three years. Thereafter the post in question must be filled by an employee with a permanent contract of employment.

30. No agreement was reached on the question whether teaching staff under contract are a suitable comparable group. It was pointed out that, unlike foreign-language assistants, they are self-employed and are not employees, so that the conditions of their contracts could not be used to prove unequal treatment of foreign-language assistants. Furthermore, they were said to be able to influence the wording of their contracts, which was impossible for foreign-language assistants. In my opinion, this is such a fundamental difference that the two occupational groups cannot be compared.

31. The removal of the limit on the duration of employment also raises the question whether the two types of employment relationship are comparable. The rule that, after a member of the teaching staff has been employed under contract for three years, his post must be filled by an employee with a permanent contract may also be regarded as a manifestation of the principle of security of employment, even if the individual concerned does not benefit from it in a particular case. The fact that the employment contract of a fixed-term employee may be renewed indefinitely reinforces the difference between his legal position and that of a member of the teaching staff under contract.

32. In conclusion, therefore, I take the view that the one-year limit on the employment contracts of foreign-language assistants in the third paragraph of Article 28 of Decree No 382/1980 also constitutes prohibited discrimination within the meaning of Article 48(2) of the EEC Treaty. The necessary adjustment to existing needs may be made with fewer contracts of limited duration only in exceptional cases and only in accordance with the rules laid down by the legal system of the Member State in question. In this context paragraph 17 of the judgment in Case 33/88 may also be incorporated in so far as it refers to the non-renewal of the contracts of assistants who are not needed.

C — Conclusion

33. On the basis of the foregoing considerations I propose the following reply to the question from the national court:

Article 48(2) of the EEC Treaty precludes a provision such as the third paragraph of Article 28 of Decree No 382/1980, also in so far as it limits the contracts of employment of foreign-language assistants to one year.