1. Since it 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, employment as a teacher, in general, and as a foreign-language assistant at a university, in particular, is not employment in the public service within the meaning of Article 48(4) of the EEC Treaty.

2. The principle of equal treatment of which Article 48(2) is one embodiment and which 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 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 precludes a given category of workers, largely nationals of other Member States, such as foreign-language assistants in universities from being excluded from the social security scheme of a Member State which is in general available to other workers in that Member State.

REPORT FOR THE HEARING
delivered in Case 33/88 *

I — Facts and procedure

A — *The dispute in the main proceedings*

Since the 1980/81 academic year, Pilar Allué and Carmel Mary Coonan, the plaintiffs in the main proceedings, have been employed as foreign-language assistants at the Università degli studi di Venezia (University of Venice). In November 1986 the University of Venice refused, on the basis of the Italian legislation in force (Presidential Decree No 382 of 11 July 1980 — hereinafter referred to as 'the Presidential Decree'), to extend the contract governing its relationship with the plaintiffs or to conclude a new contract with them.

* Language of the case: Italian.

The plaintiffs in the main proceedings then obtained an interim order from the Pretura unificata di Venezia (Magistrate's Court, Venice) requiring the Rector of the University of Venice to take the measures necessary to ensure that the plaintiffs would continue to be employed until the main proceedings had been decided.

In the main proceedings the plaintiffs claimed that the Pretura unificata should:

(1) establish and declare that the relationship between the plaintiffs and the University from the 1980/81 academic year to the 1985/86 academic year was an employment relationship;

(2) declare that this employment relationship was for an indeterminate period;

(3) order the University to pay the difference between the salary actually received by the plaintiffs and that payable to them on the basis of the remuneration of a lecturer engaged for a determinate period;

(4) establish and declare that the plaintiffs were entitled to compulsory social security and insurance cover as from the date on which the employment relationship commenced.

Since it considered that the interpretation of a number of Community provisions were necessary to enable it to decide the case pending before it, the Pretura unificata di Venezia stayed the proceedings and asked the Court for 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.'

B — *Written procedure*

1. The order of the Pretura unificata di Venezia was received at the Court Registry on 29 January 1988.

2. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 9 May 1988 by the Commission of the European Communities, represented by Enrico Traversa, a member of its Legal Department, acting as Agent, and on 16 May 1988 by the plaintiffs in the main proceedings, Pilar Allué and Carmel Mary Coonan, represented by Professor Fausto Capelli, of the Milan Bar, and by Maria Virgilio, of the Bologna Bar.

3. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. A number of questions were put to the Italian Government.

II — The Italian rules applicable

Article 28 of the Presidential Decree provides as follows:

'Within the limits of the funds decided upon and distributed for that purpose in accordance with the rules laid down in Article 25 above and entered in the University budgets, rectors may engage on contracts governed by private law, upon reasoned proposals from the faculty concerned and in order to meet the actual needs for practice of students attending language courses, even outside the scope of specific international agreements, foreign-language assistants of proven and recognized competence, verified by the faculty, up to a number not exceeding a ratio of 1 to 150 between the assistant and the students actually attending the course.

The faculty must in every case certify the specific competence of the assistants. The corresponding costs shall be covered by funds provided for that purpose for each university by decree of the Minister for Public Education after consultation of the National University Council. Estimates of expenditure shall be based on the numbers of students who attended the corresponding courses in the preceding academic year.

Authorization of a ratio lower than that prescribed in the preceding paragraph shall be granted by the Minister for Public Education only in the case of manifest need, after deliberation of the Faculty Board, stating reasons, and consultation of the National University Council.

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.

The duties of assistants and their remuneration shall be decided upon by the Administrative Council of the university after consulting the Faculty Board.

Remuneration shall not exceed the starting salary of a lecturer engaged for a determinate period.'

Pursuant to that provision, two circulars issued by the Italian Ministry of Public Education (No 8544 of 29 December 1980 and No 5494 of 29 December 1982) instructed universities to conclude with foreign-language assistants contracts for the supply of intellectual work by self-employed persons instead of contracts of employment. According to the rules applicable to such contracts, it is for the person supplying the work to deduct from his remuneration the amount necessary to pay social security contributions subsequently; in the case of an employed person, it is the employer who is responsible for paying a substantial part of such contributions.

The application of the aforesaid circulars gave rise to a number of actions either brought by the assistants affected or between the Ministry of Public Education and the Instituto nazionale della previdenza sociale (INPS). According to the Commission, all the national courts upheld the plaintiffs' claims that they were employed persons, and ordered the universities in question to pay the social security contributions which had not been paid. The consiglio di Stato took the same view in its opinion of 30 September 1987.

III — Written observations submitted to the Court

1. *The question whether the employment in question constitutes employment in the public service within the meaning of Article 48(4) of the Treaty*

The Commission and the plaintiffs in the main proceedings consider that this question should be answered in the negative. The State has an interest not in excluding from such posts nationals of other Member States but on the contrary in filling the posts in question with non-Italian nationals capable of offering students taking degree courses in foreign languages and literature advanced teaching in those subjects and a model of correct pronunciation of the language taught. These posts are, by their very nature, in practice occupied by foreigners.

In any event, the Court has held that once a national of another Member State has been duly engaged to occupy a post in the public service, Article 48(2) is applicable.

2. *The question of the compatibility with Article 48(2) of the Treaty of a provision restricting to six years (a one-year contract renewable five times) the employment relationship between universities and foreign-*

language assistants, when security of tenure is in principle guaranteed to Italian workers and the characteristics of the post in question do not justify derogation from that principle

On this question the Commission states that Article 28 of the Presidential Decree applies to Italian nationals and nationals of other Member States without distinction. However, according to the judgments of the Court, Article 48(2) of the Treaty prohibits indirect or disguised discrimination.

In view of the fact that the Italian Republic is essentially a monolingual State (apart from certain German-speaking linguistic 'islands' or 'peninsulars' situated essentially in the Alto Adige or the south Tyrol, the entire population has Italian as its mother tongue), the vast majority of foreign-language assistants employed by Italian universities are of non-Italian nationality. It is therefore essentially migrant workers who are nationals of other Member States that face the problem of the restriction in question.

According to the Commission, in order to ascertain whether the six-year restriction on the length of contracts concluded between the universities and foreign-language assistants constitutes indirect or disguised discrimination prohibited by Article 48(2) of the Treaty, it is necessary to determine which Italian workers perform duties comparable to those of the assistants. The comparison made by the national court between the assistants and all workers in the private sector, whom the law guarantees security of tenure, is not appropriate in the light of the judgments of the Court on Article 48(4), which apply equally in the case of Article 48(2). According to those judgments, the criterion for determining whether Article 48(4) of the Treaty is applicable must be functional and must take account of the nature of the tasks and responsibilities inherent in the post (see in particular, judgment of 3 June 1986 in Case 307/84 *Commission* v *France* [1986] ECR 1725).

According to the Commission, it is impossible to accept the comparison between foreign-language assistants and lecturers under contract, who are employed by Italian universities on an annual contract for the supply of work which may not be renewed more than twice unless a derogation from such restriction is granted by decree of the Minister for Public Education in person 'solely where it appears impossible otherwise to provide highly specialized training of a largely technological nature in sectors in which the university does not have the appropriate qualified staff' (Article 25, seventh paragraph of the Presidential Decree). None of these restrictive conditions appears in Article 28 of the Presidential Decree as regards foreign-language assistants.

Under the previous legislation, the duties closest to those of foreign-language assistants were those of university assistants, but those posts were abolished by the 1980 reform. Today, the category of researchers is perhaps the one whose duties are comparable to those performed by foreign-language assistants. Article 32 of the Presidential Decree provides, as regards researchers:

'University researchers . . . perform pedagogical duties which supplement the official teaching courses. Those duties include exercises, cooperating with the students on research for dissertations and helping to test new teaching methods and related tutorial activities.'

In addition, Article 34 of the Presidential Decree provides as follows: '. . . the legal status of university researchers is governed, in so far as it is not specifically laid down in this decree, by the provisions on the legal status of established university assistants'.

The duties of foreign-language assistants are to work with the professor holding the chair in foreign-language and literature and are strictly comparable, if not identical, to those of university assistants or researchers who, by law or as a matter of fact, are almost all of Italian nationality and benefit from absolute security of tenure up to the age of 65 (Article 11 of Law No 349/1958 and the penultimate paragraph of Article 34 of the Presidential Decree).

The Commission accepts that the duties of a foreign-language assistant are comparable to those of lecturers, in particular on the basis of the last paragraph of Article 28 of the Presidential Decree which provides that 'the remuneration (paid to foreign-language assistants) may not exceed the starting salary of a lecturer engaged for a determinate period'. The result, however, is the same since lecturers also enjoy security of tenure.

According to the Commission, comparison of the duties of foreign-language assistants to those of researchers or lecturers is not invalidated by the argument that the assistants' work is of an exceptional and occasional nature. Although that may be so in the case of the teaching of the least commonly spoken Community languages (such as Portuguese or Danish), which might be taught on a trial basis, or in the framework of the system for the exchange of assistants between Italian universities and other Member States, outside these rare cases the teaching of foreign languages would be inconceivable without the participation of highly specialized native teachers and meets permanent needs. That is borne out by the fact that universities have had to conclude new contracts with assistants other than those affected by the legislation in question.

Nor is such a comparison invalidated by the argument that the universities need to obtain 'fresh' assistants, that is to say assistants with an up-to-date knowledge of their mother tongue and in particular of the spoken, living language. Although such a need unquestionably exists, the means employed by the Italian legislature are out of proportion to the objective to be attained. In order to ensure that foreign-language assistants employed in Italian universities maintain an adequate knowledge of their mother tongue, it would be sufficient to reimburse the cost of one or more trips every year to their State of origin, to provide for special leave for basic or advanced vocational training in their country of origin as well as temporary secondment in the interests of the service to universities in that country. The university employing the assistant could also regularly

make available to him appropriate recent publications in his mother tongue.

It would then be for the Faculty Board to check periodically, and if necessary every year, as provided for by Article 28 of the Presidential Decree, the linguistic and cultural knowledge of the assistant and to take appropriate measures in cases where it discovers an unacceptable reduction in the assistant's linguistic and cultural ability — and in no other cases.

The plaintiffs in the main proceedings essentially share the Commission's opinion.

Article 28 of the Presidential Decree in their view constitutes discrimination prohibited by Article 48(2) of the Treaty in so far as it essentially affects nationals of other Member States even though it makes no formal distinction between nationals of the host State and nationals of other Member States.

The duties of foreign-language assistants are in most cases comparable to those of researchers and in certain cases comparable to lecturers. In addition to the work in the linguistic sphere, assistants are expected to assist professors in their work relating to doctoral theses and examination boards and give courses, which researchers are not required to do. The rules governing assistants' work are laid down by the professors. The timetable is strictly tied to the academic timetable without any leeway for the assistant, whose conduct is subject to the control of the dean of the faculty.

Both researchers and lecturers enjoy security of tenure.

The argument that the need to ensure the purity of the mother tongue distinguishes the duties of an assistant from other duties and justifies the lack of security of tenure cannot be upheld. The plaintiffs in the main proceedings claim that such a line of argument is not supported by any evidence and is contradicted by administrative practice. The Minister for Public Education considers that the six-year limit relates only to employment in a single university.

3. *The question whether the lack of insurance and social security cover constitutes discrimination prohibited by the EEC Treaty and in particular by Article 51*

The Commission and the plaintiffs in the main proceedings claim that this question need not be answered. It is by implication covered by the second question and in any event the difference in treatment as regards social security to the detriment of foreign-language assistants is contrary to Italian legislation. As was established by the aforesaid decision of the consiglio di Stato, their work is in the nature of employment.

J. C. Moitinho de Almeida
Judge-Rapporteur