JUDGMENT OF THE COURT (Fifth Chamber)
20 November 1997 *

In Case C-90/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Tribunale Amministrativo Regionale per il Veneto (Italy) for a preliminary ruling in the proceedings pending before that court between

David Petrie and Others

and

Università degli Studi di Verona

Camilla Bettoni

on the interpretation of Articles 5 and 48 of the EC Treaty and Articles 1 and 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),

* Language of the case: Italian.

THE COURT (Fifth Chamber),

composed of: C. Gulmann, President of the Chamber, J. C. Moitinho de Almeida (Rapporteur), D. A. O. Edward, J.-P. Puissochet and L. Sevón, Judges,

Advocate General: N. Fennelly,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Mr Petrie and Others, by Lorenzo Picotti, of the Verona Bar,

— the Italian Government, by Professor Umberto Leanza, Head of the Contentious Diplomatic Affairs Department of the Ministry of Foreign Affairs, acting as Agent, assisted by Pier Giorgio Ferri, Avvocato dello Stato, and

— the Commission of the European Communities, by Pieter van Nuffel, of its Legal Service, acting as Agent, and Enrico Altieri, a national civil servant on secondment to that service,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Petrie and Others, the Italian Government and the Commission at the hearing on 6 February 1997,

after hearing the Opinion of the Advocate General at the sitting on 20 March 1997,

gives the following

Judgment

1 By order of 14 December 1995, received at the Court on 21 March 1996, the Tribunale Amministrativo Regionale per il Veneto (Regional Administrative Court for the Veneto) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Articles 5 and 48 of the EC Treaty and Articles 1 and 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).

2 That question was raised in proceedings brought by Mr Petrie, Mr Hill and Mr Newbold against the Università degli Studi di Verona.

3 Mr Petrie, Mr Hill and Mr Newbold are United Kingdom nationals and have been working as foreign-language assistants in the Faculty of Foreign Languages and Literature of the University of Verona for a number of years.

4 The applicants in the main proceedings, who hold contracts of indefinite duration, with pay equivalent to that of a lecturer appointed to work part-time, each applied to fill the temporary teaching vacancy for the course in 'modern language teaching' for the 1995/96 academic year in response to the notice published on 15 March 1995 by the faculty board of the University of Verona, in accordance with Article 12 of Law No 341 of 19 November 1990 (hereinafter 'Law No 341').

5 Article 12 of Law No 341 states:

'5. The first paragraph of Article 114 of Presidential Decree No 382 of 11 July 1980, previously replaced by Article 3 of Law No 477 of 13 August 1984, is replaced by the following paragraph:

"Appointment to teach supplementary courses and to fill temporary teaching vacancies is open only to tenured teaching staff and established university researchers in the same or a similar academic sector who belong to the same faculty; or, in the absence of such persons, by reasoned resolution, to tenured teaching staff and established university researchers of other faculties of the same or another university. When filling temporary vacancies, if applications are received from tenured teaching staff and established researchers in the same academic sector, the faculty board must give preference to applications submitted by teaching staff."'

6 By decisions of 14 April 1995, the rector of the University of Verona rejected the applicants' requests on the grounds that 'Article 114 of Decree No 382 of 1980, replaced by Article 3 of Law No 477 of 1984 and Article 12 of Law No 341, provides that appointment to teach supplementary courses and to fill temporary teaching vacancies is open only to tenured teaching staff and established university researchers'.

7 By resolution of 19 April 1995 the faculty board appointed Ms Bettoni, a teacher from another university, to fill the temporary teaching vacancy for the course in modern language teaching for the 1995/96 academic year.

8 Mr Petrie, Mr Hill and Mr Newbold therefore brought proceedings before the national court challenging the decisions of 14 April 1995 and the resolution of 19 April 1995.

9 It appears from the order for reference that the applicants raised two pleas in law, the first based on infringement of Articles 5 and 48 of the Treaty and Articles 1 and 3 of Regulation No 1612/68 and the second on the illogical and inconsistent nature of the reasoning and conduct of the defendant, which appointed a teacher from another university to fill the temporary teaching vacancy in breach of the criteria governing priority laid down in Article 12 of Law No 341.

10 The University of Verona claimed that the fact that temporary university teaching vacancies must be filled by tenured teaching staff and established university researchers does not involve any discrimination based on nationality. Such a restriction applies in exactly the same way to nationals of all Member States — including, therefore, Italian nationals — who do not fall into either of those two categories.

11 The national court none the less considered that the applicants had submitted several observations which raised doubts as to the validity of that argument. In its order for reference, it makes the following observations.

12 First, until very recently, only Italian nationals could gain access to posts as tenured teachers or established university researchers. Nationals of other Member States have only been able to qualify for such posts since the entry into force of Prime Ministerial Decree No 174 of 7 February 1994, implementing Article 37 of Legislative Decree No 21 of 3 February 1993, which lists the posts in the public service restricted to Italian nationals but does not include teaching posts.

13 Second, it appears from Article 28 of Presidential Decree No 382 of 11 July 1980 (hereinafter 'Decree No 382') and from Judgment No 284 of the Corte Costituzionale (Constitutional Court) of 23 July 1987 that university foreign-language assistants are in a paid employment relationship of indefinite duration and perform

teaching duties which are equivalent in content to those of lecturers or, at least, of university researchers.

14 Finally, as regards the requirement that researchers must be established, the national court points out that renewal of a foreign-language assistant's contract for more than three years is tantamount to acknowledging that such a requirement is satisfied, since it presupposes that his work has received a favourable assessment.

15 In those circumstances, the Tribunale Amministrativo Regionale per il Veneto decided to stay the proceedings before it and to ask the Court:

'whether Articles 5 and 48 of the EEC Treaty and Articles 1 and 3 of Council Regulation (EEC) No 1612/68 have to be interpreted as precluding a Member State's legislation from restricting eligibility for appointment to teach supplementary courses and to fill temporary teaching vacancies in universities to specific categories, such as those provided for under the Italian legislation, within a framework of legislation and administrative practice of the kind that exists in Italy, rather than providing that foreign-language university assistants with an employment relationship of indefinite duration with an Italian university are also entitled to compete for appointment to teach supplementary courses and to fill temporary teaching vacancies in universities.'

Admissibility

16 The Commission considers that the question is inadmissible.

17 It notes that the applicants are challenging the fact that they were excluded from posts as tenured teaching staff or established university researchers, which is a personal requirement for admission to compete for appointment to fill a temporary teaching vacancy under the Italian legislation, which restricts access to those posts to Italian nationals, in breach of Article 48(2) of the Treaty.

18 The Commission considers that the applicants cannot allege infringement of Article 48(2) in proceedings relating to their exclusion from competing for appointment to fill a temporary teaching vacancy, and that that provision thus bears no relation to the actual nature of the case or the subject-matter of the main action.

19 In the Commission's view, therefore, the Court has no jurisdiction to rule on the question whether a provision such as Article 12 of Law No 341 is discriminatory on the ground that persons other than Italian nationals were previously excluded from appointment as tenured teaching staff or established researchers.

20 The Italian Government expresses doubt as to the admissibility of the reference. It considers that the national court has merely reproduced the contentions of fact and law submitted by the parties, without having first verified them and expressed a finding. Rather than referring a question to the Court on the interpretation of Community law, the national court is, in fact, asking the Court to rule directly on the dispute before it.

21 First, as regards the plea of inadmissibility raised by the Commission, it should be noted that the national court is asking whether Articles 5 and 48 of the Treaty and Articles 1 and 3 of Regulation No 1612/68 require the inclusion of foreign-language assistants in the categories of staff eligible for appointment to fill temporary teaching vacancies, bearing in mind, in particular, that until 1994 foreign-language assistants from other Member States were excluded from appointment as tenured teaching staff or university researchers.

22 Since the proceedings before the national court concern the University of Verona's refusal to appoint any of the applicants to fill the teaching vacancy in question and its appointment of a teacher from a different university, the question raised has a connection with the dispute in the main proceedings. The arguments put forward in that respect by the Commission do not, in fact, relate to the relevance of the question referred by the national court but rather to the manner in which it should be answered by the Court.

23 Finally, as regards the question whether the order for reference provides the Court with the necessary details of fact and of law for it to carry out its task under Article 177 of the Treaty, although it is true that the national court has not given a comprehensive presentation of the legislative background to the main proceedings, the Court none the less has sufficient information to provide it with a helpful answer.

Substance

24 By its question the national court is essentially asking whether Articles 5 and 48(2) of the Treaty preclude a national rule which restricts eligibility for appointment to fill temporary teaching vacancies in universities to tenured teaching staff and established university researchers, thus excluding foreign-language assistants who are nationals of other Member States.

25 As a preliminary point, it should be observed that there is no need to consider Articles 1 and 3 of Regulation No 1612/68, since they serve to implement the principle of non-discrimination laid down in Article 48(2) of the Treaty but do not extend its scope.

26 The applicants claim, first, that Articles 5 and 48 of the Treaty require that foreign-language assistants be eligible to compete for appointment to fill temporary teaching vacancies, in view of the fact that they were precluded from gaining access to posts as tenured teaching staff or university researchers by the nationality requirement imposed by national rules which applied until 1994 and were contrary to Article 48.

27 The Italian Government notes that the applicants are not claiming that their applications to fill those vacancies were rejected on grounds relating to their nationality. Furthermore, it points out that in Case 225/85 *Commission* v *Italy* [1987] ECR 2625, it merely argued that Article 48(4) permitted the exclusion of researchers in the 'Consiglio Nazionale delle Ricerche' (hereinafter the 'CNR') from application of the provisions relating to freedom of movement for workers for reasons which do not apply to university researchers.

28 In that respect, it is settled case-law that Article 48(2) of the Treaty has direct effect (see in particular, Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337). As regards, in particular, access to research posts in the CNR, the Court held in *Commission* v *Italy*, cited above, that such posts could not be considered to constitute employment in the public service within the meaning of Article 48(4) of the Treaty.

29 Nationals of other Member States could therefore apply for posts as university researchers and challenge the refusal to admit them to the relevant competitions on the basis of Article 48 of the Treaty.

30 In any event, the fact that the nationality requirement imposed, until 1994, by the Italian law in respect of participation in competitions for posts as tenured teaching staff or established researchers was discriminatory, and thus contrary to Article 48 of the Treaty, does not, in itself, enable the persons concerned to insist that they must be eligible for appointment to fill temporary teaching vacancies. In order to

be eligible, they must first be tenured teachers or established researchers and the discriminatory nature of one of the conditions for participating in the competitions for such posts does not exempt them from the need to pass the competitions.

31 That conclusion does not however mean that the persons concerned cannot seek compensation, for the harm suffered as a result of the application of the discriminatory clause at issue, before the competent courts, according to the relevant national procedures and under the conditions laid down in Joined Cases C-46/93 *Brasserie du Pêcheur v Federal Republic of Germany* and C-48/93 *The Queen v Secretary of State for Transport, ex parte Factortame and Others* [1996] ECR I-1029.

32 The applicants claim, second, that the rule at issue is discriminatory is so far as it excludes foreign-language assistants who are nationals of other Member States from being appointed to fill temporary teaching vacancies, although their teaching activities are essentially the same as those of lecturers or university researchers.

33 They point out that, according to the first paragraph of Article 6 of Law No 349 of 18 March 1958, foreign-language assistants enjoy the same legal and economic status and the same career structure as university assistants and that, in Judgment No 284, cited above, the Corte Costituzionale found the duties of the two categories of staff to be comparable, noting that it was clear from university practice that the duties of foreign-language assistants were not limited to exercises on the correct pronunciation of foreign languages. Although the category of university assistant no longer exists under the current legislation on the organization of Italian universities, that category is governed, as a transitional measure and for various purposes, by an express reference to the regime for established researchers.

34 Furthermore, the applicants state that in their duties, which must be coordinated with those of the staff teaching official courses (as is also the case for researchers), they may choose their own teaching methods and frequently return to their

Member State of origin in order to refresh their language skills; their situation is clearly different from that of other categories of non-teaching staff.

35 Furthermore they claim that the exclusion of foreign-language assistants from eligibility to fill temporary teaching vacancies is even less justified in view of the fact that the first paragraph of Article 16 of Law No 341 provides that 'tenured assistants' ('assistenti di ruolo ad esaurimento') and even 'qualified technicians' with certain qualifications are included in the categories of 'researchers' or 'established researchers'. For qualified technicians, as for foreign-language assistants, there is no provision for any examination with a view to establishment and, in any event, the Corte Costituzionale has already held in Judgment No 284, cited above, that the categories of foreign-language assistant and university assistant are equivalent.

36 Finally, the fact that foreign-language assistants are engaged under private-law contracts whilst lecturers and researchers have the status of civil servants is a purely formal distinction which should be of no relevance as regards the application of the relevant provisions of Community law.

37 The Italian Government claims that, in the context of an education planning policy which must ensure 'optimum use of teachers and researchers in teaching structures', teachers and researchers may be required, pursuant to Article 12 of Law No 341, to teach supplementary courses or fill temporary teaching vacancies in addition to their existing teaching activities, which constitute the principal purpose of their employment relationship with the university. The teaching of additional courses and the filling of temporary teaching vacancies do not, therefore, involve separate teaching posts.

38 Thus, according to the Italian Government, the reason why Article 12 of Law No 341 does not include foreign-language assistants amongst the persons eligible for appointment to teach additional courses or to fill temporary teaching vacancies is that, in their case, such appointment would involve not an extension of their activity but rather a principal activity requiring the creation of a separate employment relationship.

39 The Italian Government considers that the eligibility of established researchers for appointment to teach supplementary courses or to fill temporary teaching vacancies is justified since their professional experience after three years' service, and their establishment, which must be approved by a national teaching committee (Article 31 of Decree No 382), imply that they are qualified to teach supplementary courses or fill temporary teaching vacancies.

40 Furthermore, as far as their teaching ability is concerned, the Italian Government points out that foreign-language assistants are employed on the basis of private-law contracts, without participating in any open competition, on the basis of their linguistic knowledge acquired in another country, in order to satisfy students' 'needs for practice' (Article 28 of Decree No 382), and that renewal of their contracts is not subject to the same requirements as those for establishment of researchers. In contrast, Article 32 of Decree No 382 defines the teaching duties of researchers as including, in addition to practical work, assisting students in research relating to their final theses, experimenting with new teaching methods and providing guidance. Furthermore, Article 32 also refers to academic research, whereas the provisions relating to foreign-language assistants do not mention any of those activities. Academic research is indispensable in teaching, particularly in 'horizontal' subjects, such as modern language teaching.

41 It is thus clear that the conditions concerning the recruitment and assessment of the professional skills of the two categories in question and the nature of the activities which they are required by statute to perform are different; thus, since those categories are not comparable, the rule at issue in the main proceedings is not discriminatory.

42 As regards the judgment of the Corte Costituzionale, cited above, the Italian Government claims that the provision which was held to be unconstitutional is part of a specific measure intended to bring certain categories of staff, whose employment relationships are particularly precarious, within the category of researchers. Inclusion within that category is dependent upon assessment of the candidates' skills by committees consisting of three university teachers, one designated by the faculty

board and the others by the national university board. Before the 1980 reforms, researchers and foreign-language assistants were subject to different rules.

43 The Italian Government adds that, in any event, since appointment to teach a supplementary course or to fill a temporary teaching vacancy does not involve the creation of an employment relationship, Article 48(2) of the Treaty, which refers to access to employment, has no relevance.

44 The Commission considers that, in order to determine whether the rule at issue is discriminatory, it is necessary to ascertain whether the tasks performed by foreign-language assistants are identical to those performed by tenured teachers and established researchers. The order for reference provides no information in that respect. If the applicants' argument were accepted, discrimination of an opposite kind, even more serious than that alleged here, might occur. Eligibility to compete for appointment to fill temporary teaching vacancies would be open to persons (foreign-language assistants) who would thus enjoy more favourable treatment than researchers or tenured teachers, since they are recruited under private-law contracts and have therefore not participated in any competition.

45 First of all, the Italian Government's argument that the restriction in question does not involve access to employment, and that there is thus no infringement of Article 48(2), must be rejected.

46 The principle of equal treatment enshrined in that provision is not limited to access to employment but also includes remuneration and other conditions of employment, a concept which covers the ineligibility of foreign-language assistants to be appointed to fill temporary teaching vacancies.

47 In order to determine whether a rule such as the one at issue breaches the principle of equal treatment, it is necessary to ascertain whether the situation of foreign-language assistants is comparable to that of lecturers and established researchers.

48 A Member State may consider that temporary teaching vacancies, involving the replacement of teachers who, for whatever reason, are prevented from teaching, must in the first place be filled by other teachers who enter university teaching by open competition or, failing that, by established researchers who, in addition to participating in an open competition, must also be 'established', under a procedure whereby their teaching and academic skills are recognized by a national committee after three years' service.

49 Such a choice is based on the premiss that only the open competitions and establishment mentioned above ensure the recruitment of teachers with the necessary skills for university teaching, on the basis of assessment criteria applied throughout the country; it cannot be called into question by claiming that the duties of foreign-language assistants are comparable to those of lecturers and researchers.

50 Even if, as the applicants claim, foreign-language assistants are called upon to carry out some research work under their contracts with the universities and therefore do more than merely satisfy students' 'needs for practice', in the definition of the duties of foreign-language assistants set out in Article 28 of Decree No 382, it is none the less necessary to demonstrate that their academic and teaching skills are equivalent to those of lecturers and established researchers.

51 In order to make such an assessment, competitions organized to fill temporary teaching vacancies, based on an examination of the candidates' files, would have to have the same characteristics as the open competitions which, according to the Member State concerned, are the only means of selecting staff who satisfy the requirements of university teaching. Such competitions, which would thus duplicate those organized for teaching and research posts, would be contrary to the requirements of sound university management.

52 In those circumstances, the situation of established researchers is not comparable, in principle, to that of foreign-language assistants and, in that context, a national rule such as that at issue in the main proceedings is therefore not contrary to Article 48(2) of the Treaty.

53 Such a rule could none the less be contrary to Article 48(2) of the Treaty if it assimilated to established researchers other categories of staff appointed to university teaching otherwise than by way of open competition, whose teaching and academic skills were not subject to evaluation in the same way as those of researchers and thus permitted them to compete for appointment to fill temporary teaching vacancies, whilst foreign-language assistants who, under Italian law, had the same status and performed equivalent duties were excluded.

54 In that connection, it must be recalled that, according to the case-law 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 (see, in particular, Case 33/88 *Allué and Another* v *Università degli Studi di Venezia* [1989] ECR 1591 (hereinafter '*Allué I*'), paragraph 11).

55 Although a rule such as that referred to in paragraph 5 above may apply irrespective of the nationality of the worker concerned, it operates, in practice, to the detriment of nationals of other Member States. As the Court noted at paragraph 12 of the judgment in *Allué I*, only 25% of foreign-language assistants are Italian nationals, according to the statistics provided by the Italian Government.

56 In those circumstances, if it were not justified on objective grounds, such a rule would be incompatible with Article 48(2) of the Treaty. It is for the national court, in the light of the factual and legal circumstances of the case before it, to ascertain whether that is so.

57 The answer to the national court's question must therefore be that Articles 5 and 48(2) of the Treaty do not preclude a national rule which reserves eligibility for appointment to fill temporary teaching vacancies in universities to tenured teachers and established researchers and excludes foreign-language assistants, unless such appointment is open to other categories of staff appointed to university teaching otherwise than by way of open competition, whose teaching and academic skills are not subject to evaluation in the same way as those of researchers, whilst foreign-language assistants who, under national law, have the same status and perform equivalent duties are excluded.

Costs

58 The costs incurred by the Italian Government and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Tribunale Amministrativo Regionale per il Veneto by order of 14 December 1995, hereby rules:

Articles 5 and 48(2) of the EC Treaty do not preclude a national rule which reserves eligibility for appointment to fill temporary teaching vacancies in universities to tenured teachers and established researchers and excludes foreign-language assistants, unless such appointment is open to other categories of staff appointed to university teaching otherwise than by way of open competition, whose teaching and academic skills are not subject to evaluation in the same way as those of researchers, whilst foreign-language assistants who, under national law, have the same status and perform equivalent duties are excluded.

Gulmann Moitinho de Almeida Edward

Puissochet Sevón

Delivered in open court in Luxembourg on 20 November 1997.

R. Grass C. Gulmann

Registrar President of the Fifth Chamber