Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

2 February 2012 *

(Convention defining the Statute of the European Schools — Interpretation and application of Articles 12(4)(a) and 25(1) — Right of seconded teachers to access to the same progression in status and pay as those enjoyed by their national counterparts — Exclusion of certain teachers seconded by the United Kingdom to the European Schools from access to improved pay scales and other additional payments available to their national counterparts — Incompatibility with Articles 12(4)(a) and 25(1))

In Case C-545/09,

ACTION brought on 22 December 2009 under Article 26 of the Convention defining the Statute of the European Schools,

European Commission, represented by J. Currall and B. Eggers, acting as Agents, with an address for service in Luxembourg,

applicant,

v

United Kingdom of Great Britain and Northern Ireland, represented by H. Walker, acting as Agent, and J. Coppel, Barrister,

defendant,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, A. Borg Barthet, M. Ilešič (Rapporteur), J.-J. Kasel and M. Berger, Judges,

Advocate General: P. Mengozzi,

Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 4 May 2011,

after hearing the Opinion of the Advocate General at the sitting on 7 July 2011,

gives the following

* Language of the case: English.

Judgment

1 By its application, the European Commission seeks a declaration from the Court that Article 12(4)(a) of the Convention defining the Statute of the European Schools of 21 June 1994 (OJ 1994 L 212, p. 3, 'the Convention') is to be interpreted and applied so as to ensure that teachers seconded by a Member State have access during their secondment to the same progression in status and pay as those enjoyed by teachers employed in that Member State, and that the exclusion of certain teachers seconded by the United Kingdom of Great Britain and Northern Ireland, during their secondment, from access to improved pay scales (known as 'threshold pay', 'excellent teacher system' or 'advanced skills teachers') and from access to other additional payments (such as 'teaching and learning responsibility payments'), and also from progression within existing pay scales available to teachers employed in maintained schools in England and Wales, is incompatible with Articles 12(4)(a) and 25(1) of the Convention.

Legal context

The Convention defining the Statute of the European Schools and the Regulations for Members of the Seconded Staff

2 The European Schools were originally set up by two instruments: the Statute of the European School, signed at Luxembourg on 12 April 1957 (*United Nations Treaty Series*, Volume 443, p. 129), and the Protocol on the setting-up of European Schools with reference to the Statute of the European School, signed at Luxembourg on 13 April 1962 (*United Nations Treaty Series*, Volume 752, p. 267).

3 Those instruments were replaced by the Convention, which entered into force on 1 October 2002 and is the instrument currently applicable. Unlike the original instruments, to which only the Member States were parties, the Convention was also concluded by the European Communities, which were empowered to do so by Council Decision 94/557/EC, Euratom of 17 June 1994 authorising the European Community and the European Atomic Energy Community to sign and conclude the Convention defining the Statute of the European Schools (OJ 1994 L 212, p. 1).

4 The third recital in the preamble to the Convention reads:

'considering that the European School system is "sui generis"; considering that it constitutes a form of cooperation between the Member States and between them and the European Communities while fully acknowledging the Member States' responsibility for the content of teaching and the organisation of their educational system, and for their cultural and linguistic diversity'.

5 Article (3)2 of that Convention provides:

'Instruction shall be provided by teachers seconded or assigned by the Member States in accordance with decisions taken by the Board of Governors under the procedure laid down in Article 12(4).'

6 Article 12(4)(a) of the Convention, which falls within the second title thereof, entitled 'Organs of the Schools', provides:

'In administrative matters, the Board of Governors shall:

...

(4) (a) determine each year, on a proposal from the Boards of Inspectors, the teaching staff requirements by creating or eliminating posts. It shall ensure a fair allocation of posts among the Member States. It shall settle with the governments questions relating to the assignment or secondment of the secondary school teachers, primary school teachers and education counsellors of the School. Staff shall retain promotion and retirement rights guaranteed by their national rules'.

7 Article 25 of the Convention reads as follows:

'The budget of the Schools shall be financed by:

1. contributions from the Member States through the continuing payment of the remuneration for seconded or assigned teaching staff and, where appropriate, a financial contribution decided on by the Board of Governors acting unanimously;

2. the contribution from the European Communities, which is intended to cover the difference between the total amount of expenditure by the Schools and the total of other revenue;

3. contributions from non-Community organisations with which the Board of Governors has concluded an Agreement;

4. the School's own revenue, notably the school fees charged to parents by the Board of Governors;

5. miscellaneous revenue.

The arrangements for making available the contribution from the European Communities shall be laid down in a special agreement between the Board of Governors and the Commission.'

8 Under Article 26 of the Convention, 'the Court of Justice of the European Communities shall have sole jurisdiction in disputes between Contracting Parties relating to the interpretation and application of this Convention which have not been resolved by the Board of Governors.'

9 On the basis of Article 12(1) of the Convention, the Board of Governors adopted the Regulations for Members of the Seconded Staff of the European Schools ('the regulations for seconded staff'). These contain, inter alia, provisions on the remuneration and conditions of employment of the teaching staff of the European Schools.

10 Article 10(1) of the regulations for seconded staff requires seconded teachers to have the qualifications and meet the conditions necessary for an equivalent post in their country of origin. Chapter III of the regulations, entitled 'Performance Evaluation', contains Article 30, which provides, in its first paragraph, that 'the ability, efficiency and conduct in the service of each member of the teaching and supervisory staff and of Deputy Directors shall be the subject of a performance evaluation report drawn up by both the Director and the national Inspector, in accordance with the arrangements laid down in the Implementing Regulations. In the event of disagreement, the Inspector's report shall preponderate.'

11 Under Article 49 of the regulations, teachers on secondment receive their national salary, paid by the competent national authorities, and also receive the difference between the remuneration as laid down in the regulations and the exchange value of their national salary, less compulsory social security deductions, which is paid by the European School ('the European supplement').

12 Under Article 72(1) of the regulations for seconded staff, members of staff whose service terminates are entitled, on leaving — provided that they leave for reasons other than disciplinary action — to the payment of a severance grant proportionate to the length of actual service, up to a maximum of nine

years. That grant is calculated, in accordance with Article 72(2), on the basis of the difference between one and a half months of the last basic European salary, weighted at the rate for the country of origin, and one and a half months of the last basic national salary for each year of service.

13 However, the regulations make no provision for the retirement of seconded teachers, who continue to contribute to their national schemes during their secondment.

The rules applicable to teachers serving in England and Wales

14 In the United Kingdom, education is a decentralised matter, split between three separate jurisdictions, namely England and Wales, which together form a single jurisdiction, Northern Ireland, and Scotland. The terms of employment are different in each of those jurisdictions.

15 For the jurisdiction comprising England and Wales, which is the only relevant jurisdiction for the purposes of the present case, the majority of teachers are employed by maintained schools. The salaries and conditions of employment of those teachers are determined by order of the competent minister in the 'School Teachers Pay and Conditions Document' ('STPCD'), which is binding in relation to any contract of employment concluded by a maintained school.

16 Some teachers are employed not in maintained schools but in other types of school, such as independent, mixed-ability State schools supported by sponsors ('academies'), private schools, the European School in Culham and schools run by foreign governments. For such schools, the terms and conditions of employment laid down in the STPCD are optional.

17 The STPCD of 2009 sets out the pay scales, the key features of which are as follows.

18 There is a basic salary scale for classroom teachers, which has six points. The main criterion for moving up this pay scale is the level of experience measured in completed years of teaching. Thus, leaving aside exceptional cases where the results achieved are unsatisfactory, progression up this scale is automatic.

19 In 2000, a 3% salary increase was granted in England and Wales. At the same time, a pay rise of 7% was granted in that jurisdiction on the basis of a new scheme entitled 'threshold pay', for which teachers had to meet certain conditions in order to qualify.

20 Under this scheme, teachers in England and Wales may, when they reach the threshold level at the top of the basic scale, apply to cross the threshold into the higher salary scale ('post threshold pay scale'). Teachers wishing to make such an application must satisfy certain professional standards, provide evidence of their qualifications and request an assessment of their abilities, which is carried out by the head teacher. The professional standards to be met are set out in a document entitled 'Professional Standards for Teachers'. Once a teacher has crossed the threshold into the higher scale ('post-threshold teacher'), progress up that scale is not automatic but is subject to the conclusions of an annual review meeting.

21 In the case of maintained schools, the STPCD also provides for the possibility of creating posts for 'excellent teachers' and 'advanced skills teachers', for which there are special salary scales, and posts entitling teachers to 'teaching and learning responsibility payments'. Teachers may not occupy more than one of these posts at the same time.

22 Teachers wishing to join the excellent teacher scheme must have been placed at the highest of the three levels of the post-threshold pay scale for at least two years and possess specific professional abilities as laid down in the Professional Standards for Teachers. However, they may apply for

assessment in this connection only in relation to a vacancy for an excellent teacher post in their own school. In addition to their normal classroom duties, excellent teachers have to help other teachers to improve their effectiveness and the quality of their teaching.

23 In order to be eligible for an advanced skills teacher post, candidates need not necessarily have attained the post-threshold pay scale, but must nevertheless meet post-threshold teacher standards and, in particular, the special professional performance standards for advanced skills teachers, as laid down in the Professional Standards for Teachers. Assessments in this connection are carried out by external assessors. These posts entail additional responsibilities, which are carried out for the benefit of teachers from other schools.

24 Finally, teaching and learning responsibility payments are available to all teachers carrying out normal classroom duties, whether or not they have attained the post-threshold pay scale. These additional payments are awarded to teachers who take on 'sustained additional responsibility in the context of [the school's] staffing structure'. They are intended to reward support given to pupils outside the class or leadership in subject or curriculum area development.

The scheme applicable to teachers seconded to the European Schools from England and Wales

25 The UK posts in the European Schools are open to all suitably qualified teachers irrespective of whether, at the time of their secondment or assignment, they are employed in a maintained school, in the private sector, or in schools outside the UK, or indeed even if they are not employed in a teaching job.

26 Teachers seconded by the United Kingdom to the European Schools do not retain their contractual relationship with their previous employer but enter into a new contract of employment with the Department for Children, Schools and Families ('the Ministry of Education') for the purpose of the secondment.

27 This contract of employment stipulates, as regards English and Welsh teachers, that the STPCD does not apply to teachers in the European Schools. It nevertheless provides that the national salaries paid monthly to seconded teachers are fixed in line with the basic salary scale laid down in the STPCD and that they are entitled to the annual nationally negotiated pay increases applicable under the STPCD. It further states that no other increases in national salary will be paid and that a seconded teacher may not, during his secondment to a European School, apply to be paid on a higher salary scale or for any additional allowance or status referred to in the STPCD. Lastly, the contract of employment specifies that employment in a European School is pensionable under the Teachers' Pension Scheme for England and Wales and that contributions are based on national salary only.

The precontentious consultations

28 Following a large number of complaints by the teachers concerned and several parliamentary questions, the Commission has repeatedly raised this issue with successive Secretaries of State responsible for education in the United Kingdom at various times from 2000 onwards, arguing that the decision that British teachers seconded to the European Schools were not entitled to the higher performance-related pay scales was incompatible with the Convention. An initial exchange of letters in 2000 and 2001 and a further exchange of letters in 2007 failed to resolve the difficulty. The Commission then requested that the matter be discussed at the meeting of the Board of Governors of 20 to 22 October 2008. On 20 November 2008 a videoconference took place between representatives of the Commission and the Ministry of Education, which once again failed to resolve the dispute. On

13 January 2009, the Commission made a final request to the Board of Governors with a view to resolving the situation, while announcing that, if there were no result, it would have to make an application to the Court.

29 The interpretation of Articles 12(4)(a) and 25(1) of the Convention was considered at the meeting of the Board of Governors of 20 and 21 January 2009. Following that meeting, the Board of Governors concluded that it 'was unable to resolve this dispute and took formal note of the Commission's intention of requesting the Court of Justice for a ruling on interpretation and application of the said articles and of bringing an action against the United Kingdom on the basis of Article 26 of the Convention in liaison with Articles 10 and 39 of the Treaty'.

30 It was against that background that the Commission brought the present action.

The action

31 By its action, the Commission asks the Court to rule, under Article 26 of the Convention, on the interpretation to be given to the last sentence of Article 12(4)(a) of that Convention and to rule, also, as to whether the United Kingdom is applying that provision correctly, as regards teachers seconded to the European Schools from England and Wales specifically, and is thus complying with the obligations arising under that provision and under Article 25(1) of that Convention.

The interpretation of the last sentence of Article 12(4)(a) of the Convention

Arguments of the parties

32 The Commission submits that the last sentence of Article 12(4)(a) of the Convention imposes an obligation on the Member States to ensure that teachers on secondment retain promotion and retirement rights guaranteed by their national rules. That Convention therefore confers a right to that effect on teachers on secondment.

33 That interpretation is confirmed by the clear and unconditional wording, the context and the objective of the provision, which is to ensure that teachers are not penalised as a result of their secondment.

34 The Commission also submits that the word 'promotion' calls for an independent interpretation and is intended to cover the different national systems of remuneration applicable to teachers in the event of secondment. Thus, the broad meaning of the term is confirmed by analysis of the various linguistic versions.

35 The United Kingdom, in contrast, takes the view that Article 12(4)(a) of the Convention is addressed only to the Board of Governors, and thus does not impose any obligation on the Member States.

36 That interpretation is borne out, first, by the wording of that provision, which is part of the second Title of the Convention, headed 'Organs of the Schools', no provision of which imposes obligations on the Member States, and, second, by the reference made in Article 3(2) of the Convention to Article 12 thereof.

37 According to the United Kingdom, the effect of Article 12(4) is to require the Board of Governors, when exercising administrative functions, to respect national rules regarding promotion and retirement. Indeed, there would be little sense in the argument that the Convention imposed an obligation on Member States to respect their own national rules.

38 Moreover, it would be contrary to Article 165(1) TFEU, which preserves the autonomy of the Member States in organising their educational systems, for the Convention to impose an obligation on Member States to confer rights on teachers seconded or assigned to the European Schools to which they are not entitled under national rules.

39 Furthermore, that Member State submits that, according to the usual understanding in the United Kingdom of the term 'promotion', it ordinarily refers only to the advancement of a teacher to more senior administrative positions with more responsibilities within the management structure of a school, such as head teacher or deputy head teacher. As regards the terms, 'promotion … rights guaranteed' by the national rules, the United Kingdom essentially argues that those terms must be given a strict, literal interpretation. Thus, a promotion which is not automatically granted on the basis of seniority but which must be applied for by the teacher, who will not be promoted unless he satisfies a certain number of criteria, does not constitute a right guaranteed by national rules.

Findings of the Court

40 The dispute between the Commission and the United Kingdom as to the interpretation to be given to the last sentence of Article 12(4)(a) of the Convention essentially turns on two questions: the first, whether that provision entails an obligation on the Member States party to that Convention and the second, the scope to be attributed to the terms 'promotion … rights guaranteed by … national rules'.

41 As regards the first of those two questions, it must, first, be recalled that Article 12(4)(a) of the Convention provides that the Board of Governors is to determine each year, on a proposal from the Boards of Inspectors, the teaching staff requirements by creating or eliminating posts. It is to ensure a fair allocation of posts among the Member States. It is to settle with the governments questions relating to the assignment or secondment of the secondary school teachers, primary school teachers and education counsellors of the School. Staff are to retain promotion and retirement rights guaranteed by their national rules.

42 It thus follows from the wording of that provision that, while the first three sentences place the burden of responsibilities on the Board of Governors, and those responsibilities must be discharged, where appropriate, in collaboration with the governments, its last sentence is worded neutrally, recording the right of teachers to retain their promotion and retirement rights guaranteed by their national rules, without specifying by whom those rights must be guaranteed.

43 However, it is clear that those rights could not be guaranteed if the Member States party to the Convention were free to organise their national rules and the provisions governing the assignment or secondment of their teachers to a European School in a way that would deprive those teachers of those rights during the assignment or secondment.

44 In that regard, it must be pointed out that the promotion and retirement rights of the teachers assigned or seconded to European Schools are entirely governed by the national legislation of the States concerned and that it is, consequently, impossible for the Board of Governors to ensure that those rights are retained where that legislation does not allow them to be retained. Moreover, while the Board of Governors is required to respect that legislation, the fact remains that, first, the application of that legislation to those teachers does not require any intervention on the part of the Board and, second, it is hardly conceivable that the Board could affect the promotion and retirement rights granted to those teachers by their national legislation, given that its powers are limited and strictly defined by the Convention.

45 Against that background, it must be held that the interpretation proposed by the United Kingdom, to the effect that the last sentence of Article 12(4)(a) of the Convention is addressed exclusively to the Board of Governors so as to oblige it to respect national legislation as regards promotion and retirement, would deprive that provision of any meaningful effect.

46 It follows that, contrary to the contention of the United Kingdom, that provision must be interpreted as meaning that it also entails an obligation on the Member States party to the Convention to ensure that teachers retain the promotion and retirement rights guaranteed by their national rules during their assignment or secondment to the European Schools.

47 That finding is undermined neither by the fact that Article 12 of the Convention is part of the second Title, headed 'Organs of the Schools' and that it lists the responsibilities of the Board of Governors in administrative matters nor by the reference made in Article 3(2) of the Convention to Article 12.

48 Although it is common ground that Article 12 principally states the responsibilities falling on the Board of Governors, it must none the less be pointed out that that article also refers, in the penultimate sentence of paragraph (4)(a), to 'governments' and that the last sentence of that provision is worded, as noted in paragraph 42 of the present judgment, not as a responsibility of the Board of Governors, but as an unconditional right of teachers assigned or seconded to the European Schools.

49 Moreover, the placing of that sentence is explained by historical reasons and by the inherent link between the subject-matter of that sentence and that of the preceding sentence. Thus, in the Statute of the European School, mentioned in paragraph 2 of this judgment, in the version of 12 April 1957, those sentences were combined and Article 12(3) of that Statute then provided that the Board of Governors was 'in consultation with the governments, [to] decide matters concerning the assignment or secondment of the School's teaching and supervisory personnel in such a way as to ensure that they retain their statutory rights to promotion and to retirement benefits in their country of origin and enjoy the advantages afforded to civil servants in their category serving abroad'. It is clear from that earlier version of the Statute that the Board of Governors and the governments were jointly to determine questions relating to secondment and assignment so as to ensure that teachers were not disadvantaged as a result of their secondment or their assignment to a European School. Although the Convention, in its current version, further increases the protection of teachers by conferring on them an express and unconditional right, it is in no way intended to release governments from their obligation in that regard.

50 Contrary to what the United Kingdom appears to suggest, that obligation is not, moreover, deprived of purpose by the fact that the Member States are bound to respect their own legislation. It follows from the preceding paragraphs that the responsibility of the Member States party to the Convention to achieve the objective in the last sentence of Article 12(4)(a) entails not only the obligation to respect the national legislation on promotion and retirement rights but also the obligation to ensure that that legislation is structured so as not to exclude teachers assigned or seconded to the European Schools.

51 Such an obligation is not, moreover, incompatible with Article 165 TFEU. First, the limitation of the competences of the European Union as regards education laid down in that article does not concern the Convention given that it is not secondary legislation adopted by the bodies of the Union but an instrument of international law concluded between the Member States of the European Communities. Second, and insofar as the third recital in the preamble to the Convention also states that this 'sui generis' system of cooperation between the Member States and the European Communities acknowledges the Member States' responsibility for the organisation of their educational systems, it must be held that this responsibility is in no way affected by the obligation of the Member States not to penalise teachers assigned or seconded to the European Schools as regards promotion and retirement rights.

52 As regards the second question of interpretation on which the parties disagree and which concerns the scope of the terms 'promotion … rights guaranteed' by national rules, appearing in the last sentence of Article 12(4)(a) of the Convention, it must be pointed out that that scope, and thus the protection granted by that provision to teachers assigned or seconded to the European Schools, may not differ according to their place of origin and that those terms, therefore, require an independent interpretation.

53 Such an interpretation must, inter alia, allow the objective of that provision actually to be achieved and must therefore ensure that teachers do not suffer disadvantages as regards promotion or retirement as a result of their assignment or secondment to a European School.

54 As regards, more specifically, the term 'promotion' ('avancement' in French), it must be held that, in the light of that objective, that term cannot be given the restrictive interpretation proposed by the United Kingdom. As the Advocate General pointed out in points 45 and 46 of his opinion, the term refers not only to a teacher's access to posts at a higher level in the hierarchy of a school, entailing additional responsibility, such as that of head teacher, but also to any career progression. It thus also covers access to grades within a career structure, entailing a better salary but not implying the award of a different title or additional responsibilities.

55 Similarly, contrary to what the United Kingdom seems to suggest, it cannot be inferred from the terms 'promotion … rights guaranteed' by national rules that they are, as a matter of principle, only intended to refer to situations in which the national rules provide for automatic promotion on the basis of seniority. As the Advocate General indicated in points 53 to 55 of his opinion, it follows from the wording and the purpose of the last sentence of Article 12(4)(a) of the Convention that that provision seeks to safeguard, for teachers assigned or seconded to the European Schools, all the rights relating to career progression as laid down by the respective national rules, regardless of the form those rights take. Thus, depending on the content of the rights awarded by those rules, they may take the form of an automatic right to promotion or merely a right to take part in procedures for access to career progression. However, those rights cannot have a less extensive scope than those which those teachers would have enjoyed if they had remained in their post in a school in their Member State of origin.

56 It follows from all the foregoing considerations that the last sentence of Article 12(4)(a) must be interpreted as meaning that it requires the Member States party to that Convention to ensure that teachers assigned or seconded to the European Schools enjoy, during their secondment or assignment, the same rights to career progression and retirement as those applicable to their national counterparts under the legislation of their Member State of origin.

The application by the United Kingdom of the last sentence of Article 12(4)(a) and Article 25(1) of the Convention

Arguments of the parties

57 The Commission submits that the contract of employment which teachers seconded from England and Wales must enter into with the Ministry of Education for the purposes of their secondment to the European Schools freezes their salary at the moment of secondment for the duration of their secondment, excluding them from eligibility for any of the higher pay scales and the teaching and learning responsibility payments laid down in the STPCD and that this situation is inconsistent with Articles 12(4)(a) and 25(1) of the Convention.

58 First, there is the disadvantage for potential candidates of not being able to take part in an assessment which would allow them to access the post-threshold pay scale while seconded. Because of this, when they return to the United Kingdom after their secondment, they can only apply for a job on the basic pay scale, which limits the range of posts they can apply for.

59 Secondly, their non-eligibility for any allowances and promotions during a nine-year secondment significantly reduces the salary taken into account for the calculation of their pension rights and thus the amount of their future pension.

60 Furthermore, the Commission complains that this exclusion entails a significant financial loss to the Union budget, since it has to bear a larger difference between the lower national salary and the harmonised salary under the regulations for seconded staff.

61 It estimates, on the basis of a rough calculation, that the Union budget had to bear in 2008 an additional cost of some EUR 720 000 simply for the 194 teachers seconded from England and Wales. That cost flowed from the higher differential that had to be paid under Article 49(2)(b) of the regulations for seconded staff and, in consequence, under Article 25(2) of the Convention. On the basis of that calculation, it might reasonably be supposed that the inability of teachers seconded from England and Wales to attain the post-threshold pay scale in itself entails an additional cost to the Union budget of between EUR 500 000 and 1 000 000.

62 The Commission emphasises that it does not claim that teachers seconded from England and Wales should automatically move to and progress through the higher salary scales provided for post-threshold teachers, advanced teachers and excellent teachers, or receive teaching and learning responsibility payments. Its claim is simply that such teachers should have the same access to progression on the pay scale as any teacher employed in the United Kingdom and that they should therefore be able to participate in the assessment procedures for access to those salary scales.

63 According to the Commission, a detailed analysis of the various professional standards and tasks to which those salary scales and increments relate reveals that teachers seconded to the European Schools frequently carry out duties which make them in principle eligible to progress to such pay scales and benefit from such increments.

64 The Commission maintains that the United Kingdom cannot rely on alleged technical difficulties to justify its failure to fulfil its obligations under the Convention. Moreover, it disputes that such difficulties really exist or that they could not be resolved by making an effort proportionate to the interests in issue.

65 In so far as concerns, first of all, organising the assessment of teachers on secondment, the Commission observes, first, that assessments for the purposes of access to the post-threshold pay scale are carried out by the head teachers of local schools and that there is prima facie no reason why the head teacher of the European School could not be entrusted with the threshold assessment. Secondly, there appear to be several options. For instance, the United Kingdom could send inspectors to verify the assessments carried out by the head teachers of the European Schools, or send external assessors to carry out the assessment themselves, or choose an appropriate combination of these possible solutions. Finally, there is no reason why assessors from the national agency which carries out the assessments of national candidates for posts for advanced skills teachers and excellent teachers could not visit the European Schools, given that they already assess Ministry of Defence Schools in Germany and other countries outside the United Kingdom.

66 As regards, second, the United Kingdom's argument that access to the higher pay scales depends on the creation of posts, the Commission asserts that this is not the case for access to the post-threshold pay scale, the introduction of which essentially constitutes a disguised general pay rise. Access to the other upper pay scales entails the creation of new posts in the budgetary sense. However, nothing prevents the United Kingdom from giving the Ministry of Education the appropriate number of posts for advanced skills teachers and excellent teachers for teachers on secondment.

67 The United Kingdom dismisses the argument that its policy with regard to seconded teachers is contrary to Articles 12(4)(a) and 25 of the Convention.

68 The United Kingdom submits that the Commission's action is premised on misconceptions with regard to the employment status of teachers on secondment and the nature of the additional payments provided for by the STPCD. In this connection that Member State emphasises, in particular, that English and Welsh teachers on secondment do not necessarily come from maintained schools and consequently may not have been subject to the STPCD before their secondment. The STPCD does not therefore constitute the 'national rules' within the meaning of Article 12 of the Convention.

69 Furthermore, English and Welsh teachers on secondment have chosen to leave their previous position of employment in order to take up a new post in a European School on the basis of a new contract of employment with the Ministry of Education. That contract actually states that a teacher on secondment may not apply for any additional scale or for any additional allowance covered by the STPCD. Those teachers have thus chosen to accept a post to which the STPCD does not apply.

70 For the rest, the United Kingdom argues that the additional payments provided for by the STPCD are not 'guaranteed' by the national rules and do not constitute promotion 'rights' within the meaning of Article 12(4)(a) of the Convention. The payments are not automatically granted on the basis of seniority, but must be applied for and are granted only when certain criteria are met. Further, teaching and learning responsibility payments and the advanced skills teachers and excellent teachers schemes are only available to the extent that individual schools decide to create posts which carry those additional payments. Moreover, the additional payments are not promotions within the meaning of that article, given that teachers who are awarded additional pay in return for undertaking additional responsibilities retain their position as 'teacher' and are not promoted to any higher ranking position.

71 The United Kingdom submits that, if teachers on secondment were to be entitled to additional payments without being obliged to perform the additional responsibilities that go with them, that would create discrimination in their favour to the detriment of 'home' teachers. The United Kingdom disputes, in particular, that teachers on secondment meet the criteria for the award of the additional payments. It maintains that there is no real equivalence between the circumstances of teachers at the European Schools and those of teachers in maintained schools in the United Kingdom who are subject to the STPDC.

72 Such discrimination would also arise from the fact that the performance review of teachers in the European Schools is not as strict and rigorous as the national system. The Commission's proposed solution of sending inspectors from the United Kingdom to review performance in the European Schools would not achieve the same result.

73 Finally, in so far as concerns Article 25 of the Convention, the United Kingdom maintains that even if its interpretation of the last sentence of Article 12(4)(a) were to prove incorrect, that would not mean that the Union budget has suffered any particular loss. Admittedly, it is possible that some teachers could acquire the right to additional payments in the future if they make an appropriate application and are approved. However, insofar as the award of that right would depend upon an individual assessment of each teacher, none of those teachers could claim it at present. The United Kingdom has thus so far fulfilled its obligation under the Convention to pay all teachers' remuneration due to teachers on secondment.

Findings of the Court

74 In essence, the Commission alleges that the United Kingdom has failed to ensure that teachers assigned by that Member State to European Schools retain promotion and retirement rights guaranteed by their national rules in accordance with Article 12(4)(a) of the Convention and, consequently, that it has not continued payment of the remuneration to those teachers, in contravention of Article 25(1) of the Convention.

75 In order to assess the merits of that complaint, it must first be established whether the STPCD constitutes, for those teachers, the national rules within the meaning of the last sentence of Article 12(4)(a) of that Convention.

76 In that regard, it must be noted that, although the Member States party to the Convention remain, as the third recital in the preamble to the Convention recalls, fully responsible for the organisation of their education system, they cannot rely on particular features of that system to evade the obligations deriving from that Convention and to deprive the teachers that they assign or second to the European Schools of the protection provided for by the last sentence of Article 12(4)(a) of that Convention.

77 However, that would be precisely the implication of the argument put forward by the United Kingdom that the STPCD does not constitute national rules within the meaning of that provision, for English and Welsh teachers. According to that provision, given the particular features of the education system of that Member State, there are quite simply no national rules for that system.

78 Moreover, it must be pointed out that the STPCD is compulsory for all maintained schools in England and Wales and that the majority of teachers employed there are actually employed in such schools, but also that, even amongst non-maintained schools, a good number apply the STPCD in part or in full. The Commission has stated in that regard, without being contradicted on that point by the United Kingdom, that the non-maintained schools which apply the STPCD only in part in fact use the conditions laid down in it as a minimum and add additional benefits, and that, in practice, the STPCD applies to 90% of all teachers employed in that Member State.

79 Moreover, the standard employment contract which teachers assigned or seconded from England and Wales to the European Schools sign with the Ministry of Education for the purposes of that assignment or secondment provides that the national salaries paid monthly to those teachers are fixed in accordance with salary scales laid down by the STPCD and that annual salary increases negotiated at national level, applicable under the STPCD, are paid. It is thus common ground that even for those teachers, working conditions are partially governed by the STPCD and that the contract excludes its application only selectively, and in particular as regards the benefit of a higher salary scale and an additional allowance.

80 It must be held that, in those circumstances, the STPCD constitutes the national rules within the meaning of the first sentence of Article 12(4)(a) of the Convention for English and Welsh teachers.

81 As regards the argument of the United Kingdom that it cannot be obliged to grant the rights to promotion provided for by the STPCD to all the teachers which it assigns or seconds to the European Schools, since only some of them were employed, before their assignment or secondment, in a maintained school in England or Wales, it must be observed that the Commission claims, in the present proceedings, that the rights provided for by the STPCD should be applied, not to all teachers assigned or seconded by that Member State, but only to those from England or Wales. Consequently, the fact that the STPCD does not apply to teachers employed, for example, in Scotland is of no relevance in this action.

82 For the rest, since not only maintained schools in England and Wales but also a large proportion of the non-maintained schools apply the STPCD in part or in full, it may be presumed that, of the English and Welsh teachers assigned or seconded to the European Schools, a majority enjoyed the conditions provided for by the SPTCD before their assignment or secondment. Even if it were to appear that some of those teachers were not covered by the STPCD because they were previously employed either by a non-maintained school which did not avail itself of the option of applying the STPCD, or by another school, that fact cannot, in any event, justify the United Kingdom's excluding, on the basis of the standard contract which teachers must sign for the purposes of their assignment or secondment to the European Schools, the application of certain benefits provided for by the STPCD for all English and Welsh teachers.

83 Moreover, contrary to the United Kingdom's contention, such exclusion is not justified by the mere fact that those teachers sign that contract voluntarily and in full knowledge of the situation. While it is true that those teachers are in no way obliged to ask to be assigned or seconded to a European School and are in a position to be aware of the conditions of the new employment contract, the fact remains that those teachers have no choice but to sign that contract, the conditions of which are imposed on them by the Ministry of Education. If the last sentence of Article 12(4)(a) of the Convention is not to be deprived of meaningful effect, it cannot validly be argued that, in such circumstances, the teachers have intentionally foregone the benefits provided for by the STPCD and the right granted them by that provision of the Convention.

84 As regards, next, the question whether access to the more advantageous pay scales such as the post-threshold pay scale and the scales applying to excellent teachers and advanced skills teachers and access to other additional payments such as the teaching and learning responsibility payments provided for by the STPCD constitute promotion rights within the meaning of that provision, it must be recalled that it has already been held in paragraphs 54 and 55 of this judgment that rights which entail more advantageous remuneration without that advantage being linked to the award of a different title to the teacher, and those which are not conferred automatically on the basis of seniority but require the teacher to take part in procedures and meet certain criteria also constitute such rights.

85 It follows that the arguments of the United Kingdom based on the fact that the teachers to whom those scales and payments apply retain their position and had to submit to such procedures must be rejected. Moreover, the Commission maintains, not that the teachers assigned or seconded from England and Wales should automatically benefit from those scales and payments, but that they must have access to them under the same conditions as those applying to English and Welsh teachers subject to the STPCD.

86 Although the United Kingdom submits that assigned or seconded teachers cannot, as a matter of principle, meet the professional standards on the basis of which access to those salary scales is granted and the additional responsibilities linked to the application of certain of those scales and payments, it must be pointed out that the Commission made a detailed analysis of those criteria and those responsibilities, explaining plausibly that a large number of those teachers meet those standards and bear equivalent responsibilities within the European Schools.

87 That analysis and those explanations are not called into question by the specific arguments put forward by the United Kingdom, according to which, essentially, there is no real equivalence between the position of teachers in the European Schools and the position of their national counterparts. That assertion is contradicted by Article 10 of the regulations for seconded staff which requires assigned or seconded teachers to possess the qualifications and meet the conditions necessary to occupy equivalent posts in their countries of origin. Moreover, insofar as the arguments of the United Kingdom are based on the notion that those standards and responsibilities could not, by definition, be met by those teachers given that the European Schools do not operate in the same way as maintained schools in England and Wales, they misconstrue the particular status and sui generis nature of the European Schools.

88 Contrary to the United Kingdom's contention, the access of teachers assigned or seconded to the European Schools from England and Wales to those salary scales and additional payments would not entail discrimination to the detriment of their national counterparts on the ground that it would be impossible to ensure assessment of the professional competence of such teachers which was as precise and rigorous as that carried out at national level. As the Advocate General pointed out in points 87 to 90 of his opinion, there is no basis for that argument since there are perfectly viable solutions enabling such assessments to be carried out. Moreover, the United Kingdom did not explain the reasons why it considers that the various options proposed by the Commission in that connection would not allow a satisfactory result to be achieved, but confined itself to stating that it was not sufficient to send national inspectors into the European Schools.

89 The United Kingdom also submits that many teachers in maintained schools in England and Wales do not benefit from the salary scales for excellent teachers and advanced skills teachers or teaching and learning responsibility payments because no or very few posts giving rise to entitlement to those scales and payments have been created in their schools. However, that fact does not justify excluding all English and Welsh teachers assigned or seconded to the European Schools from the benefit of those scales and payments.

90 Moreover, in response to the Commission's request for the allocation to the European Schools of a number of such posts proportional to that in England and Wales, the United Kingdom did not dispute that such an allocation was actually possible, but stated that the number of posts allocated to the European Schools would then be very low, or non-existent, and that it would accordingly be difficult to determine the European Schools which should actually be given such posts. However, such practical difficulties in the distribution of posts giving rise to entitlement to those scales and payments cannot justify the blanket refusal to allocate such posts to the European Schools. It is, moreover, common ground that, under the penultimate sentence of Article 12(4)(a) of the Convention, the United Kingdom could have the assistance of the Board of Governors to resolve those difficulties in order, inter alia, to identify within the European Schools posts for excellent teachers and advanced skills teachers.

91 It follows from the foregoing that access to higher salary scales such as the post-threshold pay scale and the scales applying to excellent teachers and advanced skills teachers and access to other additional payments such as teaching and learning responsibility payments provided for by the STPCD constitute promotion rights within the meaning of the last sentence of Article 12(4)(a) of the Convention which the United Kingdom must ensure the observance of for the teachers assigned or seconded from England and Wales to the European Schools. Moreover, given that access to those scales and access to those payments have a direct influence on the amount of the retirement pension which such teachers may claim, they also represent a retirement right guaranteed by their national rules, within the meaning of that provision.

92 Finally, as to whether the United Kingdom is applying Article 25(1) of the Convention correctly, it must be recalled that that provision requires the Member States to contribute to the budget of the European Schools by continuing to pay the remuneration of the teachers they second or assign to those schools. According to paragraph 2 of that article, in conjunction with Article 49 of the regulations for seconded staff, the Union contributes to that budget by paying the European supplement. In that regard, the Commission, without being contradicted on that point by the United Kingdom, put forward figures which demonstrated plausibly that the freezing of the remuneration of English and Welsh teachers assigned or seconded to the European Schools resulted in the Union having to pay a higher European supplement to those teachers, which entailed an increase in the annual contribution of the Union to the budget of those schools.

93 That finding is not undermined by the argument of the United Kingdom that access to the higher salary scales and the additional payments depends on an individual assessment of each teacher, which has not yet been made in the case of English and Welsh teachers assigned or seconded to the European Schools. That argument clearly disregards the fact that, first, such assessments have not yet been made precisely because of the systematic exclusion of those teachers from the scales and payments in question and, second, it may reasonably be presumed that, in the absence of such exclusion, some of those teachers would in fact already have been awarded those scales and those payments.

94 It follows that, insofar as the correct interpretation and the correct application of the last sentence of Article 12(4)(a) of the Convention by the United Kingdom would have resulted in a higher contribution by that Member State to the budget of the European Schools, there is at least an indirect link between the breach of Article 12(4)(a) of the Convention and the obligation incumbent on the Member States under Article 25(1) of that Convention, a link which was, moreover, not disputed by

the United Kingdom. Consequently, by preventing those teachers from applying for one of the higher salary scales or benefiting from the teaching and learning responsibility payments the United Kingdom has also breached Article 25(1) of the Convention.

95 In the light of all those considerations, it must be held that, by excluding English and Welsh teachers assigned or seconded to the European Schools, during their assignment or secondment, from access to the higher salary scales, in particular those known as 'threshold pay', 'excellent teacher system' or 'advanced skills teachers' and from access to additional payments, such as 'teaching and learning responsibility payments', provided for by the STPCD, the United Kingdom has applied Articles 12(4)(a) and 25(1) of the Convention incorrectly.

Costs

96 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the United Kingdom has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

the Court (First Chamber)

hereby:

1. **Declares that the last sentence of Article 12(4)(a) of the Convention defining the Statute of the European Schools of 21 June 1994 must be interpreted as meaning that it requires the Member States party to that Convention to ensure that teachers assigned or seconded to the European Schools enjoy, during their secondment or assignment, the same rights to career progression and retirement as those applicable to their national counterparts under the legislation of their Member State of origin;**

2. **Declares that by excluding English and Welsh teachers assigned or seconded to the European Schools, during their assignment or secondment, from access to the higher salary scales, in particular those known as 'threshold pay', 'excellent teacher system' or 'advanced skills teachers' and from access to additional payments, such as 'teaching and learning responsibility payments', provided for by the 'School Teachers Pay and Conditions Document', the United Kingdom of Great Britain and Northern Ireland has applied Articles 12(4)(a) and 25(1) of the Convention incorrectly;**

3. **Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs.**

[Signatures]