JUDGMENT OF THE COURT
3 June 1986 *

In Case 307/84

Commission of the European Communities, represented by its Legal Adviser, Joseph Griesmar, acting as Agent, with an address for service in Luxembourg at the office of Giorgios Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

applicant,

v

French Republic, represented by Gilbert Guillaume, with an address for service in Luxembourg at the French Embassy, 9 boulevard Prince Henri,

defendant,

APPLICATION for a declaration that by making the possession of French nationality a precondition for appointment and establishment in permanent employment as a nurse in public hospitals, the French Republic has failed to fulfil its obligations under the EEC Treaty,

THE COURT

composed of: Lord Mackenzie Stuart, President, T. Koopmans, U. Everling and R. Joliet (Presidents of Chambers), G. Bosco, Y. Galmot and C. Kakouris, Judges,

Advocate General: G. F. Mancini
Registrar: D. Louterman, Administrator

after hearing the Opinion of the Advocate General delivered at the sitting on 15 April 1986,

* Language of the Case: French.

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an application lodged at the Court Registry on 21 December 1984, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by making possession of French nationality a precondition for appointment and establishment in permanent employment as a nurse in public hospitals, the French Republic had failed to fulfil its obligations under Article 48 of the EEC Treaty.

2 Articles L 792 *et seq.* of the French code de la santé publique [Public Health Code] lay down 'General Rules applicable to staff in public hospital establishments and in certain establishments of a social nature'. By virtue of Article L 792, those rules 'apply to persons established in permanent employment in public hospital establishments, public hospices, public retirement homes, with the exception of those attached to the Paris Social Aid Office, establishments which are the responsibility of departmental social services for children, public establishments for maladjusted minors other than national establishments and supervised education or teaching establishments'. The rules include Article 809 which provides that 'no person may be appointed to a post in the establishments referred to in Article L 792: (1) if he does not possess French nationality . . . '.

3 Considering that that nationality requirement was contrary to Article 48 (2) of the Treaty with respect to the employment of nurses and of dental practitioners, and that such employment was not covered by Article 48 (4), on 1 December 1982 the Commission sent a letter to the French Government calling upon it to submit its observations. Having received no reply, the Commission delivered a reasoned

opinion on 23 March 1984, stating that, by imposing a nationality requirement for appointment to or establishment in the permanent posts in question, the French Republic had failed to fulfil its obligations under the Treaty.

4 The French Republic did not respond to the reasoned opinion. However, by decree of 24 February 1984, it abolished the nationality requirement for permanent posts as dental practitioners in public hospitals. Nevertheless, that requirement was maintained for appointment and establishment in permanent employment as a nurse in public hospitals. As a result, the Commission brought the present action.

5 Referring to previous decisions of the Court, the Commission states in the first place that the exception laid down in Article 48 (4) of the Treaty must be interpreted restrictively. The criterion for determining whether a post forms part of the public service is a functional criterion taking account of the duties which the post in question entails: only posts which have a direct connection with specific activities in the public service fall within the exception contained in Article 48 (4) of the Treaty in so far as the exercise of powers conferred by public law and responsibility for safeguarding the general interests of the State are vested in it. The Commission concludes that, by virtue of the case-law of the Court, employment as a nurse in public hospitals is not covered by Article 48 (4) of the Treaty and must therefore be open to nationals of the other Member States without discrimination.

6 The Commission considers that the special features of the French public service (principle of unity, rules applicable to staff, and so on) do not justify a different approach: those special features are not such as to prevent the appointment of nationals of other Member States to permanent posts as nurses. The Commission recognizes, however, that a foreigner established in such a post will not subsequently be able to qualify for promotion to a post in the public service within the meaning of the Treaty, and that therefore the 'career principle' will be called in question. It maintains, however, that to deny the nationals of other Member States

any access to the permanent posts involved in this case on the ground that they could not be subsequently promoted to certain posts would result in even more serious discrimination against them.

7 The French Government considers, in the first place, that the exception contained in Article 48 (4) of the Treaty extends to all employment in the public service and not merely to certain posts in it. A comparison of Article 48 (4) of the Treaty with Article 55 thereof shows that the criterion adopted in the first of those provisions is institutional and not functional.

8 The French Government states, in that connection, that by virtue of the principles governing the organization and internal functioning of the French public service it is not possible to grant access thereto to nationals of the other Member States. It emphasizes that civil servants work in the public service and that their activity is not comparable with that of employees in the private sector. There are a number of rules (principle of unity of the public service, the fact that the civil service is governed by public law, and so on) which are specifically intended to ensure that the public service serves as an instrument for giving effect to the public interest. The criterion advocated by the Commission for the implementation of Article 48 (4) of the Treaty would, in particular, jeopardize observance of the 'career principle' which is one of the fundamental principles applicable to the French public service: a national of another Member State entering the public service could not in any circumstances be promoted to posts in the public service within the meaning of the Treaty. There would therefore be two types of career structure: one for nationals of the other Member States and one for French nationals, who could qualify for promotion to all posts.

9 The French Government considers, in the second place, that in any event Article 48 of the Treaty does not require that workers who are nationals of other Member States should be entitled to become members of the established staff. It is sufficient for them to be entitled, as is the position in France, to take up employment in public hospitals on a contractual basis. In reply to a question put to it by the Court at the hearing, the French Government provided statistics from which it appears that, as at 31 December 1983, French public hospital establishments employed 89 000 nurses of whom 86 000 were established in their posts and 3 000 were employees under contract. Of the latter, fewer than 5% were nationals of other Member States.

10 The first question which arises in these proceedings is whether employent as a nurse in a public hospital is to be regarded as employment in the public service to which the rule prohibiting discrimination contained in Article 48 (2) of the Treaty is not applicable by virtue of Article 48 (4) thereof.

11 In that connection, it should be noted in the first place that, as was held in the judgment of 12 February 1974 (Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153), the scope of the exception provided for in Article 48 (4) of the Treaty cannot be determined by reference to the nature of the legal relationship between the employee and the employing administration and that 'in the absence of a distinction in the provision referred to, it is of no interest whether a worker is engaged as a workman (ouvrier), a clerk (employé) or an official (fonctionnaire), or even whether the terms on which he is employed come under public or private law. These legal designations can be varied at the whim of national legislatures and cannot therefore provide a criterion for interpretation appropriate to the requirements of Community law'. Access to certain posts cannot be limited by reason of the fact that in a given Member State the persons appointed to such posts are governed by staff regulations which provide for establishment. To make the application of Article 48 (4) of the Treaty dependent upon the legal nature of the relationship between the employee and the administration would, in practice, enable the Member States to extend at will the number of posts covered by the exception laid down in that provision.

12 More particularly, it was held in the judgment of 17 December 1980 (Case 149/79 *Commission* v *Kingdom of Belgium* [1980] ECR 3881) that in order to determine whether posts are posts in the public service within the meaning of Article 48 (4) of the Treaty, it is necessary to consider 'whether or not the posts in question are typical of the specific activities of the public service in so far as the exercise of powers conferred by public law and responsibility for safeguarding the general interests of the State are vested in it'. As the Court also stated in that judgment, that interpretation — to the effect that 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 — is necessary in order to ensure 'that the effectiveness and scope of the provisions of the Treaty on freedom of movement for workers and equality of treatment of nationals of all Member States shall not be restricted by interpretations of the concept of public

service which are based on domestic law alone and which would obstruct the application of Community rules'.

13 Finally, it follows from the judgment of 26 May 1982 (Case 149/79 *Commission* v *Kingdom of Belgium* [1982] ECR 1845) that, in view of the nature of the functions and responsibilities which they involve, posts of nurses in public hospitals do not constitute employment in the public service within the meaning of Article 48 (4) of the Treaty.

14 The second question which arises in these proceedings is whether the contested provision of the French Public Health Code leads to discrimination of the kind prohibited by Article 48 (2) of the Treaty.

15 The French Government claims that access to employment as a nurse in public hospitals is not subject to any nationality requirement and that such employment is open to the nationals of other Member States when it comes to recruiting employees under contract as opposed to members of the established staff.

16 That argument must be rejected, since the French Republic has not established that all posts as nurses offered in public hospitals were equally accessible to the nationals of other Member States and that when such nationals were recruited they enjoyed conditions — with the exception of the possibility of promotion to posts in the public service within the meaning of the Treaty — advantages and safeguards which were in every respect equivalent to those deriving from the status of members of the established staff, which is reserved to French nationals.

17 In those circumstances, it must be concluded that by restricting to its own nationals appointment and establishment in permanent employment as a nurse in a public hospital, the French Republic has failed to fulfil its obligations under Article 48 of the EEC Treaty.

Costs

18 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the French Republic has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Declares that by restricting to its own nationals appointment and establishment in permanent employment as a nurse in a public hospital, the French Republic has failed to fulfil its obligations under Article 48 of the EEC Treaty;

(2) Orders the French Republic to pay the costs.

Mackenzie Stuart Koopmans Everling

Joliet Bosco Galmot Kakouris

Delivered in open court in Luxembourg on 3 June 1986.

P. Heim
Registrar

A. J. Mackenzie Stuart
President