JUDGMENT OF THE COURT (Fifth Chamber)
18 June 1985 *

In Case 197/84

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal administratif [Administrative Court], Pau (France), for a preliminary ruling in the proceedings pending before that court between

P. Steinhauser

and

City of Biarritz

on the interpretation of Article 52 of the EEC Treaty,

THE COURT (Fifth Chamber)

composed of: O. Due, President of Chamber, C. Kakouris, U. Everling, Y. Galmot and R. Joliet, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of:

— Peter Steinhauser, the plaintiff in the main proceedings, by J. B. Saint-Cricq and F. Froment, *avocats*,

— the City of Biarritz, by J. Biatarana, *avocat*,

— the Commission of the European Communities, by G. Berardis, a member of its Legal Department, acting as Agent,

after hearing the Opinion of the Advocate General delivered at the sitting on 30 April 1985,

gives the following

* Language of the Case: French.

JUDGMENT

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

Decision

1 By order of 20 July 1984, which was received at the Court Registry on 31 July 1984, the Tribunal administratif [Administrative Court], Pau, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question concerning the interpretation of Article 52 of the EEC Treaty; it seeks, in particular, to ascertain whether Article 52 applies to a provision which makes nationality a condition for the acceptance of applications to participate in a tendering procedure for the allocation of public property belonging to a municipality.

2 That question was raised in a dispute between the City of Biarritz and P. Steinhauser, a professional artist of German nationality residing in that city.

3 On 27 February 1983 the plaintiff in the main proceedings submitted an application to the City of Biarritz to participate in a tendering procedure for the allocation of rented lock-ups belonging to the municipality; the lock-ups are situated in the Port des Pêcheurs and are at present used for the exhibition and sale of craft products.

4 On 1 March 1983 the City of Biarritz refused to allow Mr Steinhauser to participate in the tendering procedure on the ground that Article 3 (2) of the Conditions of Tender provided that 'no person shall be allowed to submit a tender unless he proves his French nationality . . .'

5 Mr Steinhauser brought an action for the annulment of the municipality's decision before the Tribunal administratif, Pau, on the ground that Article 3 (2) of the Conditions of Tender was incompatible with Article 52 of the EEC Treaty, relating to freedom of establishment.

6 The Tribunal administratif, Pau, whilst recognizing that Article 52 of the EEC Treaty was directly applicable, considered that it was not clear from its wording

whether it extended to national measures such as that relied upon by the City of Biarritz which are not intended directly to regulate the right to take up a specific occupation, but merely lay down rules for the allocation, under a tendering procedure, of public property belonging to a local authority in a Member State and make such allocation conditional upon nationality.

7 In those circumstances the national court stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

'Does Article 52 of the Treaty of 25 March 1957 apply to the measures adopted by the City of Biarritz under Article 3 of the Conditions of Tender dated 25 January 1983, when that provision is not intended directly to govern the right to take up an activity as a self-employed person, but lays down rules for the allocation, on the basis of tenders, of premises owned and made available for letting by the City of Biarritz and makes the acceptance of applications conditional upon nationality?'

8 In its question the national court seeks in substance to ascertain whether Article 52 of the EEC Treaty allows the Conditions of Tender in a tendering procedure for the allocation of public property belonging to a municipality to make the acceptance of applications conditional upon nationality.

9 The plaintiff observes that the reference in Article 52 of the EEC Treaty to the pursuit of an activity as a self-employed person must be given a broad interpretation and that the renting of the premises which the City of Biarritz has set aside for use by craftsmen may be regarded as necessary to enable him to pursue his occupation as an artist. It follows, in his view, that the refusal to allow him to participate in the tendering procedure on grounds of nationality, under Article 3 of the Conditions of Tender issued by the City of Biarritz, hinders him in the pursuit of his occupation and constitutes a discriminatory practice which is incompatible with Article 52 of the EEC Treaty, a provision which is directly applicable.

10 The Commission is also in favour of a broad interpretation of Article 52 of the Treaty. It emphasizes that Article 52, which is directly applicable, constitutes a specific application of the general principle that there must be no discrimination on grounds of nationality, embodied in Article 7 of the EEC Treaty, and prohibits any discrimination between a Member State's own nationals and those of other Member States. It therefore requires the abolition of provisions and practices

which prohibit or hinder not only the right to take up, but also the pursuit of, an activity as a self-employed person within the Community.

11 The Commission considers that the latter requirement is apparent both from the wording of Article 52 of the Treaty and from the General Programme for the abolition of restrictions on freedom of establishment (Official Journal, English Special Edition IX, Resolutions of the Council and of the Representatives of the Member States, p. 7, Title III: Restrictions, Section A), which lists amongst the examples of restrictions to be abolished those concerning the right to enter into contracts, the right to submit tenders for contracts with the State or with any other legal person governed by public law, the right to obtain licences or authorizations issued by the State and the right to acquire, use or dispose of movable or immovable property or rights therein.

12 Finally, the Commission considers that the prohibitions laid down by Article 52 of the Treaty apply not only to the rules laid down by the central authorities of each Member State or by professional or trade associations, as is already apparent from the case-law of the Court, but also to the regulations and administrative practices of the local authorities of the Member States.

13 It follows, in the Commission's view, that the decision refusing, on grounds of nationality, to allow the plaintiff to participate in the contested tendering procedure organized by the City of Biarritz is based on a provision which is incompatible with the fundamental principle governing establishment, namely that a Member State must treat nationals of other Member States in the same way as its own nationals. Nor can that provision be justified by either of the two exceptions laid down in that regard, namely the reservation concerning activities connected with the exercise of official authority, provided for by Article 55 of the EEC Treaty, and the reservation relating to public policy, provided for by Article 56 of the EEC Treaty.

14 It should be noted that, as the Court has stated on a number of occasions, Article 52 of the Treaty, which has been directly applicable in the Member States since the end of the transitional period, constitutes one of the fundamental legal provisions of the Community. By prohibiting any discrimination on grounds of nationality resulting from national laws, regulations or practices, that article seeks to ensure that, as regards the right of establishment, a Member State accords to nationals of other Member States the same treatment as it accords to its own nationals. As the Court held in its judgment of 28 April 1977 in Case 71/76 (*Thieffry* v *Conseil de l'ordre des avocats à la Cour de Paris* [1977] ECR 765), it is incumbent upon all the

competent public authorities, including legally recognized professional bodies, to observe that rule.

15 In that regard, it must also be borne in mind that, in the context of the abolition of restrictions on freedom of establishment, the General Programme adopted by the Council on 18 December 1961 provides, as the Court pointed out in its aforementioned judgment, useful guidance for the implementation of the relevant provisions of the Treaty. The Programme provides (in Section A of Title III: 'Restrictions') for the abolition of provisions and practices which, in respect of foreign nationals, exclude, limit or impose conditions on the power to exercise rights normally attaching to the activity of a self-employed person. Those rights include, in particular, the power: (a) to enter into contracts for work, business or agricultural tenancies, and contracts of employment, and to enjoy all rights arising under such contracts; (b) to submit tenders for or to act directly as a party or as a subcontractor in contracts with the State or with any other legal person governed by public law; (c) to obtain licences or authorizations issued by the State or by any other legal person governed by public law; and (d) to acquire, use or dispose of movable or immovable property or rights therein.

16 It follows from the foregoing that any practice or rule adopted by a local authority of a Member State which discriminates against nationals of other Member States falls within the prohibition laid down by Article 52 of the Treaty. Moreover, it must be emphasized that freedom of establishment, as provided for by that article, includes the right not only to take up activities as a self-employed person but also to pursue them in the broad sense of the term. The renting of premises for business purposes furthers the pursuit of an occupation and therefore falls within the scope of Article 52 of the EEC Treaty.

17 The answer to the question submitted by the Tribunal Administratif, Pau, must therefore be that Article 52 of the EEC Treaty does not allow the Conditions of Tender in a tendering procedure for the allocation of public property belonging to a municipality to make the acceptance of applications conditional upon nationality.

Costs

18 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of 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 Tribunal administratif, Pau, by order of 20 July 1984, hereby rules:

Article 52 of the EEC Treaty does not allow the Conditions of Tender in a tendering procedure for the allocation of public property belonging to a municipality to make the acceptance of applications conditional upon nationality.

Due Kakouris

Everling Galmot Joliet

Delivered in open court in Luxembourg on 18 June 1985.

P. Heim
Registrar

O. Due
President of the Fifth Chamber