JUDGMENT OF THE COURT (Sixth Chamber)

26 June 2001 *

In Case C-212/99,

Commission of the European Communities, represented by P.J. Kuijper and E. Traversa, acting as Agents, with an address for service in Luxembourg,

applicant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented by J.E. Collins, acting as Agent, assisted by C. Lewis, Barrister, with an address for service in Luxembourg,

intervener,

* Language of the case: Italian.

Italian Republic, represented by U. Leanza, acting as Agent, assisted by G. Aiello, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, because of the administrative and contractual practices applied by some public universities, which result in the non-recognition of the acquired rights of former foreign-language assistants, even though such recognition is guaranteed to all national workers, the Italian Republic has failed to fulfil its obligations under Article 48 of the EC Treaty (now, after amendment, Article 39 EC),

THE COURT (Sixth Chamber),

composed of: C. Gulmann, President of the Chamber, J.-P. Puissochet, F. Macken, N. Colneric and J.N. Cunha Rodrigues (Rapporteur), Judges,

Advocate General: L.A. Geelhoed,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 11 January 2001,

after hearing the Opinion of the Advocate General at the sitting on 20 March 2001,

gives the following

Judgment

1 By application lodged at the Registry of the Court on 4 June 1999, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, because of the administrative and contractual practices applied by some public universities, which result in the non-recognition of the acquired rights of former foreign-language assistants, even though such recognition is guaranteed to all national workers, the Italian Republic has failed to fulfil its obligations under Article 48 of the EC Treaty (now, after amendment, Article 39 EC).

2 By order of the President of the Court of 16 December 1999, the United Kingdom of Great Britain and Northern Ireland was granted leave to intervene in support of the forms of order sought by the Commission.

National legal framework

3 Following the judgments in Case 33/88 *Allué and Coonan* [1989] ECR 1591 and in Joined Cases C-259/91, C-331/91 and C-332/91 *Allué and Others* [1993] ECR I-4309, as well as a first infringement case (No 92/4660) brought by the Commission under Article 169 of the EC Treaty (now Article 226 EC), the Italian Republic adopted Law No 236 of 21 June 1995 (GURI No 143 of 21 June 1995, p. 9) (hereinafter 'Law No 236'), the purpose of which was to reform foreign-language teaching in Italian universities.

4 Law No 236 laid down four fundamental rules:

(a) The post of foreign-language assistant was abolished and replaced by that of 'associate and mother-tongue linguistic expert' (hereinafter 'linguistic associate');

(b) Linguistic associates are engaged by universities on the basis of a private-law employment contract (and no longer on a self-employed basis) usually concluded for an indeterminate period, and, in exceptional circumstances, in order to meet temporary requirements, for a fixed term;

(c) Linguistic associates are engaged following a public selection procedure, the detailed rules of which are laid down by universities according to their respective statutes;

(d) Those who were previously foreign-language assistants are entitled to a preferential right of employment and, in addition, they retain, under Article 4(3) of Law No 236, the rights acquired in the course of previous employment relationships.

5 In view of the independence of Italian universities, the legal status of linguistic associates is currently governed by the following provisions:

(a) Law No 236 and, more generally, Law No 230 of 18 April 1962 on the regulation of fixed-term employment contracts (hereinafter 'Law No 230'), Article 2 of which provides that, 'if the employment relationship continues after its date of expiry as initially fixed or subsequently extended, the contract of employment shall be deemed to be a contract for an indeterminate period from the date on which the worker was first employed';

(b) the collective employment agreement for the university sector ('Contratto collettivo di lavoro del comparto dell'Università');

(c) the collective agreement at each university ('Contratto collettivo d'Ateneo'); and

(d) the individual employment contract made between each university and each linguistic associate.

Pre-litigation procedure

6 After Law No 236 came into force, the Commission received several complaints from former foreign-language assistants, directed against the allegedly discriminatory treatment by Italian universities at the time of the changeover to the system established by the new legislation.

7 Following those complaints, the Commission started proceedings against the Italian Republic for failure to fulfil its obligations by sending it, on 23 December 1996, formal notification to submit its observations. The Italian Government replied by letter of 12 March 1997.

8 Since it was not satisfied with the reply of the Italian Republic, the Commission issued a reasoned opinion on 16 May 1997. Following the explanations and information provided by the Italian authorities in their reply of 21 August 1997, the Commission served on the Italian Government, by letter of 9 July 1998, a further request for observations, which was intended to explain and rephrase its complaint concerning non-recognition of the rights acquired by those linguistic associates who had worked in certain Italian universities as foreign-language assistants before 1995.

9 In the light of the replies of the Italian authorities of 11 August and 11 December 1998, the Commission issued a further reasoned opinion on 28 January 1999 and called on the Italian Republic to adopt the measures necessary for compliance within one month from the date of its notification.

10 Since it considered that the Treaty infringement had not been remedied, the Commission decided to bring the present action before the Court.

Substance

11 According to the Commission, in the universities of La Basilicata, Milan, Palermo, Pisa, 'La Sapienza' in Rome, and at the Eastern University Institute in Naples (Italy), linguistic associates have not had their length of service as foreign-language assistants before Law No 236 came into force recognised in terms of pay and social security.

12 The Commission submits, in that respect, that the collective agreements and individual employment contracts of those universities have not provided for any recognition of the rights acquired by each former assistant corresponding to his or her specific and personal professional experience. That is to say:

(a) At the University of La Basilicata, linguistic associates who had previously been foreign-language assistants receive the same salary as a newly recruited linguistic associate. Although that salary is higher than that laid down in the national collective employment agreement, this does not mean, in the Commission's view, that the university has taken proper account of the experience individually acquired by each former assistant.

(b) At the University of Milan, there is no mention of acquired rights in its collective agreement, no distinction being made in the pay of former assistants according to their length of service.

(c) The Eastern University Institute in Naples entered into employment contracts of indeterminate duration with former assistants only with effect from 1996. It imposed on them at the same time a reduction in salary since, despite an

increase in overall annual pay, the number of hours to be provided by linguistic associates during the year was almost trebled.

(d) The University of Palermo employed former assistants without their length of service being taken into account in fixing their terms of employment. As a result, 38 linguistic associates challenged, before an employment tribunal, the level of remuneration proposed by the university.

(e) At the University of Pisa, the situation is identical in all respects to that at the University of La Basilicata, as the employment contracts of former assistants and newly-recruited linguistic associates provide for the same salary.

(f) At the University of 'La Sapienza' in Rome, the relevant collective agreement does not contain any clause providing protection for acquired rights. This university has therefore applied, in the same way as the universities of Pisa and La Basilicata, the same basic pay to former assistants and to newly-recruited linguistic associates.

13 The Commission submits that the mere fact that the remuneration received by some linguistic associates is greater than that which they previously received as foreign-language assistants, or than that of newly-recruited linguistic associates, does not suffice to establish that their professional experience has been recognised.

14 According to the Commission, discrimination will persist until a clause providing for recognition of the rights acquired by each former assistant in respect of his or

her specific personal professional experience gained prior to engagement as a linguistic associate is included in the collective agreements and the employment contracts of the universities concerned.

15 The Commission concludes that the Italian Republic is guilty of discrimination based on nationality, which is prohibited by Article 48 of the Treaty. This conclusion rests, first, on the finding that the universities in question have not recognised, in their collective agreements and employment contracts applicable to linguistic associates, the years of service previously completed by the latter as foreign-language assistants, notwithstanding the requirement of Article 4(3) of Law No 236, and, second, on the view that Law No 230, relating to all national workers whose employment relationship is governed by private-law contracts, provides in case of abuse, that is to say if the employment relationship continues after its initially fixed term, for the automatic conversion of the fixed-term employment contract into an employment contract of indeterminate duration 'from the date on which the worker was first employed'.

16 In its written pleadings, the Italian Government first contends that recognition of the rights acquired by former foreign-language assistants is guaranteed in the universities concerned, inasmuch as they receive higher remuneration than that paid to newly-recruited linguistic associates.

17 The Italian Government goes on to argue that the Commission's reference to Law No 230, taken as a basis of comparison for assessing the allegedly discriminatory nature of the remuneration paid to former assistants, is irrelevant.

18 Contrary to Law No 230 on fixed-term contracts, which applies to all national workers, Law No 236 does not, in relation to former foreign-language assistants,

provide for an automatic conversion of employment relationships, since those assistants may fill the new posts as linguistic associates only in so far as they have been successful in the selection tests.

19 The Italian Government further submits that the problem of recognition of acquired rights arises in a contractual legal context. As a result, that problem cannot be resolved either unilaterally by the public bodies or, *a fortiori*, according to the arrangements proposed by the Commission.

20 Finally, according to the Italian Government, the Commission has made proposals concerning the effective recognition of the rights acquired by each linguistic associate by suggesting 'the award of a salary higher than the basic level to the extent to which it includes a specific additional item of pay ... or ... the payment of a lump sum, as arrears of salary, proportionate to the years served as an assistant', even though such legislative policy choices fall, in reality, within the scope of the sovereign powers of each Member State.

Findings of the Court

21 It should be noted at the outset that, when a worker whose employment relationship is governed by private law is entitled, under Law No 230, to have his fixed-term employment contract converted into one of indeterminate duration, all his acquired rights are guaranteed from the date of his original recruitment. That guarantee has consequences not only with regard to increases in salary, but also with regard to seniority and to payment, by the employer, of social security contributions.

22 That being so, when a foreign-language assistant who is a national of another Member State and has been employed under a fixed-term contract is entitled to have that contract replaced by one of indeterminate duration, also governed by private law, the Italian authorities must ensure that he retains all his acquired rights from the date of his original recruitment, failing which there would be discrimination based on nationality, contrary to Article 48 of the Treaty.

23 As the Court held at paragraph 12 of its judgment in *Allué and Coonan*, cited above, the fact that only 25% of foreign-language assistants are Italian nationals means that measures taken in relation to assistants essentially concern workers who are nationals of other Member States and may therefore, in the absence of justification, constitute an indirect form of discrimination.

24 Further, according to settled case-law, the principle of equality of treatment, of which Article 48 of the Treaty is a specific expression, prohibits not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing criteria, lead in fact to the same result (see, *inter alia*, Cases 41/84 *Pinna* [1986] ECR 1, paragraph 23, and C-237/94 *O'Flynn* [1996] ECR I-2617, paragraph 17).

25 It follows that Law No 230, which applies to all national workers whose employment relationships are governed by private-law contracts, must serve as a measure of comparison to decide whether the new system applying to former foreign-language assistants is similar to the general system applying to the national work-force or whether, on the contrary, it affords them a lower level of protection.

26 It is worth recalling in this respect that in paragraph 19 of its judgment in *Allué and Coonan* the Court held that a provision of national law imposing a limit on the duration of the employment relationship between universities and foreign-language assistants was contrary to Community law, in so far as such a limit did not in principle exist with regard to other workers. The Court replied in that sense to the Pretura unificata di Venezia (Magistrates' Court, Venice) (Italy) which had asked it, among other things, if such a measure applying only to assistants was compatible with Article 48 of the Treaty 'whilst other State employees are generally guaranteed security of tenure under Law No 230 of 18 April 1962'. One of the questions which the Court answered to similar effect in its judgment in *Allué and Others*, cited above, also referred to Law No 230.

27 Law No 230 has thus been used, both by referring courts and by this Court, as a measure of comparison enabling them to determine whether the professional situation of foreign-language assistants was discriminatory compared with that of national workers.

28 As for the Italian Government's argument that reference to Law No 230 is irrelevant since that law provides for the automatic conversion of contracts contrary to the scheme established by Law No 236, which sets out a new public selection procedure for former foreign-language assistants, regard must be had to the substance and the objectives of those two statutory schemes rather than to their form and detailed rules. Only an analysis concentrating on the substance, rather than the form, of those statutory schemes will make it possible to establish whether their actual application to different categories of workers in comparable legal situations leads to situations which are compatible or, in contrast, incompatible with the fundamental principle of non-discrimination on the ground of nationality.

29 Both the above laws provide, with a view to the professional record of workers being taken into account, for the replacement of fixed-term employment

contracts by employment contracts of indeterminate duration, while guaranteeing the retention of rights acquired in previous employment relationships.

30 Therefore, if workers are entitled, under Law No 230, to reinstatement from the point of view of increases in salary, seniority and the payment by the employer of social security contributions, from the date of their original recruitment, former foreign-language assistants who have become linguistic associates must also be entitled to similar reinstatement with effect from the date of their original recruitment.

31 Consideration of the national legal context reveals that Article 4(3) of Law No 236 provides expressly for retention of the rights acquired by foreign-language assistants during former employment relationships. However, an evaluation of the contractual and administrative practices operated by certain public Italian universities leads to the conclusion that discriminatory situations exist.

32 Thus it appears that, in the universities of La Basilicata and 'La Sapienza' in Rome, former foreign-language assistants who have become linguistic associates and newly-recruited linguistic associates receive the same remuneration. The experience acquired by former assistants has therefore not been taken into account. In the universities of Milan, Palermo, and, since a decision of 27 July 1994, Pisa, former assistants who have become linguistic associates are all placed on the same salary level, without regard to their respective years of service. Thirty-eight former assistants at the University of Palermo contested that level of remuneration before an employment tribunal, which upheld their claim. Finally, while the salary of former assistants at the Eastern University Institute in Naples was increased, the annual number of hours to be worked also increased, which had the effect of reducing the level of their hourly remuneration.

33 Admittedly, the Eastern University Institute in Naples has, since the adoption of a decision of 14 July 1999, provided three types of seniority for its former assistants who have become linguistic associates and, at the universities of La Basilicata, Palermo and 'La Sapienza' in Rome, the university authorities have stated their wish to resolve the problem of the acquired rights of former assistants. However, according to settled case-law the existence of a failure by a Member State to fulfil its Treaty obligations must be determined at the end of the period laid down in the reasoned opinion (see, among others, Case C-166/97 *Commission* v *France* [1999] ECR I-1719, paragraph 18, and Case C-219/99 *Commission* v *France* [2001] ECR I-1093, paragraph 7). In the present case, the further reasoned opinion issued by the Commission on 28 January 1999 allowed, for compliance therewith, a period of one month from the date of its notification.

34 It must further be recalled that, in accordance with several decisions of the Court, a Member State may not plead provisions, practices or situations existing in its internal legal order to justify the failure to comply with obligations arising from Community law (to this effect see, *inter alia*, Case C-166/97 *Commission* v *France*, cited above, paragraph 13, and Case C-83/00 *Commission* v *Netherlands* [2001] ECR I-2351, paragraph 10).

35 It follows that the Italian Government's defence argument that, since the problem of the recognition of acquired rights is of a typically contractual nature, it cannot be resolved unilaterally by the public bodies concerned, must be rejected. There is even stronger ground for rejecting the argument of that Government that the absence of definitive legislation governing the legal position of former foreign-language assistants is attributable to the particular organisation of the Italian university system.

36 In light of all the foregoing, it must be held that, by not guaranteeing recognition of the rights acquired by former foreign-language assistants who have become

linguistic associates, even though such recognition is guaranteed to all national workers, the Italian Republic has failed to fulfil its obligations under Article 48 of the Treaty.

Costs

37 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 Italian Republic has been unsuccessful, the latter must be ordered to pay the costs. The United Kingdom, which has intervened in the proceedings, must bear its own costs under Article 69(4) of the Rules of Procedure.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Declares that, by not guaranteeing recognition of the rights acquired by former foreign-language assistants who have become associates and mother-tongue linguistic experts, even though such recognition is guaranteed to all

national workers, the Italian Republic has failed to fulfil its obligations under Article 48 of the EC Treaty (now, after amendment, Article 39 EC);

2. Orders the Italian Republic to pay the costs;

3. Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs.

Gulmann Puissochet Macken

Colneric Cunha Rodrigues

Delivered in open court in Luxembourg on 26 June 2001.

R. Grass — Registrar

C. Gulmann — President of the Sixth Chamber