Opinion of Advocate General Fennelly delivered on 20 March 1997

David Petrie and Others v Università degli studi di Verona and Camilla Bettoni

Reference for a preliminary ruling: Tribunale amministrativo regionale per il Veneto - Italy

Freedom of movement for workers - Foreign-language assistants - Eligibility for appointment to teach supplementary courses and to fill temporary teaching vacancies in universities

Case C-90/96

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Opinion of the Advocate-General

I – Introduction

1 This case relates to alleged indirect discrimination on grounds of nationality against non-Italian foreign-language assistants, teaching in their mother tongue in an Italian university, regarding access to paid supplementary teaching posts. These assistants are employed on the basis of private-law contracts, whereas Italian legislation reserves such supplementary teaching to members of certain grades of teaching staff whose employment is governed by public law. Italian law precluded non-Italians from acquiring such public-law university posts before 1994. Does this reservation of supplementary teaching constitute discrimination on grounds of nationality, and, if so, is it a proportionate and objectively justified response to legitimate needs of the Italian university system?

II - Legal and factual background

2 Articles 1 and 3(1) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (1) provide as follows:

`Article 1

1. Any national of a Member State shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.

2. He shall, in particular, have the right to take up available employment in the territory of another Member State with the same priority as nationals of that State.

... .

Article 3

1. Under this Regulation, provisions laid down by law, regulation or administrative action or administrative practices of a Member State shall not apply:

- where they limit application for and offers of employment, or the right of foreign nationals to take up and pursue employment or subject these to conditions not applicable in respect of their own nationals; or

- where, though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered.

This provision shall not apply to conditions relating to linguistic knowledge required by reason of the nature of the post to be filled.'

3 The relevant provisions of Italian law are as follows. Article 114 of Presidential Decree No 382 of 11 July 1980 (hereinafter `the 1980 Decree'), as amended by Article 12 of Law No 341 of 19 November 1990, states:

`Appointment to teach supplementary courses and to fill temporary teaching vacancies is open only to tenured teaching staff and established university researchers (2) in the same or a similar academic sector who belong to the same faculty; or, in the absence of such persons, by reasoned resolution, to tenured teaching staff and established university researchers of other faculties of the same or another university. When filling temporary vacancies, if applications are received from tenured teaching staff and established researchers in the same academic sector, the faculty board must give preference to applications submitted by teaching staff.'

4 Both eligible categories of university employment are governed by public law. It appears that `courses', in the context of the Italian legislation in question, are additional to the principal teaching provided to students, and that temporary course-teaching can become available either where it is necessary to find a substitute for an absent teacher or where the same course is provided more than once in a given academic year because of the large number of interested students. Supplementary and temporary course-teaching is ancillary to the normal

work-load of the teacher or researcher in question, and it appears that it is paid only where the hours worked exceed those ordinarily required of the employee responsible. (3)

5 The duties of researchers are defined in Articles 31, 32 and 38 of the 1980 Decree as including the performance of teaching exercises with students, the provision of assistance with the preparation of their final theses and of guidance, the development of new teaching methods and the pursuit of research. (4) The competition to become a researcher consists of written and oral examinations and of an assessment of candidates' qualifications. In order to become established after a three-year probationary review period, researchers are subject to confirmation by a national committee, which reviews their research and teaching activity during that period. (5)

6 The status and duties of an assistant/teacher in foreign languages (Lettore/docente, hereinafter `foreign-language assistant') are set out in Article 28 of the 1980 Decree:

`... [R]ectors may engage on contracts governed by private law, upon reasoned proposals from the faculty concerned based on the actual needs for practice of students attending language courses ... assistants of foreign mother tongue of proven and recognized competence, verified by the faculty ... .

The faculty must in any case certify the specific competence of the assistants ... .

The contracts referred to in the first paragraph may not be extended beyond the academic year for which they are concluded and may be renewed annually for a maximum of five years.

The duties of assistants and their remuneration shall be decided upon by the Administrative Council of the university after consulting the Faculty Board.

Remuneration shall not exceed the starting salary of a lecturer engaged to work part-time.' (6)

7 These conditions were the subject-matter of the decisions of the Court in Allué and Another v Università degli Studi di Venezia (7) (`Allué 1') and in Allué and Others v Università degli Studi di Venezia (8) (`Allué 2'). In those cases, the grant of contracts to foreign-language assistants of more limited duration (one year only, renewable for a maximum of five years) than those granted to other workers, (9) or other teaching staff, (10) was held to constitute discrimination on grounds of nationality, as 75% of such assistants were non-Italian (11) and there was no objective justification for the difference in treatment. The applicants in the main proceedings (hereinafter `the applicants') are United Kingdom nationals and are foreign-language assistants at the Università degli Studi di Verona (University of Verona, hereinafter `the University'). As a result of the Allué cases, their contracts with the University were deemed by the Pretore (Magistrate), Verona, to be those of university teachers appointed for an indeterminate period (docenti a tempo indeterminato dell' Università), and they receive the pay of an assistant lecturer appointed to work part-time (professore associato a tempo definito). (12) However, their contracts are still deemed to be governed by private law, unlike those of most other university staff-members. In Allué 2, Advocate General Lenz observed that this was also regarded as discriminatory by the applicants in that case, but was not part of the subject-matter of those proceedings. (13) As a matter of Italian law, posts in the public service, including university posts governed by public law, were until 1994 confined to Italian citizens. Article 3 of Prime Ministerial Decree No 174 of 7 February 1994, implementing Article 37 of Legislative Decree No 21 of 3 February 1993, opened up such university posts to non-Italian nationals.

8 The applicants applied for a paid temporary teaching post in modern-language studies at the University which had been advertised for the 1995/96 academic year. Their requests were refused by the rector, by decisions of 14 April 1995, on the sole ground that they were neither tenured teachers within the meaning of the applicable law nor established university researchers. Two of the applicants made similar applications in 1994, and were met with refusal on similar grounds. By a decision of 19 April 1995, Ms Camilla Bettoni, an employee of the University of Padua, was granted the temporary teaching post in question.

9 The applicants sought the annulment of these decisions before the Tribunale Amministrativo Regionale per il Veneto (hereinafter `the national court'). They submitted that the principal effect of Article 114 of the 1980 Decree, as amended, was to exclude the nationals of other Member States from the temporary posts in question. They could not gain access to the posts of researcher or tenured teacher before 1994 because of the unlawful situation in Italy (exclusion of non-nationals from posts in the public service which did not involve the exercise of public authority), whereas their present unlimited contracts should be deemed, they asserted, to be equivalent to confirmation as researchers after three years. They argued that their present teaching duties are equivalent to those of tenured teachers or, at the very least, to those of researchers. The University denied discrimination, on the basis that the same criteria apply to Italian applicants for the paid posts in question.

10 The national court suspended the proceedings before it and referred the following question to the Court for a preliminary ruling pursuant to Article 177 of the EC Treaty:

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

III - Observations

11 Written and oral observations were submitted by the applicants, the Italian Republic and the Commission.

12 To develop their argument regarding unjustified discrimination, the applicants refer to provisions in their contracts requiring language teaching, the administration of oral and written examinations, and the provision of assistance to students in the preparation of their final theses. They also state that certain categories of university employees - tenured assistants (assistenti di ruolo ad esaurimento) and qualified technicians (tecnici laureati) - whose employment is not governed by public law, or who, at the very least, do not accede to their posts by competition, are assimilated to researchers for the purposes of applying for temporary teaching posts, pursuant to Article 16, first indent, of Law No 341 of 19 November 1990. The applicants also argue that their own status is assimilated, by Article 6, first indent, of Law No 349 of 18 March 1958, to that of university assistants (assistenti universitari), who are, in turn, governed by an express reference in the 1980 Decree to the regime for established researchers. As a result, in its judgment No 284 of 23 July 1987, the Corte Costituzionale (Italian Constitutional Court) condemned as discriminatory the difference in treatment between such assistants and foreign-language assistants.

13 Italy and the Commission argue that the case is inadmissible for want of necessary factual information, as the national court merely outlined the competing contentions of the parties in the order for reference without establishing the facts. The Commission argues that the question of discrimination does not arise in the main proceedings, as this relates to the prior question of appointment as a tenured teacher or researcher, rather than to the question of appointment to undertake supplementary teaching. The applicants could have relied upon Article 48(2) of the Treaty and on Regulation No 1612/68 to counter their exclusion from the former posts, rather than waiting to contest the present provision. The Commission suggests that a challenge to the former discrimination would now be time-barred, and that the Court is not competent to consider the question posed by the national court in the present proceedings, which involve no real dispute but are, instead, merely a vehicle to re-open an old grievance.

14 As regards the substance, Italy submits that there is an objective difference between the role and qualifications of tenured teachers and researchers, on the one hand, and of the applicant foreign-language assistants, on the other. The former have more onerous teaching responsibilities; the duties of researchers, in particular, are distinguishable from those of foreign-language assistants, whose duties are essentially practical, by the requirement that they conduct research in their disciplines. Supplementary teaching would, in the case of researchers and tenured teachers, constitute merely an extension of their contractual functions, and would be paid only where the hours involved exceeded those contractually required of the appointee, rather than a qualitatively new employment, as would be the case regarding foreign-language assistants. The system permits universities to make rational use of resources by giving priority to internal candidates already engaged in similar teaching tasks and whose abilities have been proven by competition. Italy also argues that the assimilation of university assistants to researchers and the consequent Constitutional Court judgment No 284 of 23 July 1987 related to a category of employees which has now been abolished, and which was not comparable to that of foreign-language assistants provided for in Article 28 of the 1980 Decree. The assimilation was a transitional measure, relating only to persons who had held posts as university assistants before the 1980 reforms. At the oral hearing, Italy responded to the applicants' contentions regarding the content of their contracts by stating that, to the extent that they went beyond the purely practical tasks of language teaching, these contracts were unlawful.

15 The Commission agrees with Italy's stance, in so far as objective differences exist between the positions of foreign-language assistant and of established researchers and tenured teachers, which the Court is not in a position to verify for itself and which is not indicated in the order for reference. The Commission also stresses the objective difference between persons employed under public-law and private-law contracts. (14)

IV - Analysis

A - Admissibility

16 I would reject the argument submitted by Italy and the Commission that the present reference is inadmissible for want of information on the factual context of the case. The Court has stated that `the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based'. (15) This has been done in the present case. It is true that the national court has not referred to facts as established by it, but has simply recited the factual contentions of the parties. However, `[t]he decision at what stage in proceedings a question should be referred to the Court of Justice for a preliminary ruling is ... dictated by considerations of procedural economy and efficiency to be weighed only by the national court and not by the Court of Justice'. (16) The national court's account of the parties' contentions demonstrates clearly the subject-matter of the dispute, and the Court's response to the question referred should, in turn, indicate to the national court which factual issues are material and must be resolved in order to reach judgment in the case. A decision on a question of legal principle may therefore guide the national court in its assessment of the facts, and forestall unnecessary consideration of complex but immaterial factual disputes.

B - The existence of covert discrimination

17 I would also reject the Commission's argument that the present proceedings merely raise an old grievance, now time-barred, regarding the discriminatory rules on access to the posts of tenured teachers and university researchers before 1994. As the Court has noted, `[a] request for a preliminary ruling from a national court may be rejected only if it is obvious that the interpretation of Community law sought by that court bears no relation to the actual nature of the case or the subject-matter of the main action'. (17) That is not the case here. The pre-1994 recruitment rules established a direct discrimination on grounds of nationality. However, the principle of

equal treatment of which Article 48(2) of the Treaty is one embodiment, and Articles 1 and 3 of Regulation No 1612/68 another, prohibits not only overt discrimination based on nationality but all covert forms of discrimination which, by applying other distinguishing criteria, in fact achieve the same result. (18) The Court had occasion in O'Flynn v Adjudication Officer (19) to analyse the various types of factual circumstances which have arisen in the Court's case-law in which covert or indirect discrimination against workers on grounds of nationality was deemed to exist:

`**18**. Accordingly, conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers (20) or the great majority of those affected are migrant workers, (21) where they are indistinctly applicable but can more easily be satisfied by national workers than by migrant workers (22) or where there is a risk that they may operate to the particular detriment of migrant workers. (23)

19. It is otherwise only if those provisions are justified by objective considerations independent of the nationality of the workers concerned, and if they are proportionate to the legitimate aim pursued by the national law. (24)

20. It follows from all the foregoing case-law that, unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage.

21. It is not necessary in this respect to find that the provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect. Further, the reasons why a migrant worker chooses to make use of his freedom of movement within the Community are not to be taken into account in assessing whether a national provision is discriminatory. The possibility of exercising so fundamental a freedom as the freedom of movement of persons cannot be limited by such considerations, which are purely subjective.'

18 The identification of a national rule which is liable to affect essentially, or for the most part, migrant workers, or which can more easily be satisfied by national workers than by migrant workers, or which may operate to the particular detriment of migrant workers, is, in itself, a value-neutral, objective process. It is effected by comparing the relative likelihood of the rule in question affecting, respectively, national and migrant workers. For example, if, as in O'Flynn, members of the families of both migrant and national workers are likely to prefer to be buried in their country of origin, a national rule confining financial assistance for burial expenses to cases of burial in national territory will have a disproportionate effect on migrant workers.

19 The Court made clear in O'Flynn that migrant workers do not have to explain the pattern of conduct which results in their being disproportionately adversely affected by a national rule. Whether the national rules governing the allocation of paid temporary teaching disadvantage disproportionately the non-Italian employees of language faculties in Italian universities is an objective question. This effect can be found to exist, if a substantial majority of those eligible to apply for paid temporary teaching is Italian, while a substantial majority of the excluded categories of teaching staff in the faculties in question is non-Italian, or where the proportion of Italians in the eligible staff categories is substantially greater than that in the relevant faculties as a whole. Furthermore, as the Court indicated in O'Flynn, a national rule can be deemed to have a discriminatory effect if it is liable to have such disproportionate effects, even if they have not been established in practice.

20 A former national rule which excluded non-Italians from the eligible staff categories until relatively recently (the year before the decisions which gave rise to the present proceedings) is, in practice, liable to have the effect of excluding a disproportionate number of non-Italian faculty members from eligibility for paid temporary teaching. It is likely to take several years for any imbalance in the representation of migrant and national workers in those staff categories to be redressed. This is an objective conclusion, reached independently of the lawfulness of the circumstances which gave rise to it. Thus, subject to verification by the national court, I will proceed on the basis that, in the light of that past discrimination, the application of Article 114 of the 1980 Decree, as amended, is liable to disadvantage disproportionately the non-Italian employees of Italian university language faculties.

C - Justification

21 A national rule which disproportionately favours national workers will, none the less, be examined further to assess whether it is justified by objective considerations independent of the nationality of the workers concerned, and if its effects are proportionate to the legitimate aim pursued by the rule. In particular, the Court pointed out in Allué 2 (25) that the provisions of the Treaty do not prevent Member States from taking indistinctly applicable measures with a view to ensuring the proper management of their universities and which are liable to affect, in particular, the nationals of other Member States, provided these conditions are respected.

22 The stated aim of Article 114 of the 1980 Decree, as amended, is to permit the rational utilization of staff resources in Italian universities by having recourse, in the first place, to tenured teachers and established researchers who are members of the relevant or a related faculty and, failing that, to equivalent members of the faculties of other universities, when additional instruction has to be provided. Additional expenditure is avoided where the hours of teaching contractually required of the staff-member are not exceeded. From this perspective, the competence of the eligible staff-members to undertake the supplementary instruction is automatically assured by their having passed a competition in order to be appointed to their principal posts, by their having been confirmed after a probationary period, and by the functional correspondence between the additional teaching and their existing duties. The essential distinction between employment governed by public law and that governed by private law is also invoked.

23 The rational utilization of resources, the avoidance of unnecessary expenditure and the verification of the competence of instructors are all legitimate aims in the context of good university management. However, the

total exclusion of certain categories of staff from eligibility for paid temporary teaching may be a disproportionate means of pursuing those aims.

24 The aim of having recourse initially to existing members of a given faculty may hold good against applications from persons who, however well qualified, are not already employed by the university in question, but cannot justify, in my view, the exclusion of persons who are currently staff-members in that faculty, provided they are otherwise competent. Furthermore, the rules regarding payment only for hours of teaching in excess of those stipulated in a staff-member's contract could very easily be extended to excluded employees, as it appears that their contracts also provide for specified numbers of working hours during the academic year. In any event, it seems to me questionable whether this rule is likely to produce significant economies, unless it is to be assumed that applicants apply for unpaid work. The Court has not been told that the successful applicant from the University of Padua, the second-named defendant in the main proceedings, was unpaid.

25 I now turn to the issue of the reliance on the tenure of a particular public-law post for verification of competence. This turns on two distinct issues: on the one hand, the guarantee supposedly afforded by the processes of recruitment by competition and of confirmation after probation, and, on the other, the disputed equivalence of the functions of foreign-language assistants and of established researchers. For reasons set out more fully below, it is my view that the automatic application of the exclusionary rule in Article 114 of the 1980 Decree, as amended, without regard for the qualifications, experience and research of other applicant staff-members, is disproportionate. The final decision on appointments will, of course, always be that of the university. The role of this Court is merely to assist the national court in ensuring that unjustified discriminatory practices are not followed in that decision-making process.

26 Member States are, of course, entitled to stipulate that universities have regard to the formal evidence of competence afforded by success in a recruitment competition when allocating paid temporary teaching posts. The Court has stated that the Member States are similarly entitled to stipulate that the pursuit of certain professional activities be restricted to holders of a diploma, certificate or other evidence of formal qualifications, to members of a professional body or to persons subject to particular rules or supervision, as the case may be. The nationals of other Member States must, in principle, comply with such conditions, provided they are non-discriminatory and proportional. (26) However, in applying their national provisions, Member States may not ignore the knowledge and qualifications already acquired by the person concerned in another Member State. (27) They must take account of the equivalence of diplomas, (28) and, if necessary, proceed to a comparison of the knowledge and qualifications required by their national rules and those of the person concerned. (29)

27 Similarly, evidence other than success in a recruitment competition should be considered by universities when allocating temporary teaching posts to existing staff-members, when that evidence is capable of affording similar guarantees of competence. While this requirement arguably applies a fortiori in cases where non-nationals were effectively excluded in the past from the competition process itself, it is by no means confined to such cases. It will always be likely that migrant workers will have qualifications which, in formal terms, are different from those expected of national workers but which, upon examination, may be found to be equivalent. It may be objected that it is too onerous, in the context of temporary, ancillary posts, to require a detailed examination by universities of a variety of qualifications to ascertain whether they correspond to the standards applied in recruitment competitions. However, these temporary posts are available, in the first place, to existing staff-members of the faculty concerned. The faculty authorities should already be familiar with their foreign-language assistants' qualifications. By virtue of Article 28 of the 1980 Decree, the faculty will have certified its own verification of their proven and recognized competence.

28 By the same token, universities may take into account the evidence of competence afforded by the confirmation of researchers in their posts after a three-year probationary period. However, equivalent evidence should also be considered. The university may decide that the review process before the renewal of the applicants' annual contracts in the period before 1993 was equivalent to that to which researchers are subject in order to become established. Even if it is not, evidence of qualifications and experience such as would suffice for confirmation, if foreign-language assistants were subject to such a process, should satisfy the legitimate concerns of university authorities. A provision which does not permit such alternative evidence of competence to be taken into account is overly restrictive and, therefore, disproportionate.

29 The question whether the functions of foreign-language assistants and established researchers are in fact equivalent elicited markedly different responses in the observations submitted to the Court. In particular, it is not clear whether the nature of their teaching obligations is similar, and, thus, whether one category is better qualified than the other to undertake the type of instruction involved in temporary course-teaching. Furthermore, it appears that researchers, true to their title, are subject to research obligations, which are not imposed on foreign-language assistants.

30 In order to be proportionate, a measure which has discriminatory effects must be relevant and no more restrictive than is necessary to the achievement of its legitimate aim. As the Court stated in P.H. Asscher v Staatssecretaris van Financiën, (30) a difference in treatment between two categories of person `may constitute discrimination within the meaning of the Treaty where there is no objective difference between the situations of the two such as to justify different treatment in that regard'. A distinction should only be made in the light of the material similarities and differences between the teaching duties of foreign-language assistants and researchers. As the university's concern in this context is to ascertain the experience and abilities of candidates for a post, the candidates' actual teaching activities, as provided for in contracts of employment and as set out in the faculty teaching programme, are as material as the formal prescriptions in the 1980 Decree. The relevance of any differences between the roles of foreign-language assistants and researchers will be dictated by the character of the additional temporary teaching which must be undertaken - only differences in function and experience which would affect candidates' ability to perform the required task should be taken into account. This is equally true of research. The character of the temporary course-teaching should indicate whether experience of research activity

in the discipline concerned would be an asset. In any event, research conducted by candidates such as foreign-language assistants, even if not contractually required of them, should be considered along with their other qualifications and experience, if such research is germane to the temporary teaching in question. In the light of these considerations, which will necessarily vary with each individual applicant and with the posts offered, it is apparent that the difference between the legally prescribed teaching roles of researchers and of foreign-language assistants is, in itself, insufficient to justify the automatic exclusion of the latter from temporary course-teaching posts.

31 Quite apart from this general analysis, I also note the applicants' contention that certain categories of staff are assimilated to the eligible categories of tenured teachers and established researchers, even though they are not recruited by competition and do not perform similar teaching functions. It is a question of Italian law, to be decided by the national court, whether this contention is correct, and whether it results in the assimilated categories of staff also being eligible to be considered for paid temporary teaching opportunities. If this were the case, the continued exclusion from such posts of other categories of staff such as foreign-language assistants would, in the absence of a further possible justification not pleaded before the Court, be tainted with irrationality and would, therefore, be disproportionate.

32 It is also necessary to address the argument that temporary course-teaching posts must be reserved to public-law university staff-members because these posts are themselves governed by public law. It has been submitted that the appointment to such posts of staff-members whose principal contracts are governed by private law would involve the creation of an autonomous legal relationship, rather than the mere extension of a public-law employment contract as in the case of tenured teachers and established researchers. However, in circumstances of prima facie discrimination on grounds of nationality, I regard this as too formalistic to justify the rule in question. In the light of the above analysis, private-law employees of university language faculties could hope to be appointed only where their qualifications, experience and relevant research were substantively equivalent to those expected of the public-law employees specified in Article 114 of the 1980 Decree, as amended. Furthermore, their eventual appointment to temporary course-teaching posts should not affect their rights and duties under their principal employment contract.

33 In this context, I wish to underline the limited implications of the solution here proposed for the public-law basis of the Italian university system. Article 28 of the 1980 Decree relies on mother-tongue linguistic competence to define a specific form of private-law employment, thus creating a virtually self-defined discriminatory category and providing the basis for the applicants' complaint. Foreign-language teaching thus has far greater potential for complaints on grounds of discrimination than other branches of learning. In this as in other fields, however, Member States retain the power to reserve university posts for holders of public-law appointments, so long as they do not discriminate on grounds of nationality. Similarly, there is no objection to recruitment for public-law university posts through open competitions, or competitions which are open to all who have relevant qualifications, and take due account of qualifications or experience obtained in other Member States. (31)

V - Conclusion

34 In the light of the foregoing analysis, I recommend that the Court respond to the question referred by the national court as follows:

National rules governing the allocation to staff-members of paid temporary teaching in universities which, by conferring eligibility only on certain categories of staff, operate disproportionately to the detriment of non-national employees constitute unlawful covert discrimination against workers on grounds of nationality, unless provision is also made for applications by employees in other categories of staff to be considered in the light of material qualifications, experience and research.

(1) - OJ, English Special Edition 1968 (II), p. 475.

(2) - Professori di ruolo and ricercatori universitari confirmati.

(3) - This information is drawn from the observations submitted to the Court by Italy.

(4) - This information is drawn from the observations submitted to the Court by Italy.

(5) - Article 7 of Law No 28 of 21 February 1980, cited in the observations submitted to the Court by the Commission.

(6) - This provision is set out in full in the report for the hearing in Case 33/88 Allué and Another v Università degli Studi di Venezia [1989] ECR 1591, pp. 1594 and 1595.

(7) - Cited above.

(8) - Joined Cases C-259/91, C-331/91 and C-332/91 [1993] ECR I-4309.

(9) - This was the point of comparison used by the Court in paragraph 10 and the operative part of the judgment in Allué 1. However, the Court did compare the position of foreign-language assistants to `lecturers engaged under contract, who also perform teaching duties without having passed a competition', paragraph 16.

(10) - This was the point of comparison used by the Court in paragraphs 10 and 21 and in the operative part of the judgment in Allué 2.

(11) - Paragraph 12 of the judgments in Allué 1 and Allué 2. Advocate General Lenz referred to 64% non-Italian occupancy of foreign-language assistants' posts in his Opinion in Allué 2, paragraph 18. This may be explained

by differences in the categorization of assistants of non-Italian origin who had become Italian citizens, normally by marriage.

(12) - By order of 28 October 1993, in respect of the first two applicants, and by order of reinstatement of 16 May 1994, in respect of the third applicant.

(13) - Paragraph 15 of the Opinion.

(14) - This position may be contrasted with that of the Commission in Allué 1 and Allué 2, cited above, in which it argued in detail for the comparability of the work of foreign-language assistants and researchers by reference to their respective tasks; see the respective reports for the hearing, [1989] ECR 1591, pp. 1596 and 1597 and [1993] ECR I-4309, at p. I-4318.

(15) - Joined Cases C-320/90 to C-322/90 Telemarsicabruzzo & Others [1993] ECR I-393, paragraph 6 of the judgment.

(16) - Case 14/86 Pretore di Salò v Persons Unknown [1987] ECR 2545, paragraph 11 of the judgment; see also Joined Cases 36/80 and 71/80 Irish Creamery Milk Suppliers Association v Ireland [1981] ECR 735, paragraphs 7 and 8; Case 72/83 Campus Oil v Minister for Industry and Energy [1984] ECR 2727, paragraphs 10 and 11.

(17) - Case C-143/94 Furlanis v ANAS and Itinera [1995] ECR I-3633, paragraph 12 of the judgment.

(18) - Case 41/84 Pinna v Caisse d'Allocations Familiales de la Savoie [1986] ECR 1, paragraph 24 of the judgment; Allué 1, paragraph 11; Allué 2, paragraph 11.

(19) - Case C-237/94 [1996] ECR I-2617. The footnotes to the quotation which follows are taken from the original text.

(20) - See Case 41/84 Pinna v Caisse d'Allocations Familiales de la Savoie [1986] ECR 1, paragraph 24 of the judgment; Allué 1, paragraph 12; and Case C-27/91 Le Manoir [1991] ECR I-5531, paragraph 11.

(21) - See Case C-279/89 Commission v United Kingdom [1992] ECR I-5785, paragraph 42 of the judgment, and Case C-272/92 Spotti v Freistaat Bayern [1993] ECR I-5185, paragraph 18.

(22) - See Case C-111/91 Commission v Luxembourg [1993] ECR I-817, paragraph 10 of the judgment, and Case C-349/87 Paraschi [1991] ECR I-4501, paragraph 23.

(23) - See Case C-175/88 Biehl [1990] ECR I-1779, paragraph 14 of the judgment, and Case C-204/90 Bachmann v Belgium [1992] ECR I-249, paragraph 9.

(24) - See, to that effect, Bachmann, cited above, paragraph 27 of the judgment; Case C-111/91 Commission v Luxembourg, cited above, paragraph 12; Allué 2, paragraph 15.

(25) - Paragraph 15 of the judgment.

(26) - Case C-55/94 Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano [1995] ECR I-4165, paragraphs 35 to 37 of the judgment.

(27) - Case C-340/89 Vlassopoulou [1991] ECR I-2357, paragraph 15 of the judgment.

(28) - Case C-71/76 Thieffry v Conseil de l'Ordre des Avocats à la Cour de Paris [1977] ECR 765, paragraphs 19 and 27 of the judgment; Case 11/77 Patrick v Ministre des Affaires Culturelles [1977] ECR 1199.

(29) - Vlassopoulou, paragraph 16 of the judgment; Gebhard, paragraph 38.

(30) - Case C-107/94 [1996] ECR I-3089, paragraph 42 of the judgment, emphasis added.

(31) - See Case C-419/92 Scholz [1994] ECR I-505.