

In Case 149/79

COMMISSION OF THE EUROPEAN [UNION], represented by its Legal Adviser, Jean Amphoux, acting as Agent, assisted by Louis Dubouis, a professor at the Faculty of Law and Political Science of the University of Aix-Marseille III, with an address for service in Luxembourg at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Plateau du Kirchberg,

applicant,

v

KINGDOM OF BELGIUM, represented by the Minister for Foreign Affairs, whose Agent is Roben Hoebaer, Director at the Ministry of Foreign Affairs, Foreign Trade and Cooperation with Developing Countries, with an address for service in Luxembourg at the Belgian Embassy, Residence Champagne, 4 Rue des Girondins,

defendant,

supported by

FEDERAL REPUBLIC OF GERMANY, represented by Martin Seidel and Eberhardt Grabitz, acting as Agents, with an address for service in Luxembourg at the Chancellery of the Embassy of the Federal Republic of Germany, 28 and 22 Avenue Emile Reuter,

FRENCH REPUBLIC, represented by G. Guillaume, acting as Agent, and P. Moreau Defarges, acting as Deputy Agent, with an address for service in Luxembourg at the French Embassy, 2 Rue Bertholet, and

UNITED KINGDOM, represented by W. H. Godwin, Assistant Treasury Solicitor, acting as Agent, with an address for service in Luxembourg at the British Embassy, 28 Boulevard Royal,

interveners,

APPLICATION for a declaration that the Kingdom of Belgium has failed to fulfil its obligations under [Article 45 TFEU] as well as under Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the [Union] by making Belgian nationality a condition of entry for posts which do not come under [Article 45(4) TFEU],

THE COURT

composed of: J. Mertens de Wilmars, President, G. Bosco, A. Touffait and O. Due, Presidents of Chambers, P. Pescatore, Lord Mackenzie Stuart, A. O'Keefe, T. Koopmans and U. Everling, Judges.

Advocate General: S. Rozes

Registrar: P. Heim

gives the following

JUDGMENT

Decision

- 1 By application lodged at the Court Registry on 28 September 1979 the Commission brought an action under [Article 258 TFEU] for a declaration that by requiring or permitting to be required the possession of Belgian nationality as a condition of recruitment to posts not covered by [Article 45(4) TFEU], the Kingdom of Belgium has failed to fulfil its obligations under [Article 45 TFEU] and Regulation (EEC) No 1612/68 on freedom of movement for workers within the [Union] (Official Journal, English Special Edition 1969 (II), p. 475).

- 2 By an interim judgment of 17 December 1980 ([1980] ECR 3881) the Court defined a number of criteria enabling the scope of the exception contained in [Article 45(4) TFEU] to be determined with regard to posts such as those at issue which are offered by public authorities.
- 3 However, the information available in the case, which was provided by the parties during the written and oral procedure, did not enable the Court accurately to appraise the actual nature of the duties involved in the posts in question and to determine which of those posts were not within the ambit of [Article 45(4) TFEU]. Consequently it invited the parties to re-examine the issue between them, taking account of the principles of interpretation defined by the Court and having regard to the characteristics of each post.
- 4 The operative part of the aforesaid judgment of 17 December 1980 provides as follows:

"The Court . . . hereby orders the Commission and the Kingdom of Belgium to re-examine the issue between them in the light of the legal considerations contained in this judgment and to report to the Court on the result of that examination before 1 July 1981, after which date the Court will give a final decision."

- 5 The Commission and the Kingdom of Belgium have not been able to agree on a single report to be submitted jointly to the Court and after the period prescribed, originally ending on 1 July 1981, had been extended they submitted two separate reports on 29 and 30 October respectively. Those reports show that the parties still disagree on the question whether, in the light of the legal considerations contained in the judgment of 17 December 1980, some or all of the posts at issue are of the kind to which the reservation contained in [Article 45(4) TFEU] applies. However, the parties do not disagree on the nature of the duties and responsibilities involved in each of the posts at issue, which both reports describe in basically the same terms.
- 6 The task therefore falls on the Court to settle the dispute by examining whether and to what extent the posts at issue, as described in the two reports aforesaid, must be regarded as posts which fall within the ambit

of [Article 45(4) TFEU], as defined in the judgment of 17 December 1980.

- 7 It follows from that judgment, in particular from paragraphs 12 and 19, that employment within the meaning of [Article 45(4) TFEU] must be connected with the specific activities of the public service in so far as it is entrusted with the exercise of powers conferred by public law and with responsibility for safeguarding the general interests of the State, to which the specific interests of local authorities such as municipalities must be assimilated.
- 8 The Commission has rightly acknowledged that, regard being had to the duties and responsibilities attached to some of the posts at issue described in the aforesaid reports, they may have characteristics which bring them within the scope of the exception contained in [Article 45(4) TFEU] in the light of the criteria established in the judgment of the Court of 17 December 1980. The posts are those described as head technical office supervisor, works supervisor, stock controller and night watchman with the municipality of Brussels and architect with the municipalities of Brussels and Auderghem. Those matters may be therefore be regarded as being no longer at issue.
- 9 However, as far as the other posts dealt with in the two reports in question are concerned, it does not appear from the nature of the duties and responsibilities which they involve that they constitute "employment in the public service" within the meaning of [Article 45(4) TFEU].
- 10 The arguments put forward by the Kingdom of Belgium with regard to certain posts with the Societe Nationale des Chemins de Fer Belges [Belgian National Railway Company] and the Societe Nationale des Chemins de Fer Vicinaux [National Local Railway Company] according to which the question of the admission of foreign staff must be considered above all in terms of the possibility that a situation may arise in which the security of the State is jeopardized cannot be accepted in the context of [Article 45(4) TFEU]. Such a line of argument is based on an hypothesis which has no connection with the legal context of that provision.

11 For those reasons it must be declared that by making Belgian nationality or allowing it to be made a condition of entry for the posts referred to in the reports lodged by the parties on 29 and 30 October 1981, other than those of head technical office supervisor, principal supervisor, works supervisor; stock controller and night watchman with the municipality of Brussels and that of architect with the municipalities of Brussels and Auderghem, the Kingdom of Belgium has failed to fulfil its obligations under the [FEU] Treaty.

Costs

12 Under the first subparagraph of Article 69 (3) of the Rules of Procedure the Court may order that the parties bear their own costs in whole or in part where each party succeeds on some and fails on other heads.

13 Since the Kingdom of Belgium has failed on a number of heads of its defence it must be ordered to bear half the costs incurred by the Commission. The interveners should be ordered to bear their own costs:

On those grounds,

THE COURT

hereby:

- 1. Declares that by making Belgian nationality or allowing it to be made a condition of entry for the posts referred to in the reports lodged by the parties on 29 and 30 October 1981, other than those of head technical office supervisor, principal supervisor, works supervisor, stock controller and night watchman with the municipality of Brussels and**

that of architect with the municipalities of Brussels and Auderghem, the Kingdom of Belgium has failed to fulfil its obligations under the [FEU] Treaty;

- 2. Orders the Kingdom of Belgium to bear half the costs incurred by the Commission and the interveners to bear their own costs.**

Mertens de Wilmars	Bosco	Touffait	Due Pescatore
Mackenzie Stuart		O'Keeffe	Koopmans
	Everling		

Delivered in open court in Luxembourg on 26 May 1982.

P. Heim
Registrar

J. Mertens de Wilmars
President