Maria Chiara Spotti v. Freistaat Bayern
(Case C-272/92)

Before the Court of Justice of the European Communities

ECJ

(Presiding, Due P.C.: Mancini, Moitinho de Almeida and Edward PP.C.; Joliet, Schockweiler, Grévisse, Zuleeg and Murray JJ.) Mr Francis Jacobs , Advocate General

20 October 1993 [FN1]

Reference from Germany by the Arbeitsgericht, Passau, under Article 177 EEC.

Provision considered:
EEC 48(2)

Employment. Discrimination. Teaching.

Given that the overwhelming majority of foreign-language assistants at universities in a Member State are foreign nationals domestic law which provides that such posts must or may be filled by means of fixed term contracts as a matter of course, while permitting the use of such contracts with regard to other specialist posts only if it is justified on objective grounds in each particular case, constitutes indirect discrimination in breach of Article 48(2) EEC unless such difference in treatment is, itself, justified on objective grounds. [18]

FN1 The judgment in this case has been translated by us. The Advocate General's Opinion was in English in the original.--Ed.

Employment. Discrimination. Teaching.

The need to ensure up to date tuition cannot justify indirect discrimination against university foreign-language assistants from other Member States by limiting the term of their contracts of employment. The danger of their losing contact with

their mother tongue is slight, in the *630 light of the increase in cultural exchanges and improved communications, and, in addition, it is open to the universities to check the level of assistants' knowledge. [20]
Under German federal law certain specialist teaching posts at universities may be filled using fixed term contracts provided it is justified on objective grounds in the particular circumstances. In the case of foreign-language assistants, however, fixed term contracts may be imposed solely on the basis of the nature of the work involved and are subject to a maximum limit of five years. Bavarian legislation, moreover, imposes fixed term contracts for all foreign-language assistants and also fixes a maximum term of five years. The Court *interpreted* Article 48(2) EEC *in the context of* an Italian national who, after working as a foreign-language assistant at the University of Passau from 1986 to 1991, had her request for renewal of her contract refused *to the effect that* given the vast majority of foreign-language teachers were foreigners singling them out for such treatment constituted indirect discrimination in breach of **Article 48(2)** *and that* it could not be justified as necessary to ensure up-to-date tuition.

Representation

Annette Kähler, of the Frankfurt am Main Bar, for the applicant.
Ernst Röder, Ministerialrat at the Federal Ministry of Economic Affairs, for the German Government.
Dimitrios Gouloussis, Legal Adviser, and Roberto Hayder, of the Commission's Legal Service, for the E.C. Commission as *amicus curiae.*

The following case was referred to in the judgment:
1. Alluè and Coonan v. Università di Venezia (33/88), 30 May 1989: [1989] E.C.R. 1591, [1991] 1 C.M.L.R. 283.

The following further cases were referred to by the Advocate General:
2. Alluè and Coonan v. Università di Venezia (C-259, 331 & 332/91), 2 August 1993: not yet reported.
3. 7 azr 280/79 (Bundesarbeitsgericht), 19 August 1981.
4. 2 azr 87/80 (Bundesarbeitsgericht), 13 May 1982.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Facts

I. Legal background

Section 57a of the Hochschulrahmengesetz (German Framework Act on Universities, "HRG") provides as follows: *631

Limitation of term of contracts of employment

Sections 57b to 57f are applicable to fixed-term contracts of employment concluded with staff members with teaching and research tasks in the fields of science and art, referred to by section 53, staff with medical tasks, referred to by section 54, and teaching staff with special tasks, referred to by section 56, and with auxiliary scientific staff. The rules of employment law and the principles governing fixed-term contracts of employment are applicable only in so far as they are not contrary to the provisions of this Act.
Section 57b reads as follows:

Objective justification of fixed term

(1) Save in cases where an objective ground is not required by the general rules and principles of employment law, the conclusion of fixed-term contracts of employment with the staff referred to by section 57a, sentence 1, is authorised if the limitation of the term is justified by an objective ground.
(2) The objective grounds justifying limitation of the term of a contract of employment of assistants with teaching and research tasks in the fields of science and art, referred to by section 53, and of staff with medical tasks, referred to by section 54, exist also in the following cases:
1. if the assignment of the staff member to the tasks referred to by section 53(1) or by the combined provisions of section 53(3) and (1) serves also to further his training as a future researcher or professional in the field of art or to further his professional training;
2. if the staff member is paid from budget funds which, for budgetary reasons, are earmarked for work of limited duration and if he has a post within that category;
3. if the staff member is appointed in order to acquire, or temporarily to contribute, special knowledge and experience in research or work in the field of art;
4. if the staff member is paid mainly from outside finance and if his work meets the object of the finance;
5. if the staff member is engaged for the first time for teaching and research tasks in the fields of science or art.
(3) An objective ground justifying the conclusion of a fixed-term contract of employment with an instructor of foreign mother-tongue with special tasks also exists where his work consists mainly of instruction in a foreign language ("assistant").
(4) Subsection 2, indents 1, 2 and 4, apply *mutatis mutandis* to the conclusion of contracts of employment with auxiliary scientific staff.
Section 57c(2) provides as follows:
In the cases referred to by section 57b(2), indents 1 to 4, and (3), the fixed-term contract may be concluded for a maximum term of 5 years. If more than one fixed-term contract is concluded pursuant to section 57b(2), indents 1 to 4, and (3), with the same higher-education establishment, their total duration shall not

exceed such maximum term ...
Section 56 is worded as follows:

Teaching staff with special tasks

Where a task mainly requires knowledge and practical skills to be *632 imparted and does not require the conditions prescribed for the appointment of teachers to be fulfilled, such task may be given to teaching staff as their principal activity if they have special tasks.
Section 53 provides as follows:

Staff members with teaching and research tasks in the field of science or art

1. Staff members with teaching and research tasks in the field of science shall be civil servants or employees appointed to departments, scientific establishments or units with scientific tasks. These tasks shall include that of teaching students specialised subjects, practical skills and the application of scientific methods to the extent necessary for the subject offered.
...
3. Subsection (1) applies *mutatis mutandis* to staff members with teaching and research tasks in the field of art.
Section 54 reads as follows:

Staff with medical tasks

Persons whose main work in a higher-education establishment consists in tasks in the medical, dental or veterinary fields and who are not teachers or assistants in higher education shall normally be treated, for the purpose of the rules concerning administrative status and social insurance, as staff with teaching and research tasks in science.
Section 27(3) of the Bavarian Hochschullehrergesetz (University Teachers Act, "Bavarian HLG") provides as follows:
Instructors with special tasks shall be appointed as established instructors with the grade of secondary teacher in higher education or the grade of specialist teacher. Instructors with special tasks may be engaged as non-civil servants under a fixed-term contract, in particular:
1. if they do not fulfil the general conditions for the appointment of civil servants,
2. if they hold a post as foreign-language assistant.
Foreign-language assistants shall not be employed for a term exceeding 5 years.

II. Facts and proceedings

Mrs Maria Chiara Spotti, an Italian national, held the post of a foreign-language assistant at the University of Passau, Bavaria. She was initially employed on the basis of a 1-year "contract of employment as foreign-language assistant" from 1 November 1986 to 31 October 1987, and subsequently on the basis of a second

contract for the period from 1 November 1987 to 31 July 1991. Article 1, paragraph 2, of this contract justified the time limit as follows:
Guarantee of uninterrupted cultural exchanges, prevention of loss of contact with the native country to ensure up-to-date tuition, duration of residence outside country of origin since 1 November 1986 (1 year) counts against the maximum statutory term of employment. Post as foreign-language teacher under section 57b(3) of the HRG.
When Mrs Spotti applied for her employment to be continued after 31 July 1991, the University of Passau refused by reason of the *633 abovementioned section 27(3) of the Bavarian HGL and sections 57b(3) and 57c(2) of the HRG. After an attempt to resolve the dispute by conciliation, Mrs Spotti brought proceedings before the Arbeitsgericht Passau.
In the order making the reference, the abovementioned court refers to the Court's judgment in Case 33/88, Allue, [FN2] according to which Article 48(2) EEC prohibits not only overt discrimination but also all forms of covert discrimination which have the same result. The national court accepts that there could be indirect discrimination in the present case because the overwhelming majority of foreign-language assistants in the University are foreign nationals.

FN2 [1989] E.C.R. 1591, [1991] 1 C.M.L.R. 283, at paras. [11] and [12].

However, it considers that Allué, cited above, is not sufficient to conclude that the German provisions are "null and void" . They are not comparable in every way with the Italian legislation which is the subject of that judgment and, in particular, sections 57b(3) and 57c of the HRG do not entirely exclude the conclusion of contracts of employment for an unlimited period.
The doubts of the national court arise from the fact that section 57b(3) provides for the possibility of limiting the duration of the appointment of a particular category of "teachers with special tasks", *i.e.* foreign-language assistants, solely by reason of the nature of their work, in contrast to other "teachers with special tasks", for whom this practice must be justified by an objective ground. Furthermore, in the case of foreign-language assistants, under section 57c(2) of the HRG, contracts can only be concluded for a maximum of five years, whereas fixed-term contracts with other "teachers with special tasks" are not subject to this limitation, as section 57b(1) is not mentioned in section 57c(2) of the Act.
The court making the reference observes that, although the abovementioned sections do not prevent the conclusion of contracts with an unlimited term, it cannot be excluded that the rule is for the term to be fixed in view of the facility offered by section 57b(3). In the territorial ambit of the Bavarian HLG, the conclusion of contracts for an unspecified term with foreign-language assistants has even been totally excluded and their maximum term has been fixed at five years by the above mentioned section 27(3).
With regard to the arguments of the defendant in the main action, to the effect that a fixed-term appointment is necessary to ensure up-to-date tuition, the national court points out that this is precluded by paragraphs [13] and [14] of Allue cited above. According to the case law of the Bundesarbeitsgericht

(Federal Labour Court), however, the basis for up-to-date tuition may be an objective ground justifying the conclusion of fixed-term contracts for the posts of foreign-language assistants. In the national court's opinion, it cannot be concluded from this German case law that the term of all contracts *634 must be subject to a maximum limit. For these reasons, the national court stayed judgment and referred the following questions to the Court of Justice:
1. Where legislation of a Member State lays down special rules on the length of contracts in relation to the activity of foreign-language assistants, the length of such contracts being limited (section 57(b)(3) and (c)(2) of the Hochschulrahmengesetz ("the HRG") in conjunction with section 27(3) of the Bayerisches Hochschullehrergesez), but there is no such restriction on the length of contract for other teaching staff performing special duties (Paragraph 56 of the HRG), is such legislation compatible with **Article 48(2)** EEC?
2. Is such legislation so compatible at least if such a restriction is based on special objective grounds, in particular that of ensuring that the instruction is topical?

Opinion of the Advocate General (Mr Francis Jacobs)

1. In this case the Court is asked once more to consider the position under Community law of persons employed as foreign-language assistants in another Member State. The case is a request for a preliminary ruling by the Arbeitsgericht Passau, which has referred the following questions:
1. Where legislation of a Member State lays down special rules on the length of contracts in relation to the activity of foreign-language assistants, the length of such contracts being limited (section 57(b)(3) and (c)(2) of the Hochschulrahmengesetz ("the HRG") in conjunction with section 27(3) of the Bayerisches Hochschullehrergesetz), but there is no such restriction on the length of contract for other teaching staff performing special duties (section 56 of the HRG), is such legislation compatible with **Article 48(2)** EEC?
2. Is such lelgislation so compatible at least if such a restriction is based on special objective grounds, in particular that of ensuring that the instruction is topical?
2. The plaintiff in the main proceedings is an Italian national who, since 1 November 1986, has been employed in Germany as a foreign-language assistant at the University of Passau. The plaintiff initially entered into a contract of employment for one year (1 November 1986 to 31 October 1987). On 22 September 1987 she entered into a second contract, under which her employment continued for a further four-year period (1 November 1987 to 31 July 1991). On 10 July 1991 the university refused her request for a further renewal of her contract on the ground that, under the applicable federal and Bavarian legislation, employment as a foreign-language assistant was limited to a maximum period of five years.
3. The plaintiff argues that such a refusal to extend her contract of employment beyond a maximum period of five years is incompatible with **Article 48(2)** of the Treaty. The plaintiff refers to the judgment of the Court in Case 33/88, Allue and Another v. Università degli *635 Studi di Venezia [FN3] ("Allué I"), and submits

that the principles established in that judgment apply also to the circumstances of the present case. It is to be noted that the legislation at issue in Allué I has given rise to further references by Italian courts: see Joined Cases C-259/91, C-331/91 and C-332/91, Allué and Others, [FN4] in which the opinion of Advocate General Lenz was delivered on 20 January 1993. In Allué I the Court held that **Article 48(2)** of the Treaty precludes the application of a national provision imposing a limit on the duration of the employment relationship between universities and foreign-language assistants where there is, in principle, no such limit with regard to other workers.

FN3 [1989] E.C.R. 1591, [1991] 1 C.M.L.R. 283.

FN4 Judgment of 2 August 1993, not yet reported.

4. In what follows I shall first briefly resume the provisions of German law at issue in the main proceedings, and then discuss how the principles established in Allué I are to be applied to such legislation. It will be recalled that **Article 48(2)** of the Treaty requires the abolition of any discrimination based on nationality between workers of Member States as regards employment, remuneration and other conditions of work and employment. It may also be noted that Article 7(1) of Council Regulation 1612/68 on freedom of movement for workers within the Community provides that:
A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment.

The German legislation

5. As the German Government explains in its written observations, it follows from the case law of the German courts that, under German law, a contract of employment may be concluded for a limited period of time only where an objective ground exists for such a limitation. I shall refer to such contracts of employment as "fixed-term contracts".
6. Provisions on the conclusion of fixed-term contracts by institutions of higher education and research are contained in the Hochschulrahmengesetz of 26 January 1976 (Framework law on universities, hereafter "the HRG"), as amended by section 1 of the Gesetz über befristete Arbeitsverträge mit wissenschaftlichem Personal an Hochschulen und Forschungseinrichtungen of 14 June 1985 (Act on fixed-term contracts of employment with academic staff at universities and research institutes). [FN5]

FN5 [1985] I BGB1. 1065 .

7. That amendment inserted into the HRG a series of new sections 57a to 57f. Section 57a defines the categories of worker to which those new provisions

apply, including in particular the "scientific and artistic assistants" referred to in section 53 of the HRG, the "personnel with *636 medical tasks" referred to in section 54, and the "teaching staff for special tasks" referred to in section 56.
8. Section 57b(1) provides that, except when no objective ground is required under the general provisions and principles of labour law, the conclusion of fixed-term contracts with the personnel mentioned in section 57a is permitted where it can be justified on such a ground. Section 57b(2) provides that, in the case of the workers referred to in sections 53 and 54, such grounds exist in particular (1) where the activities of an assistant further his scholarly or artistic development or professional training, (2) where he is paid out of funds which are earmarked for activities of limited duration, (3) where he is intended to acquire or temporarily to contribute special knowledge or experience, (4) where he is financed mainly from the funds of a third party, or (5) where he is engaged for the first time.
9. Section 57b(3) provides that an objective ground exists for the engagement on a fixed-term contract of an instructor who is the native speaker of a foreign language where, in particular, the instructor is mainly engaged as a foreign-language assistant ("Lektor").
10. Section 57c(2) imposes a maximum period of five years for any fixed-term contract limited on a ground mentioned in section 57b(2), points 1 to 4, or in section 57b(3). Where an employee is employed on more than one such contract with a single institution, the total period of the contracts may not exceed five years. In the case of a contract limited on the ground mentioned in section 57b(2), point 5, the maximum period of the contract is two years. Finally, section 57c(3) to (6) contain various exceptions to those requirements which are not relevant in the circumstances of the present case.
11. It can be seen that, under the above provisions of the HRG, the employment of foreign-language assistants on fixed-term contracts is permitted but is not compulsory. In the case of universities in Bavaria, however, it appears that the employment of such assistants can only be made on fixed-term contracts not exceeding five years: see section 27(3) of the Bayerisches Hochschullehrergesetz (Bavarian law on university teachers).

Foreign-language assistants and Community law

12. As I have already mentioned, in Allué I the Court held that national provisions imposing a time-limit on the employment of foreign-language assistants are incompatible with Community law where, in principle, no such limit is imposed in respect of other workers: see paragraph 3 above. However, in the view of the German Government the national provisions at issue in the present case can be distinguished from the provisions which were at issue in Allué I. In the case of the latter provisions, it appears that the employment of workers other than foreign-language assistants was not subject to any time-limit. As Advocate General Lenz stated at paragraph 19 of his opinion in Allué I: *637
Apart from "lecturers on contracts", who are engaged on the basis of a one-year contract for services, which may be renewed no more than twice, the teaching and research staff [at Italian universities] ... have permanent posts which are filled by competition. In addition ... contracts of employment are concluded

according to the general rule of Italian labour law for an indeterminate period. Accordingly, in Allué I there was no doubt that foreign-language assistants were treated differently from other workers as regards the time-limits imposed on their contracts of employment, and in particular that they were treated differently from other university staff. Since it was clear, equally, that that difference in treatment affected a substantially greater proportion of nationals from other Member States than Italian nationals, the only question at issue in Allué I was whether the difference in treatment could be objectively justified. In contrast, the provisions which are at issue in the present case provide for the possibility of fixed-term contracts also in the case of university staff other than foreign-language assistants. In particular, they provide for such a possibility in the case of other "teaching staff for special tasks" (see sections 56 and 57a of the HRG), the workers to whom foreign-language assistants are, it appears, most closely comparable.

13. The German Government suggests a second ground on which the present provisions can be distinguished from the legislation at issue in Allué I. It points out that the time-limits imposed by the Italian legislation were mandatory, whereas section 57b of the HRG regulates only the circumstances in which fixed-term contracts are permissible. Thus, the HRG does not exclude the possibility of foreign-language assistants being appointed on contracts of unlimited duration. As I have already mentioned, however, the Bavarian legislation which is applicable in the present case does in fact exclude such a possibility.

14. In the Commission's view, legislation of the kind presently at issue is incompatible with **Article 48(2)** of the Treaty for essentially the same reasons as applied in the case of the legislation at issue in Allué I. Although the German legislation, unlike the Italian legislation, provides for the engagement on fixed-term contracts of other university staff as well as foreign-language assistants, the fact remains that the circumstances in which such an engagement is permitted may differ. As the Commission points out, in the case of foreign-language assistants section 57b(3) of the HRG provides that employment on a fixed-term contract is automatically justified. In contrast, in the case of other university staff an objective ground must be made out in the circumstances of each individual case. Moreover in Bavaria a mandatory limit of five years on the engagement of foreign-language assistants is laid down, and it appears that such a mandatory limit does not apply to other categories of university staff.

15. The Commission also points out that in Allué I the Court considered the question whether special restrictions on the employment of foreign-language assistants can be justified on the ground that such assistants are required to have an up-to-date *638 knowledge of their language. The Court stated, at paragraph [14] of its judgment, that:

... the danger of their losing contact with their mother tongue is slight, in the light of the increase in cultural exchanges and improved communications, and in addition it is open to the universities in any event to check the level of assistants' knowledge.

The Court also noted that under the legislation in question the assistant could be engaged by another university for a further maximum period, a consideration

which applies equally in the case of the rules laid down by section 57c(2) of the HRG. There would appear therefore to be no good reason for imposing the five-year time-limit laid down by that provision in respect of any one university.

16. It seems to me to be incontestable that the Court's reasoning in Allué I applies equally in the circumstances of the present case. It is true that the German legislation, at least at the level of the framework rules laid down by the HRG, is less obviously discriminatory than the Italian legislation which was at issue in Allué I, since the German legislation permits several categories of university staff to be employed on fixed-term contracts. It remains the case however that foreign-language assistants--and moreover those whose mother tongue happens to be other than German--are singled out for special treatment. They may be refused the benefit of an indefinite contract of employment solely on account of their status as foreign-language assistants; in contrast, teaching staff assigned to other special tasks may be employed on fixed-term contracts only for a reason based on their particular circumstances.

17. It is clear that, even in the absence of the provisions of section 57b(3) of the HRG, a German university would be able to employ language assistants on fixed-term contracts. The university would however be required to have an objective reason for doing so other than the mere circumstance that the person concerned is employed as a foreign-language assistant. Even if foreign-language assistants were made subject to the régime of section 57b(2), which currently applies only to the categories of staff referred to in sections 53 and 54 of the HRG and to "scientific auxiliaries" , concrete reasons based on the actual circumstances of the case would still have to be given for employment on such a contract (except for the case of a contract given on first appointment: see paragraphs 8 and 10 above). Foreign-language assistants are thus less favourably treated than other university employees who may be offered short-term contracts. In the case of the special rules applicable in Bavaria the difference in treatment is even more evident, since as we have seen under Bavarian law there is a mandatory limit of five years on the employment of foreign-language assistants, but not it appears on the employment of other university staff.

18. In its written observations the German Government does not accept that the German legislation gives rise to discrimination; nor *639 however does it put forward any reason justifying the different treatment accorded to foreign-language assistants, as compared with other categories of university staff, under both federal and Bavarian law. As we have seen, the reason mentioned in the second question referred by the Arbeitsgericht, namely the need for an up-to-date knowledge of the language, was rejected by the Court in Allué I: see paragraph 15 above. It seems to me that the Court's reasoning on that point must apply also to the mandatory time-limit of five years imposed by the Bavarian legislation. Furthermore it is not contested that, as in Allué I, the less favourable treatment afforded by the law of the Member State in question is particularly likely to affect nationals from other Member States. Such treatment amounts therefore to indirect discrimination contrary to **Article 48(2)** of the Treaty.

19. Accordingly, there is no doubt in my opinion that legislation of the kind

applicable in the present case, which includes a mandatory time-limit of five years, is incompatible with the principle of equal treatment laid down by the Treaty. In the absence of a mandatory time-limit such as that imposed by Bavarian law, the question might arise whether a difference in treatment of the kind which results from the HRG itself could be justified on the ground of the need for an up-to-date knowledge of the language concerned. It will be recalled that section 57b(3) of the HRG permits, but does not require, a university to employ foreign-language assistants on a fixed-term contract. It might be argued that such a provision is necessary in order to give the university a sufficient discretion to conclude fixed-term contracts in appropriate cases. Thus although it is clear that such a ground cannot be used to justify a mandatory time-limit imposed by national law, a university may well wish to have the discretion to appoint some of its language assistants for terms of limited duration.

20. However, it does not seem to me that a provision such as section 57b(3) of the HRG can be justified on such a basis. As we have seen, appointment on a fixed-term contract is already permitted under German law where there are objective grounds for such an appointment. In so far as a university has an objective ground for employing a language assistant on a fixed-term contract, therefore, it is entitled to do, although any grounds given are presumably subject to scrutiny by the national court. The unlimited discretion to make such appointments given by section 57b(3) is accordingly unnecessary. Its only effect, in practice, is to remove any possibility of judicial review under national law of the decision not to offer a contract of indefinite duration. Even in the absence of the mandatory time-limit imposed by the Bavarian legislation, therefore, it seems to me that provisions of the kind in question are incompatible with the prohibition of discrimination laid down by **Article 48(2)** of the Treaty.

21. It must none the less be emphasised that the employment of foreign-language assistants on fixed-term contracts in individual cases need not in itself be incompatible with Community law where under *640 the national law in question other university staff can also be engaged on such contracts. So far as German law is concerned, it must be recalled that for staff falling within sections 53 and 54 of the HRG the fact of being engaged for the first time is a sufficient ground for a fixed-term contract. Community law would not preclude the same provision being applied to foreign-language assistants to the extent that they are comparable to staff in those categories--a question which does not fall to be decided in the present case. Moreover, both on initial recruitment, and on any subsequent contract, valid reasons may well exist for fixed-term contracts in the particular circumstances. In the case of foreign-language assistants such contracts may well be thought desirable from the point of view both of the students and of the instructors themselves. One reason for making some such posts available might be to offer young academics from other countries the opportunity to spend a limited period of time in Germany for the purposes of their own *Bildung.* Conversely, depending upon the nature of the instruction to be given, it might be thought desirable to have an instructor in a foreign language recently arrived from the country concerned. A university may for instance wish to lay particular stress on recent developments in the colloquial language for the

benefit of advanced students. It does not seem to me that in Allué I the Court intended to exclude the possibility that, in individual cases, fixed-term contracts might be justified by the need for a topical knowledge of the language or even by the need for an up-to-date acquaintance with the cultural and political life of the country concerned. It would be for the national court to decide, in any individual case, whether such a need amounts to a sufficient objective ground. From the case law of the German courts referred to in the order for reference, it appears that that was indeed the position under German law before the amendment to the HRG made by the Gesetz über befristete Arbeitsverträge of 14 June 1985, cited above in paragraph 6: see the judgments of the Bundesarbeitsgericht of 19 august 1981 [FN6] and of 13 May 1982. [FN7] A rule of national law cannot however be justified which removes any requirement to give objective grounds for the employment of foreign-language assistants on fixed-term contracts, where such grounds are required to be given in the case of comparable categories of worker.

FN6 7 AZR 280/79; AP No. 59, at para. 620 BGB.

FN7 2 AZR 87/80; AP No. 68, Ibid.

Conclusion

22. I am accordingly of the opinion that the questions referred by the Arbeitsgericht Passau should be answered as follows:
Article 48(2) EEC precludes the application of a provision of national law which imposes a limit on the duration of an employment relationship between universities and foreign-language assistants, or which has the effect that the employment of such assistants on fixed-term contracts is automatically permitted, where in the case of other comparable workers *641 employment for a fixed term is permitted under national law only if there is an objective ground for limiting the duration of the contract of employment.

JUDGMENT

[1] By order of 27 May 1992, received by the Court on 15 June following, the Arbeitsgericht Passau referred to the Court for a preliminary ruling under Article 177 EEC two questions on the interpretation of Article 48(2) EEC.
[2] The questions have arisen in the context of a dispute between Mrs Maria Chiara Spotti and the Freistaat Bayern.
[3] Mrs Spotti worked as a foreign-language assistant at the University of Passau from 1 November 1986 to 31 July 1991 under two contracts of employment, the first dated 22 October 1986 for the period from 1 November 1986 to 31 October 1987, and the second dated 22 September 1987 for the period from 1 November 1987 to 31 July 1991.
[4] The fixed nature of the term of the employment relationship was justified as follows by Article 1, paragraph 2, of the later contract:
Guarantee of uninterrupted cultural exchanges, prevention of loss of contact with

the native country to ensure up-to-date tuition, duration of residence outside country of origin since 1 November 1986 (1 year) counts against the maximum statutory term of employment. Post as foreign-language teacher under section 57b(3) of the HRG.
[5] When the University refused to extend the employment relationship beyond 31 July 1991, Mrs Spotti initiated a conciliation procedure pursuant to section 22 of the Gesetz zur Ausführung des Gerichtsverfassungsgesetzes (Act implementing the Judicial Organisation Act). As she was unsuccessful, she brought proceedings before the Arbeitsgericht Passau for, in particular, a ruling that her contract of employment was for an unlimited period.
[6] Finding that there were serious doubts as to whether the German provisions concerning the contracts of employment of foreign-language assistants were compatible with **Article 48(2)** EEC, the Arbeitsgericht Passau decided to stay judgment and to refer the following questions to the Court;
1. Where legislation of a Member State lays down special rules on the length of contracts in relation to the activity of foreign-language assistants, the length of such contracts being limited (section 57(b)(3) and (c)(2) of the Hochschulrahmengesetz ("the HRG") in conjunction with section 27(3) of the Bayerisches Hochschullehrergesetz), but there is no such restriction on the length of contract for other teaching staff performing special duties (section 56 of the HRG), is such legislation compatible with **Article 48(2)** EEC?
2. Is such legislation so compatible at least if such a restriction is based on special objective grounds, in particular that of ensuring that the instruction is topical?
[7] The abovementioned sections 57b and 57c of the Hochschulrahmengesetz (Framework Act on Universities, "HRG") were added by the Gesetz über befristete Arbeitsverträge mit wissenschaftlichem Personal an Hochschulen und Forschungs-einrichtungen (Act on Fixed-Term Contracts of Employment with Academic Staff at Universities and Research Institutes) of 14 June 1985 *642 .
[8] Section 57b(1) provides that the conclusion of fixed-term contracts in the cases referred to by section 57a must be justified on an objective ground. Section 57b(2) goes on to list various objective grounds which can be cited on the appointment of persons with teaching and research tasks, referred to by section 53, or medical tasks referred to by section 54: (1) contract serving the training of the person concerned, (2) paid out of budget funds earmarked for work of limited duration, (3) appointment in order to acquire, or temporarily to contribute, special knowledge and experience in research or work in the field of art, (4) paid mainly from outside finance, or (5) if the staff member is engaged for the first time for teaching and research tasks.
[9] Next, section 57b(3) provides as follows:
An objective ground justifying the conclusion of a fixed-term contract of employment with an instructor of foreign-tongue with special tasks also exists where his work consists mainly in instruction in a foreign language ("assistant").
[10] Pursuant to section 57c(2) of the same Act, the fixed-term contracts in question may also be concluded for a maximum of five years, and this limit also applies where more than one contract is concluded by the same foreign-

language assistant with the same university.
[11] As for section 27(3) of the Bavarian Hochschullehrergesetz (University Teachers Act, "Bavarian HLG"), this provides as follows:
Instructors with special tasks shall be appointed as established instructors with the grade of secondary teacher in higher education or the grade of specialist teacher. Instructors with special tasks may be engaged as non-civil servants under a fixed-term contract, in particular:
1. if they do not fulfil the general conditions for the appointment of civil servants,
2. if they hold a post as foreign-language assistant.
Foreign-language assistants shall not be employed for a term exceeding five years.
[12] Reference is made to the Report for the Hearing for a fuller account of the facts and the legal background of the main action and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.
[13] By its questions the national court seeks to ascertain, first, whether **Article 48(2)** EEC precludes the application of national provisions to the effect that posts as foreign-language assistants must or may be filled by means of fixed-term contracts of employment whereas, for other instructors with special tasks, the use of such *643 contracts must be justified by an objective ground in each particular case.
[14] In Case 33/88, Allué [FN8] the Court held that **Article 48(2)** EEC precludes the application of a provision of national law which imposes a limit on the duration of the employment relationship between universities and foreign-language assistants where there is in principle no such limit for other workers.

FN8 [1989] E.C.R. 1591, [1991] 1 C.M.L.R. 283.

[15] The German Government considers that this case law cannot be applied in a situation, such as the present, where national law permits the appointment on fixed-term contracts, not only of foreign-language assistants, but also of other categories of staff.
[16] In this connection it must be observed that, for the other categories of staff mentioned by the German Government *viz.* scientific researchers, staff with medical tasks, other instructors with special tasks and auxiliary teaching and research staff, the conclusion of a fixed-term contract is authorised only if it is justified on an objective ground. According to the national court, if the statutory provisions do not specify the grounds which can be invoked, the validity of the contract depends in principle on an examination in each case of whether the particular features of the employment relationship in question justify such a restriction in the light of the principles developed in this connection by case law.
[17] On the other hand, for foreign-language assistants, section 57b(3) of the HRG provides for the possibility of limiting the term of contracts solely on the basis of the nature of their work, and section 27(3) of the Bavarian HLG lays down that the contracts of employment of foreign-language assistants shall always be for a fixed term.

[18] As the overwhelming majority of foreign-language assistants are foreign nationals, this difference in treatment is likely to put them at a disadvantage by comparison with German nationals and is therefore a form of indirect discrimination which is prohibited by **Article 48(2)** EEC unless it is justified on objective grounds.
[19] Secondly, the national court asks whether such legislation is justified in so far as it is necessary to ensure up-to-date tuition. On this point the national court refers to the case law of the Bundesarbeitsgericht (Federal Labour Court) relating to the legislation in force before the Act of 14 June 1985, according to which such necessity is an objective ground justifying the conclusion of fixed-term contracts for posts as foreign-language assistant.
[20] In this connection it must be observed that, as the Court held in Allué, cited above, at paragraph [14], the need to ensure up-to-date tuition cannot justify limiting the term of the contracts of employment of foreign-language assistants. The danger of their losing contact with their mother tongue is slight, in the light of the increase in cultural *644 exchanges and improved communications, and in addtion it is open to the universities to check the level of assistants' knowledge.
[21] Therefore the reply to the questions from the national court must be that **Article 48(2)** EEC precludes the application of a provision of national law to the effect that posts of foreign-language assistants must or may be filled by means of fixed-term contracts whereas, for other instructors with special tasks, the use of such contracts must be justified on an objective ground in each particular case.

Costs

[22] The costs incurred by the German Government and the European Commission, which have submitted observations to the Court, are not recoverable. As these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

Order

On those grounds, THE COURT, in answer to the questions referred to it by the Arbeitsgericht Passau by order of 27 May 1992,
HEREBY RULES:
Article 48(2) EEC precludes the application of national law according to which posts for foreign-language assistants must or may be the subject of employment contracts of limited duration, whereas, for other teaching staff performing special duties, recourse to such contracts must be individually justified by an objective reason.

[1994] 3 C.M.L.R. 629

END OF DOCUMENT