

## REPORT FOR THE HEARING delivered in Case C-379/87 \*

### I — Facts and procedure

#### 1. *Legal background*

Article 8 of the Constitution of Ireland provides that the Irish language as the national language is the first official language of the Irish State. English is recognized as a second official language.

Article 23 of the Vocational Education Act 1930, as amended, provides that the numbers, qualifications, remuneration and appointment of all 'officers' of each vocational educational committee must be approved by the Minister of Education.

In exercise of that power the Minister issued Circular Letter 28/79 of 26 June 1979 setting out the requirement that in future all candidates for permanent full-time posts as senior lecturer, lecturer or assistant lecturer in vocational education institutions had either to hold a certificate of knowledge of the Irish language (*An Ceard-Teastas Gaeilge*) or to take a special oral examination in the Irish language. The examination had to be taken before the candidate could be appointed to the vacant post. If the candidate failed the examination, the institution was not entitled to appoint that person to a full-time or part-time permanent post. However, it was possible for it to appoint the candidate to a temporary post

for the remainder of the academic year if it was not possible to fill the post in accordance with principles set out in the circular letter. Furthermore, the Minister confirmed a provision of an earlier memorandum, V7, whereby a derogation from the obligation to establish the required competence in the Irish language might be granted to a national of a country other than Ireland (or to a candidate born and educated in Northern Ireland) who possessed all the other necessary qualifications if there was no fully qualified candidate.

#### 2. *Background to the main proceedings*

Mrs Anita Groener (hereinafter referred to as 'the applicant'), who is a Netherlands national, has resided in Ireland since August 1982.

In September 1982 she was engaged temporarily as a part-time art teacher at the College of Marketing and Design, Dublin, which comes under the authority of the City of Dublin Vocational Educational Committee.

In July 1984 she applied for a permanent full-time post at the College as a lecturer in art (Lecturer 1 (Painting)). The second respondent proposed to the first respondent, the Minister, that the applicant should be appointed to that post. The Minister gave

\* Language of the case: English.

his approval on condition that the applicant passed the special oral examination.

The applicant asked for this condition to be waived but her request was refused. The oral test took place on 28 May 1985 and the applicant failed. The College, her employer, sought authorization to employ her for the academic year 1985-86 as a full-time lecturer under a temporary contract. This was refused by the Department of Education on the ground that she had failed the oral test.

Finally, the applicant wrote directly to the Minister to ask once again for the obligation to prove her knowledge of the Irish language to be waived. By letter of 27 September 1985, the Minister replied that the condition could not be waived under the terms of Circular Letter 28/79 since other fully qualified persons had applied for the post in question.

After having informed the Commission of the European Communities and the European Parliament by means of a petition to its President, the applicant commenced proceedings for judicial review before the High Court, Dublin, against the Minister and the City of Dublin Vocational Educational Committee (hereinafter referred to as 'the respondents').

During those proceedings she maintained that the conditions imposed by the Minister in Circular Letter 28/79 and Memorandum V7 were contrary to Community law and in particular to Article 48 of the EEC Treaty and Regulation (EEC) No 1612/68.

### 3. *The preliminary questions*

The High Court took the view that the arguments raised questions of interpretation of Community law and by order of 3 December 1987 stayed its proceedings and referred the following questions to the Court of Justice in accordance with Article 177 of the Treaty:

'1. Where provisions laid down by law, regulation or administrative action make employment in a particular post in a Member State conditional upon the applicant having a competent knowledge of one of the two official languages of that Member State, being a language which nationals of other Member States would not normally know but would have to learn for the sole purpose of complying with the condition, should Article 3 of Regulation (EEC) No 1612/68 of the Council be construed as applying to such provisions on the ground that their exclusive or principal effect is to keep nationals of other Member States away from the employment offered?

2. In considering the meaning of the phrase "the nature of the post to be filled" in Article 3 of Regulation (EEC) No 1612/68 of the Council, is regard to be had to a policy of the Irish State that persons holding the post should have a competent knowledge of the Irish language, where such knowledge is not required to discharge the duties attached to the post?

3. (1) Is the term "public policy" in Article 48(3) of the EEC Treaty to be construed as applying to the policy of the Irish State to support and foster the position of the Irish language as the first official language?

(2) If it is, is the requirement that persons seeking appointment to posts as lecturer in vocational educational institutions in Ireland, who do not possess “An Ceard-Teastas Gaeilge”, shall undergo a special examination in Irish with the view to satisfying the Department of Education of their competency in Irish, a limitation justified on the grounds of such policy?”

#### 4. *Proceedings before the Court of Justice*

The order making the reference was registered at the Court on 21 December 1987.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted on 25 March 1988 by Anita Groener, the applicant in the main proceedings, represented by John A. Reidy, solicitor, on 5 April 1988 by Ireland and the respondents in the main proceedings, the Minister for Education and the City of Dublin Vocational Educational Committee, represented by Louis J. Dockery, Chief State Solicitor, acting as Agent, on 1 April 1988 by the Government of the French Republic, represented by Régis de Gouttes, acting as Agent, and on 30 March 1988 by the Commission of the European Communities, represented by Karen Banks, a member of its Legal Department, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. It did, however, request Ireland to answer a number of questions.

## II — Summary of the written observations submitted to the Court

The observations submitted to the Court essentially concern the concept of public policy in Article 48(3) of the EEC Treaty and the interpretation of Article 3(1) of Regulation No 1612/68, which provides as follows:

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

- (i) 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
- (ii) 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’.

All the parties who have submitted observations acknowledge that it is not the exclusive or principal aim of the national measures in question to exclude non-nationals.

However, the applicant considers that that is the principal effect of the national measures. There are very few nationals of Member States other than Ireland who

could satisfy the conditions imposed without undertaking extensive study.

Regulation No 1612/68 implements Article 48 of the EEC Treaty which prohibits all national measures significantly limiting the number of nationals of other States who qualify for certain posts, unless they can be justified by other substantial grounds.

The phrase 'the nature of the post to be filled' in Article 3 of Regulation No 1612/68 is part of a derogation from the freedom of movement of workers guaranteed by Article 48 of the Treaty and must therefore be narrowly construed as being confined solely to cases where the candidate could not competently carry out his duties without the relevant linguistic knowledge.

The substantial efforts made by the College and the second respondent in order to procure the appointment of the applicant prove that this is not the case with the post for which she is applying. No complaint could be made if it were probable that the applicant would have to give lessons in Irish. Despite the defendants' assertion that the measures in question have substantially increased knowledge of the Irish language, no evidence to support this assertion has been produced.

The key question in this case is therefore whether the policy of the Irish State of encouraging the use of Irish, which the applicant does not challenge and regards as legitimate in itself, may justify the maintenance of the provisions in question and the extension of the concept of the 'nature of the post'.

The answer must be in the negative. Each Member State conducts its own policies to promote national culture, including the national language or languages. Such policies may not be a justification for requiring a high level of familiarity with the national culture as a prerequisite for certain posts, which would negate the effect of Article 48 and Regulation No 1612/68.

That would also be the result if the fostering of national culture, and not the exclusion of non-nationals, was considered to be the 'principal effect' of such a policy if that policy was considered to form part of the 'nature of the post' thereby justifying a requirement of thorough knowledge of a language as a qualification for the post and, finally, if such a policy could be justified on grounds of public policy within the meaning of Article 48(3) of the Treaty. In its case-law the Court has never given that scope to the concept of public policy and it should not do so.

The applicant therefore proposes that the first question should be answered in the affirmative and Questions 2, 3(1) and, if necessary, 3(2) in the negative.

Ireland and the respondents in the main proceedings consider that the real issue in the case is whether it is legitimate on their part to require of their full-time holders of teaching posts a certain competence in the Irish language.

This language is recognized by the Irish Constitution as the national language although it has never been universally spoken by the Irish people and it is central to the identity of the Irish State.

It has been the policy of successive governments to make Irish the vernacular of the Irish people, especially by means of the education system. Knowledge of the Irish language has always been required in the case of posts in the education service. The requirement that holders of teaching posts at all levels of the education system should be capable of assisting persons educated by the system in both official languages is, in the respondents' view, the logical consequence of the fact that schools occupy a central place in that restoration movement.

Ireland cites a number of government initiatives such as the 1983-86 'Action Plan for Irish' and stresses that the Government has always considered and stated that government support is essential in efforts to restore the Irish language. Above all, that support must find expression in the educational establishments financed by the State. Irish will never become a living language if it is treated simply as a school subject. It would be an abandonment of its policy if the State did not attempt to create a supportive environment for the use of Irish outside formal classes. In the light of the above considerations the requirement that all teachers have a knowledge of Irish is fair and reasonable.

One of the results of this policy is that knowledge of Irish is now found throughout the country whereas at the foundation of the State it was limited to the 'Gaeltacht' (Irish-speaking areas). Irish is a Community language in so far as it is a language of the Treaties and can be used as a working language in the European Court.

Vocational education establishments governed by the Vocational Education Acts 1930-70 take pupils from primary schools where the teachers are fluent in the national language. Since these Acts do not contain provisions explicitly requiring a particular knowledge of the national language or the second official language, the Minister had to insist on it under his powers conferred by Section 23 of the Vocational Education Act 1930. The possession of the *Ceard-Teastas Gaeilge*, which was established in 1932 with the aim of ensuring that all teachers of practical or technical subjects could give instruction in the 'subjects in Irish', is required for all full-time permanent posts in the second level vocational area.

Furthermore, it is scarcely logical to attempt to distinguish between the 'indirect' and 'direct' teaching duties of a teacher who has pastoral and formative duties which extend beyond direct instruction. Teachers have a duty to participate actively in the fostering of the national language and to respond to those who wish to express themselves in the national language of the State. A teacher's knowledge of this language is required by the very nature of the post sought to be filled.

This requirement cannot be considered to be disguised discrimination against the applicant because of her nationality. The circular letter, which was issued during a period of rapid growth in the educational system, was intended to improve the suitability of candidates and not to reserve posts for Irish nationals. The respondents' good faith is shown by the fact that the requirement can be derogated from when there is a shortage of suitably qualified applicants.

In the respondents' view, the applicant's rights flowing from Article 48 of the Treaty and Regulation No 1612/68 have not been infringed. Her application was treated as fairly as that of any Irish national. The exclusive or principal effect of the circular letter is not to exclude non-Irish nationals from full-time posts but rather to ensure that the persons engaged are suited for those posts. It is not fluency in Irish (which is professed by roughly a third of the Irish population) which is required for the teaching post in question but a certain level of competence which has been acquired by particular non-Irish nationals who have been able to comply with the conditions imposed by the circular letter.

However, if the Court is of the view that there is discrimination, the State has, in any event, the right to limit any non-national's right to accept an offer of employment on the grounds of public policy referred to in Article 48(3).

Although the term 'public policy' must be interpreted strictly, it would not have a meaning independent of the term 'public security' if Ireland were not entitled to rely upon it in order to implement a policy of establishing and maintaining Irish as the national language and first official language. That policy is implemented in a manner which is not disproportionate to the aim to be achieved and which has no economic purpose. The Court's case-law does not preclude such an interpretation of the concept of public policy. In all the judgments in which the Court has been required to rule on that concept, the particular circumstances of the case were more concerned with public security or public health.

In the special context of this case Ireland and the respondents propose that the first question should be answered in the negative and the second and third questions in the affirmative.

The French Government considers that a condition requiring a knowledge of the national language of the host country is legitimate. Ireland is entitled to adopt measures to ensure that Irish is respected and used in conformity with its constitution. Pupils are entitled to ask to communicate with their teachers in Irish. No provision of Community law can preclude those rights.

Moreover, as the Court held in its judgment of 15 October 1987 in Case 222/86 *Unectef v Heylens and Others* [1987] ECR 4097, Member States are entitled, if the conditions of access to a profession have not been harmonized at Community level, to regulate those conditions and to require the possession of the necessary diplomas on condition that the requirements for such proof are reasonable and not too difficult. That condition has been complied with in this case.

The special examination in Irish reflects the approach adopted by the Commission in the negotiations for a Council directive establishing a general system of mutual recognition of diplomas and other qualifications obtained in higher education. This approach consists of allowing the host country to impose either a training period or a short examination (of, for example, 30 minutes) to assess the suitability of candidates and their knowledge of subjects not covered by their national diplomas.

It is not the exclusive or principal aim or effect of such an examination to keep nationals of other Member States away from the employment in question. Knowledge of the official or spoken language of a Member State is not the exclusive preserve of nationals of that State. The Irish measures are applicable to Irish nationals and to nationals of other Member States alike. They do not therefore fall under Article 3 of Regulation No 1612/68. In any event, the measures are justified by reason of the nature of the employment.

Contrary to what appears to be the national court's opinion, the Court must reflect, not on the need for a knowledge of the Irish language in order to be an art teacher, but on the need for all teachers to have such a knowledge.

All Member States are at liberty to require their teachers to be able to give lessons at any time in the official language or languages. A teacher who does not have a satisfactory command of the language or languages of the host country is not capable of fully carrying out his duties, irrespective of the subject taught.

Finally, a condition requiring knowledge of the national language of the host country, applied in a manner proportionate to the intended objective and without discrimination as regards nationality, is in the public interest since it is pursuing an objective (the maintenance of cultural diversity in the Community and respect for linguistic pluralism) which is worthy of being recognized and furthered by the Community authorities. If, contrary to the opinion of the French Government, the requirement is considered to be a limitation on the freedom of movement of workers, it

is justified by the aforementioned imperative reasons, indeed by the concept of public policy referred to in Article 48(3). The Community institutions must respect a Member State's choice of its national language or languages and the measures suited to giving effect to that choice.

The Commission explains that, after becoming aware of this matter after the applicant had sent a petition to the President of the European Parliament, it took the view that the Irish measures were contrary to certain provisions of Community law. It therefore commenced the procedure provided for in Article 169 of the EEC Treaty by sending a letter, on 10 March 1987, to the Irish authorities formally requesting their observations on the matter. The reply of the Irish authorities of 10 April 1987 was limited to informing the Commission of the action commenced by the applicant before the High Court. The Commission thereupon confirmed its preliminary view in a reasoned opinion addressed to Ireland on 6 November 1987 pursuant to Article 169.

Ireland's response of 14 March 1988 was subsequent to the order of the High Court referring the preliminary questions to the Court of Justice.

Ireland put forward three main arguments in its reply to the reasoned opinion. The Commission considers it necessary to examine them since one of them persuaded it to close the file regarding the alleged breach of the Treaty and, in its opinion, indicates the solution which should be adopted.

The first main argument concerns the second indent of Article 3 of Regulation No 1612/68 (the first indent is clearly irrelevant since the special test in Irish is imposed

irrespective of nationality). Ireland puts forward two strands of argument to rebut the claim that the exclusive or principal effect of the measures in question is to keep non-nationals away from the employment in question. First, it argues that the test also presents difficulties for Irish nationals since most of them do not speak the national language fluently. The Commission does not find this argument convincing since the vast majority of Irish people study Irish at school and thus, when sitting the special examination which normally occurs not many years after leaving school, have a clear advantage over non-Irish nationals who have never studied the language. Secondly, Ireland argues that the main effect of the measures is not to keep out non-nationals but to ensure that persons, whether Irish or not, occupying the posts in question have the required competence. In the Commission's view, it is necessary to attribute to the word 'effect' a meaning other than that attributed to the word 'aim'. Although one may accept that the aim of the measures is to ensure a certain level of competence in the national language, the principal effect, interpreted in a purposive fashion, is to create a greater obstacle for non-Irish nationals, likely to keep them away from the employment in question. To be acceptable, that obstacle would have to be justified under the last sentence of Article 3(1), which forms the subject-matter of the Irish authorities' second main argument.

As regards that second argument, the Commission accepts the Irish authorities' view that the language requirement in question is justified by reason of the nature of the post. The Commission then assesses three of the possible bases for such a justification.

The first is that the language requirement is a matter of practical necessity, irrespective of the legal status of the language.

The second depends on whether the job has to be done in an environment where the language in question is generally spoken, even if the activities directly connected with the job might not require a mastery of the language. This approach would lead to different results in mono- and bilingual regions.

The last possible basis is that of the linguistic policy of the national authorities. A dynamic policy of fostering and protecting a minority language might justify the obligation in question, even if knowledge of that language is not widespread in the relevant Member State.

Since those approaches constitute a limitation on a basic freedom laid down in the Treaty, they must all be reconciled with the principle of proportionality. That cannot be done as regards the criterion of practical necessity in a situation where the language in question is not the everyday language. On the other hand, the principle of proportionality is more easily satisfied in the third case, especially in the circumstances of this case where the requirement is not applied to part-time employment in order to avoid too many difficulties for educational institutions, where there is provision for certain derogations in the absence of fully qualified candidates and where the required level of knowledge is not perfect fluency.

The Commission agrees with Ireland that this third criterion is consequently applicable in this case and constitutes the justification for the obligation concerned in the light of the importance of Irish as the historic



language of the Irish people and the constant policy pursued by the Irish State to re-establish it as a generally spoken language in the face of real threats to its survival. The educational system occupies a central role in this policy. Even if the level of knowledge required and the ubiquity of the English language make it unlikely that Irish students can be instructed entirely in Irish, it remains worthwhile to ensure that communication can take place, at least on a one-to-one basis, in the native tongue of the minority-language student. The Community has a general interest in protecting minority languages and it is appropriate that the relevant measures should apply throughout the national territory.

This approach finds support in the Court's case-law, in particular the judgment in Case 182/83 *Robert Fearon & Co. Ltd v Irish Land Commission* [1984] ECR 3677, in which the Court confirmed that it is not enough, in order to establish that a particular measure is discriminatory, to show that it has a greater impact on non-nationals than on nationals, if the measure in question is intended to achieve certain important policy objectives. In the *Fearon* case the Court held that a residence requirement, the purpose of which was to promote a national policy of reducing land speculation and ensuring that the land belonged to those who worked it, was acceptable.

The third main argument of the Irish authorities was that the language policy was in any event covered by the notion of 'public policy' referred to in Article 48(3). In the Commission's view, this argument cannot be

accepted, although the Court has not yet been called on to give a ruling in a case similar to this. Nevertheless, it is clear from the Court's case-law, in particular the judgment in Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337, that this concept must be interpreted strictly, whilst according to the judgment in Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 35, recourse to the concept of public policy presupposes 'the existence . . . of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society'. The Commission doubts whether this condition is fulfilled in this case.

In any event, recourse to the concept of public policy only becomes relevant if there is discrimination and the justification available under the last sentence of Article 3(1) of Regulation No 1612/68, which the Commission supports, is applicable only if there is no discrimination.

In the light of the foregoing, the Commission proposes that the Court reply as follows to the questions of the Irish High Court:

'1. Article 3 of Council Regulation (EEC) No 1612/68 is not to be construed as forbidding national provisions which make employment in a particular post conditional upon the applicant having a competent knowledge of one of the two official

languages of the Member State in question where this knowledge is required by reason of the nature of the post to be filled.

2. In considering the meaning of the phrase "the nature of the post to be filled" in Article 3 of Council Regulation (EEC) No 1612/68, regard may be had to the policy of a Member State to promote an official language of that State, particularly when the post in question is in a sector central to the pursuit of that policy.

3. The term "public policy" in Article 48, paragraph 3 of the EEC Treaty is not to be construed as applying to the policy of a Member State to support and foster the position of an official language of that State.'

### III — Replies to the Court's written questions

Ireland replied to the Court's written questions that the *Ceard Teastas Gaelige* is the qualification in Irish which must be held by teachers applying for posts in vocational schools and that only candidates who have qualifications recognized by the post-primary branch — or who are in the final year of a training course — will be permitted to take the examination, which is in two parts, written and oral.

Exemption from the written part will only be awarded to the following categories of person:

- (a) any person with a degree, from a recognized degree-awarding authority, who has passed Irish as a subject in that degree;
- (b) any person with a degree who has completed his full course and the final examinations of that degree through the medium of Irish, with the exception of

modern languages, although Irish was not one of the subjects in his final examinations;

- (c) any person who has obtained the Higher Diploma in Education, having completed his studies for that course, together with the examinations, through the medium of Irish;
- (d) any person with a recognized qualification to teach in a primary school, who has studied Irish satisfactorily for at least three years, and who has obtained a pass in Academic Irish in the final examinations of that course;
- (e) university students in the final year of a degree course who satisfy the conditions stated at (a) to (d) above.

Exemption from the oral part will be awarded to any candidate who has obtained a pass in the oral examination for registration as a secondary-school teacher.

Since the entry into force of Circular Letter 28/79, a total of 594 Irish nationals have sat for the special examination in Irish of whom 592 passed. Of the two who failed one was successful in a subsequent examination for a different post. A total of six nationals of Member States other than Ireland sat for the special examination in Irish of whom four passed. Of the two who failed one was successful in a subsequent examination for a different post. As far as can be ascertained from official records, Mrs Groener is now the only national of a Member State other than Ireland who remains unsuccessful in the special examination in Irish.

There are 1 723 Irish nationals in vocational education establishments and 189 nationals of Member States other than Ireland. Exemption from the special examination in Irish where applicable has been granted to all but six of the nationals of Member States other than Ireland on the grounds that there were no other fully qualified candidates available for the posts in question.

There are 69 full-time teachers in the College of Marketing and Design. None of them actually teaches in Irish.

Ireland was requested to produce a copy of Memorandum V7 and did so.

G. Slynn  
Judge-Rapporteur