Judicial review – decision that post in DPP was a public service post – whether decision unlawful – characteristics of public service employment – whether decision maker had discretion to open post to Irish national – Article 39(4) of EU Treaty

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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY MARGARET O'CONOR FOR JUDICIAL REVIEW

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GIRVAN J

[1] In this judicial review application the applicant, Margaret O'Conor, is a solicitor who is an Irish national living and working in Belfast. She applied for the post of legal assistant with the Department of the Director of Public Prosecutions ("the DPP") in May 2004. She was invited to an interview scheduled for 18 June 2004. Subsequently on 14 June 2004 she was informed that the position of legal assistant had been designated by the Northern Ireland Office to be a "public service post" and that she was not eligible since she was not a UK national. She was informed that the Department of Finance and Personnel had issued directions under the Civil Service (Northern Ireland) Order 1999. Paragraph 4-6 of the Directions set out the nationality requirements. The applicant was subsequently informed that equivalent posts in the English Crown Prosecution Service ("the CPS") had not been designated as public service posts and thus European and Commonwealth nationals were eligible to apply for those posts. On 25 May 2004 she was interviewed for the post of prosecutor with the Police Service of Northern Ireland ("PSNI") and offered a post as prosecutor, the PSNI not designating such post as a public service post. The original respondent to the application was the Department of Finance and Personnel. The Director of Public Prosecutions was originally a notice party and in view of the fact that the impugned decision was made by the Director's Department I shall join him as a respondent.

The eligibility requirements

[2] Under the provisions of the Civil Service (Northern Ireland) Order 1996 ("the 1996 Order") made under powers conferred on the Secretary of State by Letters Patent of 20 December 1973 ("the Letters Patent"). Paragraph 4 makes the Department of Finance and Personnel responsible for the general management and control of the NICS ("the NICS"). Under paragraph 4(2) the Department may make regulations or give directions, inter alia, relating to the recruitment of persons to situations in the NICS including regulations and directions prescribing the requirement for appointment to such a situation.

[3] Eligibility requirements were issued by the Department in December 1996. Paragraph 4 deals with nationality and provides that every person appointed to a public service post must be either a UK national or an Irish or non-UK Commonwealth citizen who was in post in the NICS on 31 May 1996 or was appointed as a result of a competition with a closing date on or before 31 May 1996 and who has remained in the NICS since that time. In the case of non-public service posts the category of eligible persons is wide and includes nationals of member states of the European Union. A "public service" post is defined as a post which constitutes employment in the public service within the meaning of Article 48(4) of the EC Treaty (since renumbered Article 39(4) . That Article deals with the free movement of workers within the EU and prohibits discrimination based on nationality but its provisions do not apply to "employment in the public service".

[4] The 1996 Order was revoked and replaced by the Civil Service (Northern Ireland) Order 1999. Paragraph 4 of that Order empowers the making of regulations prescribing the requirements for appointment to posts in the NICS. The Department remains responsible for the general management and control of the NICS. It is clear that the 1999 Order repeals and substantially re-enacts the provisions of the 1996 Order.

<u>The ultra vires argument</u>

[5] Mr Macdonald QC on behalf of the applicant contended that the nationality requirements are ultra vires. He relied on section 7(1) of the Northern Ireland Constitution Act 1973. Under Schedule 2 amongst the "excepted matters" not to be transferred to the Northern Ireland Assembly or the Northern Ireland Executive were "nationality, immigration and the status of aliens as such." By the letters patent of 20 December 1973 delegation of prerogative powers in respect of transferred of matters was made to the Secretary of State. Recruitment to the NICS was a transferred matter. The 1996 Order was a prerogative order made under the Letters Patent. While it was accepted that the Department had power to make regulations, counsel argued that it was not entitled to include a nationality requirement since that trespassed on the forbidden territory of an excepted matter. In March 1999 the Secretary of State exercised the same powers to make the Civil Service (Northern Ireland) Order 1999 which revoked the 1996 Order. Article 3(2)

provided that any reference in an instrument or other document to a provision of the 1996 Order to which there is a corresponding provision in the 1999 Order shall be construed as a reference to the corresponding provision. Article 4(2) corresponds to Article 4(2)(c) of the 1996 Order with the effect that reference to the 1996 Order in the 1996 Regulations issued by the Department should now be construed as a reference to the 1999 Order. Section 23 of the Northern Ireland Act 1998 when it came into force provided that the Executive power in Northern Ireland continued to be vested in the Crown but as respects transferred matters concerning the NICS the prerogative and the executive powers of the Crown would be exercised by the First Minister and Deputy First Minister. Section 95(1) provided that so far as otherwise provided by an order nothing in the Act should effect the operation in relation to Northern Ireland of any law in force on the appointed day. Paragraph 7 of schedule 14 made under section 100(1) provided that any prerogative powers made by the Secretary of State under the Letters Patent dated 20 December 1973 before the appointed day should have effect as if they had been validly made under section 23(3) by the First Minister and Deputy First Minister. The 1999 Order has effect as if validly made under section 23 of the Northern Ireland Act 1998. Since orders validly made under section 23(3) have effect only as respects transferred matters (section 23(2)) any regulation made thereunder must also be confined to transferred matters. Excepted matters include in schedule 2 "nationality including asylum and status and capacity of persons, the status of persons who are not British citizens; free movement of persons within the EEA; issue of travel documents." The imposition by the Department of eligibility requirements related to "the free movement of workers and persons within the EEA" in that it purports to restrict such movement and derogate from the rights conferred by Article 39 of the Treaty. Only Westminster could make laws relating to Article 39(4). The Secretary of State (as the First Minister and Deputy First Minister) cannot exercise executive powers in respect of nationality. This means that he had no power to legislate about anything to do with the reserved matter of nationality. The regulations here expressly mention the forbidden topic and impose restrictions by reference to it.

[6] Mr McCloskey QC and Mr McMillen on behalf of the respondents argued that the effect of the Alien Restrictions (Amendment) Act 1919, and section 3 of the Act of Settlement as amended by the European Communities (Employment in the Civil Service) Order 1991 is to prohibit the employment of EU aliens in public service posts in the NICS while permitting EC nationals to be employed in non-public service posts. NICS must observe the prohibition in UK domestic law against the employment of EU aliens in the public service posts in the NICS. The eligibility requirements do not trespass on the territory of any of the excepted mattes listed in Schedule 2 of the Northern Ireland Act 1998. If they do impinge on any of those matters they do so in a manner that is ancillary to the transferred matter of the general management and control of the NICS under Article 4 of the 1990 Order. No

infringement of section 23 of the Northern Ireland Act arises. By a combination of section 3(1) and section 98(1) of the Northern Ireland Act the appointed day was 20 December 1999. The 1999 Order pre-dated that section. Section 1(b) of the Interpretation Act (Northern Ireland) 1954 defines an "enactment" as an "Act or a statutory instrument". Instruments include instruments constituting an Order in Council. By section 28(2)(b) the repeal and revocation of a transferred provision shall not affect the previous operation of the transferred provision so repealed and revoked. Section 29 provides that where an enactment repeals a transferred provision and substitutes another enactment everything made or done under the transferred provision and not inconsistent with the new enactment shall have the like effect as if it had been made or confirmed or granted under the corresponding provision of the enactment so substituted. It was accepted that the eligibility requirements could not be validly made after the operative date of section 4 in the Northern Ireland Act 1998 as they impact on the free movement of persons within the EEA. The question was whether they have survived the enactment of the Northern Ireland Act 1998 Schedule 14 Para 7 which provides that any prerogative order made by the Secretary of State under the letters patented of 20 December 1973 before the appointed day should on or after that date have effect as if it had been "validly made" under section 23(3) by the First Minister and Deputy First Minister acting jointly. A saving provision is a provision the intention of which is to narrow the effect of the enactment so as to preserve some existing legal rules and rights from its operation. Section 29(3)(a) of the Interpretation Act (Northern Ireland) 1954 which deals with the repeal and re-enactment of any transferred provisions save the eligibility requirements. The 1999 Order has effect as if it had been validly made by section 23(3) of the 1998 Act by the First Minister and Deputy First Minister.

Determination of the ultra vires issue

[7] Section 3 of the Act of Settlement provided that no person born out of the Kingdoms of England, Scotland or Ireland or their dominions there unto belonging should be capable of enjoying any office or place of trust, either civil or military, from the Crown. Subsequently, section 6 of the Aliens Restriction (Amendment) Act 1919 provided that no alien shall be appointed to any office or place in the Civil Service of the state. Section 1 (1) of the Aliens Employment Act 1955 authorised the employment of aliens in the Civil Service in the circumstances referred to in paragraphs (a) and (b) neither of which is relevant in the present context.

[8] The old legislation was in part incompatible with the Treaty obligations of the United Kingdom on accession to the EEC. The European Communities (Employment in the Civil Service) Order 1991 ("the 1991 Order") was enacted to deal with this problem. Article 3 of the Order provides that notwithstanding the Aliens Restrictions legislation an alien may

be employed in the NICS if he is a national of a member state of the Communities and is not employed in the public service within the meaning of Article 48(4) (now Article 39(4) of the Treaty).

[9] Nationals of the other member states of the EU apart from Ireland continue to be aliens for the purposes of domestic law, though the evolving principles of European law have made inroads into the old concept of alienship. Irish nationals for the purposes of the domestic law are not aliens as such (see section 2 of the Ireland Act 1949 and section 51(4) of the British Nationality Act 1981). But neither are they British citizens.

[10] Under Article 39(4) the state is entitled to exclude anyone other than its own nationals from employment in the public service. In respect of positions within NICS it is necessary to determine what posts should be treated as being in the public service and which posts should not. A validly arrived at determination to treat a post as being restricted to UK nationals as a public service post for the purposes of Article 39(4) has the legal consequence that the job is only open to UK nationals. Employment of aliens in the post would in itself be unlawful under domestic law. The exclusion of Irish nationals would also follow because, while not aliens, they are not UK nationals. If the state were to permit Irish nationals to qualify for the job that would create a discriminatory treatment in favour of one category of EU nationals (Irish nationals) as against other nationals of other EU states. This would call into question the validity of the decision to treat the post as a public service post (which is by definition a post which the appropriate decision maker is entitled under Article 39 to conclude must be restricted to UK nationals alone).

[11] The Department is charged with the general management and control of the NICS and has power to make regulations and give directions (inter alia) relating to the recruitment of persons to situations in the Civil Service including directions and regulations prescribing the requirement for appointment to such situations. The 1996 Eligibility Requirements make clear that in relation to every post which is not a public service post EU nationals (which include Irish nationals) are eligible. This is required by community law and in that regard the Eligibility Requirements add nothing to the existing community law rights of EC nationals. The Eligibility Requirements are thus declaratory of the legal position. In the case of public service posts EC nationals have no community law rights under Article 39 to be eligible for such posts and the eligibility requirements add nothing as such to the existing law. Special provision is made in respect of Irish or non-UK Commonwealth citizens appointed on or before 31 May 1996. Whether or not that special provision raises issues of compatibility with community law does not arise in this case. The Eligibility Requirements set out the legal consequences which flow from the distinction between public service and non-public service jobs in the NICS. The consequences which flow arise from the nationality of individuals but the requirements in themselves do not determine or affect the

nationality of individuals. They do not as such confer rights or obligations on grounds of nationality or detract from the existing status of individuals under the existing law (save with the possible exception of Irish and non-UK Commonwealth citizens in post on 31 May 1996 which is not material in the present context). Accordingly, there was nothing in the Eligibility Requirements that trespassed on the excepted matters of nationality, immigration and aliens as such so far as the 1973 Act was concerned.

[12] For the sake of completeness reference can also be made to Schedule 2 para 3 of the 1973 Act which includes in excepted matters "international relations including treaties and matters connected therewith" but that did not include the exercise of legislative powers for any of the purposes in section 2(a) and (b) of the European Communities Act 1972. Any designated minister or department may be regulation make provision for (inter alia) enabling rights to be enjoyed by the United Kingdom under the EC Treaties and for the purpose of dealing with matters arising out of rights and obligations under the Treaty. It is possible that the Eligibility Requirements could be considered to be regulations governing the way in which the state exercised its rights under Article 39(4). However, neither party referred to that provision or sought to rely on it. I have accordingly left the provision out of account in arriving at my conclusions.

[13] The 1999 Order revoked and replaced the 1996 Order. Those Orders were made by the Secretary of State under the letters patent. They do not constitute "enactments" within the meaning of section 1 of the Interpretation Act (Northern Ireland) 1954 which defines an enactment as a Act of the Parliament of Northern Ireland or a "statutory instrument" which is defined as an instrument under an Act of the Parliament of Northern Ireland. However, under the Interpretation Act 1978 the effect of section 23 and section 17(2)(b) is that the Eligibility Requirements made under the 1996 Order continue to have effect under the 1999 Order.

[14] Under the Northern Ireland Act 1998 Schedule 2 set out the excepted matters. Paragraph 8 is drafted in terms which are wider than under the 1973 Act and now cover (inter alia) the free movement of workers within the EU. Section 23(3) provides that:

> "As respect to the (NICS) and the Commissioner for Public Appointments for Northern Ireland, the prerogative and other executive powers of Her Majesty in relation to Northern Ireland shall be exercisable on Her Majesty's behalf by the First Minister and the Deputy First Minister acting jointly."

By virtue of Schedule 14 (dealing with transitional provisions and savings) paragraph 7 provides:

> "Any prerogative order made by the Secretary of State under the Letters Patent of Her Majesty dated 20 December 1973 before the appointed day shall on and after that date have effect as if it had been validly made under Section 23(3) by the First Minister and the Deputy First Minister acting jointly."

[15] The statutory validation of prerogative orders made before the appointed day has the effect of keeping in place the 1999 Order and in consequence the Eligibility Requirements which thus have continued effect. For the sake of completeness reference can also be made to section 25 of the 1998 Act which empowers the Secretary of State to revoke any subordinate legislation made, confirmed, or approved by a minister (which means the First Minister, Deputy First Minister or a Northern Ireland Minister) or a Northern Ireland Department containing a provision dealing with an excepted or a reserved matter and an order made under section 75(1) shall recite the reasons for revoking the legislation and may make provision having retrospective effect. Neither party called this provision in aid. Whatever interpretation is put upon that provision there is nothing in it that would appear to assist the applicant's argument in the present case.

[16] In the result I am satisfied the Eligibility Requirements were not ultra vires.

Validity of the decision to treat the post as public service

[17] The approach of the Department is that if a post is a public service post the Department must comply with domestic law so as to exclude non-UK nationals (aliens because it is illegal to employ aliens as such and Irish nationals in order to avoid unlawful discrimination in favour of Irish nationals as against nationals of other EU states). The Department's guidelines give guidance as to the posts that "may" be classified as public service. A post "may" be so designated if the duties and responsibilities, directly or indirectly, are concerned with the prosecution of offences. The post in the present case was one concerned with the prosecution of offences and the holder of the post has a duty to consider files submitted by the police and government departments with a view to deciding and advising as to prosecution.

[18] The applicant contends (and it is largely accepted by the respondent) that the equivalent post in the CPS in England and Wales is not designated as a public service post and that functionally the CPS and the DPP posts are to all intents and purposes the same in nature. However, the respondent argues that the decision to designate the post as a public service post is not undermined or compromised by the practice of the CPS in another

jurisdiction. It is contended that the respondent has no discretion in the matter. Once a post functionally satisfies the conceptual ingredients of a public service post, that is the end of the matter and the post must be so designated.

[19] In a number of affidavits Anthony Harbinson, Assistant Director and Head of Corporate Services in the DPP, disposed to the process of the decision making in the case. In his first affidavit he stated that he received from the NIO a checklist compiled by recruitment service. This list focused on the key factors characteristic of employment in the public sector. If any of those factors is a significant factor of the duties of the post it is likely that the post is public service even if it has other non-public service characteristics. The checklist indicates that by significant they mean the factors in question individually or collectively or either estimated as contributing 25% or more of the posts duties by time spent or are otherwise reckoned to constitute an important part of the posts responsibility. In terms of time spent if the postholder spent more than 25% of his time on any of the issues listed or any combination then the post "is likely" to be public service. The issue includes "criminal justice, international affairs and relations and exercising statutory and or enforcement powers". Mr Harbinson stated that in conjunction with the DPP and the Deputy DPP it was considered that senior legal assistant and legal assistant posts involved time spent on exercising statutory and or enforcement powers, criminal justice powers and international affairs and relations. The first affidavit concluded:

> "This guidance was duly considered by the DPP, the Deputy DPP and me. We concluded without hesitation that the factors which I have highlighted in paragraph 4 above clearly contributed a major proportion of the duties involved in each of the posts. Our further conclusion was, in consequence, that each of the posts was unquestionably 'a public service post'. In paragraph 7 of the affidavit said clearly the decision was made on or about 29 March 2004 and communicated to the NIO and recruitment service."

[20] In a second affidavit Mr Harbinson provided further information relating to the decision. The Project Board of the DPP met on 15 December 2003 with Mr Harbinson being the project manager. The attendance included the DPP and the Director of the NIO Criminal Justice Directorate. Recruitment of professional staff to fill 60 posts at various grades and levels was an issue. The practice of the CPS (which treated such legal posts as non-public service) was considered and the preferred view of the Board members was that recruitment should be undertaken broadly. On 16 December the Director of Criminal Justice Directorate wrote to Mr Harbinson recording that it was agreed that he would make a formal approach to NIO to seek

ministerial approval to restrict the categorisation of the posts as public service to a number of senior and sensitive appointments. It would seem that legal assistants would not be designable as public service posts. At a meeting on 10 February Mr Harbinson stated that he was not yet in a position to provide a comprehensive report on the issue of public service status for the jobs. The recruitment exercise started from 22 January 2004 before it was decided whether the post should be designated public service or not public service. On 24 March 2004 the classification criteria contained in the checklist were discussed while it was noted that in accordance with the criteria the posts of legal assistant and senior legal assistant would be public service no final decision was taken. It was decided that further guidance would be sought from the NIO Personnel Section and further information obtained from the CPS. In a memorandum dated 29 March 2004 the Director wrote to the Deputy Director noting that applying the checklist criteria the duties of the post may constitute public service posts. The memorandum went on:

> "On any analysis on this basis, subject to the use of the word 'may' which implies that there is a discretion, the SLA and LA posts appeared to be posts which individually can be classified as public service. However as I have previously noted that the authorising officer takes full responsibility for the categorisation of the post, I should like guidance as to the meaning of the word 'may' in the context of the guidelines."

A handwritten note to the Director from the Deputy Director stated that:

> "I would suggest that the word 'may' is used in the permissive rather than the discretionary sense of the word. On any analysis of work involved the SLA and LA posts are public service."

A further side note explains permissive:

> "It is permissible to have the following as public service posts."

Mr Harbinson in his second affidavit states that:

> "It was determined that duties of being directed or indirectly concerned with the prosecution of offences would constitute a '*significant* feature' of both posts in the sense that they would clearly exceed 25% of the functions of the posts. On the basis of the foregoing

> and for the reasons set out in the first affidavit it was considered that the posts were 'public service posts' and should therefore be designated."

The decision was made on 29 March as stated in paragraph 7 of the first affidavit. However, on 30 March it is noted in the memorandum that the "Director still wishes us to be advised as to the meaning of the word 'may'. Can you take this forward?" The note makes the averment in paragraph 6 of Mr Harbinson's affidavit difficult to understand. The note states that the DPP, Deputy DPP and Mr Harbinson concluded that each of the posts was unquestionably a public service post. It seems clear from the note of 30 March that the DPP was still unclear as to what matters could be taken into account in reaching a decision of whether to designate the posts. If Mr Harbinson's affidavit correctly sets out his understanding of the position he seems to have been in error in believing that the DPP agreed that the post was unquestionably a public service post.

[21] It further appears from Mr Harbinson's affidavit that on 2 April 2004 (ie after the decision was made to designate the post as a public service post) the Director of Criminal Justice Directorate wrote to the legal secretariat of the law officers asking for clarification as to how the CPS was able to differentiate between the small number of posts which are public service and the rest which are not give the apparent Cabinet Office view that any posts which involved determining whether or not to prosecute should be classified as public service. The reply dated 26 April and received on 20 April stated:

> "…The CPS has not been designating prosecutor posts generally for UK nationals only. Those posts that are so designated are restricted to those cleared to DV level and who have regular access to material produced by the Intelligence and Security Agencies. In those circumstances the CPS considers it can justify the restriction to UK nationals only as special allegiance is justifiable regarded as a pre-requisite to handling this type of material.
>
> The CPS would not seek to reserve posts for most, if not all, the remaining prosecutors throughout the service. Special allegiance to the state could not be justified when dealing with routine criminal cases. The CPS had for some years been seeking to agree a diverse workforce, which represents the needs of modern society and the community it serves. If it were to impose unjustifiable restrictions it would damage the public's perception of the CPS and undermine its objectives in terms of diversity and

> equality. The CPS thus considers that the approaches now adopted balances the special needs of allegiance of the state in sensitive matters, whilst also meeting its commitment to a modern and inclusive society. It will keep the matter under review, particularly in the light of the possible changes to vetting policy, currently being considered by the Cabinet Officer."

In this third affidavit Mr Harbinson reveals that following the request from the DPP for clarification of the word 'may' in the checklist criteria he contacted Mr Coleman in Personnel's' senior division and asked him to make enquiries as to the meaning of the word 'may' as it was used in the guidelines. Mr Coleman wrote to the Treasury Solicitors' department which in a letter from Katherine Hayes replied:

> "As is clear from both sets of guidance, there is no definitive list of posts which are in public service and posts which are not. The guidance therefore sets down areas of work and/or functions of a post which 'may' lean more towards classifying that post as being in public service. That is not to say that if a post does fall within the type referred to that must be deemed to be a public service the word 'may' leave scope for the department's discretion in particular circumstances.
>
> This means that where a post has previously been classified as being a non-public service, if the nature of that job has changed, it may be that the authorising officer now believes that the post fits more appropriately in the public service classification. If challenged the authorising officer must be able to identify the reasons why it was felt that the post had been classified as it has.
>
> Within the suggested areas as to functions of post which could be deemed to be in public service it is probably the case that the more senior the position, the more likely it is that the person will be more heavily involved in the sensitive side of those areas-functions and the easier it will be to deem the post to be in public service.
>
> In relation to a specific query the classification of senior legal assistant and legal assistant posts in the offices of the DPP Northern Ireland you may wish to

> note the inclusion of Case Reviewing officers within the CPS who decide whether or not to prosecute particular cases are included in positions which are likely to be classified as reserved (public service) posts under the Cabinet Office guidance".

Mr Harbinson considered that letter was an endorsement of the conclusions reached within the DPP. He contended that while the decision was made on 29 March 2004 it could have been changed at any time before advertisement. Nothing had occurred that persuaded him that the decision was wrong.

[22] Among the exhibits to Mr Harbinson's last affidavit was a document setting out the guidelines for the classification of posts within the meaning of Article 48(4) of the EC Treaty in the NICS. Paragraph 1 in Annex B states:

> "Despite the lack of clearly defined EC guidance, it is important that the categorisation of posts should so far as possible be consistent across the NICS and the Home Civil Service…"

[23] In Re Colgan [1996] NI 24 I had occasion to analyse the case law of the ECJ in relation to the concept of public services posts. It is not necessary in this judgment to restate the position. The question of public service and employment was further considered in the Court of Appeal decision in Re O'Boyle [1999] NI 126. From those decisions the number of principles clearly emerge:

(a) Article 39(4) removes from the ambit of Article 39(1) to (3) (the free movement of workers within the EU) posts which involve direct or indirect participation in (a) the exercise of powers conferred by public law and (b) duties designed to safeguard the general interests of the state and of other public authorities.

(b) There is no free standing criterion that to fall within the scope of the Article a post has to be of such a sensitive nature that it necessitates a special bond between the post holder and the state. Allegiance to the state is a necessary consequence of the two criteria.

(c) Article 39(4) confers a discretion on a member state allowing but not obliging the state to reserve certain posts for its own nationals. It is open to a member state to assert its right to limit holders to its nationals but the state may decide not to rely on Article 39(4) in respect of that post.

[24] In approaching the question whether a particular post should be limited to the state's own nationals the relevant decision maker must

determine the question whether the post has the characteristics of a public service post. If it has not then to exclude non-nationals would infringe Article 39(1) to (3) and there would be a breach of the Treaty obligations. Once it is properly determined that the post has the characteristics of a public service post the question arises as to whether the post must be restricted to nationals. Since it is clear that Article 39(4) does not oblige the designation of the post as one that must be limited to nationals the question arises how the decision is made whether to restrict the post to nationals. The respondents' contention in essence is that the state authorities in respect of the Civil Service have made it clear under the European Communities (Employment in the Civil Service) Order 1991 that once a post is shown to have the characteristics of a public service post then the post must inevitably be designated as a post restricted to nationals. At the heart of the applicant's case is the proposition that the decision maker has a discretion or a margin of judgment whether a particular post should be restricted to nationals. The applicant's approach is that once a decision, properly arrived at, is made that the post has the characteristics of public service post and should in all the circumstances be restricted to nationals it is a public service post.

[25] The prohibition on the employment of aliens in the Civil Service under the old law remains in place in respect of public service posts but not in respect of non-public service posts. This is made clear by the 1991 Order which lifts the prohibition provided the post is not "employment in the public service within the meaning of Article 39(4) of the Treaty." A decision not to rely on Article 39(4) in respect of a post which otherwise falls within the community concept of a public service post would not mean that the particular post is not employment in the public service. It would simply mean that the state has decided that, although it is a public service post, it will not rely on its legal entitlement to restrict it to its own nationals. In the case of the Civil Service the state in the 1991 Order appears to have made a policy decision, compatible with European law, to forbid the employment of aliens in such posts, continuing a pre-existing legal policy which remains valid under community law for public service posts. The state could have legitimately pursued a different legal policy which would have been equally compatible with community law, providing, for example, for the prohibition of aliens in public service posts subject to a discretion on the part of the state authorities to decide that a particular public service post should be open to non-nationals. The exercise of such a discretion could be the subject of policy guidance as to the factors to be taken into account in determining the circumstances in which a particular job should be open to non-nationals notwithstanding that it is a public service post. One of those factors might legitimately be that only posts that demanded a special bond of allegiance in the view of the relevant state authorities should be restricted. The 1991 Order is, however, framed in absolute terms forbidding employment in posts which constitute public service posts under EU law and does not confer that discretion.

[26] Clearly a decision must be made as to whether the characteristics of the relevant post satisfy the criteria under EU law of public service employment. In this case the decision maker considered the question of the characteristics of the job and concluded that the posts satisfied European law criteria as a public service post. It cannot be said that that decision was unreasonable, untenable or unlawful. The holder of the post will be called on to exercise powers in the public interest relating to the application and enforcement of the criminal law. The duties involve the safeguarding of the interests of the state in ensuring the enforcement of the criminal law, the investigation of offences, the initiation of prosecutions and the enforcement of state laws. Advocate General Mancini in EC Commission v France [1986] ECR 725 gave as clear examples of public services posts those involving the exercise of powers relating to policing, the administration of justice and criminal law.

[27] The various guidelines and explanatory documents circulating within the Civil Service as to whether a particular post is or is not a public service post may by somewhat ambiguous language suggest that a relevant decision maker has a discretion to disapply Article 39(4) in respect of a particular post. Nothing in such documents can override the proper legal effect of the 1991 Order and should in any event be read in the light of the 1991 Order. If the intention of the legislature and executive was that decision makers should have a discretion, notwithstanding that a job otherwise constitutes a public service post, to decide not to apply Article 39(4) to the particular post then clear language to that effect would be necessary. In the guidelines the use of the word "may" on its proper construction means "is capable of constituting a public service post." The decision maker must proceed to decide whether a particular post does in fact constitute such a post.

[28] The fact that the CPS has opened such posts to non-nationals does give rise to an inconsistency within the state in respect of the same type of post. The decision maker in the present case had to decide whether the post was a public service post under EU law. His determination in law was for the reasons stated correct. The fact that the CPS decided to open the post to non-nationals arose either because the CPS wrongly concluded that they had a discretion notwithstanding the wording of the 1991 Order to disapply Article 39(4) in respect of the post or because they viewed the requirements of the job differently. The correspondence rather tends to suggests that they applied the test whether the jobs required a special allegiance rather than whether the nature of the job pre-supposed such a special allegiance. If they applied the former test I am bound by Re O'Boyle [1999] NI 126 to conclude that they applied the wrong test. While consistency is clearly one of the desiderata of good administration, a decision maker cannot be compelled to act contrary to the law in order to ensure consistency.

[29] As noted earlier the decision was made on 29 March 2004 before the decision maker was aware of the information later provided in respect of the CPS practice and before the Director's query as to the meaning of "may" in the guidelines. The question arises as to whether the decision reached was thus premature because the decision maker had not put himself in possession of relevant material necessary to enable him to inform himself properly before making the decision. However, since in my view the decision maker was required to focus on the functional aspects of the post the question of exercising a discretion to disapply Article 39(4) did not arise. The question of discretion did not arise in relation to determining whether the function of the post fell or did not fall within the concept of public service. If the CPS practice was itself based on an incorrect approach for the reasons set out above (and in my view it was) information about that practice could not have assisted the decision maker in deciding the functionality question that it was necessary for him to answer in respect of the post.

[30] If contrary to my conclusion that the designation of the post is a public service post was lawfully correct and determinative and if the decision maker had a discretion to conclude that the post should be open to non-nationals, then the decision would have been open to challenge on the ground that the decision maker had wrongly assumed that he had no discretion; he failed to await advice on the meaning of "may" in the guidelines and he had failed to have any proper regard to the desirability of consistency between Northern Ireland and England where such posts were not restricted to nationals. In view of my primary conclusion it is not necessary to expatiate further on this aspect of the case.

[31] In the result I dismiss the application.