THE HIGH COURT

Record No: 2018/309MCA

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 90(1) OF THE EMPLOYMENT EQUALITY ACT 1998 AS AMENDED

Between:

ROBERT CUNNINGHAM

Appellant

-AND-

IRISH PRISON SERVICE

Respondent

-AND-

THE LABOUR COURT

Notice Party

SUPPLEMENTARY SUBMISSION OF THE APPELLANT

15th November 2019

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I. Introduction

1. In July 2019 the Supreme Court delivered a landmark judgment *Nano Nagle School v Daly* [1]. It marked a paradigm shift in the way in which disability discrimination is dealt with in Ireland. The Supreme Court analysis moved away from the narrow medical model of disability- where the disabled person is the problem and has to adapt to the workplace. Instead, it moved toward the social model, which frames the workplace (or physical environment) as the disability, which must be adapted to the worker. The Supreme Court also made clear that provisions of the Employment Equality Acts 1998-2015 (the 'Acts') must be interpreted in a European and International context and in line with the States international obligations to guarantee and improve the right to work of persons with disabilities.

2. The Supreme Court judgment and its paradigm shift has a huge importance for the case and situation of Robert Cunningham (the 'Appellant') a Prison Officer who is seeking reasonable accommodation by the Irish Prison Service (the 'Respondent'), so that he can keep on working in his job as Prison Officer.

3. The Respondent in earlier submissions outlined its position- that the Acts exempt the Irish Prison Service from liability for a claim of discriminatory treatment if an employee is not fully competent and available to undertake all the range of duties a Prison Officer is required to do and that it is not required by the Acts to provide any reasonable accommodation. It has also argued, that even if the Irish Prison Service did not have such an exemption, that the Court of Appeal decision in *Nano Nagle* would make the Appellant's right to reasonable accommodation moot, as the Appellant cannot perform the duties of the role.

4. The Respondent, as the Irish Prison Service, is an emanation of the State. Therefore, the obligations on the Respondent to comply with EU law are subject to direct effect.

[1] [2019] IESC 63

II. The Decision of the Supreme Court

(i) Facts

5. Ms Daly was a special needs teacher who had been injured in an accident, after which she was in a wheelchair. She wanted to return to work. She has been employed by a special needs school with pupils of varying needs – some severely disabled and needing high levels of physical care. Due to the injuries of Ms Daly there was a limit on the physical work she could perform. The issue for the litigation was what lengths the school was obliged to go to reasonably accommodate Ms Daly so that she could return to work.

6. The proceedings came before the High Court as an appeal brought by the employer school on a point of law from a determination of the Labour Court where the Labour Court had found that the school had failed in its statutory duty under s.16, and had awarded Ms Daly €40,000 in compensation. This judgment was appealed by the school to the Court of Appeal, and it succeeded in its appeal.

7. The appeal of the decision in *Nano Nagle* relates to s.16 of the Acts and the interpretation and application of s.16 in particular, and the Acts, more broadly.

8. S.16 contains provisions relating to the extent of an employer's obligations in relation to persons with disabilities. It provides *inter alia* that an employer is not obliged to retain someone in a position to employment if that person is not fully competent and capable of undertaking the duties to that position, per s.16(1). This is however subject to s.16(3) which provides that "*For the purposes of this Act"* a person who has a disability is fully competent and capable if they would be if provided by the employer with "*appropriate measures"* which are defined as including "*the adaptation of premises and equipment and in the working time distribution of tasks or the provision of training or integration resources"*. This obligation on the employer is mandatory "*unless the measures would impose a disproportionate burden on the employer"*.

9. The judgment of the Court of Appeal significantly reduced the ambit of s.16 by stating that s.16(1) requires "*full competence as to tasks that are the essence of the position"* and that s.16(3) must be read in that light rather than the other way around.

10. The Supreme Court rejected the analysis of the Court of Appeal and allowed the appeal. Centrally, it held that full competence to do a job is competence **after** reasonable accommodation, not the other way around.

11. The Supreme Court explicitly aligned the Irish concept of disability with the developments in EU law -set out in the decision of the CJEU in *Ring*[2]- which itself aligns the human rights approach to workers with disability in the United Nations Convention on the Rights of Persons with Disabilities (The 'UNCRPD').

12. In particular, Article 27(1)(b) UNCRPD provides that:

> **"**1 State parties shall safeguard and promote the realisation of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia; …
>
> (b) Protect the rights of rights of persons with disabilities, on an equal basis with others, to just and favourable conditions at work, including equal opportunities and equal remuneration for work of equal value …"

13. More than that, the Supreme Court ruled very strongly that a person with a disability must be treated with dignity, and that the right to work is an essential part of that dignity.

ii) Decision

14. The Supreme Court found, in summary that:

- There is a mandatory primary duty on an employer to provide reasonable accommodation to an employee. This duty comes before any analysis of whether the person would be fully competent and capable of performing the duties attached to the position.

- Removing or redistributing some of the duties attached to a person's position, which they are no longer in a position to perform, may be the appropriate measure that is needed in a particular case to reasonably accommodate an employee with a

[2] *HK Danmark acting on behalf of Jette Ring v Dansk Almennyttigt Boligselskab Case* C-335/11 and C-337/11 [2013] ICR 851.

disability. This applies irrespective of whether the duties are the main duties of the role.

- The creation of an entirely new role is not something the employer is required to do, but it will be a balancing exercise to consider whether, on the facts, when some duties have been removed, the person is still performing the job for which they were employed.

- The only limitation on an employer's duty to reasonably accommodate an employee is where the measures which are required would give rise to a disproportionate burden on the employer, having regard to the financial cost in the context of the scale of the employer's business.

15. The Supreme Court also made some important findings of principle:

- The Dignity of the employee is important and must be respected. (Charleton J)

- It was not valid of the Court of Appeal to distinguish between *"tasks"* and *"duties"* or to distinguish between *"main duties/essential functions"* and non-main duties and non-essential functions.

- Reasonable accommodation can include the reorganisation of work.

- The only ultimate limit to what is required of an employer is proportionality and whether the accommodation imposes a disproportionate burden on the employer.

III Relevance of Nano Nagle to this case

16. The decision in *Nano Nagle* is relevant to this appeal in three key ways:

Firstly because of the way in which the Supreme Court held that the Acts should be analysed; that is as a whole, purposively and in line with international obligations and treaties;

Secondly, because the Supreme Court held that reasonable and objective assessment must be undertaken by employers if they want to rely on exceptions provided for in the Acts to the general principles underlying the purpose of the Acts;

Thirdly, because if this appeal on the preliminary point succeeds, there will be an obligation on the Respondent to consider reasonable accommodation of the Appellant as balanced by the need to preserve its operational capacity. The position of the Respondent until now has been that it has an immunity in law from any obligation to provide reasonable accommodation as it does not have to redistribute tasks of an employee who is unable to carry out all of the core-duties of his job. It has in its earlier submissions argued against the position of the Appellant on the preliminary issue because, it argued, that it would make no difference to the Appellant if he is successful in establishing that the Respondent does not have an immunity. After the *Nano Nagle* decision, this argument is no longer correct.

17. Each of these will now be considered in turn.

(i) There must be a purposive analysis of the Employment Equality Acts as a whole, which means that reasonable accommodation applies throughout the Act.

18. MacMenamin J ruled that the provision in s.16 (1) that an employer is not required to retain an individual in a position if they are no longer fully competence and fully fit to undertake the duties attached to the position must be interpreted in light of the obligation to reasonable accommodate a person with a disability, in s.16(3) and the Acts as a whole. The majority of the Supreme Court agreed with that ruling. The reasoning of McMenamin J is set out as follows:

> "84 Reduced to its essentials, the interpretation issue as applied here could, at one level, be characterised as to whether Section 16(1) is to be seen as subject to Section 16(3), or vice versa … Section 16(1) sets out a premise. That is, as an employer is not required to retain an individual in a position, if that person is no longer fully competent, and available to undertake the duties attached to that position, having regard to the conditions under which the duties are to be performed. But the effect of the terminology of Section 16(3) is unavoidable.

It carves out an exception. It provides that, for the purposes of the "Section", that is, the *entirety* of Section 16, a person with a disability is to be seen as fully competent to undertake *any duties*, if they would be so competent on reasonable accommodation. Thus if a person with a disability can be reasonably accommodated, they are deemed as capable of performing the job as if they had no disability; subject to the condition that reasonable accommodation should not impose a disproportionate burden on the employer; including an assessment of the financial and other costs involved, the scale and financial resources of the employer, and the possibility of obtaining public funding or other assistance. But, Section 16(3)(b) explicitly identifies the mandatory primary duty of an employer. He or she *shall take appropriate measures* where needed in a particular case to enable a disabled person to have access to employment, to participate and advance in employment, and to undergo training unless these measures would impose a disproportionate burden. "[emphasis in original]

19. It is submitted that the same can be said of s.37(3) which must be understood in the light of s.37(2), the purpose of the Acts and also in light of s.16.

20. It is worth remembering that the obligation to reasonably accommodate in s.16(3) applies to the whole Act. This is clear from the wording of s.16(3). What is important about the Supreme Court decision is that it emphasised that even though the drafting and sequencing of the Acts placed s.16(3) as a sub-section of a piece of legislation that it was still a mandatory primary duty of an employer.

21. The Supreme Court also looked at the Directive, and at the UNCRPD. It recognised that Irish law must be interpreted in line with EU and UN legal obligations, because the EU had ratified the UNCRPD. Therefore the Irish Courts must interpret the obligations in a purposive way in order to achieve and respect international and EU Rights and the dignity and rights to work of a person with a disability. Charleton J – agreeing in principle with the majority but dissenting in part, summarised the context of the Acts as follows;

"3. The Employment Equality Act 1998 has been much amended; including by the Equal Status Acts 2000 and 2004, the Equality Act 2004, the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, the Civil Law

(Miscellaneous Provisions) Act 2011, the Education and Training Boards Act 2013, the Equality (Miscellaneous Provisions) Act 2015 and the Workplace Relations Act 2015. Central to the changes in the legislation is the drive by society to ensure that persons of varying ethnicity, language, religion, and orientation do not suffer from exclusion but are treated, as much as any majority, as valued members of the workforce and of society. This is part of an international and European drive to declare the value which is inherent in the dignity of all people and to combat discriminatory conduct. In this regard, the United Nations Convention on the Rights of Persons with Disabilities, ratified by both the State and the European Union, is part of the necessary backdrop to this appeal. Article 27 of the Convention outlines the rights of persons with disabilities at work, which encompasses "the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities." State parties to the Convention have an obligation under this Article to "safeguard and promote the realisation of the right to work, including for those who acquire a disability during the course of employment" through measures such as reasonable accommodation and prohibition of discrimination. Directly relevant are Ireland's obligations under European Law as expressed in EU Council Directive 2000/78/EC of 27 November 2000, the Framework Equality Directive. The Directive prohibits employment discrimination on the grounds of religion or belief, disability, age or sexual orientation. It states in Recital 16 that the provision of measures accommodating "the needs of disabled people at the workplace play an important role in combating" such discrimination. The 1998 Act must be interpreted in the light of the Directive. In turn, the Directive requires to be seen in the light of the international obligations entered into by the European Union, the Convention.

22. Recital 17 and 18 and Articles 4 and 5 of the Directive therefore provide guidance on the analysis of s.37(3). They provide;

> "(17) This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the *essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.*

(18) This Directive does not require, in particular, the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out *the range of functions that they may be called upon to perform* with regard to the legitimate objective of preserving the operational capacity of those services."

**Emphasis added*

23. Article 5 of the Directive sets out the obligation to provide reasonable accommodation, and the recital has already said that any requirement to be competent or, capable etc. are without prejudice to the obligation to provide reasonable accommodation.

24. Finally, Article 4(1), the article which s.37 implements, does not provide for an absolute immunity, or refer to essential function or a range of function. Instead it refers to "occupational activities" in the context in which they are carried out, and there is no mention of a requirement to be able to carry out a range of function. It provides,

"4(1). Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of *the particular occupational activities concerned or of the context in which they are carried out*, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate."

**Emphasis added*

25. For that reason, it is submitted that following the Supreme Court Judgment, any interpretation of s.37(2) has to be read in light of the purpose of the Acts, the Directive and its aims, and the UNCRPD. The concept fully competent and fully able, therefore must and can only be understood as fully competent and fully fit after reasonable accommodation.

26. The comparison to be drawn here is s.37(5) of the Acts which expressly and unconditionally excludes the Defence Forces. If the legislature intended to exclude the Respondent, it would have been simple to do so.

27. The methodology of the Supreme Court rejected the technical word by word analysis that the Court of Appeal engaged in. Similarly, in this case, the Appellant is entitled to more than a technical and word by word analysis of s.37 in isolation.

28. It is submitted in summary therefore, that s.37 fits together with s.6 and s.16 of the Acts and cannot be read independently of those provisions. S.37 is a provision setting out various pragmatic exceptions that employers can rely on for several discriminatory grounds. All of the exceptions, except one for the Defence Forces- are subject to objective justification. An exemption for the Defence Forces is explicitly allowed for Member States in the Directive. The Directive does not allow any other complete immunities from the equality obligations. An interpretation of s.37(3) which would give the Respondent a complete exemption from the disability obligations, which would be contrary to the Directive and the UNCRPD.

(ii) The relationship between the requirement to be fit to perform the range of duties must be necessary and proportionate to the objective of preserving the operational capacity of the Prison Service.

29. The second impact of *Nano Nagle* comes from the repeated emphasis of the Supreme Court on balancing and proportionality and objective assessment. This can be applied to the second portion of s.37(3) because EU law in the Directive has made it very clearly that while a member state may provide that certain characteristics of a worker are a genuine occupational requirement, that is only allowed provided that:

    (i) the objective [of the difference in treatment] is legitimate; and

    (ii) The [discriminatory] requirement is proportionate [to achieving the objective].

30. S.37(3) provides, in essence, that it is an occupational requirement for the Respondent that a person is fully competent and available and fully capable of undertaking the range of duties they may be called on to perform so that the operational capacity the Respondent may be

preserved. That is all well and good, but it is does not decide the whole issue. Above, we say that fully competent and fully fit, means fully competent and fully fit **after** reasonable accommodation. Then looking at s.37(2) and the Directive, it can be seen that the occupational requirement must have

(i) a legitimate objective, and
(ii) be necessary and proportional.

31. The decision in *Nano Nagle* in emphasising the link of the Irish legislation to EU and UN treaties, means that an interpretation of s.37(3) must conform with EU law.

32. The Labour Court – it is therefore submitted- must decide on the following facts:

i) Whether a requirement that it can only employ or maintain in employment a Prison Officer who is fully fit is actually required to preserve the operational capacity of the Respondent?
ii) Is imposing this requirement on all Prison Officers over inclusive and disproportionate?
iii) Is it in fact necessary to preserve the operational capacity of the Prison Force?
iv) What factual analysis has the Respondent engaged in as to how many positions and roles there are where a Prison Officer who cannot do control and restraint of prisoners can work- such as the canine unit, or have in fact worked?
v) S. 37(4) of the Acts allows the state to change the age requirements for competitions for recruitment if it takes the view that the age profile is likely to be adversely affected. Does the Respondent have a disability profile, which can be proportional to its operational capacity?

These are all issues of fact, which must be proven by the Respondent, if it wants to exclude the Appellant from employment.

33. The decision in *Nano Nagle* also confirms the submissions already made on the Appellant's behalf herein on the question of whether the Notice Party correctly construed the provisions of sections 16 and 37 of the Acts. One of the several *ratio decidendi* in the case is that the duty of reasonable accommodation in s.16 must be understood as a question of degree,

objectively assessed. It is clear from an early point in the analysis in *Nano Nagle* that the Court viewed the matter as under consideration to be *"a balancing process identifying what is reasonable and proportionate."* (*Ibid,* para 31). In other words, the duty is subject to objective assessment. MacMenamin J, nearing the conclusion of his judgement, said,

> "Even within the scope of compliance, a situation may be reached where the degree of rearrangements necessary, whether by allocation of tasks, or otherwise, might be such as to be disproportionate. *It is a matter of degree, capable of being determined objectively*." (para 106, emphasis added).

34. MacMenamin J observed that the limitation on the duty of distributing tasks, the *only* limitation contained in s.16, is one of 'disproportionality'. Referring to s.16(3) and the duty to make appropriate adjustments, he said the limitation is based on a *'test of reasonableness and proportionality'* (para 99).

35. S.16 is a provision which deals with exceptions. It commences with a proposition in s.16(1) that full capacity to the job is clearly, and understandably, a default requirement for employers. This is an exception to the principle of equal treatment of employees with disabilities. The Acts go on, however, to set out the limitations to this in s.16(3) *et seq*. Similarly, s.37 deals with a variety of exceptions, related to various different discriminatory grounds, notably returning to disability by means of the concept used in s.37(2) and s.37(3) of 'occupational requirement'. There is only one other subsection referable to disability and that is in s.37(5) which is, by clear contrast, *not* subject to any language suggesting that the employer is required to undertake a case-by-case analysis.

36. As with the scheme of assessment in s.16, the assessment framework setting out how one might, on a case-by-case basis, satisfy the pre-conditions to the application of these exceptions is based on the same essential concept: objective justification.

37. It is clear from the section that 'occupational requirement' is a key phrase (both s.25 on exceptions to gender equality and s.37 on non-gender equality deploy the same concept). The occupational requirement is nowhere expressed as a basis for a general exception. Again, the only such bases for general exceptions are s.37(5) for the Defence Forces and s.37(4) allowing the Minister to make regulations permitting age limitations. An employer

may have certain occupational requirements that mean it may reasonably be permitted to engage a woman instead of a man (*e.g.* airport security staff searching female passengers) or a person capable of climbing a ladder instead of someone who cannot (*e.g.* a fireman). These provisions do not, however, leave it entirely to the employer to simply say that it is so. A reasoned and structured assessment process is required to be applied by the employer so that these exceptions may be availed of and the reasoning and the structure that is expected to be followed is expressly set out in s.25(1) and s.37(2). These subsections provide for an exception to the principle of equal treatment based on **(i)** occupational requirements and **(ii)** objective justification.

38. S.37(3) simply facilitates the application of this structured approach by deeming the first of these conditions satisfied in the case of the prison services. It deems that the requirement to be fit to carry out the functions required to the keep the prison services operational may be a real need of the organisation. This is simply an element of the objective justification test.

39. Accordingly, the Respondent is not exempt from completing the steps required under the three-part objective justification test. Ensuring the prison service maintains its operational capacity is a <u>legitimate aim</u>. S.37(3) deems it so. However, the Respondent must prove the rule on fitness it has adopted – namely the requirement that all employees of the prison service be fully fit to perform prisoner contact duties - is <u>appropriate</u> to preserving its operational capacity and is <u>necessary</u> to achieving that end.

(iii) There is a duty to redistribute core tasks an employee is unable to do, unless it imposes a disproportionate burden on the employer.

40. The Supreme Court has now confirmed in *Nano Nagle* that an employer must consider redistribution of tasks of a disabled employee as part of the reasonable accommodation duty provided for under s.16 of the Acts. The position of the Respondent until now has been that it has an immunity in law from any obligation to do so or to redistribute tasks of an employee who is unable to carry out all of the core-duties of his job. It has therefore, implicitly suggested that it will make no difference to the Appellant if he is successful in establishing that the Respondent does not have an immunity. That position of the Respondent can no longer be maintained.

41. The Respondent in its Submissions argues – and expands on this argument over 4 pages of its submissions -that

> "even if the Labour Court was wrong in its conclusion that Section 37(3) provides a stand-alone provision which is not qualified or conditional on Section 16(3), Robert Cunningham cannot succeed in his appeal."

42. It is submitted that position is no longer available to the Respondent, particularly given the variety of non-restraint duties undertaken by the Appellant during his service. Following the Supreme Court ruling, an interpretation of s.37 (3) must conform with the Directive and the UNCRPD, which require reasonable accommodation for persons with disabilities. The Directive does not permit Member States to give an absolute immunity to the Respondent. S.37(3) should therefore be read in a way which does not breach EU law.

43. The parts of the Supreme Court decision which deal with what reasonable accommodation is and what it requires are more relevant to the substantive arguments in this case. However, because the argument is made by the Respondent that the Appellant would not succeed in his appeal, even if the Respondent did not have an immunity, it is worth looking at relevant portions of the Supreme Court judgment on reasonable accommodation.

44. The most important part of the judgement in this respect is the finding that there is in principle no work duty that cannot be stripped out or redistributed, the only limit is whether the reorganisation would impose a disproportionate burden on an employer. [At paragraph 89]

45. When examining reasonable accommodation by way of redistribution of tasks in *Nano Nagle*, MacMenamin J said, *"In my view, the term "distribution of tasks" must be read in a manner which is consistent with the entirety of s.16, and the purpose of the Act."* (*Id*, at para 85). He then said, *"The purpose of the Act is to promote equality between employed persons, and to remove discrimination connected with employment."* (*Ibid*, at para 81).

46. The Court was untroubled by what appeared *prima facie* to be general exception in s.16(1) to the principle of equality where an employee was not capable of carrying out all essential tasks or duties. The Court saw no real difficulty in reconciling the exception in s.16(1) based on employees being fully willing and capable of doing their job with the stated purpose of

the Acts of providing equal treatment and access to employment to disabled employees. The Court did so by reference to the structured assessment which employers must carry out in order to apply that exception which is contained in s.16(3). They must carry out an assessment as to reasonable accommodation. This, it is submitted, is just another way of saying that the exception in s.16(1) must be reasonably and objectively justified

47. This requirement of undertaking an assessment of reasonable accommodation is the default mechanism of reconciling the principle of equality in the Acts with the various exceptions to that principle as provided for in the Acts. It is arguably this scheme of objective assessment of exceptions to the principle of equality that represents the most significant feature of the *Nano Nagle* decision. MacMenamin J, with whom the Court agreed, repeatedly referred to the objective justification analysis which is an essential component in the protective framework provided for in the Acts.

48. The judgment of Charleton J is also relevant. He says "*Hence, it is difficult to see distinctions in relation to any discernible differences between duties, functions and tasks, or core duties and responsibilities as helpful.*" Para 9]. Also, at paragraph 10, he referred to the multi-faceted nature of the work of the police in a way that really helps to understand the relationship between the particular facts of a case and the law. The Appellant did so many other jobs within the prison service, and the reasonable accommodation he wants is to stay in the prison service in a job which exists, and other prisoner officers are working at.

49. It is acknowledged that Charlton J was making these remarks in the context of redeployment cases in the UK- and redeployment has not been requested by the Appellant. Second, Charlton's judgment is dissenting and was not approved by majority of court. However, his remarks that every job is different and that the possibilities for reasonable accommodation are greater in a vast organisation, are very relevant to the job of the Appellant in a large organisation such as the Respondent.

IV Conclusion

50. It is submitted that the Respondent, when asked to accommodate an employee, must satisfy the following test. The Respondent must,

    i. have a legitimate objective in refusing to reasonably accommodate a disabled worker, and

ii. pursue that the discriminatory criterion is necessary; and
iii. that it is proportionate to achieving the legitimate objective. (proportionality).

51. The provision above in s.37(3) is a deeming provision allowing a prison service to satisfy (and therefore skip) the first part of the three-part test in satisfying its duty under s.16(3). The Acts deem that the prison service has a legitimate objective in requiring its employees to have the capacity to carry out the range of duties they may be called upon to perform in order to preserve the operational capacity of the prison service.

52. However, this is only one part of the test and it must prove that the discriminatory characteristic, namely its insistence on full capacity/ability without reasonable accommodation from its employees is necessary and proportionate to achieve its aim. It would have to prove on the facts, that it is disproportionate to expect a large organisation like the Respondent to cope with an employee who is perfectly able to do his job subject to a redistribution of some of his tasks. It has not done so to date, as the Labour Court did not engage in any sense at all with the facts of this case.

53. The question for the Respondent was always whether the occupational requirement is, in a given case, genuine and determining, and whether it is objectively justified.

Cathal McGreal BL
Clíona Kimber SC
(Word Count 5446)